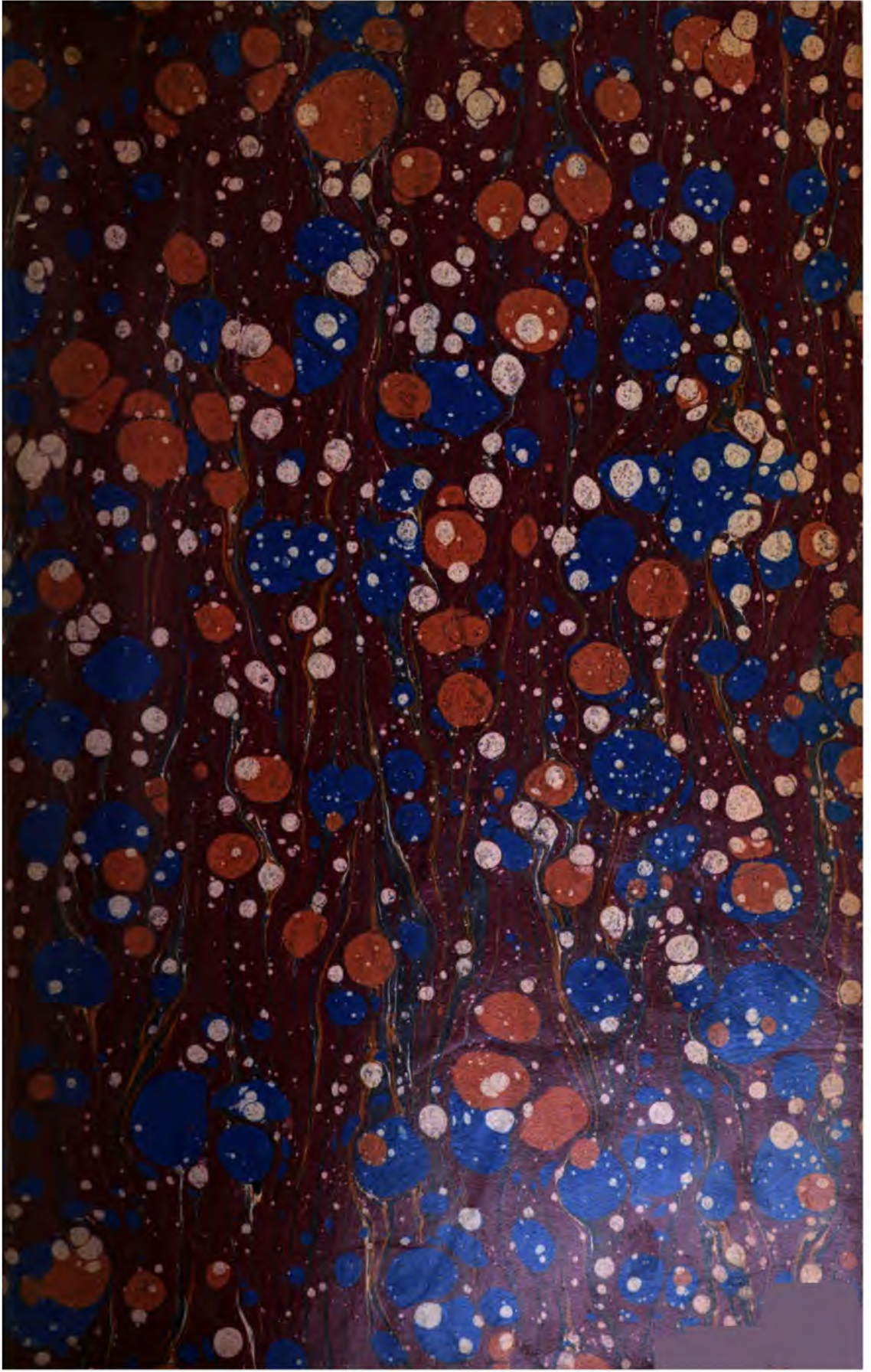

THE

PUNJAB RECORD

OR

Reference Book for Civil Officers,

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT, AND DECISIONS BY THE FINANCIAL COMMISSIONER OF THE PUNJAB.

REPORTED BY

ALWEYNE TURNER, BARRISTER-AT-LAW.

VOLUME XLII.

1907.

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Lahore:
"THE CIVIL AND MILITARY GAZETTE" PRESS,
1907.

JUDGES OF THE CHIEF COURT.

CHIEF JUDGE:

SIR WILLIAM CLARK, KT.

JUDGES:

MR. JUSTICE A. H. S. REID.

" " PROTUL CHANDRA CHATTERJI, RAI BAHADUR, C.I.E.

" " F. A. ROBERTSON.

" " A. KENSINGTON—ON LEAVE FROM *18th May* 1907, TO *12th October* 1907.

" " D. C. JOHNSTONE—(*Temporary Additional*).

" " H. A. B. RATTIGAN—(*Temporary Additional up to 12th August* 1907).

" " LAL CHAND, RAI BAHADUR—(*Temporary Additional up to 12th August* 1907).

" " MUHAMMAD SHAH DIN, KHAN BAHADUR—(*Temporary Additional up to 12th August* 1907).

" " W. CHEVIS—(*Temporary Additional from 18th May* 1907 *to 12th August* 1907).

CIVIL JUDGMENTS,

1907.

A TABLE

OF THE

NAMES OF CIVIL CASES REPORTED IN THIS VOLUME.

TABLE OF CASES CITED.

(Civil).

Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

MUHAMMAD NIAZ-UD-DIN KHAN,—(DEFENDANT),—APPELLANT,

Versus

MUHAMMAD UMAR KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 129 of 1902.

Custom—Alienation—Gift of land inherited by daughter in favor of her adopted son—Suit by reversioner of the last male owner for possession on ground that the gift was invalid as against them—Plea of estoppel by conduct of acquiescence—Inducing person to believe in and act upon the truth of anything—Evidence Act, 1872, Section 115—Limitation—Limitation Act, 1877, Schedule II, Article 118—Ansari Sheikhs of Basti Danishmandan, Jullundur District.

In 1832 'J,' a sonless Ansari Sheikh of Basti Danishmandan in the Jullundur District, gifted his ancestral land in lieu of his wife's dower to his daughter M, which in accordance with the wishes of the donor passed on her death in 1849 to her husband 'S.' In 1851 'S' in turn gifted the said property along with what he had inherited from his own father to his daughter 'Z' in lieu of her mother's dower. Z married B and being childless adopted a boy M, defendant in this case, by a registered deed which was executed in 1887 and soon after settled the property, which had come to her from her father 'S,' on her adopted son by a deed of gift, dated 4th May 1888, mutation of which was duly effected in the course of the same year in favour of M as the adopted son of Z. In 1895 a private partition was made, the parties appearing before the revenue authorities and requesting that the arrangement be recorded and entries made in accordance thereof and allowing defendant in connection with this land to be described as the adopted son of Z. This arrangement was sanctioned on 11th June 1896 with full consent of all persons concerned, and the parties then took possession of their respective shares in pursuance thereof.

On the death of Z which occurred on 4th May 1899 the plaintiffs instituted the present claim for possession on the allegation that they being the nearest collaterals were the rightful heirs to the property

held by him, and that defendant had no title thereto, the deed of gift and his alleged adoption being both fictitious and invalid by law and custom. The defence *inter alia* pleaded estoppel by conduct, acquiescence and limitation.

Held, that the plaintiffs were precluded from making the present claim, the facts noted above shewing acquiescence in the adoption and alienations.

Held, also, that Article 118 of the Indian Limitation Act applies to every case where the validity of an adoption is the substantial question, whether it arises on plaint or on defendant's pleas, and the fact that it was alleged to be invalid or inherently invalid makes no difference in this matter.

Muhammad Din v. *Sadar Din* (1) not followed.

Found upon the evidence that in matters of alienation and succession the parties were governed by Muhammadan Law and not by custom and therefore a male proprietor was competent to make an absolute gift of his ancestral immovable property in favour of his daughter.

First appeal from the decree of S. Witherforce, Esquire, District Judge, Jullundur, dated 13th January 1902.

Shah Din and Muhammad Shafi, for appellant.

Beechey and Badri Das, for respondent.

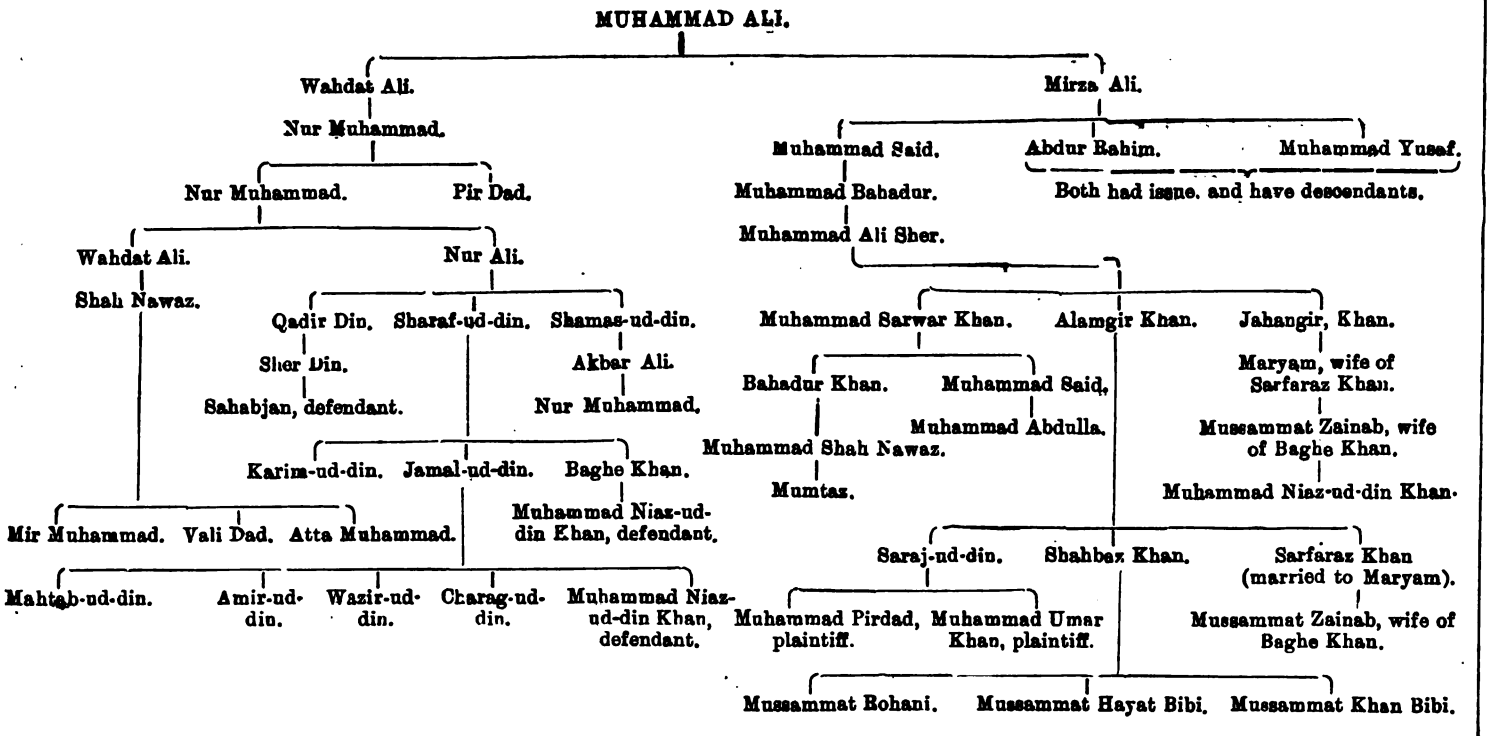
The judgment of the Court was delivered by

18th April 1906. JOHNSTONE, J.—This intricate and somewhat difficult case has been argued before us for 8 days, the debate on both sides being marked by a high level of forensic ability. The record is voluminous ; and, in addition, the number of important questions of law and custom arising on the appeal rendered it necessary for counsel to refer us to a very large number of rulings, for the adequate consideration of which we reserved judgment.

A pedigree-table is given in the judgment of the Court below, but it needs to be reproduced in a supplemented form as follows :—

(1) 67 *P. R.*, 1901.

A pedigree-table of the family of Muhammad Ali prepared by the Court.



The above table shews the relationship of the parties to each other and to the various persons who figure in the history of the case. The property in suit, as to $\frac{3}{4}$, came down from Jahangir Khan, plaintiffs' paternal granduncle, and as to $\frac{1}{4}$, from Sarfaraz Khan, plaintiffs' uncle. Plaintiffs claim $\frac{3}{4}$ as ancestral estate coming down from Muhammad Ali Sher, common ancestor of themselves and Jahangir Khan, last lawful (according to them) male holder of that $\frac{3}{4}$, and the $\frac{1}{4}$ as ancestral estate coming down from Alamgir Khan, common ancestor of themselves and Sarfaraz Khan, who was last male holder of that $\frac{1}{4}$. Plaintiffs claim in accordance with ordinary agricultural custom. Immediately before defendant the property was in possession of Baghe Khan (a scion of Wahdat Ali's branch of the family) and of his wife, Mussammat Zainab, daughter of Sarfaraz Khan aforesaid. Defendant claims to have been adopted by them both in 1887, and to have received the whole property from them by gift or *tamlik-nama* in 1888. Plaintiffs deny the *factum* of adoption and of gift and also the validity of either. The defendant pleads that Mussammat Zainab was full owner and had full powers of dealing with the property, because (*a*) her father Sarfaraz Khan in 1851 gifted the whole, then in his possession, to her in lieu of her mother Maryam's dower, and so made her full owner; (*b*) Sarfaraz Khan had got the property $\frac{1}{4}$ by ordinary inheritance from his father and $\frac{3}{4}$ from his deceased wife, Maryam, who had got it from *her* father Jahangir in 1832 by gift in lieu of *his* wife's, *i. e.*, *her* mother's dower, Mussammat Maryam thus becoming full owner; (*c*) the family do not follow custom, but Muhammadan Law or a custom resembling it, and so Sarfaraz Khan's acts could not be contested by his collaterals; (*d*) by special custom of the tribe she could adopt to herself. Plaintiffs retort (1) that Mussammat Zainab was not absolute owner, but had the customary limited female's estate; (2) that even if the two gifts of 1832 and 1851 were really for dower, which is denied, it made no difference in the capacity in which the two donees took the property, *viz.*, of females with powers limited in the ordinary way by custom; (3) that adoption by a woman to herself is unknown to the tribe, and is anyhow invalid and even wholly void.

Defendant also argues that the plaintiffs have lost their rights, if any, through acquiescence, and that the suit is for

several reasons time-barred, thus,—

(*i*) The ¾ aforesaid was ancestral in the hands of Jahangir, and the cause of action to sue for possession arose to plaintiffs on his death. But Mussammat Maryam held on 12 years and more, and so became absolute owner by adverse possession, for plaintiffs say the gift was a mere *hiba* and so was an alienation without " necessity."

(*ii*) Even if the reversioners permitted her as a daughter to hold on, then at latest on her death, which took place before 1849, their cause of action accrued.

(*iii*) In 1849 her husband Sarfaraz Khan actually litigated and got possession, and his possession anyhow was adverse from that time, for his possession was certainly not permissive then.

(*iv*) Sarfaraz Khan died in 1853, and thereafter Zainab held the property under a gift from him. Plaintiffs' cause of action arose then, if not before. This refers both to the ¾ and the ¼.

(*v*) Adoption of defendant by Mussammat Zainab being proved, or at least having been set up in 1887-88, the suit is barred under Article 118, Limitation Act, 1877, plaintiffs having had knowledge of the adoption or of the assertion of it much more than 6 years before suit.

(Mussammat Zainab herself, it should be noted, died only recently, *i. e.*, on May 4th 1899. It should also be pointed out that plaintiffs have no objection to Baghe Khan's adopting defendant to himself, but they object to his adoption of defendant being taken as giving defendant a right to Mussammat Zainab's estate.)

The above are, in brief, defendant's pleas as regards limitation, and also very briefly, plaintiffs' reply is as follows:—

As no adoption took place, and as in any case an adoption by a female would be absolutely null and void, Article 118 does not apply at all. Plaintiffs are not suing specifically to have the adoption declared invalid or void: they do and can only sue for possession, and so they are not touched by Article 118 at all. As the gifts to the two ladies did not make them

full owners with absolute powers of alienation, delay in suing to cancel those gifts, or to recover possession notwithstanding the gifts, only operated at most to bar suits *against them* for possession and did not confer full powers on them. Similarly, though perhaps Sarfaraz Khan may have acquired by adverse possession and by judicial decision the right to continue in possession against plaintiffs, the property remained ancestral in his hands, and did not take on the character of self-acquired property. When he gifted to his daughter, she could not acquire a better estate than he had, and so she could not lawfully alienate except for "necessity," inasmuch as customary rules like that prevailing among Punjab agriculturists govern the family.

As regards acquiescence, plaintiffs contended that defendant did not plead this in the Court below and should not be allowed to plead it now. A similar contention was pressed as regards (A) defendant's argument before us that the proper heir to Mussammat Zainab, apart from defendant, was Baghe Khan, her husband, and not plaintiffs, (B) defendant's argument that at most plaintiffs could sue only for their ancestral share and not for the whole, (C) defendant's argument that houses stand on a different footing from lands. Leaving out of account for the moment the validity on the merits of these arguments of the defendant and of the plea of acquiescence, I think it will be convenient to deal now with this contention of plaintiffs that defendant should not be permitted to raise these points in this Court. In my opinion acquiescence was pleaded with sufficient clearness in paragraph 6 of the pleas and paragraph 7 (*g*), if not also in paragraphs 8, 9 and 10; and it must be borne in mind that evidence of the assertions there made was given and especially of the partition of 1895, in which plaintiffs took part without raising any objection as to defendant's rights.

As regards (A) defendant refers us to paragraphs 7 (*b*) (*c*) (*d*) and (*g*) and the first clause of paragraph 7 (*f*); but I am unable to see that defendant plainly pleaded that Baghe Khan was a better heir to his wife than the plaintiffs. I do not consider defendant should be allowed to point now to the *Rivaj-i-am*, though it is on the record, and to other pieces of evidence as showing that Baghe Khan was the better heir, and to say now that he did raise the point in the Court below simply because an ingenious counsel has found in that evidence some support for the theory. I would hold that the matter was not pleaded and was never in issue, and so should be

excluded. I do not think the two authorities here quoted by defendant's counsel, *viz.*, *Secretary of State for India* v. *Sukhdeo* (1) (at page 344) and *Mussammat Anundmoyee Chowdhoorayan* v. *Sheeb Chunder Roy and others* (2) (at pages 300, 301), help him much. In the former case it was ruled that where defendant denies a whole claim, plaintiff must prove it *in toto*, and that defendant can in second appeal contend for the first time that the plaint does not disclose a cause of action. The difference between that case and this is obvious: there the contention put forward in second appeal was one to be decided solely upon the wording of the plaint, while here it is manifestly unfair to let defendant in the Appellate Court spring upon the plaintiff a contention, the refutation of which by plaintiffs could only be effected by their adducing evidence of custom *ad hoc*. The other ruling is still less useful to defendant. In it their Lordships of the Privy Council held that, where the defence put in the first Court was that defendant's adoption was valid, it did not follow that defendant admitted the rival alleged adoption of plaintiff, and that in such a case plaintiff, having sued to oust defendant on the strength of the former's adoption, *had to prove that adoption in order to succeed*, defendant being thus entitled to argue in the Appellate Court that plainitff had not proved his adoption. Here the attempt of defendant is at this stage to bring in a new plea and to set up a bar not specifically in issue in the first Court, which plaintiffs were not obliged, *primâ facie* and *ex necessitate rei*, to surmount or remove in view of the pleadings in that Court.

Turning to (B) Mr. Shafi quoted *Chowdry Pudum Singh* v. *Koer Oudey Singh* (3) (at foot of page 355). There the Privy Council, finding that plaintiff had been found as a matter of fact to be entitled to only a share, whereas the High Court had given a decree for the whole, ruled that the decree could not properly be for the whole, though the point had not been specifically taken by the defendant in any Court. I am disposed to agree with Mr. Shafi here and to rely for this opinion both upon the ruling quoted and also *Secretary of State* v. *Sukhdeo* (1), mentioned above.

As to (C), Mr. Shafi can point only to paragraph 9 of the pleas, last few words. No issue was drawn on the point, and in my opinion plaintiffs probably never understood that they had to meet a plea of the sort now put in. The plea that

(1) I. L. R., XXI *All.*, 341. (2) 9 Moo., *I. A.*, 287.
(3) 12 Moo., *I. A.*, 350.

ancestral houses are on a different footing as regards succession and alienation from ancestral land is an unusual plea, and I would hold that it cannot be utilised in an Appellate Court unless it was clearly pleaded in the Court below. I wish, therefore, to find against defendant as to this.

It is convenient here to take up the question of acquiescence. Mr. Shah Din refers us to the evidence regarding partition, and also points to plaintiffs' long delay in suing and almost complete silence all through. At pages 404—415 of the paper book we find translations of mutation entries Nos. 283, 313, 315, 320, 322. In No. 283 the mutation is of old jamabandi holding No. 8, and the alteration in proprietors' columns of defendant ⅓, daughter of Shahbaz Khan* ⅓, and plaintiffs ⅓, into defendant and the daughter of Shahbaz Khan in equal shares, is said to have been done with full consent of all persons concerned, including Baghe Khan, on 11th June 1896, on the basis of a private partition. In the entry defendant is consistently called the adopted son of Mussammat Zainab, and no objection seems to have been taken to this description of him. The entry was written up by the *patwari* at the instance of plaintiff No. 2 and defendant and of Ghulam Ghaus, son of the aforesaid daughter of Shahbaz Khan (who was dead), and it was also attested by the *lambardar*. The *girdawar* apparently did not interview the parties, but the Extra *Naib Tahsildar*, after questioning *plaintiff* No. 1 and Ghulam Ghaus, and finding them consenting, issued interrogatories and found that defendant was willing if Baghe Khan was, and that Jamal-ud-din, natural father of defendant and brother of Baghe Khan, spoke to Baghe Khan's consent. This shows that *both* the plaintiffs not only agreed to the partition, though according to their present story they did not recognise the position of defendant as heir or adopted son of, or donee under, Mussammat Zainab, but also both passed over without demur the description of defendant as adopted son of that lady.

Mutation entry No. 313 was of old jamabandi holding No. 182, and was also based on a private partition. Here the entry was made at the instance of several persons among whom was *plaintiff* No. 1 and again we find defendant, without objection, described as adopted son of Mussammat Zainab, and it is written that the co-sharers had taken possession of their separate plots of land. *Plaintiff* No. 1 appeared before

* See pedigree-table.

the *Naib Tahsildar* later and verified all this, and the latter sanctioned the mutation.

Mutation entry No. 315 and also Nos. 320 and 322 tell the same tale, plaintiff No. 1 in each speaking for himself and plaintiff No. 2.

By way of further support to the contention Mr. Shah Din refers us to *Amir* v. *Zebo* (1), *Roda* v. *Harnam Singh* (2), *Nura* v. *Tora* (3), (at page 170, penultimate paragraph, and page 172, last paragraph), and *Natha Singh* v. *Sujan Singh* (4), (at page 174, middle of first paragraph). In *Amir* v. *Zebo* (1), it was held sufficient proof of acquiescence that defendant proved long silence, *plus* purchase by one collateral from alienor to the exclusion of the other collaterals *plus* cultivation by plaintiff of disputed lands under alienees, *plus* exchange of disputed lands with alienees. In *Roda* v. *Harnam Singh* (2), following circumstances were held to shew acquiescence :—

No intimation of objection in 28 years ;

Silence at partition 24 years before suit ;

Taking disputed land from alienee as tenant.

In *Nura* v. *Tora* (3), the Court held not so much that positive estoppel was made out as that plaintiff's case was by the following circumstances so much weakened that he must lose the day, *viz.*—

Long silence, *plus* suit by plaintiff himself for partition with alienee.

Finally, in *Natha Singh* v. *Sujan Singh* (4), this Court laid it down that it was impossible to have better proof of the existence of a custom than the fact that persons interested acted as if they believed an alienation valid and never questioned it until they imagined the Chief Court had found such alienations invalid.

In reply Mr. Beechey urges that his clients objected and litigated in 1859 ; that they objected at mutation in 1888 regarding the gift by Baghe Khan and Mussammat Zainab to defendant, that the partition could not be resisted so long as Mussammat Zainab was alive ; and that it was Baghe Khan who applied for partition and not plaintiffs. The last contention, as we have seen, is incorrect, one or

(1) 42 *P. R.*, 1902. (3) 46 *P. R.*, 1900.
(2) 102 *P. R.*, 1902. (4) 34 *P. R.*, 1899.

both plaintiffs having asked for mutation in each case and the partition having been a *private* one. Taking the other points raised by Mr. Beechey one by one, I observe that in 1859 plaintiffs' father and others sued Baghe Khan, *alias* Ghulam Muhi-ud-din, for possession of land given by Mussammat Zainab to Baghe Khan, the land having been previously gifted to Mussammat Zainab by her father Sarfaraz. They did not sue for a declaration against Baghe Khan's right to it, but for possession for themselves. The result was (pages 50, 51 paper-book), that while Baghe Khan's name was removed, the gift to Mussammat Zainab was upheld and *her* name was substituted. Thus, no doubt plaintiffs' father litigated but, having lost the day in what was probably only a revenue proceeding,* he took no further steps. It must, however, be conceded that in his appeal in that case plaintiffs' father admitted that Mussammat Zainab must continue to hold but objected to the transfer to Baghe Khan, and, so far as this was concerned, they were successful; that is, he successfully combatted the theory that Mussammat Zainab could do what she liked with the land. As to objection at mutation in 1888, Exhibit D. 43, page 320, paper book, the objection was made to *patwari* and not renewed before *Tahsildar*. It was over-ruled. Lastly, in the rulings quoted on the other side, the fact that the donor was still alive when plaintiff-objector made partition, etc., with alienee, or took disputed land of his under cultivation from him, is nowhere permitted to detract from the importance of the act as shewing acquiescence.

It would appear, then, that the case for acquiescence, while fairly strong, is not so good as *Amir* v. *Zebo* or *Roda* v. *Harnam Singh*; but nevertheless I cannot help thinking that, when plaintiffs dropped their objection to mutation in 1888 after making a formal protest to the *patwari*, and then in 1895 made no demur to a friendly partition with defendant and even themselves asked that it should be recorded, at the same time contentedly allowing defendant, in connection with this same gifted land, to be described as adopted son of Mussammat Zainab, they finally abandoned their ealier designs on the property. I am rather inclined also to think that they are now estopped from denying the right of defendant, for, if in

* I do not press this because in those early days Deputy Commissioners had full civil jurisdiction and distinction between civil and revenue suit was not clear.

1895 they had refused the request of defendant to partition or had even intimated that in partitioning they still declined to recognise defendant's title and to admit his status as adopted son, defendant would probably have taken steps to establish his position while Mussammat Zainab was still alive and able to help him to explain the past history of the affair. By keeping silence then and even co-operating with defendant in a proceeding, in which he could have part and lot only as adopted son of Mussammat Zainab and as donee under her, plaintiffs have, in my opinion, caused defendant to believe that they recognised his status and claims, and have also caused him to act on that belief.

This being my view, I am not, strictly speaking, called upon to go into the other questions in the case, such as limitation under Article 118, limitation otherwise, Muhammadan Law *versus* agricultural custom ; but even if we hold that estoppel is not made out, in my opinion the conduct of the plaintiffs in 1895-96, added to the evidence on the record on the merits of the case, easily proves that plaintiffs have no title better than that of defendant.

I am also inclined to think that the suit is barred by time. Taking Article 118 first I am of opinion that the *factum* of the adoption by Mussammat Zainab is proved, notwithstanding various ingenious suggestions of Mr. Beechey. That she was hoodwinked in any way or that the deed of 1887 or that of 1888 was really written without *her* knowledge or consent is the merest conjecture. Of course, she is a *parda nashin* lady, but the usual precautions were taken and I would hold that she knew perfectly well all that passed and was a willing party. It is true that in the deed of 6th May 1887, Exhibit D. 23, page 310, paper-book, only Baghe Khan's signature appears and not Mussammat Zainab's, and that in the opening sentence he says he has adopted defendant ; but later on he writes " all that was necessary for the " adoption was done by me and my wife". Then the deed of gift, Exhibit D. 34, page 314, paper-book, is by both husband and wife. In it Mussammat Zainab expressly claims sole ownership of the property gifted by her and (by implication) claims the right to give it away to whomsoever she pleases. Baghe Khan gifts his own land which is described. *He* says he adopted defendant in infancy, and *she* says he adopted defendant with her " consent ". She also says she has brought him up like a son and he has become in every way the

owner and occupier of " our " estate like ourselves. In my opinion it is reasonable to infer that she also had adopted the young man, for clearly by her " consent " aforesaid she was intending to make defendant heir to herself also, and this would suffice, inasmuch as adoption among these Muhammadans could require no religious or other ceremonies. And in the record are many pieces of evidence pointing the same way, *e. g.*, page 319, D. 42, the lady's own statement, the constant description of defendant as adopted son of Mussammat Zainab in the mutations of 1895-96, and so forth, which I need not discuss at length; not to speak of the oral evidence of respectable witnesses Nos. 28, 29, 34, 36, 37 and 38.

The *factum* of adoption being established, it is also clear that it became known to plaintiffs at latest in 1888, for they objected to the mutation in that year. Thus, if Article 118 applies at all, plaintiffs only had till 1894 to sue. That Article provides a period of limitation for a suit " to obtain " a declaration that an alleged adoption is invalid or never in fact took place ". We are not concerned here with the latter clause. The question is whether the words " a declaration " that adoption is invalid " come within the four corners of the relief asked for in the present case.

The learned District Judge took the view that the adoption mentioned in Article 118 is an adoption done by a person who had no inherent right to adopt, that the adoption of defendant by Mussammat Zainab as heir to ancestral property in her hands is " inherently invalid "; and so Article 118 has no application. He based his reading of Article 118 upon rulings *Bhagat Ram* v. *Tulsi Ram* (1) and *Muhammad Din* v. *Sadar Din* (2), refusing to follow *Gujar Singh* v. *Puran* (3), though based on a Privy Council decision, on the ground that the Privy Council really did not deal with the distinction between invalid adoptions and inherently invalid adoptions; and he held this adoption " inherently invalid " on the evidence in this case regarding practice in the tribe and upon a series of Punjab rulings dealing with cases governed by Punjab agricultural custom. At present, then, I will confine myself to the questions whether the District Judge's reading of Article 118 is sound, and whether, if it is, the adoption of defendant in this case was inherently invalid,

(1) 144 *P. R.*, 1892. (2) 67 *P. R.*, 1901.
(3) 71 *P. R.*, 1901.

by which I understand was an absolute nullity without any show of right.

Taking first *Gujar Singh* v. *Puran* (1), which was decided by a Division Bench, whereas *Muhammad Din* v. *Sadar Din* (2), was the ruling of a single Judge, and *Hem Raj* v. *Sahiba* (3), which followed *Gujar Singh* v. *Puran*, we see that on the authority of the Privy Council it was laid down that, whether an adoption really took place or not, if plaintiff sues defendant for possession of property and defendant alleges an adoption and shews that plaintiff, more than six years before suit, was aware that defendant claimed to be adopted, the suit is barred under Article 118. *Muhammad Din* v. *Sadar Din* (2), which does not refer to the Privy Council authority at all, drew the distinction aforesaid between alleged adoptions and alleged adoptions inherently invalid. In *Ganesha Singh* v. *Nathu* (4), where the *factum* of adoption was admitted, it was held that whenever in any suit the validity or invalidity of an adoption comes into question, that point can only be raised within six years of plaintiff's knowledge. In *Dheru* v. *Sidhu* (5), the matter was incidentally discussed on the same lines. In *Ram Narain* v. *Maharj Narain* (6), it was laid down that Article 119 applies to every suit filed for whatever purpose in which plaintiff must, in order to succeed, prove the validity of an adoption, and that time begins to run from the date on which the rights of an adopted son are interfered with. (Thus, if in the present case plaintiffs had in 1888 succeeded in ousting defendant, defendant would only have had till 1894 to sue for possession). *Sardar Wasawa Singh* v. *Sardar Arur Singh* (7), quoted by Mr. Shah Din, need not be noticed. Besides these Punjab cases he has quoted *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (8), *Malkarjun* v. *Narhari* (9), *Barot Naran* v. *Barot Jesang* (10), *Parvathi Ammal* v. *Samivatha Gurukal* (11). In *Shrinivas Murar* v. *Hanmant* (8), it was held that Article 118 applied to a suit for declaration of invalidity of defendant's adoption, for possession and for mesne profits, and the reasons given by Candy and Tyabji, JJ., are instructive. The former learned Judge said that, though primarily Article 141 applies, when defendant pleads that he was holding to plaintiffs'

(1) 71 P. R., 1901.
(2) 67 P. R., 1901.
(3) 116 P. R., 1901.
(4) 20 P. R., 1902.
(5) 56 P. R., 1906., F. B.
(6) 8 P. R., 1904.
(7) 33 P. R., 1900.
(8) I. L. R., XXIV Bom., 260, F. B.
(9) I. L. R., XXV Bom., 337, P. C.
(10) I. L. R., XXV Bom., 26.
(11) I. L. R., XX Mad., 40.

knowledge, as validly adopted by the widow, Article 118 applies; and the latter expressed the opinion that Article 118 applies to every case where the validity of the adoption is the substantial question, whether it arises on plaint or on defendant's pleas. *Malkarjan* v. *Narhari* (1) at page 350 quotes *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (2), in which Article 118 was applied to a case in which plaintiff sued to recover an estate and said nothing about defendant's adoption. In *Parvathi Ammal* v. *Saminatha Gurukal* (3), it was said that, if the adoption was *set up* by defendant to knowledge of plaintiff more than six years before suit, the claim would be barred.

Mr. Beechey, on the other hand, quoted a large number of Punjab, Calcutta, Allahabad and Madras rulings, but as he claimed that *Karam Dad* v. *Nathu* (4) nullified all the previous rulings of this Court relied on by defendant, I will first examine that case. In my opinion it is in terms hardly in line with the facts of the present case. There the assertion of the plaintiff, which he successfully established, was that the widow, in order to have any power whatever to adopt an heir to succeed *to her late husband's estate*, should have had, and as a matter of fact had not, authority from him to adopt. No doubt it is stated that Article 118 applies only when validity of an adoption is in question and not when the adoptor has no inherent power to adopt, a *dictum* also to be found in *Bhagat Ram* v. *Tulsi Ram* (5), and the aforesaid *Muhammad Din* v. *Sadar Din* (6), but then here there is no question of Mussammat Zainab's having, or not having, authority *from her husband* to adopt. The *dictum* in *Karam Dad* v. *Nathu* (4) must be taken as applying to the facts of that case or at most to analogous facts, and it is impossible to say that the learned Bench would have expressed itself in the same way had it had in its mind a case like the present. To my mind it is a question whether that *dictum* taken in a broad and general way is not in conflict with the views of the Privy Council; and I consider that, though we would be bound to follow it in an exactly similar case, in a case not similar we can and should pass it by and conform to the *dicta* of the Privy Council and to those of this Court expressed in the series of rulings relied

(1) *I. L. R., XXV Bom.*, 337, *P. C.*
(2) *I. L. R., XIII Calc.*, 308, *P. C.*
(3) *I. L. R., XX Mad.*, 40.
(4) 86 *P. R.*, 1905, *F. B.*
(5) 144 *P. R.*, 1892.
(6) 67 *P. R.*, 1901.

upon by Mr. Shah Din. In short, we should hold that in *Karam Dad* v. *Nathu* (1), this Court only intended to lay it down that where a woman, in order to validly adopt defendant, *should have had authority from her late husband and yet had no such authority*, there was no "alleged adoption" and so Article 118 would not apply. For myself, though I express the opinion with all due respect, I have grave doubts regarding the soundness of the distinction between an "invalid" and "an inherently invalid" adoption: if an adoption such as that dealt with in Karam Dad's case is no adoption at all within the meaning of Article 118, the idea must be that it is not an adoption because it does not confer upon the adoptee the status of a son, but then equally an invalid adoption of any sort fails to do that, and this line of reasoning ends in the *reductio ad absurdum* that the first part of Article 118 becomes a dead letter. In these circumstances I again say that Karam Dad's case should be taken as an authority only for cases strictly similar to itself.

But even if we must adopt the distinction drawn in Karam Dad's case and in Bhagat Ram's case and Muhammad Din's case, in connection with which Mr. Beechey has referred us to the rulings quoted in the margin, which rulings I do not propose to discuss except in so far as to state that in my opinion they are either not in point or are opposed to the Privy Council's views expressed in *Jagadamba Chaodhrani* v. *Dakhina Mohun* (2), and *Malkarjun* v. *Narhari* (3), and to this Court's views given in *Gujar Singh* v. *Puran* (4), *Ganesha Singh* v. *Nathu* (5), and *Dheru* v. *Sidhu* (6), I am unable to see how it can be said that the adoption in the present case is "inherently invalid". Adoption among Muhammadans is, of course, not a religious act as it is among persons subject to Hindu Law. It amounts simply to nomination of an heir; and what we have to see is not whether according to any theory of the powers of females under custom Mussammat Zainab could or could not validly adopt a son, but whether as a matter of practice women in this tribe have in the past nominated heirs to landed property, which would, but for that nomination, have reverted on their death to

55 P. R., 1897.
96 P. R., 1898.
73 P. R., 1894.
14 P. L. R., 1902.
I. L. R., XXII Calc., 609.
I. L. R., XXV Calc., 354.
I. L. R., XXVII Calc., 243.
I. L. R., XXIV All., 195.
I. L. R., XXVI All., 40 (F. B.).
I. L. R., XXVI Bom., 291 (dissenting judgment of Bhashyam Aiyengar, J.).

(1) 86 P. R., 1905, F. B.
(2) I. L. R., XIII Calc., 808, P. C.
(3) I. L. R., XXV Bom., 337, P. C.
(4) 71 P. R., 1901.
(5) 20 P. R., 1903.
(6) 56 P. R., 1903.

the father's collaterals, and whether also, women in the position of Mussammat Zainab have not in the past alienated property received from fathers and husbands at will without consent of collaterals.

But before discussing this directly I would like to say that in my opinion the evidence on the record, which is too voluminous for detailed discussion, shews to my satisfaction that these Sheikh Ansaris are not agriculturists in the proper sense of the term, and that there is no presumption that they have adopted agricultural custom; that evidently females and especially daughters are among them a favoured class; and that, where it is not specifically proved by the plaintiffs that the tribe, in matters connected with the status of females, have actually adopted agricultural custom or some similar restrictive custom, Muhammadan Law must be presumed to apply. In connection with this I would only refer to Section 5, Punjab Laws Act, and the Full Bench ruling in *Daya Ram* v. *Sohel Singh* (1).

The learned counsel for the appellent have prepared certain lists of adoptions and alienations by and succession to females and males in these Jullundur *Bastis* and for convenience sake I will refer to them. They are compiled from materials on the record. List 3 B. is of adoptions by females. Four instances are given of which the first is the one now in dispute. The second instance is a case of a *tamlik-nama*, see page 541, paper-book, and of a judicial decision (page 53) under which property gifted by her father to the lady who executed that deed remained with the donee or legatee or nominated heir. The deed does not speak of "adoption" but it clearly makes the beneficiary an appointed heir; and see page 19, top, page 475, line 27 (adoptee's own statement) and note to khatas 1, 2 and 3, pedigree table of Basti Danishmandan. Entry 3 is a Sayad case of Basti Sheikh Darwesh. The alleged adoptee was an Arain. It is doubtful whether this case can be considered to be directly in point, but it certainly shews an extensive power in females to deal with property inherited from fathers. In my opinion too a Sayad case from one of these Bastis is as such certainly in point. Entry 4 is a curious case of the adoption of two boys or rather the execution of a *tamlik-nama* in their favour. I think this must really have occurred, though no mention of it

(1) 110 *P. R.*, 1906, *F. B.*

is made in the pedigree-table, for see the allusion at pages 402, 139, paper-book.

These cases are thus few, as one would naturally expect; but in my opinion the cases of gifts by females, which are numerous, List 1 B., are also in point as shewing that females are not in this tribe tied down as they are in ordinary Punjab tribes. There are 37 instances, of which Mr. Shafi admits that five have been shown of no value. It is impossible here to discuss these instances at length. After considering the criticisms of Lala Badri Das, junior counsel for plaintiffs, I have arrived at the conclusion that the list supports very fairly the contention of defendant as to the powers of females in the tribe, and I approve of the argument of Mr. Shafi that, when we find in such a list some gifts that can be supported both under Muhammadan Law and custom and some that can only be supported under Muhammadan Law, it must be taken that all were made under Muhammadan Law and not some under that law and the rest under custom.

There are also lists of sales, etc., by females and succession to females, and of adoptions and gifts and sales, etc., by males, and of succession of females to males. I do not propose to discuss these further than to say that, after considering Mr. Badri Das's strictures on them, I still find a considerable residum of cases which cannot be accounted for under agricultural custom.

Finally, then, my view is that the "adoption" of defendant by Mussammat Zainab was not "inherently invalid" and so Article 118 fully applies and the suit is barred. I would also express the opinion that probably the suit is barred by time in other ways also, see (i), (iii) and (iv) at beginning of this judgment. I will not discuss this further than to say that in my opinion the evidence on the whole goes to shew that gifts in lieu of dower, and even ordinary gifts, by males to females in this tribe probably makes the female donees absolute owners as in Muhammadan Law; and further to say that, even if this is not quite so, the *intention* of the gift by Jahangir to Mussammat Maryam and by Sarfaraz to Mussammat Zainab was to make the ladies full owners as the donors certainly were in the absence of applicability of agricultural custom and so these ladies held adversely to the collaterals.

I would, then, if my learned colleague agrees, accept the appeal and dismiss the suit with costs throughout.

18*th April* 1906. RATTIGAN, J.—My learned brother has dealt so exhaustively with this complicated case that I need say no more than that I entirely agree with him not only upon the question of "acquiescence" which I hold to be fully established and to be *per se* a bar to plaintiffs' claim, but also upon the other points in regard to which he has expressed his opinion. As we are agreed that plaintiffs must fail on the ground that they have by their acts accepted defendant as the adopted son of Mussammat Zainab and have estopped themselves by those acts from now contesting his *status* as such adopted son, any opinions which we express upon the other points argued before us must necessarily be *obiter*. But these questions are of so important and interesting a character and the arguments before us upon them have been so able and thorough on both sides that we are perhaps justified in giving our opinions upon them, though I am ready to admit that in general such a course is open to some objection. I find myself so completely at one with the view expressed by my learned colleague that it would be a mere waste of time for me to refer in detail to these other questions, but I must take this opportunity of remarking that I too am at a loss to comprehend the true distinction between an adoption that is "invalid" and one that is "inherently invalid." It seems to me, speaking with every respect, that one adoption is either valid or invalid, and if it is invalid, it is, I apprehend inherently invalid.

The appeal was argued before us in a manner worthy of the learned counsel who appeared for the parties, and we are greatly indebted to them for the assistance which we have received at their hands.

We accept the appeal and dismiss plaintiffs' suit with costs throughout.

No. 2.

Before Mr. Justice Lal Chand.

REVISION SIDE. JAGAN NATH AND OTHERS,—(PLAINTIFFS),—PETITIONERS,

Versus

BUDHWA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Revision No. 1855 of 1904.

Mortgage—Mortgagee obtaining money decree against his mortgagor not allowed to purchase equity of redemption in the property mortgaged to him—Effect of prohibited purchase.

Held that a mortgagee under a conditional sale cannot, by purchasing the equity of redemption in execution of a money decree obtained by him

against his mortgagor, acquire a complete title as of a purchaser in the property mortgaged to him so as to deprive the mortgagor of his legal privileges regarding the equity of redemption.

Such purchases being absolutely unlawful do not confer an irredeemable title on a mortgagee without his having recourse to the proper procedure prescribed for that purpose and without giving the mortgagor an opportunity to redeem.

Petition for revision of the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 20th August 1904.

Shadi Lal, for petitioners.

The judgment of the learned Judge was as follows :—

LAL CHAND, J.—Two houses, including the house now in suit, were mortgaged to plaintiffs by defendants 1 and 2 on 17th August 1895 for Rs. 500 by a deed of conditional mortgage. The plaintiffs did not take foreclosure proceedings after the expiry of the stipulated period but having obtained a money decree on another mortgage deed put up the equity of redemption of the house in suit for auction sale and purchased it for Rs. 50. Having obtained the sale certificate and formal possession under it the plaintiffs have now sued for possession by ejecting defendants. The defendants raised several objections, one of the objections being that plaintiffs could not sell the equity of redemption and should have sued on the original mortgage deed. No issues of law were fixed by the First Court but only an issue of fact whether defendants had not received consideration money under the mortgage deed, dated 17th August 1895. The defendants having failed to appear at the last hearing fixed for the case, proceedings were ordered *ex parte* and plaintiffs' suit for possession was decreed by the First Court. The lower Appellate Court has reversed the decree and dismissed plaintiffs' suit on the ground that the title of plaintiffs is bad as they had the equity of redemption sold which they had no right to do. This view is stated to be supported by Calcutta and Bombay rulings, which are not quoted, and by Section 99 of the Transfer of Property Act. *8th June* 1906.

It is contended in revision under Section 70 (*a*), Punjab Courts Act, that the lower Appellate Court has committed material irregularity in deciding the appeal on a point not urged in the memorandum of appeal or in the Court of first instance and which the petitioner had no opportunity to meet. It is further contended that the sale having been completed more than four years before suit, the objection that the

equity of redemption could not be sold could not be entertained and that the law as to the sale of equity of redemption has moreover been misunderstood by the lower Appellate Court. In argument it was further urged that Section 244, Civil Procedure Code, is a bar to the objection raised by defendant, and following cases were quoted and relied upon :—

Parmanand v. *Daulat Ram* (1), *Thaleri Pathumma* v. *Thandora Mammad* (2), and *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3).

As regards the first contention it seems to me that the objection was raised in the first Court though not in very clear terms. It was pleaded by the defendants in their written statement that the plaintiff's real remedy lay on his mortgage deed and that he could not sell the equity of redemption under Section 295, Civil Procedure Code. It is thus clear that the defendants pleaded that the plaintiffs could not obtain possession of the house in suit which was alleged to be worth Rs. 4,000 except by enforcing the mortgage deed. The objection therefore that the plaintiffs could not recover possession by virtue of purchase of equity of redemption independently of the mortgage deed was raised in effect, and it was not challenged by the plaintiffs. The contention that plaintiffs have had no opportunity to meet the point on which the judgment of the lower Appellate Court has proceeded is not maintainable. The plaintiffs were represented in the lower Appellate Court by a pleader and no affidavit is filed that arguments were not heard by the lower Appellate Court on this point or that the matter was not discussed at the hearing. I therefore disallow the first contention. As regards the remaining contentions I am not prepared to say that the lower Appellate Court has misapprehended the law on the subject. Even apart from Section 99, Transfer of Property Act, which, it is contended, is not applicable to this province, the view taken by the lower Appellate Court is supported by *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (4), which refers to earlier cases decided by the Calcutta High Court prior to the passing of the Transfer of Property Act. The mischief condemned by these authorities is exactly what has happened in this case. The mortgage in plaintiffs' favour was a conditional mortgage which plaintiffs could not foreclose without taking certain steps under the Regulation and without giving a year of grace to the defendants within which to redeem. Instead of taking proper

(1) *I. L. R., XXIV All.*, 549. (3) *I. L. R., XXVI. Calc.*, 727.
(2) 10 *Mad. L. J.*, 110. (4) *I. L. R., XXII Bom.*, 624.

and legal steps the plaintiffs baffle the stringent provisions of law by purchasing the equity of redemption in execution of a money decree for a nominal sum of Rs. 50, while the house is stated by the defendants to be worth Rs. 2,000. The plaintiffs thus seek to secure an unfair advantage in defiance of law when their true remedy lay in enforcing the mortgage deed. Even, however, if the law on the subject had been misapprehended by the lower Appellate Court as alleged it could not form a valid ground for revision under Section 70 *(a)*, the matter having been decided by the lower Appellate Court after due consideration. Further there is nothing to show that it was contended in the lower Appellate Court that the objection to plaintiffs' title was not admissible owing to lapse of time or that Section 244, Civil Procedure Code, precluded such objection being raised in this suit. These are obviously new contentions raised in revision on argument by the learned counsel for the petitioner and I cannot under the circumstances hold that the lower Appellate Court has acted with material irregularity in not alluding to these contentions and deciding them. But, moreover, I am not prepared to concede that the objection as to lapse of time is at all fatal. Defendants have continued in possession of the property sued for since the sale as prior to it and the limitation for setting aside an auction sale cannot apply to bar the defence that plaintiffs have no valid title to sue for possession and that the auction sale which constitutes plaintiffs' title gives them no title in equity. As regards Section 244, Civil Procedure Code, the objection taken by the defendants is not an objection relating to execution of decree or discharge or satisfaction thereof. It is not an objection that the money decree obtained by plaintiffs on 24th January 1900 could not be executed. What is objected to is that the auction sale in plaintiffs' favour in execution of his money decree has equitably failed to confer any legal title on him as purchaser of the house in dispute. The mode of execution or sale in execution is not objected to, but that the result of the proceedings is altogether abortive and inoperative to give plaintiff the title he claims. This view is supported by *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (1), already referred to where the sale was held to be a nullity and altogether void against a party who otherwise was held bound by the decree. The same view was apparently taken in *Muthuraman Chetti* v. *Ettappasami* (2). The decision in these cases proceeded under Section 99, Transfer

(1) *I. L. R., XXII Bom.*, 624. (2) *I. L. R., XXII Mad.*, 372.

of Property Act, but that is immaterial as Section 99 merely embodied the principle already in force before the passing of the Act.

Parmanand v. *Daulat Ram* (1) quoted by the counsel for the appellant is clearly distinguishable on the ground that in that case the auction sale of equity of redemption was effected in pursuance of a decree expressly passed for that purpose under Section 67, Transfer of Property Act, and hence the sale was held as binding on the judgment-debtor. *Thaleri Pathumma* v. *Thandera Mammad* (2), merely follows *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3), which is more in point. But the dispute in the last case was actually raised in execution proceedings and the point at issue was that the property sold was incapable of being sold under Section 266, Civil Procedure Code, as the judgment-debtor had no disposing power over that property. This is not at all similar to the present case where there is no question or doubt that the judgment-debtor had a disposing power over the property sold (the equity of redemption), but it is pleaded that by reason of his purchase the auction purchaser is not equitably entitled to foreclose the mortgage virtually without having recourse to proper legal procedure prescribed for that purpose and without giving the mortgagee an opportunity to redeem. This is totally a different case from the cases relied upon by the counsel for the appellant, and I am clearly of opinion that it is open to the defendants to rely in the present suit for ejectment on this equitable plea, notwithstanding the provisions of Section 244, Civil Procedure Code, or the lapse of a period of four years since the auction sale. Moreover, as already observed, it does not appear that any such objection was raised in the lower Courts on plaintiff's behalf and he is not competent to raise it on an application for revision under Section 70 (*a*). I reject the application for revision and confirm the order passed by the lower Appellate Court.

Application dismissed.

(1) *I. L. R., XXIV All.*, 549. (2) 10 *M. L. J.*, 110.
(3) *I. L. R., XXVI Calc.*, 727.

No. 3.

Before Mr. Justice Lal Chand.

FATTEH MUHAMMAD,—(PLAINTIFF),—APPELLANT,

Versus

SAID AHMAD AND OTHERS,—(DEFENDANTS), —RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 160 of 1905.

Limitation Act, 1877, Section 22—Pre-emption—Suit for pre-emption—Assignment by vendee pendente lite—Addition of assignee as co-defendant after period of limitation—Limitation.

The plaintiff brought an action to enforce a right of pre-emption within the period of limitation prescribed by law. The defendant vendee assigned over his interest to a third party after the institution of the suit. On the application of the plaintiff, after the period of limitation had expired, the Court ordered the assignee be impleaded as a co-defendant. Thereupon the defence pleaded limitation.

Held, that the suit was not barred by limitation in consequence of the joinder of the assignee. The provisions of Section 22 of the Limitation Act do not apply when the original suit is continued against the added defendant who derives his title from the original defendant by an assignment pending the suit.

Suput Singh v. *Imrit Tewari* (1), *Chuni Lal* v. *Abdul Ali Khan* (2), *Mussammat Shakro* v. *Molar Mal* (3), *Harnam Singh* v. *Jiwan* (4), referred to.

Nabi Bakhsh v. *Fakir Muhammad* (5) and *Harak Chand* v. *Deonath Sahay* (6), distinguished.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 17th October 1904.

Gurcharn Singh, for appellant.

Fasal Husain, for respondents.

The judgment of the learned Judge was as follows :—

LAL CHAND, J.—The lower Courts have dismissed the suit as barred by limitation relying on *Nabi Bakhsh* v. *Fakir Muhammad* (5). It is contended for appellant that the case is distinguishable on the ground that in the present case the resale was effected after the suit was instituted and *Suput Singh* v. *Imrit Tewari* (1), *Chuni Lal* v. *Abdul Ali Khan* (2), *Mussammat Shakro* v. *Molar Mal* (3), *Harnam Singh* v. *Jiwan* (4) and 20*th July* 1906.

(1) *I. L. R., V Calc.*, 790.
(2) *I. L. R., XXIII All.*, 331.
(3) 68 *P. R.*, 1879.
(4) 7 *P. R.*, 1906.
(5) 25 *P. R.*, 1903.
(6) *I. L. R., XXV Calc.*, 409.

Section 372, Civil Procedure Code, are relied upon to show that the claim is not barred. It appears to me that the ground taken is valid. Section 22, Limitation Act, does not seem to be applicable when the original suit is continued against the added defendant who derives his title from the original defendant by an assignment pending the suit. The First Court's order, dated the 15th April 1904, shows that Madat Ali was added as a defendant because it was considered necessary to make him a party, and although Section 372, Civil Procedure Code, was not quoted in the order itself or in the application filed by plaintiff yet that section is clearly applicable to the facts of the case and the order adding Madat Ali as a defendant may properly be held to imply that leave of Court was given as required by Section 372. When plaintiff instituted his claim for pre-emption Madat Ali had no interest in the property sued for and could not possibly have been made a party to the suit. It seems not only unjust but anomalous that the suit should be held barred because the original defendant has chosen to resell the property to another person after the suit was instituted. In this case it seems doubtful whether the resale was effected after the prescribed limitation had expired, but if the view contended for by respondent be correct then a suit may be thrown out as barred by reason of a resale effected pending the suit even after the stipulated period had expired. No claim for pre-emption could under the circumstances possibly succeed. Section 22, therefore, does not seem to me to be applicable where the added defendant derives his title from the original defendant by an assignment pending the suit. The words used in Section 22 are "when a *new* plaintiff or defendant is substituted or added after the institution of the suit." This obviously means a plaintiff or defendant who claims in his own right and in that sense is a new plaintiff or defendant. It is intelligible so far as such new plaintiff or defendant is concerned that the suit should be held instituted when he was made a party.

But when the interest set up the added party is only derivative acquired pending the suit, then, properly speaking, he is not a new defendant or plaintiff, and the case is one merely of continuation of the original suit with leave of Court under Section 372, Civil Procedure Code, without any change in the date of its institution. This view is further supported by Section 332, Civil Procedure Code, which apparently treats the transfer after the institution of the suit as holding under

the judgment-debtor and as such liable to ejectment. In spite of the resale plaintiff could obtain a decree and then recover possession in execution. *A fortiori* his claim could not be dismissed as barred by limitation by reason of resale in favour of Madat Ali, because he was added as a defendant after the expiry of the stipulated period. The counsel for respondent relied upon *Harak Chand* v. *Deonath Sahay* (1), but that case is clearly distinguishable on the ground that leave of Court was not obtained to carry on the suit in the name of the substituted plaintiffs. I therefore, hold that the suit is not barred by limitation by reason of Madat Ali (who acquired his title from the first vendee after the institution of plaintiff's suit) having been joined as a co-defendant after the expiry of the stipulated period. I accept the appeal and setting aside the decrees of the lower Courts remand the case to the first Court for a decision on the merits. This order will not debar Madat Ali from setting up in defence, if he so desires, his own equal or superior right of pre-emption, as the case may be. Court-fee on appeal in this Court and the lower Appellate Court will be refunded and other costs will be costs in the case.

Appeal allowed.

No. 4.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

UDA AND OTHERS, - (DEFENDANTS),—APPELLANTS,

Versus

MUL CHAND AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 351 of 1904.

Civil Procedure Code, 1882, *Sections* 462, 506—*Arbitration—Award—Decree on judgment in accordance with an award—Reference by guardian ad litem of a minor without leave of Court—Admissibility of objection denying validity of reference on revision—Mortgage—Conditional sale—Duty of Court to refer to Deputy Commissioner if made by a member of an agricultural tribe—Punjab Alienation of Land Act*, 1900, *Section* 9 - *Refusal of Court to recognize a party as a member of such tribe who failed to prove his assertion no ground for revision—Punjab Courts Act*, 1884, *Section* 70 (1) (*a*).

Held, that a decree passed in accordance with an award made under Chapter XXXVII of the Code of Civil Procedure, 1882, on a

(1) *I. L. R.*, XXV *Calc.*, 409.

reference to arbitration in the course of a suit cannot be set aside on revision on the ground that some of the defendants being minors reference could not be made by their guardians *ad litem* without obtaining express sanction of the Court under Section 462, especially where the objection was neither raised in the Court below nor entered in the objections filed against the award within the period prescribed under Article 158 of the Limitation Act.

Lakshmana Chetti v. *Chrinathambi Chetti* (1), *Hira* v. *Dina* (2), *Malak Sorab* v. *Anokh Rai* (3), and *Hardeo Sahai* v. *Gauri Shankar* (4), referred to.

Although it is the duty of a Court to refer a mortgage of land by way of conditional sale to the Deputy Commissioner under Section 9 of the Punjab Alienation of Land Act if it was made by a member of an agricultural tribe, but it is for the party desiring to obtain benefit of that enactment to allege and prove that he is a member of an agricultural tribe. The mere assertion by a party that he is so and the refusal of the Court to recognise him as such does not amount to material irregularity and is not open to revision by the Chief Court under Section 70 (1) (*a*) of the Punjab Courts Act, 1884.

First appeal from the decree of Munshi Muhammad Yusaf, Additional District Judge, Hissar, dated 23rd January 1904.

Beechey, for appellants.

Dwarka Das and Ishwar Das, for respondents.

The judgment of the Court was delivered by

16*th June* 1906. LAL CHAND, J.—This is an appeal against the decree of the District Judge of Hissar decreeing plaintiffs' suit for possession as owners by foreclosure of a conditional mortgage. The decree purports to have been passed in accordance with the terms of an award, filed by arbitrators, and there is no allegation in the appeal that the decree passed is in excess of, or not in accordance with, the award. The appeal, therefore, does not lie. Treating the case, however, as an application for revision two contentions were urged against the decree of the lower Court.

(1) That the case should have been referred to the Deputy Commissioner for taking action under Section 9, Punjab Land Alienation Act, and could not, therefore, be referred to arbitrators for settlement.

(2) That some of the defendants being minors, reference could not be made by their guardians *ad litem* without obtaining express sanction of the Court

(1) *I. L. R., XXIV Mad.*, 326. (2) 18 *P. R.*, 1891, *F. B.*
(3) 37 *P. R.*, 1895. (4) *I. L. R., XXVIII All.*, 85.

under Section 462, Civil Procedure Code, and that, as a matter of fact, there was no written application for reference by these guardians *ad litem*.

Neither of these contentions can prevail.

As regards (1) it proceeds on an assumption that the defendants, mortgagees, in this case were members of the agricultural tribe, as notified for the District by the Local Government under Section 4, Punjab Land Alienation Act. It is admitted that defendants as Bishnois were not included in the notification in force at the time when the suit was instituted, though they have been so included in a notification issued since the passing of the decree. The latter circumstance is immaterial, as the second notification cannot have a retrospective effect. It was, however, contended that Bishnoi is the name of a religious sect and not of a tribe, and that the defendants, petitioners, are really Jats, who were included in the original notification as an agricultural tribe. But there is no proof on the record that the defendants are Jats. It is apparent from the District Gazetteer and Extracts from Census Report for 1883, that Bishnois include Jats, Rajputs, Banias and other castes, and that since the foundation of the sect its members have discarded all caste and tribal distinctions, and have formed themselves into a separate class or sect with special rules relating to marriages and other ceremonial rites. In their application, dated 31st July 1903, it was alleged by the defendants that they were Jats by origin, but the Court was asked merely to postpone the case pending disposal of their application to the Local Government for being notified as an agricultural tribe. No request or prayer was made to fix an issue, or to make an enquiry that the defendants were really Jats. Under the circumstances it cannot reasonably be held that the District Judge has acted with material irregularity in not fixing such issue, or not ordering such enquiry. It was further argued that the Court was in any case bound to make the enquiry, but this argument is entirely fallacious. It is no doubt the duty of the Court to make a reference under Section 9, Punjab Land Alienation Act, in case of a mortgage by a member of an agricultural tribe. But it is for the party applying for such reference to allege and prove that he is a member of an agricultural tribe. If the party making the application does not move the Court to order any such enquiry but merely asks for an adjournment which, for reasons given, the Court did not think fit to grant, it cannot be argued that

the Court has failed to exercise its jurisdiction, or has acted with irregularity in the exercise of its powers. Further the allegation put forward that the defendants are Jats and, therefore, members of an agricultural tribe would constitute but one of the issues in the case, an issue of fact both in form and substance. But the reference to arbitration circumscribed the whole dispute obviously including all issues which would or did arise on the allegations. The arbitrators have not given any special finding on this point, but the award delivered in plaintiffs' favour necessarily implies a disposal of all issues against the defendants. Moreover, the objection taken to the award on the ground under notice was expressly disposed of by the District Judge against the petitioners and we are not prepared to say that the decision of the District Judge is erroneous.

Even if it were the contention would not be maintainable on revision having already been disposed of by the District Judge after due and proper consideration. For all these reasons therefore the first contention must be overruled.

As regards the second contention, it was not raised at all in the lower Court, nor entered in the objections filed against the award within the prescribed period. It cannot, therefore, now for the first time, be raised in revision. It is not easy to discover how the District Judge has acted with material irregularity in not considering, or overlooking an objection not raised before him. It was, however, contended that the objection is fatal to the reference. This does not appear to be the case. Assuming previous leave of Court was necessary for a reference to arbitration by a guardian *ad litem* of a minor yet the result of want of leave is merely to make the agreement only voidable. It cannot be treated as an objection under Section 506, Civil Procedure Code, that the application for reference was not by all the parties. The application was, as a matter of fact, made by all the parties, and it is not necessary that such application should be in writing (*Shama Sundram Iyer* v. *Abdul Latif* (1). All that could properly be contended, under the circumstances, would be that it was not a valid application by all the parties, a matter which does not necessarily contravene the express provision of Section 506, Civil Procedure Code. But even if the objection vitally affected the reference it is really an objection to the validity of the award based on the reference, and not, as was argued, an objection altogether uncon-

(1) *I. L. R.*, XXVII *Calc.*, 61.

nected with the award. It is, therefore, an objection which ought to have been urged within ten days, prescribed under Article 158, Limitation Act, and not having been so urged the petitioners are now precluded from relying upon it in order to set aside the award and the decree passed in accordance with the award. Under the circumstances it is unnecessary to decide the legal question, *viz.*, whether it was necessary to obtain leave of Court under Section 462, Civil Procedure Code,—a point on which the authorities are not consistent—vide *Lakshmana Chetti* v. *Chinnathambi Chetti* (1), *Hira* v. *Dina* (2), *Malak Torab* v. *Anokh Rai* (3), and *Hardeo Sahai* v. *Gauri Shankar* (4). It is sufficient to remark that the observations in *Malak Torab* v. *Anokh Rai* (3) and *Hardeo Sahai* v. *Gauri Shankar* (4) seem to be *obiter*, that the Madras case was a case of settlement by award without the intervention of the Court, and that the rule of law was accepted in *Hira* v. *Dina* (2), without any discussion on the mere faith of the dictum in *Malak Torab* v. *Anokh Rai* (3). Treating the matter as an open question the view expressed in *Hardeo Sahai* v. *Gauri Shankar* (4) seems to be more consonant with the wording of Section 406, Civil Procedure Code, which requires an *application* to be filed in Court if the parties *desire* a reference to arbitration. The word "agreement" in Section 562, Civil Procedure Code, seems to refer to an agreement by way of settlement rather than of the nature of an application under Section 406. As contended by the learned pleader for the respondents even if leave were applied for reference to arbitration on behalf of a minor, there would hardly be any materials referable for deciding whether the leave should or should not be granted. It is, however, unnecessary to decide this point in this case, as we hold that the objection taken is not entertainable; because it is an objection against the validity of the award and was not filed within the prescribed period, and moreover was not raised in the lower Court, and is, therefore, scarcely admissible on revision.

We, therefore, hold that no valid ground is made out for setting aside the decree passed in terms of the award, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) *I. L. R.*, *XXIV Mad.*, 326.
(2) 87 *P. R.*, 1895.
(3) 18 *P. R.*, 1891, *F. B.*
(4) *I. L. R.*, *XXVIII All.*, 35.

No. 5.

Before Mr. Justice Lal Chand.

APPELLATE SIDE.

KARAM CHAND AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

KHUDA BAKHSH, (DEFENDANT),—RESPONDENT.

Civil Appeal No. 704 of 1904.

Right of suit—Decree for possession of equity of redemption—Pre-emptor obtaining possession of property instead of equity of redemption—Suit for restitution of property wrongfully taken—Question relating to the execution, discharge or satisfaction of decree—Discretion of Court to treat plaint as an application for restitution—Civil Procedure Code, 1882, *Section* 244.

'A' purchased from 'B' the equity of redemption in a certain property which was previously mortgaged with possession to 'C' and then redeemed the mortgage of 'C' 'D' sued 'A' to enforce his right of pre emption and got a decree for delivery of possession of equity of redemption, but in execution of his decree he somehow obtained possession of the property in lieu of its equity of redemption. 'A' then filed a regular suit to recover possession of the property as a mortgagee on the ground that 'D' had taken unlawful possession in execution proceedings. Thereupon the defence contended that the suit was barred by the provisions of Section 244 of the Civil Procedure Code.

Held, that the suit was not barred under Section 244 of the Code of Civil Procedure. The question to be decided in this suit did not relate to the execution, discharge or satisfaction of the original decree within the meaning of that section because the decree in the pre-emption suit has and had no concern with it.

Rash Behares Lal v. *Bebee Wajun* (1) followed.

Held also that even assuming that no regular suit lay the plaint should be regarded under the circumstances of the case as an application for execution of decree for claiming restitution of property wrongfully taken by 'D.'

Biru Mahata v. *Shyama Churn Khawas* (2), *Jhamman Lal* v. *Kewal Ram* (3), *Pasupathy Ayyar* v. *Kothanda Rama Ayyar* (4), and *Jotindra Mohan Tagore* v. *Mahomed Basir Chowdhry* (5), followed.

Further appeal from the decree of Captain B. O. Roe, Additional Divisional Judge, Rawalpindi Division, dated 22nd April 1904.

Sukh Dial, for appellants.

Muhammad Shafi, for respondent.

(1) 11 *W. R.*, 516. (2) *I. L. R.*, *XXII All.*, 121.
(3) *I. L. R.*, *XXII Calc.*, 483. (4) *I. L. R.*, *XXVIII Mad.*, 64.
(5) *I. L. R.*, *XXXII Calc.*, 332.

The judgment of the learned Judge was as follows :—

LAL CHAND, J.—The execution file shows clearly that the defendant-respondent obtained possession of the lands in suit by executing his decree for pre-emption. The decree was merely for delivery of possession of equity of redemption in property now in suit, and neither the application for execution nor the warrant for delivery of possession issued by the executing Court ever intended that the decree-holder should obtain possession of anything beyond the equity of redemption decreed in his favour. But by a mistake or oversight on the part of the Patwari who delivered possession defendant-respondent was delivered possession of the lands in suit instead of the equity of redemption. The plaintiffs who had redeemed these lands from prior mortgagees previous to defendant's suit for pre-emption of equity of redemption, now sue for possession as mortgagees, on the ground that the defendant-respondent has taken unlawful possession in execution proceedings. The first Court decreed the claim, but the lower Appellate Court has dismissed it on the ground that the suit is barred under Section 244, Civil Procedure Code, observing at the same time that the defendant-respondent had no business to obtain possession in execution of his decree. 30*th July* 1906.

I am unable to agree with the lower Appellate Court that the suit is barred under Section 244, Civil Procedure Code. The two authorities quoted, *viz.*, *Arundadhi* v. *Natesha* (1) and *Kuriyali* v. *Mayan* (2) are not applicable, and they were not pressed on my attention in argument by the counsel for respondent. He however referred to a large number of cases—*viz.*, *Shurut Soonduree Dabee* v. *Suresh Narain Roy* (3), *Jogendra Narain Koonwar* v. *Ranee Surus Moyee* (4), *Appa Rao* v. *Venkataramanayamma* (5), *Viraraghada* v. *Venkata* (6), *Arundadhi* v. *Natesha* (1), *Rahiman Khan* v. *Pateba Miyah* (7), *Rachunath Ganesh* v. *Mulva Amad* (8), *Mahibullah* v. *Imami* (9), *Beg Raj Marwari* v. *Sreemuthy Kundali Debya* (10), *Sri Narain* v. *Daulat Ram* (11), *Choudri Gurmukh Singh* v. *Mussammat Mirsa Nur* (12), and *Kalu Khan* v. *Abdul Latif* (13), none of which seems to me to cover the present case. The

(1) *I. L. R., V Mad.*, 391.
(2) *I. L. R., VII Mad.*, 255.
(3) 12 *W. R.* 85.
(4) 14 *W. R.*, 39.
(5) *I. L. R., XXIII Mad.*, 55.
(6) *I. L. R., XVI Mad.*, 287.
(7) *I. L. R., IV Mad.*, 285.
(8) *I. L. R., XII Bom.*, 449.
(9) *I. L. R., IX All.*, 229.
(10) 8 *Calc. W. N.*, 853.
(11) 9 *P. R.*, 1889.
(12) 63 *P. R.*, 1901.
(13) 45 *P. R.*, 1904.

plaintiffs have not sued as judgment-debtors of the pre-emption case. They were then sued as vendees of the equity of redemption and a decree was passed against them as such. Their present suit is based on the ground that they are mortgagees of the land in suit, having redeemed it from the prior mortgagee and that as such they are entitled to hold possession until duly redeemed. The dispute therefore is not between a decree-holder and a judgment-debtor but between an owner and mortgagee of the property, and such dispute in no sense relates to execution discharge or satisfaction of the decree. It is a dispute with which the decree in the pre-emption suit had and has no concern.

Possession was doubtless obtained by the defendant-respondent by executing his decree, but in order to apply Section 244, it is further necessary to show that it is a question between the parties to the suit in which the decree was passed and relates to execution discharge or satisfaction of the decree. The parties are nominally the same, but at least one of them, the plaintiff, occupies a totally different character, and the dispute in no way relates to execution of the decree beyond the accomplished fact that possession was delivered to respondent by the Patwari contrary to the express orders of the Court executing the decree. No authority was quoted exactly applicable to such circumstances. In *Shurut Soonduree Dabee* v. *Puresh Narain Roy* (1) the actual facts are not given, and the case was remanded for enquiry. In *Jogendro Narain Koonwar* v. *Ranee Surus Moyee* (2) it was held that "however "absurd might be *the order of the Court* which directed the "thing to be delivered still unless jurisdiction were given "no other Court would have the power to alter the direction in "question." Referring to *Rash Beharee Lal* v. *Bebee Wajun* (3), quoted in argument to the contrary, it was explained that "there the learned Judge would seem to have said that the "decree-holder had taken something *which neither the Court* "*executing the decree nor the decree itself gave him*," and there it was held that for that something a separate suit would lie to recover it. If this is the meaning, and I understand that it is so, of the decision in question I do not at all dissent from it. It appears to me that the case *Rash Beharee Lal* v. *Bebee Wajun* (3) is exactly applicable to the circumstances of the

(1) 12 *W. R.*, 85. (2) 14 *W. R.*, 39.
(3) 11 *W. R.*, 516.

present case. The judgment in that case delivered by Sir Barnes Peacock, Chief Justice, pointed out that if a decree is obtained for delivering a cow and a horse is delivered that cannot be considered to be an act done in execution of the decree. " It would be doing something wholly different from " that which was ordered by the decree." In that particular case the decree merely ordered that an embankment should be lowered to its proper height, and the Nazir in addition caused breaches or holes to be cut in the embankment so lowered because he thought them necessary for the protection of the bund from the flow of water over its surface. It was held that this was not done in execution of decree. Similarly the act of the Patwari in the present case in delivering possession of land when warrant of Court directed delivering possession of equity of redemption cannot be called an act done in execution of decree. The case is very much alike to another illustration given in the same judgment, *viz.*, where a decree should order " Rs. 500 to be levied, and instead of levying Rs. 500 the " execution Court or the Nazir should deliver a zamindari." It appears to me that Section 244, Civil Procedure Code, bars a regular suit where the question relating to execution of a decree is raised *bonâ fide*. But when the decree itself on the face of it is wholly irrelevant to the question raised and the wrong-doer takes the plea of bar to shield his unlawful gain secured even against the express orders of the executing Court, possibly in collusion with the officer executing the decree and in the absence of the judgment-debtors, it would seem to me that Section 244 would have no application. In the present case the Divisional Judge has found that the defendant had no business to obtain possession of the land, and there is not even a plausible defence on the merits. The matter is absolutely clear that the defendant could not obtain or retain possession without payment of Rs. 1,079, and the plea of bar under Section 244 was raised on the ground which is untrue that the decree awarded actual possession of land. Under the circumstances no *bonâ fide* question relating to execution of decree arises in the case and Section 244, Civil Procedure Code, is no bar to the maintenance of the regular suit.

But further even if there were any room for doubt on this point the plaint may be treated as an application for execution of decree for claiming restitution of lands wrongfully delivered to defendant by the Patwari when executing the decree.

Viz., Biru Mahata v. *Shyama Churn Khawas*(1), *Jhamman Lal* v. *Kewal Ram* (2), *Pasupathy Ayyar* v. *Kothanda Rama Ayyar* (3), and *Jotindra Mohan Tagore* v. *Mohamed Basir Chowdhry* (4).

This course was approved of or adopted in the cases noted on the margin.

The only question for determination under the circumstances would be whether the Munsif who heard and decided the present suit was competent to entertain the application for restoration. I have no doubt that he was competent both by reason of transfer of business by the District Judge as well as being the successor in office of the Munsif who executed the decree. There is no conceivable defence against the application for restoration, the mistake made being apparent on the execution file. The plaintiff is therefore clearly entitled to claim possession of the lands in suit even by restitution in execution proceedings.

For the foregoing reasons I accept the appeal, reverse the decree of the lower Appellate Court and restore the decree passed by the first Court with costs throughout.

Appeal allowed.

No. 6.

Before Mr. Justice Lal Chand.

MAULA BAKHSH AND OTHERS,—(Defendants),—

APPELLANTS,

Versus

DEVI DITTA,- (Plaintiff),—RESPONDENT.

Appellate Side.

Civil Appeal No. 884 of 1906.

Custom—Pre-emption—Pre-emption on sale of house property—Katra *Missar Beli Ram, Amritsar city—Punjab Laws Act*, 1872, *Section* 11.

Found that the custom of pre-emption in respect of sales of house property based on vicinage exists in *Katra* Missar Beli Ram, a sub-division of the city of Amritsar.

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(1) *I. L. R., XXII Calc.*, 483.
(2) *I. L. R., XXII All.*, 121.
(3) *I. L. R., XXVIII Mad.*, 64.
(4) *I. L. R., XXXII Calc.*, 332.

Sohawa Mal v. *Chattu Mal* (1); *Mamon* v. *Ghaunsa and others* (2) referred to.

Gokal Chand v. *Mohan Lal* (3) distinguished.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 20th February 1906.

Oertel, for appellants.

Sham Lal, for respondent.

The judgment of the learned Judge was as follows :

LAL CHAND, J.—The property claimed by pre-emption in this suit is situate in *Katra* Missar Beli Ram, a well recognised sub-division of Amritsar city. The defendant vendee in his examination, dated 14th April 1905, admitted that if a custom of pre-emption be found to prevail in the *katra* plaintiff would have a superior right. The vendee thus waived all objections on score of the nature of the property which were raised in his written statement, and the issue fixed was whether a custom of pre-emption by vicinage existed in *Katra* Beli Ram. *6th August* 1906.

The lower Courts have agreed in finding this issue in the affirmative in plaintiff's favour, and I see no reason to arrive at a different conclusion.

In two cases relating to properties situate in this sub-division decided on 22nd February 1865 and 15th August 1876 a custom of pre-emption by vicinage was found to prevail. In the first case (*Chitto* v. *Maya*), decided by Munshi Jaishi Ram, the existence of custom was admitted by the vendee and the suit for pre-emption was decreed. In the second case (*Dina Nath* v. *Taboo*) the existence of custom was denied, but the claim was decreed by Pandit Behari Lal, Extra Assistant Commissioner, after an exhaustive and careful enquiry. In this case an instance (*Malan* v. *Umar Bakhsh*) in *Katra* Parja, an adjoining sub-division, was cited to the contrary. But this instance was explained in *Sohawa Mal* v. *Chattu Mal* (1), where after a careful consideration of evidence in the case and of twelve instances in neighbouring sub-divisions including the one concerned in this suit a custom of pre-emption by vicinage was found to prevail in *Katra* Parja. This case is of considerable importance as *Katra* Parja adjoins the sub-division now under reference, while quite recently the same custom was also found to exist in another sub-division in the neighbourhood, *viz.*, *Katra* Moti Ram, *Mamon* v. *Ghaunsa and*

(1) 154 *P. R.*, 1882. (2) 99 *P. R.*, 1906,
(3) 6 *P. R.*, 1905.

others (1). Plaintiff's claim for pre-emption is thus supported by two instances of admitted and proved custom in the sub-division itself supplemented by several instances in the neighbouring sub-divisions.

It was argued by the counsel for appellant relying on *Gokal Chand* v. *Mohan Lal* (2), that two instances in the sub-division combined with several instances in the neighbourhood are not sufficient to establish the alleged custom, and further that the existence of alleged custom was rebutted by numerous uncontested sales in the sub-division itself. The authority quoted for appellant is distinguishable, as it was held in that case that the existence of right of pre-emption had been assumed in the instances quoted and in "neither was there any real contest on the point." In the present case as already shown in neither instance was the custom assumed. In the first case decided in 1865 the vendee's statement made it clear that he implicitly acknowledged the existence of pre-emption and in the second case the existence of custom was established after contest and due enquiry.

As regards the uncontested sales, nine sale-deeds were produced, the first Court having rightly rejected alleged sales which were not supported by sale-deeds. The circumstances attending these sales are not fully borne out on the record and it is no way improbable that the omission to sue for pre-emption may have been due in each case to causes independent of the absence of custom of pre-emption. It may have been due to want of funds or absence or reluctance to litigate with a powerful or influential vendee, or the sale may have been kept secret or influences brought to bear on the pre-emptor to give his consent or to desist from asserting his claim.

The sale-deeds produced extend in time from 1891 to 1905, and their number decidedly is not so large or overwhelming as to negative the custom found to prevail in 1865 and established after a careful enquiry in 1876. The evidence relied upon in rebuttal is thus intrinsically weak being of a negative character supported only by private transactions, and it cannot reasonably be held to outweigh the affirmative proof established by a decision of Court after contest and enquiry. In the reported cases relating to *Kat a* Parja (*Sohawa Mal* v. *Chattu*

(1) 99 *P. R.*, 1906. (2) 6 *P. R.*, 1905.

Mal (1), several sales to strangers in the *kucha* itself were relied upon against the prevalence of pre-emption, but these were not held as sufficient to negative the custom.

It further appears on the present record that the defendants indirectly acknowledged the existence of custom by offering in reply to plaintiff's notice to give up the house if they were paid the full price as entered in the sale-deed. I have therefore no doubt that custom of pre-emption by vicinage is proved to exist in *Katra* Missar Beli Ram where the property in suit is admittedly situate. I therefore uphold the decrees of the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

No. 7.

Before Mr. Justice Chitty and Mr. Justice Lal Chand.

FATEH MUHAMMAD,—(DEFENDANT), —APPELLANT,

Versus

KARIMAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS. } APPELLATE SIDE.

Civil Appeal No. 490 of 1906.

Custom—Pre-emption—Claim to pre-emption by reason of owning site of house sold—Muhalla *Khajuranwala, Jullundur city.*

Found, that a custom of pre-emption exists in *Muhalla* Khajuranwala in the city of Jullundur under which the owner of the site has a right of pre-emption in respect to the buildings erected on it.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Jullundur Division, dated 19th May 1905.

Muhammad Shafi, for appellant.

Shah Din, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—This is an appeal in a suit for pre-emption of a house situate in *Muhalla* Khajuranwala of the town of Jullundur. The plaintiff-respondent is owner of the site on which the house sold is built, and as such has claimed pre-emption by custom. The defendant-appellant pleaded that no custom of pre-emption existed in *Muhalla* Khajuranwala, and that at any rate no custom existed as would entitle the plaintiff to claim pre-emption by reason of his being owner of the site of *4th August* 1906.

(1) 154 *P. R.*, 1882.

house sold. The lower Courts have agreed in decreeing the claim, and the sole question in appeal is whether the plaintiff has succeeded in proving the alleged custom. The lower Courts have neither discussed nor referred in any detail to the evidence on which they have based their decision.

The District Judge has contented himself with remarking that there are several judgments on the file all relating to the locality in dispute, dating from 1869 to 1901, in which the right has been admitted by Courts over and over again. The Divisional Judge has held that it is notorious that pre-emption on the ground of vicinage is universal in the town of Jullundur, and that it seems to be admitted that pre-emption has been successfully claimed all round. This is not at all satisfactory, specially as the Divisional Judge has overlooked that it is not sufficient to find vicinage as a ground for pre-emption in this case as the suit is based not on vicinage but on a peculiar allegation that on sale of a house in *Muhalla* Khajuranwala the owner of the site has as such a right of pre-emption.

It is therefore obviously necessary to discuss the proof on which plaintiff has relied to support his claim as it is strenuously argued for appellant that plaintiff has entirely failed to prove the alleged custom. Neither party has relied on oral evidence as having any bearing on the question of custom at issue, and the proof adduced by plaintiff consists entirely of judicial precedents which it is argued for appellant is not strong and sufficient to prove the alleged custom.

Before proceeding, however, to discuss the judicial precedents it is necessary to clear the ground as regards the locality of the slaughter-house inside which were situate the two houses which formed the subject matter of two out of the eight judicial precedents relied upon by plaintiff. According to the plaint the house now in dispute is described as situate in *Muhalla* Khajuranwala near the Butcher Khana. It was contended for appellant that the Butcher Khana is a separate locality not within *Muhalla* Khajuranwala. But this contention is at once set at rest not only by the oral evidence of two witnesses for appellant but also by the contents of the sale-deed in *Ahmed* v. *Rahim*, decided on 30th April 1874, where the house sued for situate inside the Butcher Khana was described as situate in *Muhalla* Khajuranwala. There is therefore

no possible reason for doubting that the Butcher Khana lies within *Muhalla* Khajuranwala.

The instances relating to houses inside the Butcher Khana must therefore be held as instances within the *muhalla* in question.

To start with then there are the two following instances of houses inside Butcher Khana pre-empted by plaintiff or his predecessor in title on the same ground as forms the foundation for the present claim :—

(1) *Ahmed* v. *Rahim*, decreed on 30th April 1874, in favour of plaintiff's father. The plaintiff relied in his plaint on custom prevailing in the town, and he supported his assertion not merely by oral evidence but certain judicial precedents, a list of which was filed and which were called for by the Court. The claim was decreed, and the only question pressed in appeal filed by the vendee was one relating to price and not to plaintiffs' right of pre-emption.

(2) (*Wali Dad v. Nathu*, decided on 24th December 1891). In this case a distinct issue was fixed whether plaintiff had a right of pre-emption by reason of ownership of the site of the house sold, and it was decided in plaintiff's favour on the strength of three judicial decisions and evidence of two witnesses for defendant who supported the alleged custom. The three judicial precedents included case No. 1, and two cases relating to *Muhallas* Ali and Sayadan, respectively.

In addition to these two judicial precedents inside the *muhalla* in question there are the following five instances of houses situate in the neighbouring *muhallas* :—

(*a*) *Jafar* v. *Basri*, decided on 19th October 1869, relating to a house in *Muhalla* Ali, which admittedly adjoins the *muhalla* in question in this suit. A distinct issue was fixed whether plaintiff had superior claim of pre-emption by reason of owning the site. Three persons were appointed as commissioners to report, two of them being selected by the parties and the third was nominated by the Court. The three commissioners unanimously

reported the issue in plaintiff's favour, and his claim was accordingly decreed.

(*b*) *Jafar* v. *Shadi*, decided on 31st July 1876. This case also related to a house in *Muhalla* Ali. A distinct issue as to pre-emption by ownership of site was fixed as in case (*a*), and the Court found in plaintiff's favour on evidence and enquiry made by a local commissioner.

(*c*) *Fateh Muhammad* v. *Jani*, decided on 22nd August 1895, claim for pre-emption of a house in *Muhalla* Ali on the same ground as in (*a*) and (*b*). Suit was decreed and instance (*b*) was referred to as a precedent.

(*d*) *Rahim Shah* v. *Jas*, suit relating to a house in *Muhalla* Sayadan decided according to the award of arbitrators.

(*e*) *Sayad Ali Shah* v. *Ghulam Muhammad*, decided on 28th December 1901, relating to a house in *Muhalla* Khadian on the ground of ownership of site under the house sold.

An issue was fixed as to whether *Muhalla* Khadian formed a sub-division and whether the alleged custom of pre-emption prevailed in that *muhalla*. It was found that *Muhalla* Khadian was surrounded on three sides by *Muhalla* Sayad Kabir and another *muhalla*, and on the south by the public road, and that it formed a separate sub-division. *Muhalla* Ali is described as situate in the same locality, and the obvious inference from the finding is that *Muhalla* Khadian is one of the several *muhalla* including the *muhalla* in question in this case which lie outside the old wall now not traceable and which have apparently been inhabited since the British occupation. It was found by the Court that the alleged custom prevailed in the *muhalla*, and the finding was supported by two instances of the same nature inside the *muhalla* decided in 1891 and 1894 and an instance in the adjoining *muhalla* of Sayad Kabir.

It is thus clear that there are at least six judicial precedents exactly in point, some of which again are based on other independent instances of the same nature. Two of these precedents relate to properties situate in *Muhalla* Khajuranwala itself and four appertain to adjoining sub-divisions. This is decidedly a very strong and cogent proof to support the custom

alleged by the plaintiff. The counsel for appellant generally contended that none of these cases were decided by a Court of appeal, and he relied upon a passage in *Panna Lal* v. *Bhagwan Das* (1), that it is not for Courts to invent custom of pre-emption by carelessly passing decrees founded on fallacious premises.

We are unable to see any force in the argument used or that the passage quoted has any relevancy. No hard and fast rule can be laid down for judging the weight to be attached to a judicial precedent quoted as an instance in support of a particular custom. The sufficiency of proof must depend on the circumstances of each case, and a judicial precedent is not less cogent simply because it was decided by a Court of first instance, though after due deliberation and consideration. In the present case the detailed particulars of each precedent already given show distinctly that in each case the alleged custom was found to prevail after proper enquiry and in some cases after making local investigation. These judgments were not appealed against by the vendees, but the omission to appeal would rather imply that the decrees passed were felt to be in accordance with the prevailing custom. We see therefore no reason for holding that plaintiff has failed to prove the alleged custom. In deciding this question we have altogether left out of consideration the precedents quoted to show that a custom of pre-emption by vicinage prevails generally in the town of Jullundur, *Sheikh Shahr Yar* v. *Imam-ud-din* (2), (and one instance quoted in this case is in *Muhalla* Khajuranwala itself). It is unnecessary in the present case to consider how far the prevalence of pre-emption by vicinage would have a bearing if at all on the question at issue, as we are fully satisfied that the proof adduced is quite adequate to support the alleged custom. Nor have we for a similar reason taken into account the equally well established custom (*Bug* v. *Asad Ali Shah* (3)), that a non-proprietor in Jullundur cannot sell his house without consent of the owner of the site—a usage which may have materially assisted in moulding the custom set up by plaintiff. It is however necessary to note that not a single instance was quoted for the appellant to the contrary, and the two unreported judgments of this Court in Civil Appeal No. 472 of 1904, decided on 29th April 1904, and C. A. No. 751 of 1905, decided on 20th

(1) 16 *P. R.*, 1902. (2) 33 *P. R.*, 1885.
(3) 75 *P. R.* 1897.

January 1906, referred to by counsel for appellant were found on examination to be entirely inapplicable. We therefore have no hesitation in concurring with the lower Courts that plaintiff has succeeded in proving that by reason of ownership of the site he is entitled by custom to pre-empt the property in dispute. We accordingly dismiss the appeal with costs.

Appeal dismissed.

No. 8.

Before Mr. Justice Lal Chand.

APPELLATE SIDE.

SIRAJ-UD-DIN AND ANOTHER, —(PLAINTIFFS),— APPELLANTS,

Versus

MUHAMMAD FARUK AND ANOTHER,—(DEFENDANTS),— RESPONDENTS.

Civil Appeal No. 749 of 1906.

Custom—Inheritance—Right of grandson whose father has pre-deceased the grandfather in the estate of the latter—Muhammadan Kashmiris of Banga, Tahsil *Nawashahr, Jullundur District.*

In a suit the parties to which were Muhammadan Kashmiris of Banga, *Tahsil* Nawashahr, Jullundur District, *found*, that in matters of inheritance they were governed by custom and not by Muhammadan Law, and that among them the son of a predeceased son was entitled to succeed to his grandfather's estate by right of representation.

Maula Bakhsh v. *Muhammad Bakhsh* (1), *Lal Din* v. *Mussammat Jainan* (2), and *Fais Talab* v. *Karm Khan* (3) referred to.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Jullundur Division, dated 11th October 1905.

Muhammad Taj-ud-din, for appellants.

The judgment of the learned Judge was as follows :—

6th August 1906. LAL CHAND, J.—The parties in this case are Muhammadan Kashmiris of Banga, a small town in Nawashahr *Tahsil*, District Jullundur. They own no land and are not agriculturists in any sense of the term. The property in dispute is one-half share of a house which belonged to Pir Muhammad, grandfather of defendants, and father of plaintiff No. 1 by a second wife who is plaintiff No. 2 in the case. The defendant's father, Imam Din, died during the life-time of Pir Muhammad, who died about three years prior to the institution of the present claim. The plaintiffs claim the

(1) 54 *P. R.*, 1906. (2) 114 *P. R.*, 1893.
(3) 80 *P. R.*, 1882.

whole house on the ground that under Muhammadan Law the defendants are excluded from inheritance, their father Imam Din having predeceased his father, Pir Muhammad. The family traces its traditional home to Kashmir valley, but the period of settlement in Banga is not known as the oldest member of the family aged eighty years is unable to give the name of Pir Muhammad's grandfather.

The sole question for decision under the circumstance is whether the defendants are entitled to succeed to Pir Muhammad by custom or are excluded from succession by Muhammadan Law, their father having predeceased his father whose property is now in dispute. The lower Courts have held that daughters are excluded from succession in the family which indicates that Muhammadan Law is not followed in matters of succession, and that the defendants are therefore not excluded from inheritance. The lower Courts have accordingly dismissed plaintiff's suit. In appeal it is contended that daughters are not excluded from inheritance in this family, that even if they are excluded it does not follow that the provisions of Muhammadan Law against succession by representation as claimed by the defendants are inapplicable, and that it is proved by two judicial decisions and certain oral evidence of witnesses from Ludhiana where the parties' family has marriage connections that Muhammadan Law is followed by Kashmiris in matters of inheritance. The pleader for appellant relied on *Maula Bakhsh* v. *Muhammad Bakhsh* (1) and the judgments referred to therein to suppor his contention.

As regards the two judicial decisions by Ludhiana Courts the judgment of the District Judge related to proceedings taken for appointment of a guardian of a minor and the second case decided by a Munsif involved a dispute relating to inheritance. In neither of these cases was there any enquiry or finding on the particular point at issue in this suit. In the first case the question of guardianship was decided in accordance with Muhammadan Law with an *obiter* as to its applicability to matters of inheritance. In the second case the provisions of Muhammadan Law were applied by admission of parties to a dispute between a widow and a co-widow and her sons. These precedents are apparently of no value for deciding the issue involved in the present case. The oral evidence of two witnesses produced from Ludhiana does not carry the

(1) 54 P. R., 1906.

plaintiff's case any further. They have stated generally that Kashmiris are governed by Muhammadan Law, but cite no instance to support their assertion. They further admit that they do not belong to the plaintiff's *gôt*, and acknowledge their complete ignorance of all matters relating to the family of the parties.

On the other hand, plaintiffs' own agent, a descendant of Pir Muhammad's father, and Muhammad Jamal's daughter, whose family originally belonged to Ludhiana but has migrated to Banga since many years, distinctly admitted when examined that daughters of Jamal's family have never received a share in inheritance. He named several daughters among descendants of Muhammad Jamal, but was unable to state that any ever succeeded to a share under Muhammadan Law. Moreover, Karim Bakhsh, a direct descendant of Karm, brother of Muhammad Jamal, was examined as a witness for defendants, and deposed that provisions of Muhammadan Law were not followed by the family in matters of inheritance.

He is aged eighty years, and has referred to an instance in his own branch of the family where the son of a pre-deceased son inherited equally with his uncle, witness's own father, and he further gave another instance to the same effect in *Mauza* Saryal among Muhammadan Kashmiris. He confirmed the statement made by plaintiffs' agent that daughters have never inherited in Muhammad Jamal's family, and supported his allegation by quoting several instances giving particulars in each case.

It is thus clear and beyond all doubt that daughters are excluded from receiving a share, and that at last in two instances the sons of pre-deceased sons have succeeded by right of representation contrary to the provisions of the Muhammadan Law. The plaintiffs tried to discredit Karim's evidence by producing one Dullan who started by alleging that he was the elder brother of Karim—a statement at once falsified by comparing their ages, but he was obliged to admit in cross-examination that he was a *pichhlag* son of Karim's father by a Rajput wife. As regards succession of daughters the witnesses stated that they receive their right whatever it be at marriage and by presents subsequent to marriage. The attempt to discredit Karim's evidence has thus failed completely. It is unnecessary to discuss at any length the authorities relied upon by the pleader for appellants. *Maula Bakhsh* v.

Muhammad Bakhsh (1), is so far relevant that Muhammadan Kashmiris of Lahore city were held to follow Muhammadan Law in matters relating to succession of daughters.

On the other hand, in *Lal Din* v. *Mussammat Jainan* (2), which is referred to in *Moula Bakhsh* v. *Muhammad Bakhsh* (1), it was established after local enquiry that Muhammadan Kashmiris of Sialkot city followed custom and not Muhammadan Law in matters relating to succession of widows. Each case must depend for its decision primarily on its own proof, and the necessity for looking elsewhere for help and guidance would arise if there be dearth or absence of reliable materials on the record. In the present case I see no reason to discredit the evidence of Karim, an aged member of the family who alone, truly speaking, is in a position to give direct evidence on the question at issue. His evidence clearly proves that the provisions of Muhammadan Law are not followed in matters of inheritance, and he quotes two instances exactly in point on a matter which so far as I know is not very unusual or exceptional. It is true that the instances quoted in this case are few in number, but the question of succession by representation on account of the death of a pre-deceased son is but of rare occurrence.

Moreover, it was admitted in argument that there are only four families of Kashmiris in Banga, and it is not easy to imagine that the defendants could be able to discover many instances in a matter of such rare occurrence. This is at once corroborated and rendered apparent by the plaintiffs' own omission to produce even a single instance to the contrary. In *Fais Talab* v. *Kaim Khan* (3), a case of Pathan zamindars of Attock *Tahsil*, the custom set up by defendants in this case was held to be a very general custom among Muhammadan agriculturists in this Province.

The family concerned in this case is not agriculturist, but their ancestors though original inhabitants of Kashmir valley have settled among agriculturists from time immemorial as Karim Bakhsh, the oldest and eldest member of the family has deposed that members of his brotherhood live in village Saryal where intermarriages take place with them. It is

(1) 54 *P. R.*, 1906. (2) 114 *P. R.*, 1893.
(3) 80 *P. R.*, 1882.

therefore neither strange nor abnormal that the family has adopted a custom found to be very general among Muhammadan agriculturists of the province even assuming which is problematical that their Kashmerian ancestors followed Muhammadan Law in excluding from inheritance the sons of a pre-deceased son. I therefore hold that the alleged custom is proved to apply and that the defendants are not excluded by Muhammadan Law from retaining the share in dispute by right of representation as their father's share who pre-deceased his father. The appeal is accordingly dismissed with costs.

Appeal dismissed.

No. 9.

Before Mr. Justice Rattigan.

APPELLATE SIDE.

NIHAL CHAND,—(PLAINTIFF),—APPELLANT,

Versus

ALI BAKHSH AND OTHERS,—(DEFENDANTS), RESPONDENTS.

Civil Appeal No. 168 of 1905.

Assignment—Conditional assignment by way of security—Right of assignee to sue in his own name.

Where the payee of a promissory note, not negotiable, assigned it to the plaintiff as a security for a debt owing from him to the latter until its repayment in full, *held* that it being merely a conditional assignment the plaintiff was not entitled to maintain an action in his own name alone against the maker of the promissory note for the recovery of amount due thereunder.

Durham Brothers v. *Robertson* (1) followed.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 14th November 1904.

Ishwar Das and Sohan Lal, for appellant.

Beechey, for respondents.

The judgment of the learned Judge was as follows:—

3rd August 1906. RATTIGAN, J.—The facts of the case are fully stated in the judgment of the first Court and need not be repeated. The case, briefly stated, is that plaintiff, Nihal Chand, sues on the basis of a pro-note executed by Ali Bakhsh, defendant No. 1, in favour of Nathe Khan, and mortgaged by the latter to plaintiff by three deeds of mortgage.

(1) *L. R.* 1, Q. B. (1898), 765.

The translation of the pro-note as given by the first Court and admitted to be correct, is as follows :—

"I am indebted to Nathe Khan, son of Kamman Khan, in "Rs. 1,700, half of which is Rs. 850. To be paid on demand. "Hence this promissory note, 13th October 1900."

"(Signed) Ali Bakhsh, *Lambardar*."

Nathe Khan, according to plaintiff, mortgaged this pro-note with him for Rs. 750, at Rs. 2 per cent. per mensem interest, by three deeds of mortgage, (1) one of 10th September 1901 for Rs. 500; (2) a second of 30th September 1901 for Rs. 100; and (3) a third of 19th April 1902 for Rs. 150. According to the terms of these mortgage deeds, the pro-note was to remain in the possession of plaintiff who was to have the right of realising the amount from the drawer by suit or otherwise, it being further stipulated that Nathe Khan should have no right to transfer the pro-note to any one else or to bring any suit upon it, or to enter into any agreement with respect to it with the drawer.

The first Court granted a decree in full to plaintiff, but upon the drawer's appeal, the Divisional Judge, without discussing the merits of the case, dismissed plaintiff's suit on the ground that the pro-note, as worded, was payable to Nathe Khan only and was, therefore, not a negotiable instrument as defined in Section 13 of Act XXVI of 1881, and that the rights of Nathe Khan thereunder could not be transferred to plaintiff, who had thus no *locus standi*. Plaintiff has preferred a further appeal to this Court, and on his behalf Mr. Ishwar Das contends that, though the pro-note is not a negotiable instrument as defined in the Act relating to such instruments, the subject matter of the mortgages was an actionable claim, that as such it could be assigned, and in point of fact was actually assigned to plaintiff in such a manner as to enable him to sue in respect of it as effectually as the assigner himself could have sued.

For the respondent, Mr. Beechey did not seriously attempt to support the ground upon which the suit had been dismissed by the lower Appellate Court; his main, if not indeed his sole, contention was that there had been no complete and absolute assignment of the actionable claim, but merely a *charge* (or charges) created in respect of it. He further urged that if in such cases every mortgagee of the debt was competent to sue in respect of the claim upon which he had been given a charge, the original debtor might be subjected to innumerab

suits at the instances of all such persons as had been given such charges. The learned counsel in support of his arguments referred to Section 25 (*b*) of the English Judicature Act, 1873, and to *Durham Brothers* v. *Robertson* (1). In the case before me there are, as I have pointed out, three separate and distinct mortgage deeds dealing with this "actionable claim". These deeds are all in favour of one and the same person, and except as regards the amounts of the mortgage debts, they are in exactly similar terms. These terms run as follows :—

"Manke Nathe Khan, wald Kammi Khan, kaum Rajput, "sakin mauza Gharkian, Tahsil Batala ka hun.

"Jo ke ek kita promissory note tadadi rakam rupees 1,700, "mawarrikha 13th October 1900, nawishta musamma Mehr Ali "Bakhsh, Lambardar, patti Faizpur, mashmula Batala, muqarrar "ka yaftni aur milkayat-i-mazhir hai, is lie raqam-i-promissory "note-i-mazkur yani rupees 1,700 ko bamuqabla mablagh pausad "pas Lala Nihal Chand, wald Lala Gand Mal Shah, kaum Agar- "wal, sakin Batala, ke rahn ba kabza kar ke promissory note "hawala Lala mazkur ke kar diya hai aur zar-i-rahn badin tafsil "babat karza sabika murtahin se wasul pa lie hain aur sud zar-i- "rahn bala ka mablagh do rupae fi sadi mahwari dena muqarrar "kar liya hai pas iqrar karta hun aur tahrir kar deta hun ke "raqam rupees 1,700 mundarja promissory note ke wasul karne "ka bataur-i-khud ya basariya nalish ke murtahin mazkur ko "akhtiyar hai bad wasul karne raqam mandarja sadar ke mur- "tahin mazkur ko awal mablagh zar-i-rahn asl wa sud jis kadar "us waqat tak wajib-ul-ada ho wasul karne ka akhtiyar hoga "aur jis kadar kharch muqadma par babat irja-i-nalish ke kharch "hoga woh bhi murtahin is raqam se wasul karne ka haq rakhta "hai jis kadar bad mujrai asal zar-i-rahn wa sud kharcha "waghaira ke baqi bachega woh mera haq hoga. Mein bataur "khud murtahin se lunga jab tak ke kul zar-i-rahn wa sud wa "kharcha waghaira murtahin ko wasul na hojawe kul raqam "promissory note rupees 1,700 par murtahin kabiz rahega. Muj "ko bidun us ki rai ke intqal karne ya lene ya nalish karne ka aj "se koi akhtiyar na hoga. Sirf murtahin se mutabaqa raqam "lene ka haq hai, aur jab murtahin-i-mazkur nalish kare muj "ko dauran-i-muqadma men masalihat karne ya razi nama ya "kisi aur tasfiya karne ka koi haq nahin hai, agar koi tanaza "babat raqam promissory note ya minjumla raqam-i-maskur ke "paida ho uski jawab dahi mere zimme hai murtahin ka koi

(1) *L. R.*, 1 *Q. B.* (1898), 765.

" wasta nahin hoga, aur murtahin ko asal zar-i-rahn aur sud " aur jo kharcha waghaira ho mere aur meri digar jaidad manqula " wa ghair manqula se har waqat wapis wasul karne ka akhtiyar " hai. Mukarrar yih ke murtahin-i-mazkur ko bahat raqam-i- " promissory note marhuna mazkur ke nalish karne ka misal " mere akhtiyar hai ke kul raqam rupees 1,700 mandarja promis- " sory note ki naliah karke wasul karlewe. Lihaza in chand " haruf bataur rahnama baqabza ke likh deta hun ke sanad " howe."

Such then are the terms of the documents under consideration, and the question is whether under these terms there has been such an assignment of the pro-note, or of the debt of which that pro-note is the evidence, as would enable the assignee to sue in his own name for the recovery of the debt?

As above remarked, the pro-note is clearly not a negotiable instrument, but the learned Divisional Judge was not on that ground alone justified in dismissing the assignee's suit. A debt or other legal *chose in action* is assignable in this country no less than in England, and the general principles of law on the subject of such assignment are to be found in Chapter VIII of the Transfer of Property Act, 1882, as amended by Act II of 1900. The Transfer of Property Act is not in terms in force in the Punjab, but the law on the subject under consideration in force in this Province is, *speaking generally*, to the same effect as that contained in that chapter (see *Jhoki Ram* v. *Malik Kadir Bakhsh* (1). As laid down in Section 130 (2) of that Act, " the transferee of an actionable claim may, upon the execution " of such instrument of transfer as aforesaid, sue or institute " proceedings for the same in his own name without obtaining " the transferer's consent to such suit or proceedings and without " making him a party thereto." Clearly, then, if there has been a good and effectual assignment or transfer of the debt, the assignee or transferee is competent to sue in his own name for its recovery, and none the less so because the pro-note does not fall within the definition of " negotiable instrument " as given in Section 14 of Act XXVI of 1881 (see *Kunhaiya Lal* v. *Domingo* (2). Mr. Beechey did not, as I understand, dispute this; his sole contention in support of the decree under appeal was that the so-called assignment was not " absolute " but by " way of charge only", and as such did not entitle the assignee to sue

(1) 12 P. R., 1894. (2) *I. L. R., I All.*, 782.

in his own name and without making the assignor a party. Upon this contention two difficult questions arise. *Firstly*, was the "assignment" an "absolute assignment" within the meaning of Section 26 (6) of the Judicature Act of 1873 or was it conditional or merely by way of charge? And, *secondly*, if it was not an absolute assignment but was conditional or "by way of charge only", is the assignee thereby debarred from suing in his own name for recovery of the debt?

Mr. Beechey further contended that the three mortgages in favour of plaintiff constitute three separate and distinct assignments of the debt, and that each mortgage must, therefore, be regarded as an assignment of part only of the debt, and as such does not amount to such an assignment as would give the assignee the right to sue, *Durham Brothers* v. *Robertson*, *ubi supra*; *Hughes* v. *Pump House Hotel Coy.* (1). In my opinion this is not the proper construction to put upon the transactions between the mortgagor and mortgagee. There was in point of fact but one assignment and this was effected by the first mortgage deed, under the terms of which the mortgagor assigned the *entire* debt (*viz.*, Rs. 1,700) to the assignee and expressly agreed to make no further assignment or alienation of that debt. But under the terms of the said mortgage deed, the mortgagee when he recovered the amount of the debt from the debtor, was entitled to pay himself thereout only the principal and interest due under *that* deed. When, however, subsequent advances were made to the mortgagor, this part of the agreement between the parties was so far modified that the mortgagee was given the further right to retain from the monies recovered by him such an amount as would cover the principal and interest due not only under the first but also under the subsequent mortgages. But this is, I think, perfectly consistent with the theory that by the first mortgage deed the whole debt, and not merely a part of it, was assigned to the mortgagee. In terms, it certainly was, and I think that such was obviously the intention of the parties.

To revert now to the question whether the assignment was absolute or "by way of charge only".

There is, and can be, no question that an assignment may be "absolute" though by way of mortgage (see *Burlinson* v. *Hall* (2), *Tancred* v. *Delagoa Bay and E. Africa Railway Coy.*, (3), *Hughes* v. *Pump House Hotel Coy.*, *ubi supra*, per Cozens

(1) *L. R.*, 2. *K. B.* (1902), 195. (2) 53 *L. J., Q. B.*, 222.
(3) *L. R.*, 23 *Q. B. D.*, 239.

Hardy, L. J.) And if on the construction of the document, it appears to be an absolute assignment, *though subject to an equity of redemption, express or implied*, it cannot be material to consider what was the consideration for the assignment or whether the security was for a fixed and definite sum or for a current account. In either case the debtor can safely pay the assignee and he is not concerned to inquire into the state of accounts between the assignor and the assignee (per Cozens Hardy, L. J.) in *Hughes* v. *Pump House Hotel Coy.*, *ubi supra*.

But the assignment must be *absolute* in order to be effectual for the purposes of Section 26 (6) of the English Judicature Act; and a *conditional* assignment—that is an assignment until the happening of an uncertain event—is not within that section. Thus an assignment of the assignor's interest in a certain sum due from a third party *until certain advances made by the assignee to the assignor had been paid off with interest*, is a "conditional assignment" and does not come within the purview of Section 26 (6) of the Judicature Act (*Durham Brothers* v. *Robertson*). In this case Chitty, L. J., remarked: "The repayment of the money advanced is an uncertain event "and makes the assignment conditional. When the Act applies, "it does not leave the original debtor in uncertainty as to the "person to whom the legal right is transferred; it does not "involve him in any question as to the state of accounts between "the mortgagor and the mortgagee. The legal right is "transferred, and is vested in the assignee. There is no "machinery provided by the Act for the reverter of the legal "right to the assignor dependent upon the performance "of a condition; the only method within the provision "of the Act for reverting in the assignor the legal right is by "a retransfer to the assignor followed by a notice in writing to "the debtor, as in the case of the first transfer of the right. "The question is not one of mere technicality or of form; it "is one of substance, relating to the protection of the original "debtor and placing him in an assured position".

In the mortgage deeds before me the provisions, with one important exception, are such that the assignment might well be held to be "absolute"; but this exception is fatal to any such construction. The words I refer to are these: "*Jabtak sar-i-rahn "wa sud wa kharchu waghaira murtahim ko wasul na hojawe ku "raqam promissory note rupees* 1,700 *par murtahin kabiz rahega; "mujh ko bidun us ki rai ke intiqal karne ya lene ya nalish karne "ka aj se koi ikhtiyar na hoga*". This clause clearly is on all

fours with that which the court of appeal in the case last cited held to constitute a merely conditional assignment, for here, as there, the assignment is to continue only *until* all monies due to the assignee remain unpaid. Following that authority, I hold, therefore, that the assignment in this case was not such as would in England entitle the assignee to rely upon Section 25 (6) of the Judicature Act as enabling him to sue in his own name for the recovery of the debt. The next question is whether an assignment by way of charge or a conditional assignment should in this Province be regarded as giving the assignee the right to sue in his own name? I do not think it should. As pointed out by Justice Chitty, the difference between an absolute assignment and a conditional assignment is not a mere technicality; it is one which most materially affects the position of the debtor. When an absolute assignment is made, the debtor receives notice of the assignment and he is entitled and bound thereafter to regard the assignee as the sole person to whom the debt is payable. And he is entitled to take up his position until he receives notice that the debt has been reconveyed to the assignor. But if the assignment is to last only until such time as the money due to the assignee from the assignor is not paid, and is to terminate *ipso facto* upon payment of such money, the debtor in order to protect himself would necessarily from time to time have to examine the accounts between the assignor and the assignee. This would be a most irksome burden to put upon the debtor, and I do not think that we should be justified in imposing it on him. The rule as laid down in the 25th Section of the Judicature Act appears, if I may say so, to accord with convenience and with equity, and if in the Province where there is no express statute law on the subject, the assignment of a debt is to be recognised as conferring upon the assignor the right to sue in his own name for recovery thereof, the courts should, I think, in fairness to the debtor, insist that the assignment in question be absolute and not merely conditional. Before the enactment of the Judicature Act, a *chose in action* was not assignable at law, and "in equity the "assignee of a debt, even when the assignment was absolute "on the face of it, had to make his assignor, the original "creditor, party in order primarily to bind him and prevent "his suing at law, and also to allow him to dispute the as-"signment if he thought fit" (Chitty, L. J., *ubi supra a*). There is thus no equitable reason why an assignee should be permitted to sue the debtor in his own name for the recovery of the debt, and if we are to recognise, as I think we should, the

rule in the Judicature Act by which assignees were given rights which they did not previously possess either at law or in equity, we should, in my opinion, adopt that rule in its entirety, especially in a matter which is of such vital concern to the debtor. The rule is one in consonance with justice, equity and good conscience; and it should therefore be followed; but if it is to be applied, it should be strictly applied, for it is only by such strict application that the interests of all parties can be effectively safe-guarded. In Shephard and Brown's Commentary on the Transfer of Property Act (5th edition, page 438) it is said that "a charge which "is excluded under that Act (*i.e.*, the Judicature Act) must "apparently be regarded as a transfer within the meaning of "the present chapter." However this may be, so far as Chapter VIII of the Transfer of Property Act is concerned, I, not being bound by the provisions of that Act, do not feel justified in regarding a charge or a conditional assignment as such an assignment as gives the assignee all the rights which under the Judicature Act he can have only when the assignment is of an absolute character, that is when it absolutely vests the property in him. Neither the Judicature Act nor the Transfer of Property Act is in terms in force in this Province, and I am, therefore, at liberty to adopt such provisions of the one or the other as appear to me to be consonant with the general principles of law and equity, and in this particular I have no hesitation in accepting for my guidance the rule enunciated in the English statute.

I hold, therefore, that the assignment of the debt to plaintiff was merely conditional and that he is in consequence not entitled to sue for recovery of the debt in his own name. I must accordingly dismiss the appeal with costs, as plaintiff's suit was rightly dismissed as against Ali Bakhsh.

Appeal dismissed.

No. 10.

Before Mr. Justice Lal Chand.

SUNDAR LAL AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

APPELLATE SIDE.

Versus

RAM SINGH,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 158 of 1905.

Punjab Alienation of Land Act, 1900—*Effect of, on suits for possession of land purchased before that Act came into force.*

Held, that the provisions of the Punjab Alienation of Land Act do not apply to a suit of a vendee for the possession of land, where the property was conveyed by defendant to him and the right to claim possession had accrued long before that Act came into operation.

Ram Nath v. *Kerori Mal* (1) and *Nathu Lal* v. *Jafar* (2) referred to.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 15th July 1904.

Duni Chand, for appellants.

Durga Das, for respondent.

The judgment of the learned Judge was as follows :—

20th June 1906. LAL CHAND, J.—The facts of this case are given in full in the judgment of the lower Appellate Court. The only question in appeal is whether the lower Appellate Court has rightly dismissed plaintiffs' suit on the ground that the claim for sale of lan by defendant to plaintiffs is contrary to the provisions of the Punjab Land Alienation Act and therefore not maintainable. I am unable to agree with the view taken by the lower Appellate Court. It is found correctly that the sale transaction was completed on 31st May 1899, *i. e.*, more than two years prior to the passing of the Land Alienation Act. But the lower Appellate Court has held the Act applicable because "the making "of the deficiency was to be completed in case of certain "contingencies occurring, and it is only now the plaintiffs "have acquired a right to claim the land promised to them."

There is nothing on the record to support the view that the contingencies requiring the deficiency to be made up occurredd after the passing of the Land Alienation Act. The sale-deed and the contemporaneous registered agreement did not fix any time for delivering possession by the vendor to the vendee and in

(1) 38 *P. R.*, 1904. (2) 20 *P. R.*, 1905.

the absence of any special stipulation as to time entered in the agreement it would be fair to presume that it was intended to deliver possession within reasonable time. I cannot hold that two years would at all be a reasonable period for fulfilling the agreement. The right to claim the land in dispute had therefore accrued to the plaintiffs before the Land Alienation Act came into force and the subsequent passing of the Act could not deprive plaintiffs of their vested rights under the sale-deed which is found to have been completed on 31st May 1899. Similar view was taken of sales by foreclosure in *Ram Nath* v. *Kevori Mall* (1) and *Nathu Lal* v. *Jafar* (2), and it appears to me to be the correct view. Moreover, I am inclined to hold that the purchase of the area sued for was completed on 31st May 1899 when the deeds were executed and registered and that the present claim is not for specific performance of an agreement but to enforce a sale already complete. This view is supported by the fact that 78 bighas were actually sold and what was agreed upon was to make up the deficiency in the manner agreed upon in case possession was not delivered of the whole area alienated by sale. There is therefore no reason for holding that the suit really involves a sale by defendant to plaintiff of land sued for.

For these reasons I accept the appeal, set aside the order of dismissal and return the case to the lower Appellate Court for deciding the defendant's appeal. Stamp fee will be refunded and other costs will be costs in the case.

Appeal allowed.

No. 11.

Before Mr. Justice Lal Chand.

SHER SINGH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SIDHU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 208 of 1904.

Alienation of reversionary rights—Power of a reversioner out of possession to assign his interest after devolution of inheritance—Right of assignee to sue for possession.

Held that a reversioner out of possession of a childless male proprietor can transfer his interests to a stranger after devolution of inheritance

(1) 38 *P. R.*, 1904. (2) 20 *P. R.*, 1905.

and the assignee is entitled to recover possession of the property and contest the validity of the title of the person in possession subject to the same rules which could have been enforced by the assignor.

Jhoki Ram v. *Malik Kadir Bakhsh* (1), *Achal Ram* v. *Kasim Husain Khan* (2), *Tota* v. *Abdulla Khan* (3), and *Mouladad* v. *Ram Gopal* (4), referred to.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Hoshiarpur Division, dated 10th August 1903.

Sukh Dial, for appellants.

Chuni Lal and Ganga Ram, for respondents.

The judgment of the learned Judge was as follows:

9th July 1906. LAL CHAND, J.—The facts of this case are given in full in the judgments of the lower Courts and need not be recapitulated. Briefly the suit is for possession of 17 *kanals* originally owned by one Ram Singh, who transferred the whole of his property to defendants by a deed of gift, dated 2nd January 1886. Mutations followed, but apparently the donees did not at once obtain actual possession of any portion of the property conveyed by gift, as Ram Singh retained possession of 17 *kanals* now in dispute and the remaining land was held in possession by a previous mortgagee. Ram Singh died in 1891 when defendants took possession of 17 *kanals* now in dispute. He left certain collateral heirs, Dheru and others, who on 4th January 1894 sold his estate to Rai Devi Singh, plaintiff-appellant. Devi Singh, having redeemed the previous mortgage from Gopal, has now in conjunction with Dheru and others, the collaterals of Ram Singh, sued for possession of 17 *kanals* held by defendants. The first Court found against the gift and held that Dheru and others, the collaterals of Ram Singh, were entitled to a decree against defendants, but inasmuch as Devi Singh was the representative of the heirs of Ram Singh by his sale and they could after obtaining possession by decree put Devi Singh in possession, Devi Singh was entitled to obtain a decree for possession. A decree for possession was accordingly passed in Devi Singh's favour. This decree was set aside on appeal by the Divisional Judge. In further appeal to this Court on the question of bar by limitation the names of Dheru, &c., were removed from the record on their own application and the case was remanded. The Divisional Judge on remand has now dismissed the claim on the ground that Devi Singh being left sole plaintiff on the record has no *locus standi* to contest the validity of the

(1) 12 *P. R.*, 1894.
(2) *I. L. R.*, *XXVII All.*, 271, *P. C.*
(3) 66 *P. R.*, 1897.
(4) 22 *P. R.*, 1900.

gift in defendants' favour being himself a stranger to the family. In support of his view the Divisional Judge has principally relied on certain *dicta* in *Mouladad* v. *Ram Gopal* (1). It is contended for the vendee appellant that the sale was not of an expectancy but of land which by inheritance had at the time become vested in the vendors though possession was held by defendants, and further that in any case a decree having already been passed in his favour with consent of Ram Singh's heirs, who were competent to challenge the gift and joined as plaintiffs, the decree so passed could not be set aside on account of their subsequent withdrawal from the suit.

For the respondents it is contended that the collateral heirs who never obtained possession were in the same position as reversioners during the life-time of a widow and that Devi Singh's vendee could not obtain a decree for possession without challenging the gift which he was not competent to do being a stranger to the family. Certain passages in *Tota* v. *Abdulla Khan* (2) and *Mouladad* v. *Ram Gopal* (1) were relied upon in support of this contention.

For appellant reliance was placed on *Jhoki Ram* v. *Malik Kadir Bakhsh* (3) and *Achal Ram* v. *Kazim Husain Khan* (4), for contending that plaintiff-appellant as an assignee of a chose in action was competent to claim possession. The question raised is not entirely free from difficulty. If the powers of a childless proprietor to alienate ancestral property without necessity were absolutely limited as those of a widow there would be very little difficulty in coming to a decision. The assignee of the reversionary heir after widow's death would be in a position to ignore the alienation and sue for the estate unless it is proved by the alienee that the alienation was made for necessity, for a widow is absolutely incompetent to alienate without necessity whether any reversionary heirs existed or not. But the status of a childless proprietor as regards power to alienate ancestral property is no way analogous to that of a widow. If there are no male lineal descendants of the common ancestor from whom the property was received in inheritance the childless proprietor is competent to alienate even without necessity. In his case therefore the restraint to alienate without necessity is not absolute but contingent and the alienation made by him without necessity is not void but only voidable by the male lineal descendants of the common ancestor. It would thus

(1) 22 *P. R.*, 1900. (3) 12 *P. R.*, 1894.
(2) 66 *P. R.*, 1897. (4) *I. L. R.*, *XXVII All.*, 271, *P. C.*

appear that in a suit to recover an estate left by a childless proprietor it is necessary for the plaintiff to allege that the alienation made is not binding on him. He cannot absolutely ignore it as it is not void even if made without necessity, but only voidable at his instance. The right to object no doubt is conferred on a collateral heir under the Customary Law, but can such heir after devolution of inheritance transfer the same to a stranger to the family ? This was doubted in *Mouladad* v. *Ram Gopal* (1), though the matter was not definitely decided. But I am not convinced that he cannot. It is not open to denial that a collateral heir after devolution of inheritance can sue for the estate, object to the alienation which may be set up by the adverse party and in case of success can transfer in favour of a stranger the decree so obtained or the property itself after obtaining possession in execution. Similarly he may assign his interest wholly or partially before suit if he has no funds to sue, join as a co-plaintiff with the assignee, object as such to the alienation made by the childless proprietor and if successful may transfer the decree to the assignee or share the property with him. It is hardly conceivable that any valid objection could be raised against such procedure. If this is permissible why he cannot assign whole of his interest to a stranger including all its necessary incidents, one of these being the right to object to the alienation and authorize the assignee expressly or by implication to sue in his own name only. There seems to be no reason why he cannot. The right transferred is but a mere expectancy and the sale itself is controllable under Customary Law by the reversionary heirs of the assignor. There is therefore no apparent ground why it should be insisted that the assignor, although he has wholly parted with his interest in the estate, should formally be joined as a co-plaintiff in the suit. The inheritance having already devolved the heir is competent to alienate it to a stranger subject to the veto of his own reversionary heirs which may or may not be exercised. And suppose the alienation in dispute made by the childless proprietor was in favour of a stranger then is there any reason why another stranger to the family who derives his title from the actual heir should not be competent to object to the alienation and receive the property alienated ? To hold otherwise would virtually result in depriving the true heir if devoid of funds from receiving his inheritance or deriving any

(1) 22 *P. R.*, 1900

benefit from it. I am therefore inclined to hold that appellant Devi Singh as assignee of the actual heir was competent to object to the gift set up by defendants. But the present appeal is maintainable on another ground also. In this case the true heirs did actually join as co-plaintiffs with Devi Singh. They successfully objected to the gift made by Ram Singh and then assented to a decree being passed in favour of Devi Singh, which was done. In their cross-objections before the Divisional Judge they claimed a decree in their own favour only in case it was not maintained in favour of Devi Singh. Can this all be undone because they subsequently withdrew from the case when it was pending in the Chief Court on a question of bar by limitation I think not.

Their subsequent withdrawal from the case cannot affect the decree already obtained, and this view is supported to a certain extent by *Achal Ram* v. *Kazim Husain Khan* (1), where the co-plaintiff who was the true heir withdrew from the suit even before decree was passed, but his withdrawal was not held to affect the assignee's right to carry on the suit and obtain a decree. I therefore hold that the lower Appellate Court was not justified in reversing the decree of the first Court on the ground that Devi Singh being left sole plaintiff on the record had no *locus standi* to contest the gift. I accept the appeal, reverse the order of the lower Appellate Court and remand the case under Section 562, Civil Procedure Code, for decision on the merits. Court fee on appeal will be refunded and other costs will be costs in the case.

Appeal allowed.

No. 12.

Before Mr. Justice Chatterji, C.I.E.

GANDU SINGH,—(PLAINTIFF),—PETITIONER,

Versus

NATHA SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS. } REVISION SIDE.

Civil Revision No. 139 of 1906.

Suit for possession of ghair-mumkin *land attached to a well—Land suit—Appeal—Punjab Tenancy Act,* 1887, *Section* 4 (1)—*Revision—Power of Chief Court to revise findings on facts relating to question of jurisdiction.*

Held, that a suit for possession of *ghair-mumkin* land outside the *abadi* and attached to a well upon which *khurlis* are built and *bhusa* is stacked is a land suit as defined in Section 4, sub-section (1) of the Punjab

(1) *I. L. R., XXVII All.,* 271, *P. C.*

Tenancy Act, 1887, and that therefore the course of appeal is to the Divisional Court and not to the District Court.

Held, also, that the Chief Court is fully competent to consider on the revision side the correctness of an Appellate Court's findings on the facts relative to the question of jurisdiction of that Court to entertain the appeal.

Roebuck v. *Henderson* (1) referred to.

Petition for revision of the order of Lala Kesho Das, District Judge, Amritsar, dated 18th October 1905.

Sheo Narain, for petitioner.

Gurcharan Singh, for respondents.

The judgment of the learned Judge was as follows:—

15th June 1906. CHATTERJI, J.—The only point for consideration by me is whether the District Judge had jurisdiction to hear the appeal, or in other words whether the suit is a land suit or an unclassed one.

Mr. Gurcharan Singh objects that I have no power to question the finding of the District Judge, that the land is not land as defined in Section 4, clause 1, of the Punjab Tenancy Act, 1887, but I am of opinion that I have that power and must have it in order to be able to exercise my revisional functions. I have to decide whether the District Judge had jurisdiction, and in order to do this I must have power to go into all the matters pertaining to the conditions of cognizance by the lower Court of the appeal decided by it. This seems to be a self-evident proposition, *vide* remarks in *Roebuck v. Henderson* (1) at page 158. I therefore over-rule the objection.

Coming now to the merits of the question, I am of opinion after a due consideration of the authorities and the definition given in the Tenancy Act that the land is land within the meaning of Section 4, clause 1 of that Act. The definition is not very clear on all points, but I find that the land is outside the *abadi*, and is attached to a well. It has a *khasra* number which shows that it was measured at Settlement, and it is proved that it is duly entered in the *jamabandi* in 1892-93. Defendants, Mangal, &c., are entered in the cultivators' column. It appears in the *jamabandi* of 1903 and 1904 as land of their ownership, and mutation of names took place in their favour on 15th June 1904, it has all along been shown in the revenue records. It has *khurlis* and is entered as *ghair-mumkin*, and *bhusa* is

(1) 54 P. R., 1896.

stacked on it. These facts are sufficient to show, I think, that the land is agricultural land and is used for purposes subservient to agriculture, and fulfils the requirements of Section 4, clause 1, of the Tenancy Act. The suit is thus a land suit, and the District Judge was not competent to hear the appeal.

Objection to the jurisdiction of the District Judge was taken before him, but over-ruled; I am bound therefore to interfere.

I accept the application and set aside the decree of the District Judge, and order the memorandum of appeal to be returned to the defendant for presentation in the proper Court.

Court fee on the petition for revision to be refunded. Costs to abide the event.

Application allowed.

No. 13.

Before Mr. Justice Reid.

KARIM BAKHSH AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

WATTA MAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 278 of 1906.

Custom—Pre-emption—Pre-emption on sale of shops—Katra Patrangan, Amritsar city.

Held, that the custom of pre-emption in respect of sale of shops by reason of vicinage in *Katra* Patrangan of the city of Amritsar had not been established.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 4th November 1905.

Fazal Hussain, for appellants.

Sukh Dial and Rup Lal, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—The first question for decision is whether the right of pre-emption in respect of shops exists in *Katra* Patrangan. *9th Novr.* 1906.

The evidence on the record satisfies me, and it is practically conceded that *Katra* Patrangan forms part of *Kila*

Bhangian and is not a separate division of the city of Amritsar. The burden of proving the existence of the right was on the plaintiff-appellant. As remarked by the lower Appellate Court, *Kila* Bhangian is a very large subdivision and the right set up must be proved to exist in it, the number and value of instances cited being considered with reference to the whole subdivision and not with reference to any particular part thereof, evidence of 2 or 3 instances in one small *katra* or street does not establish the existence of the right in that *katra* or street, as distinguished from a *katra* or street of the same subdivision in which no instances have occurred, all being part of the same subdivision and not separate subdivision. The whole subdivision is the unit, the existence of the right in which has to be established. Apart from oral evidence, which is of very little value, counsel for the appellant relied on—

(1) *Labhu Singh* v. *Gurditta* (1), in which a Division Bench in a suit for pre-emption in respect of a shop, said: "The first question which arises in this case is whether *Katra* "Kanak Mandi in the city of Amritsar forms part of *Katra* "Bhangian, in which the custom of pre-emption admittedly "prevails." The language used is loose, and I am unable to accept this statement as a finding, or as recording an admission of the existence of the right in respect of shops as distinguished from houses. The plaintiff might well have sought to base an argument in favour of the existence in respect of shops on an admission of the existence in respect of houses. The Court held that the shop was situate in another subdivision and dismissed the suit. The issues in the Courts below and the memorandum of appeal to this Court did not distinguish between the right in respect of houses and the right in respect of shops.

(2) *Attar Singh* v. *Sant Singh* (2), in which a Division Bench held, on the authority of a ruling of this Court in 1888 and a compromise decree of the Additional District Judge of Amritsar in 1896, that the right existed in respect of shops in *Katra* Nihal Singh, another subdivision of the city of Amritsar. The Bench also found that the vendor had himself purchased the shop property in suit by a threat of pre-emption.

(1) 46 *P. R.*, 1882. (2) 118 *P. R.*, 1906.

(3) Civil Appeal No. 39 of 1905, in which a Division Bench held that the existence of pre-emption in respect of houses in *Kila* Bhangian had been established. The Court dealt with three instances of claims, two being in respect of houses and one in respect of a shop, and found that the former had been successful and the latter unsuccessful.

(4) Amritsar Divisional Court, Civil Appeal No. 339 of 1904, dismissing a suit for pre-emption in respect of a shop in *Katra* Talab Tunda, a separate subdivision of the Amritsar City. The Court found that Talab Tunda was not part of *Kila* Bhangian, and that instances from other subdivisions could not supply the absence of instances in the subdivision in suit. These findings cannot be treated as authority for the existence of the right in respect of shops in *Kila* Bhangian.

(5) *Mamon* v. *Ghaunsa* (1), in which a suit for pre-emption in respect of a house in another subdivision of the city of Amritsar was decreed, and the Division Bench held that the existence of the right in neighbouring subdivisions might "be taken into account in support of the direct evidence "of the existence of the custom in the particular subdivision "concerned."

(6) Two decisions by subordinate Courts of Amritsar in 1895 and 1904, in the first of which the parties admitted the existence of the right in respect of a shop in *Katra* Patrangan, and a compromise was effected. In the second case there was a compromise and the decree was based thereon.

For the respondents the following authorities were cited :—

(1) Civil Appeal No. 175 of 1898, in which a Division Bench of this Court held that the plaintiff-pre-emptor had failed to prove either that Lohi Mandi was part of "*Katra* Bhangian" or that, even if it were part, any custom of pre-emption in respect of shops existed therein.

(2) Civil Appeal No. 1271 of 1900, in which a Division Bench held that the plaintiff-pre-emptor had failed to prove the existence of the right in respect of shops as distinguished from houses, in *Katra* Ahluwalian, a subdivision of Amritsar.

(1) 99 *P. R.*, 1906.

(3) Civil Revision No. 793 of 1906, in which I concurred with the two Courts below in holding that the plaintiff-pre-emptor had failed to prove the existence of the right in respect of shops in *Kila* Bhangian. A marked distinction between the right of pre-emption in respect of shops and in respect of houses, exists, and the plaintiff-pre-emptor has, in my opinion, failed to establish the existence of the right in respect of shops in *Kila* Bhangian, the weight of authority, indeed, being against him.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No 14.

Before Mr. Justice Reid.

APPELLATE SIDE.

SHARFO AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

RAMZAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 1361 of 1905.

Custom—Inheritance - Right of a son-in-law of a khanadamad *to succeed— Gujars of Gujrat District.*

Found in a case the parties to which were Gujars of the Gujrat District that by custom the son-in-law of a *khanadamad* was not entitled even if he had been appointed *khanadamad* by his father-in-law to succeed as such to the estate of the father-in-law of the latter.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jhelum Division, dated 22nd August 1905.

Nanak Chand, for appellants.

Fazal-i-Hussain, for respondents.

The judgment of the learned Judge was as follows :—

26th Novr. 1906. REID, J.—The sole question for consideration is whether among Gujars of the Gujrat District the son-in-law of a *khanadamad* may be appointed *khanadamad* and heir to the ancestral estate left by the appointer of the first *khanadamad*.

The authorities cited are *Kamman* v. *Nathu* (1), *Muhammad* v. *Mussammat Umar Bibi* (2), *Nawab* v. *Wallan* (3), Civil Appeal No. 444 of 1895; *Chiragh Bibi* v. *Hussan* (4); Roe and Rattigan's Customary Law, pages 61 and 65, and the answer to Question 13 at page iv of the Customary Law of the Gujrat District. As

(1) 96 *P. R.*, 1892. (3) 91 *P. R.*, 1906.
(2) 129 *P. R.*, 1893. (4) 19 *P. R.*, 1906.

held in *Muhammad* v. *Umar Bibi* (1) that answer has been incorrectly recorded by the Settlement Officer in the printed volume and runs as follows: "If the *aulad dukhtari* have, "during their life-time, married a daughter and kept her in "their house with her husband as *ghar-jawatra* and supported "them, and by a written deed or by a verbal gift placed them "in possession then that daughter and her *aulad* will be "*malik*"

In *Kamman's* case it was held that gifts to daughters whose husbands are *khanadamads* are allowed by Gujars and Muhammadan Jats of the Gujrat District. In *Muhammad's* case it was held that among Muhammadan Jats of Gujrat a daughter to whom a gift of ancestral property had been made could not give it to her daughter or the husband of that daughter. It does not appear clearly from the report that the husband of the first donee was a *khanadamad*, but the arguments used in the judgment imply that he was.

Civil Appeal No. 444 of 1895 was decided solely on the basis of assent by the reversioners, though it was stated that the daughter of a *khanadamad* and her husband were persons whose possession might naturally be assented to.

In *Chiragh Bibi* v. *Hassan* it was held that among tribes who do not usually recognise daughters as heirs the word *aulad* does not include females.

Nawab v. *Wallan* dealt with the custom governing Cachars of the Shahpur District and specifically distinguished them from the Gujrat tribes dealt with in *Muhammad's* case.

The passages in Roe and Rattigan's Customary Law cited lay down the general rule that married daughters who succeed do so, not as ordinary male heirs, but as the means of passing on the property to another male, whose descent from his mother's father in the female line is allowed under special circumstances to count as if it were descent in the male line, and that if there is no son the land will revert, except in special instances where the daughter's husband is allowed to hold for his life, to the agnates of the daughter's father.

The *dicta* at page 504 of the report of *Muhammad's* case, relied on for the defendant-appellants, do not help them. The *dicta* runs as follows:—

"Daughters when they are allowed to succeed rarely, "if ever, succeed absolutely. They are merely recognised as

(1) 129 P. R., 1893.

transmitting a title to their possible male children, that "is, their father's grandchildren. When the latter survive "and succeed they are naturally in the same position as if "they had succeeded through the male line and may do "whatever their maternal grandfather or any other *sahib* "*jaidad* might have done."

This cannot be interpreted as authority for holding that the daughter can transmit the estate to her daughter even where that daughter and her husband have remained in the house of the daughter and *khanadamad*, *i. e.*, the house of the last male owner whose estate is in suit.

The authorities are, in my opinion, in favour of the decree of the lower Appellate Court, and I answer the question stated at the beginning of this judgment in the negative and dismiss the appeal with costs.

Appeal dismissed.

No. 15.

Before Mr. Justice Johnstone.

APPELLATE SIDE.

AMIR ALI,—(PLAINTIFF),—APPELLANT,

Versus

BAGGO AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 829 of 1904.

Custom—Alienation—Will—Competency of a sonless proprietor to make a will in favour of his daughter in presence of brother—Awans of Rawalpindi Tahsil.

Found, that by custom among the Awans of Rawalpindi *Tahsil* a bequest of ancestral property by a sonless proprietor in favour of his daughter is valid in the presence of his own brother.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Rawalpindi Division, dated 26th May 1904.

Harris, for appellant.

Morrison, for respondents.

The judgment of the learned Judge was as follows :—

26th Novr. 1906. JOHNSTONE, J.—In this case plaintiff's suit impugns a will made by his late brother, Jafar, in favour of his widow and his two daughters as being (*a*) a fabrication, (*b*) executed by Jafar when he was out of his senses, (*c*) invalid by custom. The Courts below have both found against plaintiff as to (*a*) and (*b*),

and he does not attack these findings in his appeal. As regards (*c*) the first Court decided against the will and gave plaintiff a decree, which the Divisional Judge has reversed on the ground that custom is in favour of such wills. Plaintiff appeals on this matter alone, and I have heard arguments and have also studied most of the available information regarding the Awan tribe to which the parties belong.

In Wilson's Gazetteer of Shahpur (1897) the Awans are described as an indigenous Punjabi tribe, though they claim descent from one Alif Shah, *alias* Qutab Shah, a descendant of Ali. There are over 52,000 of them in Shahpur in the Khushab *Tahsil*, and they own all but one of the Salt Range villages and $\frac{4}{5}$ of the land of the Khushab (Salt Range) Settlement Circle. In what was until lately the Rawalpindi District but is now the two Districts of Rawalpindi and Attock, there were in 1893-94 some 130,000 of these Awans—see Revised Gazetteer, page 101. In the Talagang *Tahsil*, now a subdivision of Rawalpindi, but a short time ago a part of Jhelum, the Awans are the prevailing tribe and the tract is known by the people as Awan-kari.

The writer of the Jhelum Gazetteer (1883-84) also classes them as a Punjabi peasant tribe, and discards all the theories of foreign origin that have been put forward from time to time. These Awans, I should note here, are also found in Peshawar, Sialkot, Bannu, Gujrat, Ludhiana, Jullundur and Mianwali. We are therefore, I think, justified in taking as our *initial* presumption that they would follow customs similar to those of the Jat tribes of this Province.

The parties to the present case are inhabitants of the Rawalpindi *Tahsil*. The main provisions of the will to which exception is taken by the plaintiff are these :—

(1) $\frac{1}{4}$ estate to go to widow, $\frac{1}{4}$ to each daughter, $\frac{1}{4}$ to collaterals.

(2) After death of widow her $\frac{1}{4}$ to go to collaterals.

(3) Daughters (two) to be full proprietors even after they marry and to be succeeded by their husbands and sons.

(4) If daughter dies unmarried, her share to go to collaterals.

Here I should note in passing that I over-rule the suggestion made by Mr. Morrison, advocate for respondents, that the suit should not have been for a mere declaration. The widow being

alive, how could plaintiff get possession at once even if he succeeded in overthrowing the will?

The dispute is clearly really between plaintiff, a brother, and the two daughters : plaintiff can hardly have a case against the widow who under the will is made little more than a life owner. Or, if this is not clear, plaintiff is, as regards the widow, entitled merely to a declaration that what she holds, she holds as a life owner only.

Turning to the daughters there can be no doubt that among Punjabi agriculturists the presumption is that as heir to the ancestral property of a sonless proprietor a brother is preferred to a daughter, except perhaps where the daughter is married to a *khanadamad* or has rendered special services to her father. Neither of these two incidents emerge here. The presumption also is that gift or will of ancestral property to a daughter without the consent of the brother is invalid. For these general propositions no authority is required, but I may quote section 23, Rattigan's "Digest of Customary Law," 6th Edition.

But the Awans, notwithstanding their supposed origin, have undoubtedly here and there departed from the rules of custom here stated, if they ever followed them, though the evidence to be found in compilations of customs and in Chief Court rulings is conflicting.

In the Rawalpindi Code of Customary Law (Robertson) we find the following indications of the position of daughters amongst Awans and of the powers of a sonless proprietor to give or bequeath ancestral estate, *viz.*:—

(*a*) Page 10, question 13, among Awans collaterals up to 4th degree exclude daughters.

(*b*) Page 10, question 14, even if daughter lived with her father till his death, near male collaterals are preferred.

(*c*) Page 16, question 37, established that a man can will away some part of his property, though bequest of whole estate to the detriment of near collaterals would be disputed.

(*d*) Page 17, question 38, Awans say testamentary disposition can be made without consent of heirs, but this is more than doubted by the author.

(e) Page 18, question 40, an Awan proprietor having no male issue can make a gift of whole or part of his estate without the consent of near agnates. Instances are given ; but—

(f) Page 19, question 42, Awans admit a difference in power of gift according as property is ancestral or acquired.

(g) Page 21, question 48, a father cannot disinherit one son for the benefit of the rest.

(h) Page 22, question 54, the custom is for a father to divide equally between his sons, but he can divide unequally if he chooses : many instances of unequal division in adjoining tribes, not among Awans.

In the last three pages of Roe and Rattigan's "Tribal Law" (1895) an abstract is given of the unpublished Shahpur *Riwaj-i-am*. It is there stated (page 149) that if among Awans there are male descendants in male line, immoveable property cannot be gifted without their consent, but in default of them it may be gifted to any heir (*waris*) or to daughters or sisters, or their sons, or to a son-in-law, while an unequal distribution amongst sons cannot be made.

I have given this information from Robertson's Code and from Roe and Rattigan's book in order to show what guidance the Courts have had in recent years from what might be called text-books or statements of opinions of expert officers. It remains to see (i) the net result of the Chief Court rulings regarding Awans, (ii) special proof of custom offered in this case itself. I have said that the *initial* presumption, before we look at statements of custom and Chief Court rulings and the special evidence on the present record, is against the will and against the succession of daughters in preference to brothers. It is therefore for defendants to show that this presumption is rebutted by statements of custom aforesaid and by Chief Court rulings relating to the tribe. If they are successful in this, it would then become incumbent on plaintiff to show that *the present record* proves a custom in his favour. I had better clear the ground by taking up the latter question first.

Only three instances have been put forward in the first Court by defendants and none by plaintiff. Of these three instances, one, Malli's case, is clear and is in favour of defendants, the other

two are denied and are not proved. Malli's case was fought out in Court and ended in a decision in favour of a will to a daughter to the detriment of a collateral. But a single instance can hardly rebut a presumption worthy of being called a presumption; and so we see that the present record will hardly help us at all.

As regards Chief Court rulings bearing on this dispute I have found a very large number, out of which I have selected 30 as showing varieties of view and opinion. These I proceed to classify. One ruling appears twice—

(*A*) Daughters *v.* collaterals as heirs :—

1. *Mussammat Pana Bibi* v. *Khodayar* (1), unmarried daughters preferred to collateral.

2. *Sharf-ud-din* v. *Nabia* (2) (Ludhiana) : agnates in tenth degree preferred to daughter's son.

3. *Mussammat Sharfan* v. *Kammu* (3) (Rawalpindi town) : *onus* generally against daughter and daughter's son and in favour of brother and nephew. (In this ruling no previous cases were noticed, the parties being treated as if they were Jats. This ruling appears again lower down under B).

4. *Mussammat Mirjan* v. *Rahmat* (4), (Peshawar) : in presence of collaterals daughter only gets maintenance.

(*B*) Gifts to daughters and their sons and husbands in presence of sons and agnates :—

5. *Ranjha* v. *Mussammat Rahim Bibi* (5), (Sialkot) : notwithstanding *Riwaj-i-am* to the contrary gift to daughter by sonless proprietor held valid.

6. *Jiwan* v. *Wazir* (6) (Gujrat) : gift to resident daughter valid, not to non-resident daughter.

7. *Ahmad Khan* v. *Mussammat Gulam Bibi* (7), (Khushab), decided finally on the ground of non-delivery of possession : contest between a mother, widow and agnates on the one hand and sister's son on the other, who was donee : no opinion in favour of or against gift.

8. *Mussammat Sharfan* v. *Kammu* (3), (Rawalpindi town, see 3 above) : gift to daughter and her son invalid in absence of evidence of special custom.

(1) 81 *P. R.*, 1879.
(2) 64 *P. R.*, 1892.
(3) 115 *P. R.*, 1892.
(4) 31 *P. R.*, 1893.
(5) 23 *P. R.*, 1877.
(6) 39 *P R.*, 1887.
(7) 36 *P. R.*, 1891.

9. *Rasul Khan* v. *Mussammat Mastur Bano* (1), (Talagang) : presumption against gifts of half ancestral estate to daughter in presence of sons.

10. *Ali Bakhsh* v. *Nathu* (2) (Sialkot) : gift upheld of half ancestral land to resident son-in-law who has not inherited from his own father.

11. *Miran Bakhsh* v. *Ala Ditta* (3), (Sialkot) : gift to resident son-in-law assumed valid, but question of succession to donee by his collaterals decided in the negative.

12. *Fattu* v. *Bakhsa* (4), (Talagang) : gift to daughter's son in presence of nephew not decided on question of power to gift : opinion rather in favour of validity if possession had only followed.

13. *Sher Muhammad* v. *Phula* (5) (Khushab) : in favour of unrestricted power of sonless proprietor to gift property, ancestral or otherwise, to daughter, daughter's son, son-in-law, or agnate.

14. *Devi Das* v. *Bhakra* (6) (Mianwali) : childless man has unrestricted powers of gift or will.

15. *Khairu* v. *Fattu* (7) (Jullundur) : gift to daughter or daughter's son by sonless man valid against agnates in third degree.

16. *Khudayar* v. *Fatteh* (8) (Talagang) : a large number of rulings collected : gift to daughter's son who had rendered service to the sonless donor valid against nephews.

(*C*) Unequal distribution among descendants :—

17. *Bakhtawar* v. *Chirag* (9) (Shahpur) : gift to son by one wife upset by son of another wife.

18. *Syad Rasul* v. *Fazal* (10) (Jhelum) : father's power of unequal distribution denied.

19. *Mian Khan* v. *Mehr Khan* (11) (Rawalpindi) : same.

20. *Mehr Khan* v. *Karam Ilahi* (12) (Khushab) : unequal distribution of ancestral estate so as to disinherit a son disallowed.

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(1) 81 *P. R.*, 1894.
(2) 98 *P. R.*, 1894.
(3) 126 *P. R.*, 1894.
(4) 15 *P. R.*, 1895.
(5) 9 *P. R.*, 1899.
(6) 53 *P. R.*, 1899.
(7) 14 *P. R.*, 1903.
(8) 8 *P. R.*, 1906.
(9) 8 *P. R.*, 1879.
(10) 7 *P. R.*, 1891.
(11) 107 *P. R.*, 1894.
(12) 13 *P. R.*, 1902.

(*D*) Gifts to other than daughters and their sons and husbands :—

21. *Mussammat Khamo* v. *Fazl Din* (1) (Peshawar) : a certain power of gift asserted, no precise rule, see also Sher Muhammad v. Phula (2) and Devi Das v. Bhakra (3) at (13) and (14) above.

22. *Hayat Muhammad* v. *Fazl Ahmad* (4), (Rawalpindi) : *onus* as in Jat cases : no power to give whole estate to grand-nephews in presence of brothers.

23. *Bakhsha* v. *Mir Baz* (5) (Khushab) : gift to wife's brother, a distant agnate, valid against half brothers.

24. *Aulia* v. *Alu* (6) (Khushab) : gift to first cousin (uterine brother) : upheld several rulings in favour of gifts mentioned.

25. *Nura* v. *Tora* (7) (Talagang) : gift by a sonless man to wife's sister's son valid in presence of brother.

(*E*) Wills :—

26. *Muhammad Khan* v. *Atar Khan* (8) (Bannu) : a sonless man has no special power to will property.

27. *Mussammat Bhato* v. *Fatu* (9) (Jullundur) : no custom proved under which a widow can bequeath whole estate to unmarried daughter.

28. *Bahadur* v. *Mussammat Bholi* (10) (Jhelum) : will to a daughter in presence of brother invalid.

29. *Mukarrab* v. *Fattu* (11) (Talagang) : bequest to an agnate one degree further removed than plaintiff held invalid in absence of proof of special custom.

30. *Ghulam Muhammad* v. *Abbas Khan* (12) (Talagang) : power to will away ancestral estate denied

31. *Ali Muhammad* v. *Dulla* (13) (Shahpur) : power to will exists, and bequest to daughter's son in presence of brother is valid.

There are also a few rulings relating to alienation of self-acquired property which are of little use here.

These, then, are the rulings ; and it has to be borne in mind that under the authority of *Mussammat Bano* v. *Fateh Khan* (14)

(1) 176 *P. R.*, 1888.
(2) 9 *P. R.*, 1899.
(3) 53 *P. R.*, 1899.
(4) 52 *P. R.*, 1892.
(5) 79 *P. R.*, 1896.
(6) 49 *P. R.*, 1898.
(7) 46 *P. R.*, 1900.
(8) 121 *P. R.*, 1886.
(9) 171 *P. R.*, 1889.
(10) 108 *P. R.*, 1893.
(11) 88 *P. R.*, 1895.
(12) 22 *P. R.*, 1899.
(13) 26 *P. R.*, 1901.
(14) 48 *P. R.*, 1903.

there is little or no difference between the power to gift and the power to will. This was not always the doctrine followed or believed to be sound, for it used to be supposed that a power of gift *inter vivos* might be more readily conceded than a power to devise by testament.

I have set forth class A, because it is important to see to what extent custom favours daughters apart from gifts or bequests. I have set forth class B, because gifts and wills have been declared to be on much the same footings. C and D are classes of cases from which it is possible to gather what is the custom in regard to alienations from another stand point, namely, the stand point of the powers of male proprietors to deal with their own at will. The present case is one of a will, and thus the object in setting down the six cases in class E is apparent. In class A only one case is in favour of daughters, and that is not only the earliest but it is of a date prior to the emergence of that agnatic theory set forth in *Gujar* v. *Sham Das* (1) and many subsequent rulings. The net result is distinctly unfavourable to daughters. The four cases in class C show the existence of a peculiarly jealous resistance against all attempts at differential treatment of male heirs apart from questions of competition between male heirs and persons outside the agnatic group. Class E also does not help defendants much. No. 31 is a fairly strong case for wills from Shahpur and No. 27 can be left out of account; but the other three cases—two from Talagang and one from Bannu—are dead against all power of alienation of ancestral estate by testament. So far the balance is undoubtedly against the defendants in the present case. It is when we come to classes B and D, gifts of all kinds, that we find evidence in favour of defendants.

I think, if these classes are fairly looked at it will be seen (i) that any interference with the natural rights of sons is jealously resented, (ii) that, when there are no sons, much freedom is allowed to male proprietors; (iii) that, while especial indulgence is shewn in approving gifts in return for services rendered or to resident daughters or son-in-law, there is a sufficient residuum of authority for the proposition that in the case of a sonless man a gift to a daughter or daughter's son would be held valid in the absence of rebuttal. As to (i) I would refer to case (9) and to the comparative absence of attempts to pass over sons. As regards (ii), I point to Nos. (5), (12), (13), (14), (15), 21), (24), (25). Of these Nos. (13), (14) and (25) from

(1) 107 P. R., 1897, F. B.

Khushab, Mianwali and Talagang, are especially strong. As regards (iii) I rely upon these same cases, Nos. (5), (12,) (13), (14) and (15), and refer also to Nos. (6), (10,) (11), (16). Against all this we have really only Nos. (8) and (22), the latter of which can be in part explained away by observing that it was a case of contest between heirs equally entitled. The statements of custom noted early in this judgment on the whole tell a similar tale.

I would find, then, in favour of the will in the present case. I adopt the idea set forth in *Mussammat* Bano *v.* Fateh Khan (1) and put gifts and wills on the same footing. The decisions against the power to will in some cases proceeded upon the idea that, while the rule of alienation by gift was a rule of custom, that of alienation by will was a matter of Muhammadan Law.

It follows that I must dismiss the appeal with costs.

Appeal dismissed.

No. 16.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

SUNDAR DAS,—(DEFENDANT),—APPELLANT,

Versus

APPELLATE SIDE.

DHANPAT RAI AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 966 of 1902.

Custom—Pre-emption—Pre-emption on sale of house property—Kucha *Gulzari Shah* Mohalla *Wachhowali in the city of Lahore—Decree in favor of pre-emptor—Payment of purchase money into Court—Withdrawal of such money by vendee—Effect of such withdrawal—Right of vendee to maintain appeal on substantive right—Revision—Competency of appellant to question finding of fact—Punjab Courts Act*, 1884, *Section* 70 (2) (*b*), (*iv*).

Found, that the custom of pre-emption in respect of sales of house property based on vicinage exists in *Kucha* Gulzari Shah which is a part of *Mohalla* Wachhowali, a well recognized subdivision of the city of Lahore.

Held also, that in a pre-emption suit a vendee does not forfeit his legal right to appeal from a decree passed against m or to proceed with his appeal on substantive right, merely because he had withdrawn the purchase money paid in Court by the pre-emptor for his benefit.

Held further, that when an application has been admitted under Section 70 (2), (*b*) (*iv*) of the Punjab Courts Act, 1884, it is not open to the appellant to question either the validity or the soundness of the findings of facts arrived at by the Lower Appellate Court.

(1) 48 P. R., 1903, F. B.

The question that whether a deed of transfer which on the face of it purported to be one of mortgage was in reality what it purported to be or a sale is a question of fact and not of law.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Lahore Division, dated 1st November 1902.

Lajpat Rai and Dwarka Das, for appellant.

Shadi Lal, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—A decree for pre-emption of the house in suit was passed by the first Court in plaintiffs' favour on 17th July 1902. The plaintiff who is respondent in this appeal applied for execution of the decree by delivery of possession on 22nd July 1902, and obtained possession in execution on the 25th July. The defendant—judgment-debtor—appealed against the original decree, but his appeal was dismissed by the Divisional Judge on 1st November 1902. The present revision which has been admitted as an appeal under Section 70 (*b*) (*iv*) was filed on 14th November 1902, and it appears that on 21st November 1902 the appellant withdrew from Court the purchase money that had been deposited for payment to him by the plaintiff-respondent. It is contended in the grounds of appeal that the deed of mortgage in question was not intended to be a sale, that *Kucha* Gulzari Shah where the house in dispute is situate is a subdivision and not part of *Mohalla* Wachhowali as held by the lower Courts, and, finally, that a custom of pre-emption is not proved to exist in *Kucha* Gulzari Shah or in *Mohalla* Wachhowali, and that at any rate the plaintiffs have failed to prove that they have a preferential right. A preliminary objection was taken by the counsel for the respondent at the commencement of the hearing that the appellant having already withdrawn the purchase money from Court was debarred from proceeding with his appeal. We over-ruled this preliminary objection at the hearing as unmaintainable. The statement of facts already given makes it absolutely clear that the money was withdrawn by the appellant subsequent to delivery of possession in execution proceedings and while his appeal was pending in this Court. There is no provision of law in the Civil Procedure Code, which under the circumstances would justify a Court in dismissing the appeal as unmaintainable. According to the Civil Procedure Code if the appellant fails to appear at the hearing his appeal must be dismissed for default.

3rd Decr. 1906.

If he does appear and proceeds with his appeal it must be heard and decided on its merits unless the appellant express his willingness to withdraw it. There is no provision which would justify a dismissal merely because the appellant in a pre-emption suit has withdrawn the purchase money paid into Court for his benefit. The worst that could be urged against the appellant under the circumstances would be that by withdrawing the purchase money the appellant had acquiesced in the decree passed by the lower Court, and thereby accepted its validity. But this is not a proper and even a fair inference to be drawn, and acquiescence by conduct is not deducible as a legitimate conclusion from the circumstances. The money was paid into Court for the express purpose of payment to the judgment-debtor, and in fact the payment formed a necessary and essential preliminary to the institution of execution proceedings for delivery of possession. The judgment-debtor was compelled by process of Court to part with possession, and if he received its equivalent as a part of the execution proceedings could it be fairly predicated that thereby he voluntarily accepted the decree of Court as final and conclusive debarring him not from merely filing an appeal, but rendering the appeal already filed a altogether nugatory and abortive. There does not appear to be any legal or equitable ground for entertaining such view. On the other hand, it appears to be extremely incongruous, if not ungracious, on the part of the decree-holder to urge the plea. It was the decree-holder who, for his own advantage, started the legal proceedings to compel delivery of possession, and he secured possession by deposit of purchase money for the benefit of the judgment-debtor. It seems therefore ridiculous on his part then to urge that the judgment-debtor should be held precluded from proceeding with his appeal because he has received the money deposited for his benefit. It is a pure question of intention in each case, and I am not prepared to hold that receipt of money under such or similar circumstances is conclusive proof that the judgment-debtor thereby intended to abandon his appeal.

In the present case the judgment-debtor received this money several months after parting with possession of property, and in his respect the case is distinguishable from *Ferose-ud-din* v. *Ghulam Rasul* (No. 695 of 1905 unpublished), which was quoted for the respondent at the hearing, and where it was found that the appellant had retained the possession of property as well as of the purchase money. But even if it were otherwise, I am

unable to see why drawing out purchase money while retaining possession of the property decreed should be treated as equivalent to an acceptance of plaintiffs' rights under the decree, so as to debar the appellant from prosecuting his appeal. If the judgment-debtor draws out money deposited for his benefit and likewise retains possession, it is open to the decree-holder to compel the judgment-debtor to part with possession. But receiving money without delivering possession has no bearing on the judgment-debtor's right to conduct his appeal which otherwise he is legally entitled to prosecute. The two positions are not entirely incompatible. A judgment-debtor's position in a pre-emption decree is in reality passive so far as receipt of purchase money is concerned. He cannot execute the decree and compel the pre-emptor to pay in the money if the latter chooses not to pay. On the other hand, he may any moment be called upon to receive the money and part with possession of the property to the pre-emptor. If the judgment-debtor then draws out the money without parting with possession he only anticipates what might take place any moment under legal compulsion. By drawing out the money beforehand he does not forfeit his legal right to appeal against the decree, nor thereby incurs a disability to have his appeal dismissed as if his legal rights were lost. Even if it were held to be inconsistent with his right to maintain the appeal it would only be just to give the appellant an option to select one of the two alternatives. There are obviously no considerations of estoppel applicable to the case, and it is inconceivable what legal ground can prevail or apply to lead to so fatal a result. The principle laid down in *Bawa Lehna Singh* v. *Jagan Nath* (1) does not appear to be applicable. It was a converse case and an instance of forfeiture of his right before suit by a pre-emptor. Moreover it was found in that case that the pre-emptor *without reservation* of his right had *demanded* the mortgage-debt from the vendee which was treated as necessarily affirming by implication that the sale was valid. The only other case, *Muhammad Khan* v. *Fida Muhammad* (2), with a possible bearing on the question at issue as against appellant has recently been over-ruled by a Full Bench decision in *Raghu Mal* v. *Bandu* (3). There existed therefore no grounds equitable or legal for accepting the preliminary objection, which as already noted was accordingly disallowed at the hearing.

(1) 188 P. R., 1888. (2) 82 P. R., 1888.
(3) 31 P. R., 1907.

I have already set out the gist of the grounds of appeal filed by the appellant. This is an appeal admitted under Section 70 (*b*) (*iv*), and it is obvious that the appellant is not entitled to question the validity or soundness of the findings of facts given by the lower Appellate Court. He is therefore not entitled to argue that the transaction sued upon is a mortgage and not a sale, and that *Kucha* Gulzari Shah where the property is situate is a subdivision of the town of Lahore and is not a part of *Mohalla* Wachhowali which is found to be a recognised subdivision. We accordingly restricted the argument in appeal to the sole question whether a custom of pre-emption by vicinage was proved to exist in *Mohalla* Wachhowali. The pleader for appellant admitted that it was a pure question of fact whether *Kucha* Gulzari Shah was a subdivision or formed part of *Mohalla* Wachhowali, but he contended that the question whether the transaction in suit was a sale or a mortgage was a question of law as it depended on an interpretation of the terms of the deed in suit. If the question were whether according to its true interpretation, the transaction represented by the deed was a sale or a mortgage, it would be a question of construction of the deed and hence a question of law. But the question raised by the plaint and found against appellant by the lower Courts is not that the document executed by the defendant mortgagor is a sale deed, but that the real transaction entered into by the defendant parties was intended to be a sale and not a mortgage. To prove this assertion the terms of the deed were referred to as relevant evidence, but no question was raised as regards the proper interpretation of these terms which are plain and involve no ambiguity or difficulty requiring any legal construction. The question raised and decided therefore is a question of fact, and it did not necessarily and entirely depend upon the terms of the mortgage deed or their interpretation. The same view was taken in *Budha Mal* v. *Gulab* (1) and another unreported case No. 163 of 1896, which is referred to in it. The matter was not discussed in *Tikaya Ram* v. *Dharam Chand* (2) which was quoted to the contrary, and we see no good reason to follow it. Moreover the correctness of this view held in that case was subsequently doubted by one of the Judges constituting the Division Bench as explained in *Budha Mal* v. *Gulab* (1). We

(2) 36 *P. R.*, 1899. (1) 45 *P. R.*, 1895.

therefore held at the bearing that the appellant was not entitled to argue whether the transaction in suit was a mortgage and not a sale, and restricted his argument to the question of local custom. It is necessary to refer to the following facts as having a direct bearing on this question. The house in dispute is situate in *Kucha* Gulzari Shah which is found to be a part of *Mohalla* Wachhowali, a well recognised sub-division of the city of Lahore. The plaintiffs' house adjoins the house in suit along side, with windows opening on it, but with its door towards the back. The defendant also owns a house and resides in the *mohalla* but his house does not adjoin the house in suit, and is a long way from it. According to the pleas it was asserted that *Kucha* Gulzari Shah was itself a sub-division, but this plea has been overruled by the lower Courts, and the simple point for consideration now is whether plaintiff has succeeded in proving a custom of pre-emption by vicinage in *Mohalla* Wachhowali inside which the house in dispute is found to be situate. The lower Appellate Court has referred to the following six cases as proving the custom :—

1. *Sant* v. *Kishen Chand.* This case was decided in 1876, and was about a house in *Kucha* Mehtian, *Qusar* Wachhowali, and a decree was given. The house is the one coloured green and marked B on the plan now put in. It has an entrance from *kucha* Gulzari Shah, but the main entrance is said to be on the other side in *Kucha* Mehtian.

2. Case of *Bishambar Das* v. *Bishambar Das and Narpat.* This was for a house in Shisha Moti, *Mohalla* Wachhowali and was decided on 27th April 1885. It was held that the custom of pre-emption existed in Wachhowali.

This is not shown on the plan.

3. The case of *Shibdial* v. *Sadiq Ali Shah,* decided on 31st August 1895.

The house was situated in *kucha* Maddi Shah, Wachhowali. It was held that the *kucha* was not a sub-division, but that it formed part of the sub-division of Wachhowali where the custom of pre-emption prevailed.

4. Case of *Ram Sahai* v. *Ghanna and others,* decided on 21st December 1897. It was held that the custom prevailed in Wachhowali.

5. Case of *Mohan Lal* v. *Dina Nath*. This case was in regard to a house in *Kucha* Tillian, Wachhowali, and was decided by arbitration.

6. Case of *Rai Bahadur Prem Nath* v. *Jiwa*, decided on the 4th October 1901, and in the Divisional Court on 26th February 1902. It was held that the custom prevailed in Wachhowali. This house is shown in the plan, and is situated in a *kucha* just beyond that of Gulzari Shah.

The only case cited to the contrary was *Ram Mal* v *Salig Ram*, decided on 25th April 1898, relating to a house in *Kucha* Sitla Mata, *Mohalla* Wachhowali. This case, however, does not support the defendant's contention, but rather supports the view that custom of pre-emption by vicinage does prevail in the *mohalla*. It was held by the Court that custom of pre-emption does prevail in *Mohalla* Wachhowali, but that plaintiff who owned an opposite house was unable to prove that by custom he had a superior right against defendant vendor who also owned a house opposite the back of the house in suit. The pleader for appellant was unable to say that the instances quoted by the lower Appellate Court did not prove the existence of custom of pre-emption by vicinage in *Mohalla* Wachhowali or that the particulars given by the Divisional Judge in each instance were not correctly stated. He, however, argued that it was not proved that a person owning an adjoining house had by custom a right superior to a resident in the *mohalla*. He was unable to say that in the six instances the vendees were not residents in the *kucha* or were strangers. As a matter of fact in the sixth instance the facts were even much stronger than in the present case. The defendant vendee owned a house opposite the house sold, while plaintiffs' house actually adjoined it, and it was held that according to custom as found in *Mohalla* Wachhowali, the owner of the adjoining house had the right of pre-emption and not the vendee whose house was situate opposite the house sold. This is an instance exactly in point, and leaves no room for doubt that by custom plaintiff is entitled to pre-empt as held concurrently by the lower Courts. The pleader for appellant referred in argument to certain cases where by local custom a person owning a house on the back was not held entitled to pre-empt, but these cases are not applicable to the circumstances of the present suit. The plaintiff having proved the existence of a custom of pre-emption by vicinage is entitled to succeed as owning an adjoining house against a person whose house does

not adjoin. The circumstance that the defendant also owns a house in the *kucha* a long way from the house in dispute has no bearing on the validity of the plaintiffs' claim. It would be for the defendant to prove, as he alleges, that residence or owning a house in the *mohalla* not adjoining the house sold is a necessary incidence or ingredient of local custom. By Section 11, Punjab Laws Act, the plaintiff must show the circumstances under which by local custom he is entitled to exercise the right of pre-emption. And he proves that by local custom a person owning an adjoining house is entitled to pre-empt against a person whose house does not adjoin. But it is not further necessary for him to prove that mere residence and owning property in the *mohalla* not adjoining the house sold also forms a necessary element for determining local custom. If the defendant relies on any such incidence as relevant or having a bearing on the question of custom the *onus* is on him to prove it, the plaintiffs' case on basis of vicinage being complete without it.

There is not even the slightest pretence for alleging that defendant has discharged the *onus* which lay on him or has succeeded in showing that owning property in the *mohalla* unconnected with the house sold gives an equal right of pre-emption. We, therefore, concur with the lower Courts in decreeing plaintiffs' suit, and dismiss the appeal with costs.

Appeal dismissed.

No. 17.

Before Mr. Justice Reid.

TOPAN DAS,—(OBJECTOR),—APPELLANT,

Versus

JESO RAM,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 828 of 1906.

Land Acquisition Act, 1894, Section 31—Acquisition of mortgaged property for public purposes—Payment of compensation—Person interested.

Held, that where the property acquired for a public purpose under the Land Acquisition Act forms part of an estate which has been mortgaged for an amount larger than the amount awarded as compensation for the acquisition the mortgagee is entitled to receive the whole of the money so awarded.

Appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Multan Division, dated 6th June 1906.

Durga Das, for appellant.

Harris, for respondent.

The judgment of the learned Judge was as follows :—

30*th Novr.* 1906. REID, J.—This is an appeal from an order under the Land Acquisition Act, awarding to a mortgagee of the land acquired, a sum out of the compensation awarded proportionate to the area acquired as compared with the area mortgaged. Counsel are agreed that the mortgaged area is 66½ *bighas* and that the area acquired is approximately 6 *bighas*, and that the compensation awarded for the latter is Rs. 410-6-0. Counsel are not agreed as to the amount due under the mortgage, which is stated on the one side to be about Rs. 800 and on the other to be about Rs. 1,600.

In any case Rs. 410-6-0 for 6 *bighas* is out of all proportion to Rs. 1,600 for 66 *bighas*.

The authorities cited are (1) *Gostobehary Pyne v. Shib Nath Dut* (1), a case in which a *patni taluk* had been sold for arrears of revenue and the mortgagee thereof claimed surplus sale-proceeds. The Court said : "We think that the "proper view to take of the matter is to regard the surplus "sale-proceed as the shape into which the mortgage security "is converted and, as before such conversion the security "could not be split up into parts and the mortgagee was "entitled to realise his money out of the whole of it, its "conversion by sale into money ought not to affect his rights "in this respect."

The ruling was under Section 73 of the Transfer of Property Act, but the principle laid down appears to be applicable to the present case.

(2). Ghose on Mortgages, Edition 3, page 332-3, in which authority is cited, for the rule that, if the mortgaged property is converted into money under circumstances which prevent the mortgagee from following such property, the security will attach to the purchase money. The author adds that as the security of the mortgagee is indivisible the charge would fasten upon the whole proceeds and not on any particular part.

(1) *I. L. R., XX Calc.*, 241.

(3). *Basu Mal* v. *Tajammal Hussain* (1), which is not in point, the mortgagee's claim having been dismissed on the ground that he had not applied the Land Acquisition Act.

(4). *Armugam* v. *Sivagnana*, (2), in which it was held that the sale of land under the Act does not effect any destruction of the property so as to give the mortgagee a personal remedy against the mortgagor, the effect of the sale being to change the nature of the security and to substitute for the property mortgaged the compensation awarded.

The mortgage was effected on the 7th September 1886 the term being 16 years, so that it is *primâ facie* redeemable at the present time and the appellants, assignees of the mortgagee, took steps under the Land Acquisition Act to assert their claim.

At Ghose on Mortgages, Edition 3, page 346, American authority is cited for the rule that, where damages are awarded under the Land Acquisition Act for injury to mortgaged premises the mortgagee will be entitled to the compensation money. "The sum awarded arises from or grows out of "the land, by reason of the injury which has diminished "its value. In equity it is the land itself". *Bank of Auburn* v. *Roberts* (3). Section 82 of the Transfer of Property Act embodies the established rule, that, where several properties are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage.

In re Stewart's Trusts (4), it was held that when money has been paid into Court by reason of real estate having been taken under the compulsory powers of an Act of Parliament, and remains in Court, it is to be considered as money or personal estate in the hands of the Court impressed with the trusts of the real estate.

In a case in which land was acquired at a date on which a considerable portion of the mortgage term had got to run and the profits are to be set off against the interest on the mortgage money, apparent hardship might be caused by holding that the whole compensation money should go to the mortgagee, but no such consideration arises in this case.

(1) *I. L. R., XVI All.*, 78. (3) *44 N. Y.* 192, *Jones, S.* 708.
(2) *I. L. R., XIII Mad.*, 321. (4) *22 L. J. (N. S.)*, 369.

A mortgagee is entitled to take as much security as he can get for his money, and when part of the land mortgaged is taken from him his security is diminished *pro tanto*. In the present case the security has been diminished to the extent of Rs. 410-6-0, and the mortgagee is, in my opinion, entitled to that amount in liquidation of the mortgage debt, the indivisibility of the mortgage attaching itself to the proceeds of the sale of part of the land mortgaged and the whole and each part of that land being security for the whole amount advanced.

For these reasons I modify the order of the Divisional Court by awarding Rs. 410-6-0 to the mortgagee-appellant. The respondents will pay the costs of this Court.

Appeal allowed.

No. 18.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Rattigan.

APPELLATE SIDE.

BAKHSHI RAM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

GUMANO,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 689 of 1906.

Decree—Construction of decree—Decree in favor of appellant with costs.

Held, that the proper interpretation of the words "appeal dismissed or accepted with costs" is that the costs of the Appellate Court alone are awarded and not that of the Courts below.

Ramji Das v. Charanji Lal (1) followed.

Miscellaneous first appeal from the order of T. P. Ellis, Esquire, District Judge, Delhi, dated 25th May 1906.

Lachmi Narain, for appellants.

Gopal Chand, for respondent.

The judgment of the Court was delivered by

27*th Nov.* 1906. RATTIGAN, J.—The plaintiff's suit was decreed with costs by the District Judge. Defendant appealed to this Court, and the order on this appeal was as follows:—"We hold that the suit "must be dismissed, and we decree accordingly with costs. "Appeal accepted and decree of lower Court set aside."

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(1) 45 *P. R.* 1877.

Subsequently the decree-holder (defendant) applied for execution of decree as regards costs, and claimed that she was entitled, under the terms of this Court's decree, to the costs both of this Court and of the District Court. Plaintiff objected and urged that the costs awarded were merely those of the Chief Court, but the objection was over-ruled by the order of the District Judge, dated 19th April 1906. The objection was again preferred to the successor of the District Judge who had passed the order disallowing the objection, but it was once more disallowed, by order dated 25th May 1906, on the ground that the Judge to whom it was presented was bound by his predecessor's order. This decision was obviously correct. The plaintiff-judgment-debtor thereupon filed an appeal to this Court on the 9th June 1906, but the appeal purported to be from the order of the 25th May. This was clearly a mistake as the appeal should have been from the actual order in the case which was that passed on the 19th April. This error was pointed out to the learned counsel who appeared for the appellant and he admitted, and quite rightly, that a mistake had been made, but urged that the mistake was that of the learned pleader who had filed the appeal. He asked that he might be allowed to file amended grounds of appeal, and to this request we acceded conditionally on his paying to the respondents Rs. 16 as costs for the postponement of the hearing which was thus necessitated. We further directed that the grounds of appeal, as amended, should be filed the following day. This order has been duly complied with, and we now proceed to dispose of the appeal on the merits.

In our opinion the intention of this Court in decreeing the appeal " with costs " was clearly that the then respondent should pay the then appellant the costs incurred in this Court only, for had it been intended that the then respondent was to pay the costs of both Courts, words to that effect would undoubtedly have been used. The decision of this Court reported as *Ramji Das* v. *Charanji Lal* (1), is an authority directly in point, whereas the ruling relied upon by the present respondent *Broughton* v. *Perhlad Sen* (2), is easily distinguishable, as the facts in the latter case were entirely different. But apart altogether from authority we would have no hesitation in holding that in a case where the words of the decree are open to doubt, that construction must be placed on the words used which does not impose a liability on the judgment-debtor, which is not in express and specific terms imposed upon him. If then an appeal is dismissed

(1) 45 P. R., 1877. (2) 19 W. R., 152.

or accepted " with costs," *simpliciter*, the proper interpretation of the words " with costs " is that the costs of the Appellate Court alone are awarded. We accordingly accept this appeal with costs both of this and the lower Court. Respondent must, however, be credited with the sum of Rs. 16 which we awarded in respect of the costs of the adjournment above referred to, unless, of course, the said sum has been already paid to appellant.

Appeal allowed.

No. 19.

Before Mr. Justice Lal Chand.

MIRAN BAKHSH,—(PLAINTIFF),—PETITIONER,

REVISION SIDE.

Versus

CHIRAGH DIN,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 1415 of 1903.

Civil Procedure Code, 1882, *Section* 523—*Agreement to refer to arbitration filed in Court—Award of arbitrators set aside as void—Right to institute regular suit to enforce such award.*

Held, that wherein proceedings taken under Section 523 of the Code of Civil Procedure an award is declared to be void by the Court conducting such proceedings no regular suit to enforce such an award will lie.

Petition for revision of the order of D. C. Johnstone, Esquire, Divisional Judge, Sialkot Division, dated 1st April 1903.

Ganpat Rai, for petitioner.

Ram Bhaj Datta, for respondent.

The judgment of the learned Judge was as follows :—

6th Decr. 1906. LAL CHAND, J.—I have no doubt in my mind that the suit to enforce the award in this case is not maintainable. The award sought to be enforced was held to be void in proceedings taken under Section 523, Civil Procedure Code. It is therefore a nullity and cannot be enforced in Court. The agreement of reference entered into by the parties could secure an award only by order of the Court before which the proceedings were taken under Section 523, Civil Procedure Code, but the Court refused to recognise the decision given by the arbitrator as a valid award. No authority was quoted to show that an award held to be void in proceedings taken under Section 523, Civil Procedure Code, could form the basis of a regular suit. The cases quoted, *viz.*,

Hassan Ali v. *Hashdar Ali* (1), *Gopi Reddi* v. *Mahanandi Reddi* (2), *Narasayya* v. *Ramabadra* (3), and *Subbaraya* v. *Chetti* v. *Sadasiva Chetti* (4), have no application. These were all cases of awards not obtained through the intervention of a Court which, moreover, had not been filed or could not be filed under Section 525, Civil Procedure Code. Further, the award sought to be enforced by a regular suit in these cases had not been declared as void in any previous proceeding. I am doubtful whether a regular suit would lie to enforce an award even in cases where such award has been held to be void on objections taken under Section 526, Civil Procedure Code. I am inclined to hold that such decision would be final. But I have no doubt that where the award subject of the suit was secured in proceedings taken under Section 523, Civil Procedure Code, and was declared to be void by the Court conducting such proceedings, that a regular suit to enforce such award would not be maintainable. I therefore agree with the lower Appellate Court that the suit did not lie in this case and reject the application for revision with costs.

Application dismissed.

No. 20.

Before Mr. Justice Rattigan.

KISHEN DIAL,—(PLAINTIFF),—PETITIONER,

Versus

RAM DITTA AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 616 of 1906.

Limitation Act, 1877, *Section* 12—*Applicability of, to application under Section* 70 (*b*) *of the Punjab Courts Act*, 1884—*Deduction of time requisite for obtaining copies of the judgment and decree of the lower Appellate Court—Sufficient cause—Punjab Courts Act*, 1884, *Section* 70 (*b*) (*i*).

Held, that Section 12 of the Limitation Act, 1877, does not apply in computing the periods of limitation prescribed for an application under Section 70 (*b*) of the Punjab Courts Act, 1884, and that therefore the time requisite for obtaining copies of the judgment and decree of the lower Appellate Court cannot be deducted in computing the periods laid down by clause (*i*) of Section 70 (*b*) of that Act.

Held, *also*, that the time spent in obtaining such copies which as a fact were received by the petitioner long before the expiry of the

(1) 113 P. R., 1890.
(2) *I. L. R.*, *XV Mad.*, 99.
(3) *I. L. R.*, *XV Mad.*, 474.
(4) *I. L. R.*, *XX Mad.*, 491.

prescribed period is not a sufficient cause within the meaning of Section 70 (b) (i) for admitting an application after the ordinary period of limitation has expired

Petition for revision of the order of J. G. M. Rennie, Esquire, Divisional Judge, Jullundur Division, dated 29th August 1905.

Sheo Narain, for petitioner.

Ram Bhaj Datta, for respondents.

The judgment of the learned Judge was as follows :—

20th Decr. 1906. RATTIGAN, J.—Mr. Ram Bhaj Datta, as a preliminary objection, urges that this petition for revision cannot be entertained under clause (*b*) of Section 70 (1) of the Punjab Courts Act (as amended), as it is time-barred, having been presented to this Court more than 90 days after the date of the decree of the lower Appellate Court. The objection is well founded. The judgment of the Divisional Judge is dated 29th August 1905, and consequently the latest date for the filing of an application under clause (*b*) of the said section would have been the 29th November 1905, whereas the present application was not presented until the 2nd December 1905. The 27th November was a working day, and upon it this Court was open for the reception of appeals and applications. Mr. Sheo Narain points out that two days were occupied in obtaining copies of the judgment and decree of the lower Appellate Court, and argues that the petitioner should be given the benefit of this time, in which case (as this Court was closed from the 28th November to the 1st December, both days inclusive) the application would be within limitation. But the obvious answer to this argument is that Section 12 of the Limitation Act, 1877, is not here applicable, and the only question is whether the applicant satisfies the Court that he had sufficient cause for not making the application within the prescribed period. In my opinion, there is in the present case no such sufficient cause. The applicant applied for the said copies on the 10th October and was supplied with those copies on the 12th October. He had thus ample opportunity to make his application long before the expiry of the prescribed period of 90 days. He did not do so, and the mere fact that he had to wait two days for the copies cannot possibly be held to constitute "sufficient cause" for his not making the application before the 2nd December, the copies having been in his possession on the 12th October.

I must accordingly reject this application as inadmissible under clause (*b*) of Section 70 of the Act, and there is admittedly no ground for entertaining it under clause (*a*) of that section. The application is therefore rejected with costs.

Application dismissed.

No. 21.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

DIAL SINGH,—(DEFENDANT),—APPELLANT,

Versus

BAKSHISH SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE

Civil Appeal No. 71 of 1905.

Custom—Pre-emption—Pre-emption on sale of residential property lately converted into shops—Alteration in the nature of such property—Katra *Ahluwalia, Amritsar City.*

Found, that the custom of pre-emption in respect of sale of house property by reason of vicinage exists in *Katra* Ahluwalia of the city of Amritsar.

Held, that the conversion of a part of a residential house into shops and their use for godowns for a short period does not change the character of the property as originally built and hitherto used.

First appeal from the decree of F. Yewdall, Esquire, District Judge, Amritsar, dated 26th October 1904.

Jhanda Singh, for appellant.

Muhammad Shafi, for respondent.

The judgment of the Court was delivered by

LAL CHAND, J.—This is an appeal in a pre-emption suit relating to a building found to be situate in *Katra* Ahluwalia, a well known sub-division of the city of Amritsar. It was not contended by the pleader for appellant that the custom of pre-emption by vicinage as regards residential houses does not prevail in *Katra* Ahluwalia. In fact the contention could not possibly be raised as the matter is absolutely concluded by the decision in *Ramji Das* v. *Kalu Mal*, decided by the District Judge of Amritsar on 21st May 1901, where the previous instances bearing on the question are all collected. This case was further followed in *Kashi Mall* v. *Lachhmi*, decided by the same Court on 11th October 1901. But it was contended for appellant that the property in dispute

28th Novr. 1906.

is not situate in *Katra* Ahluwalia, and, secondly, that, it is not a residential house but a shop. As regards the first contention it was argued that the property is situate in *Katra* Harsa Singh. This contention is, however, entirely unsupported by any evidence on the record. It is opposed to the defendant's own sale deed wherein the property is described as situate in *Katra* Mai Sevan, and it is contradicted by the evidence afforded by the City maps and house registers prepared in 1859 and 1883. We see no reason whatever for discrediting these maps and registers, and therefore have no hesitation in holding that the property in dispute is correctly found to be situate in *Katra* Ahluwalia.

As regards the nature of the property we also concur with the District Judge that it must be classed as a house. The District Judge came to this conclusion after an inspection of the locality, and he has correctly summarised the effect of the evidence adduced in the case as borne out by the following description given by him :—"The street which "leads from the corner of the building is residential in "its nature. The building itself is too clearly in its "construction a house. The ground floor consists of a *deorhi* "and a large room which some two or three years ago "was turned into four shops, which however at present "appear rather to be used as godowns. The next floor "has a *dalan*, with three or four *kothris* and the third "floor is a *baradari*. The large room below appears to "have for many years been used as a store-room for "various shop-keepers, but the rest has been lived in. "Twenty years ago it was occupied as a residence by "Lorinda Mal and his family who had been there seven "years. Since then it is not clear that it has been occupied "by a family man." Moreover in the several deeds executed at various times relating to this property it has uniformly been described as a *haveli* excepting in one instance where the lower part is described as consisting of four shops. Thus in the sale deed, dated the 23rd February 1881, the building is described as a *haveli* 2½ stories high. Similar description is contained in the award, dated 4th January 1886, and in the mortgage deed, dated 9th May 1901. But in the subsequent mortgage deed, dated 3rd August 1902, only ten months prior to the sale in question, the property is described as a *haveli* 2½ stories high having under it four shops. It is therefore clear as found by the

District Judge that the shops have only recently been constructed excepting one which was used as his ware-house by an opium contractor, but further there is no evidence that the rooms on the ground floor which have recently been converted into shops are actually used for business as shops. These are still being used as ware-houses as is evident from the evidence of defendant's own witnesses, and under the circumstances it is not permissible to hold that any portion of the property has unmistakably been converted into a different class of property so as to let in the application of a different rule of pre-emption by custom. As observed in *Mussammat Nur Jahan* v. *Azis-ud-din* (1), "before a particular property can be held not to be "governed by a rule of pre-emption which is applicable "generally to other properties in its neighbourhood on the "ground of its distinctive character, such character must be "well-marked and recognised. Proof that the custom of pre-"emption applies to residential houses is not sufficient to "show that it extends to shops in a bazar, but the "occupier of a dwelling house does not necessarily convert "it into a shop or a cluster of shops so as to make the "rule of pre-emption inapplicable by carrying on business "in it for a time." Similarly in *Nawal Kishore* v *Amir Khan* (2), the properties were not held to have lost their character as residential houses when the principal use to which the properties were put seemed to be that of residence though business might be the object of such residence. In the present case there are no indications on the record that the rooms ostensibly converted into shops were actually used as shops and therefore the property in suit must still be classed as a house as originally built and hitherto used. It is not sufficient to change the character of the building as a residential quarter that for some time past it has been occupied only by casual tenants, or that portions have been used as godowns by persons who held their business shops elsewhere. We therefore hold that the property in suit is situate in *Katra* Ahluwalia, and is primarily a residential house and as such, subject to custom of pre-emption by vicinage found to prevail in the sub-division. We accordingly uphold the decree of the lower Court decreeing plaintiff's claim and dismiss the appeal with costs.

Appeal dismissed.

(1) 108 *P. R.*, 1895. (2) 122 *P. R.*, 1896.

No. 22.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

APPELLATE SIDE.

UMRA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

GHULAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 122 of 1905.

Alienation—Alienation of ancestral property by sonless proprietor—Right of after-born reversioner to contest alienation beyond time—Legal disability—Limitation Act, 1877, Section 7.

Held, that a reversioner born subsequent to the date of an alienation which had been made in his father's life-time cannot avail himself of an extension of time under Section 7 of the Indian Limitation Act to enable him to contest the validity of such an alienation.

Further appeal from the decree of T. J. Kennedy, Esquire, Divisional Judge, Ambalia Division, dated 28th April 1903.

Harris, for appellants.

Miran Bakhsh, for respondents.

The judgment of the Court was delivered by

9th June 1906. RATTIGAN, J.—By deed of gift, executed on the 5th November 1881 and duly registered a few days afterwards, one Lalla donated part of his ancestral estate to *Mussammat* Chaubri, the daughter of his deceased brother, Saida. On the 10th August 1883 the donor had mutation of names in respect of the said property, as also of the rest of his estate, effected in favour of the donee, and at the time of mutation he stated that the whole of the property had actually been gifted by him to *Mussammat* Chaubri two years previously. Ghulam, the father of plaintiffs and nephew of Lalla, was alive at the time both of the execution of the deed of gift and of mutation, and, it may be added, at the time also of the institution of the present suit, but he made no attempt to challenge the validity of the alienations in favour of *Mussammat* Chaubri who remained in undisturbed possession of the said property until her death shortly before suit.

Plaintiffs, who are the grand-nephews of Lalla, have now sued for a declaratory decree to the effect that the said gifts in favour of *Mussammat* Chaubri were invalid by custom; and shall not affect the reversionary rights after the deaths of Lalla and Ghulam. They claim that their suit is within time by virtue of the provisions of Section 7 of the Limitation Act, three of them being still minors and the fourth having attained his majority within three years of suit. The Court of first instance dismissed the claim on the grounds (1) that plaintiffs, having been born after the dates of the alienations, had no *locus*

standi; (2) that the suit was barred by limitation owing to their father, Ghulam's omission to sue within the period of limitation, and (3) that the gifts were valid by the custom of the tribe to which the parties belong.

The Divisional Judge on appeal upheld the decree of the first Court, but on rather different grounds. He agreed with the Munsiff that plaintiffs had no *locus standi*, they not having been in existence at the date of the gifts, but the main ground on which he dismissed their appeal was that "though their "father's failure to sue did not deprive the sons of their right to "sue, yet limitation began to run against their father from the "date of possession by the donee in the first place, and afterwards, "when the gift was mutated, from the date of mutation, and as "the minors were not alone entitled to bring the suit, and their "interest could have been protected by their father, limitation "is not saved for them by the operations of Section 7 of the "Limitation Act."

Plaintiffs have preferred a further appeal to this Court and we have heard a good deal of argument on various points. We do not, however, consider it necessary to decide whether Ghulam's acquiescence in the alienations is or is not binding on his sons, or whether the gifts were valid by custom, as we are clearly of opinion that the suit is time-barred.

The cause of action in respect of the right to impeach the gift by Lalla accrued, as regards the first gift, in 1881, and as regards the second gift, in 1883, and time began to run from those dates respectively. Time having thus begun to run, the subsequent birth of a reversioner would not stop it (Section 9 of the Limitation Act; and see *Jivraj Ghulab Chand v. Babaji Apa Khadake* (1), and *Sookh Moyee Chowdhrain* v. *Raghubendro Narain Chowdhry* (2). A reversioner born after an alienation has been made is under certain conditions undoubtedly competent to contest its validity, *Jowala v. Hira Singh* (3) but he can only do so if the period of limitation had not expired before the date of his birth, and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim an extension of time under Section 7 of the Limitation Act. Regarded from this point of view, the present suit, which was not instituted till August 1902, is obviously barred by time.

We accordingly dismiss plaintiffs' appeal with costs.

Appeal dismissed.

(1) *I. L. R.*, XXIX *Bom.*, 68. (2) 24 *W. R.*, 7.
(3) 55 *P. R.*, 1903, *F. B.*

No. 23.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

APPELLATE SIDE.

HIRA,—(PLAINTIFF),—APPELLANT,

Versus

KARAM KAUR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 747 of 1906.

Custom—Alienation—Alienation by sonless proprietor—Locus standi *of the reversioners of the eighth degree to contest such alienation—Hindu Bhat Jats of* tahsil *Raya, Sialkot District.*

Found, that among Hindu Bhat Jats of *tahsil* Raya in the Sialkot District collaterals of the eighth degree are not entitled by custom to contest an alienation of his ancestral estate by a childless proprietor as being made without necessity or consideration.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 17th June 1905.

Shadi Lal and Nabi Bakhsh, for appellant.

Pestonji Dada Bhai, for respondents.

The judgment of the Court was delivered by

2nd Jany. 1907. SHAH DIN, J.—*Mussammat* Karam Kaur, widow of the deceased Jhanda, is on the record, and has been duly served with notice of the date of hearing.

Only *Mussammat* Budhi, one of the vendors, has not been served, but she is not a necessary party, and the case can proceed. This judgment will also dispose of the connected Appeal No. 748 of 1906.

The parties are Hindu Bhat Jats of *tahsil* Raya in the Sialkot District. The sole question for decision in this appeal is whether among the tribe to which the parties belong an alienation of ancestral land made by a childless proprietor can be contested by his collaterals who are related to him in the eighth degree according to the method of computation laid down in *Ladhu* v *Daulati* (1). Both the Courts below have laid upon the defendants (vendees) the *onus* of proving that the plaintiffs, the reversioners of the vendors, had not a *locus standi* to impugn the sales in dispute, and have both arrived at the conclusion that the *onus* has been fully discharged.

(1) 126 *P. R.*, 1890.

The plaintiffs appeal to this Court and on their behalf we have heard the case argued at some length by Mr. Shadi Lal. After giving our very best consideration to the argument of the learned counsel, we are unable to hold that the decision of the lower Appellate Court is erroneous, we have grave doubts whether under the circumstances of this case the *onus* was rightly thrown on the defendants of proving that the plaintiffs, so distantly related to the vendors, had not a *locus standi* to object to the alienations in question, but even if the *onus* is considered to have been correctly placed we think that it has been, upon the materials on the record, amply discharged. The oral evidence in the case is admittedly of no value; and the learned counsel for the appellant contented himself with simply referring to the documentary evidence to which reference has been made by the Divisional Judge with a view mainly to distinguish from the present case the three judicial decisions on which the Divisional Judge relies. The distinctions sought to be drawn between those precedents and this case are not, however, in our opinion of much consequence, and in any case do not serve to show that the said instances are not relevant to the present enquiry.

The first instance relied on by the Divisional Judge relates to this very village, and it is noteworthy that in that case it was the present plaintiff who sued to contest an alienation made by a widow. The Subordinate Judge held on 26th May 1890 that the plaintiffs, who, it seems, were related to the alieno'rs husband in the 8th, 9th and 10th degrees, were too remote to have the power to object to the sale in suit, and on appeal this decision was upheld by the Divisional Judge.

The second instance related, it is true, to another village, but it was a village situate in the Raya *tahsil*. There the plaintiffs were related to the vendor in the 10th degree. A pretty full enquiry appears to have been made into question of the *locus standi* of the plaintiffs, and as a result the Divisional Judge held in a considered judgment on 16th August 1899, that they were too remote collaterals to be competent to object to the alienation in dispute.

The third instance is one of great importance, as the final decision in that case was given by this Court and is published as *Natha Singh* v. *Mohan Singh* (1). This is the latest decision

(1) 93 *P. R.*, 1906.

by this Court relating to the question of the *locus standi* of distant collaterals among Jats of Sialkot District to impugn an alienation made by a childless proprietor, and we have no hesitation in following it in this case.

Although there the parties were Ghuman Jats of the Sialkot *tahsil*, that circumstance alone is, we consider, insufficient to distinguish that decision from the present case, especially in view of the fact that *Riwaj-i-am* of 1865, a copy of which is upon the present record, would seem to apply to Bhat Jats (though not specifically named as a separate tribe) equally with Ghuman Jats.

Taking into consideration the above instances in conjunction with the entry in the *Riwaj-i-am* of 1868, which from its relevant clauses seems to view with disfavour the remote collaterals' right of objection to a childless proprietor's alienation and considering also the present constitution of this particular village which, as the lower Appellate Court observes, shows unmistakably that the original trivialities of the proprietary body have been very much loosened, we hold, in agreement with the lower Appellate Court, that the plaintiffs have no *locus standi* to contest the sales in dispute. The appeal accordingly fails ; and is dismissed with costs.

Appeal dismissed.

No. 24.

Before Mr. Justice Johnstone and Mr. Justice Shah Din.

FAKIRIA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

REFERENCE SIDE. DHANI NATH,—(PLAINTIFF),—RESPONDENT.

Civil Reference No. 70 of 1906.

Jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, 1887, Section 100 and Section 77 (3) (d)—Contents of plaint and plaintiff's allegations.

Plaintiff sued for Rs. 5, value of trees cut by defendants on land alleged to be plaintiff's with which defendants had no concern whatever. Defendants pleaded that they were occupancy tenants and so entitled to the trees.

Held, that the suit was one for a Civil Court, the test being the contents of the plaint and of the allegations of the plaintiff.

Held, also, in view of the wording of Section 77 (3), Punjab Tenancy Act, 1887, that the Civil Court could not take cognizance of the defendants' plea that they were occupancy tenants, but must ignore that plea, leaving defendants to any remedy that might be open to them by suit in the Revenue Court.

Ghanaya v. *Basan Mal* (1) and *Asa Nand* v. *Kura* (2), referred to.

Case referred by Lala Kesho Das, District Judge, Jullundur, on 31st August 1906.

Sheo Narain, for respondent.

The judgment of the Court was delivered by

JOHNSTONE, J.—In this case plaintiff sued defendants in the Court of the Munsiff of Phillour for Rs. 5, the value of the branches of a tree cut and removed by defendants. Plaintiff's case was that the land on which the tree stood was his and the tree his, and that defendants had no concern with either. Defendants pleaded that they were occupancy tenants of the land on which the tree stood and so were entitled to take the aforesaid branches. The Munsiff drew up an issue—Are the defendants occupancy tenants of the land, and on what ground?—and after a long discussion of it held that defendants had not proved it. He also found that defendants had not proved that they were owners of the tree by virtue of having planted it. 12*th Dec.* 1906.

An appeal having been presented by defendants in the Court of the District Judge, that officer makes a reference to this Court under Section 100, Punjab Tenancy Act, asking that the decree of the Munsiff may be registered as that of an Assistant Collector of the 1st grade at Jullundur, and giving his reasons at length; and this reference has been sent to a Division Bench by Rattigan, J., before whom it was first laid. The learned Judge expressed the view that defendants' plea stated above could not properly be gone into by a Civil Court (in view of Section 77, (3), (*d*), Punjab Tenancy Act), that at the same time that plea could hardly be ignored as was done in *Ghanaya* v. *Basan Mal* (1) and *Asa Nand* v. *Kura* (2), and that thus the suit should be held as one triable only by a Revenue Court.

After hearing *Lala* Shiv Narain for plaintiff and giving the matter our best consideration, we are unable to hold that

(1) 96 P. R., 1894. (2) 11 P. R., 1895.

the suit is one for a Revenue Court. The important words in Section 77 (3) of the Tenancy Act are :—

"The following suits shall be instituted in and heard and "determined by Revenue Courts, *and no other Court shall* "*take cognizance of any dispute or matter with respect to which* "*any such suit might be instituted* :— * * * * *

"(*d*) Suits by a tenant to establish a claim to a right of occupancy."

With this we must read Section 100 (1) (*a*) of the Act which sets forth thus the *circumstances* in which a Civil Court shall refer the question of jurisdiction to this Court ; that is to say—

"100 (1). In either of the following cases, namely :—

"(*a*) If it appears to a Civil Court that a Court under "its control has *determined a suit* of a class mentioned in Section "77 which under the provisions of that section should have "been heard and determined by a Revenue Court."

It is settled law that ordinarily indeed, virtually always, the jurisdiction is determined by the plaint and the allegations of plaintiff, and that in this connection the pleas of the defendants are immaterial. Here plaintiff's case as put by him is clearly of civil nature—taken by themselves, his allegations can be brought within no clause of Section 77 of the Tenancy Act. Thus the suit as laid is not a revenue suit. But it is suggested that the words in clause (3) of the Section, which we have underlined above, prevent the Civil Court from taking cognizance of the claim of defendants to occupancy rights, and so the *suit* must go to a Revenue Court for trial. In our opinion this is unsound. We agree that the occupancy rights' question cannot properly be heard and determined by a Civil Court, but in our opinion the result of this is not that the fundamental rule stated above as to the materials a Court should look at in determining the question of jurisdiction should be departed from, but that the Civil Court should simply ignore the plea which under the law it cannot take cognizance of ; and the wording of Section 100 (1) (*a*) quoted above confirms this view, inasmuch as it does not contemplate transfer of a decree from a Civil Court to a Revenue Court unless the *suit* itself was one that should, under Section 77, have been heard and determined by the latter kind of Court. We are also supported in our view by the two rulings noted above.

No doubt the result at first sight is somewhat anomalous, for it is this that defendants' sole plea is ruled out and plaintiff (presumably) must succeed, while defendants are left to sue in a Revenue Court separately for establishment of their alleged *status*. Whether, having succeeded there, they could by any process get the decree in the Civil suit cancelled or not, or could recover from plaintiff any sums paid by them under that decree is not for us to say. Nor need we say whether the proper course for the Civil Court in a case like this is to keep the suit pending until the Revenue Court has decided the question of occupancy rights. Whether defendants have a remedy or not, is not for us to decide here. Even if they have not, the *circumstance* cannot affect the question of jurisdiction now before us.

For these reasons we must decline to pass the order suggested by the learned District Judge. He should hear the appeal according to law, bearing in mind that defendants' plea as to occupancy rights must be ignored. Papers returned.

No. 25.

Before Mr. Justice Johnstone.

BISHAMBAR DAS AND OTHERS,—PETITIONERS,

Versus

UDHO RAM AND OTHERS,—RESPONDENTS. } REVISION SIDE.

Civil Revision No. 198 of 1905.

Civil Procedure Code—Execution of decree—Appeal under Section 588 (16), *Civil Procedure Code—Sections* 311, 312, *Civil Procedure Code.*

Held, that, where an auction sale under a decree has been confirmed under Section 312, Civil Procedure Code, in the absence of objection under Section 311, and an application to set aside the sale has been *thereafter* put in and dismissed for default, and a further application asking (*a*) that the dismissed application be restored to the file or (*b*) that the application be treated as a fresh application or (*c*) as a petition for review of the order dismissing the first application, has been also dismissed, no appeal lies against either of the orders of dismissal, neither of which comes under Section 588 (16), Civil Procedure Code, or is an order under Section 312.

Held, also, that it is illegal for a Court to set aside a sale by auction under a decree and then without further proclamation and a further regular sale to sell the property to the decree-holder (or any other person).

Petition for revision of the order of K. B. Sheikh Khuda Bakhsh, District Judge, Gurdaspur, dated 19th October 1904.

Sukh Dial, for petitioners.

Gullu Ram, for respondents.

The judgment of the learned Judge was as follows :—

22*nd October* 1906. JOHNSTONE, J.—In this case an application was made on 8th November 1902 by Sipahi Mal, decree-holder, for attachment of house property belonging to his judgment-debtor, Abdul Rahim, minor. The decree was a small one, and it was ruled by the Court that the property named was of unnecessarily high value, and therefore one house was attached, which was proclaimed and put up to auction and bought by Bishambar Das, petitioner, on 13th May 1904. On 16th May the decree-holder offered Rs. 250 by application and on 31st May one Kanhaya offered Rs. 300. The sale came on for confirmation on 15th June 1904, decree-holder withdrawing his offer, and it was confirmed under Section 312, Civil Procedure Code, in the absence of objection under Section 311. *Next* day objections were put in on behalf of the minor who asked for re-sale. This application was dismissed for default on 30th June 1904. On 1st July 1904 application was made on behalf of the judgment-debtor asking (*a*) that the dismissed application be restored or (*b*) that this be treated as a fresh application to set aside the sale or (*c*) that this be treated as an application for review. The execution court on 9th August 1904 rejected the application, and the judgment-debtor appealed against this rejection to the District Judge who ruled that the second application aforesaid could have been considered to be an application for review of the order passed on the first application; that the proclamation of sale was irregular; that loss has been caused to the judgment-debtor, and that an appeal lay under Section 588 (16) read with Section 312, Civil Procedure Code. The learned District Judge then allowed the appeal, set aside the sale, accepted an offer of Rs. 302 from the decree-holder, without apparently referring to the auction purchaser at all, and sanctioned sale accordingly.

The auction-purchaser applies here for revision, and I feel constrained to allow the petition, much as I would like to see the minor judgment-debtor get a good price for the property. In the first place, the District Judge's

action in setting aside the sale and then proceeding to sell the property to decree-holder without fresh proclamation was wholly illegal. In the next place, I can find no indication that the proclamation of the sale was irregular. But the most important point after all is that no appeal lay to the District Judge against either the order of 30th June or that of 9th August 1904. These orders were not passed under Section 312, Civil Procedure Code. The only order under that section was passed on 15th June 1904 confirming the sale. Against that order no doubt an appeal lay to the District Judge, but no such appeal has been preferred. The applications of 16th June 1904 and 1st July 1904 were not applications under Section 311, Civil Procedure Code, at all, as they both *followed* the order of confirmation of sale. They could at best have been taken as applications for *review* of the aforesaid order of confirmation. The District Judge seems to think that he was authorized to interfere on the appellate side because the second application might have been treated as a petition for review of the order on the first application ; but this is clearly wrong, as no appeal lies against an order refusing to review.

For these reasons I hold that the District Judge has acted without jurisdiction, and I allow this petition and set aside the District Judge's final order and proceedings generally, and restore the order of the Munsiff. Respondent will pay petitioner's costs.

Application allowed.

No. 26.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

THAN SINGH,—(PLAINTIFF),—APPELLANT,

Versus

TARA SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 592 of 1903.

Custom—Pre-emption—Pre-emption on sale of house property—Mohalla *Parachian in the city of Rawalpindi—Relevancy of instances decided on admission alone.*

Found that the custom of pre-emption in respect of sales of house property based on vicinage exists in *mohalla* Parachian otherwise known as *mohalla* Matta or Waris Khan in the city of Rawalpindi.

The cases in which the right is claimed and decreed on admission alone are instances of the right being exercised within the meaning of the Evidence Act and are therefore relevant as to the existence of the custom.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Rawalpindi Division, dated 14th March 1903.

Beechey and Nanak Chand, for appellants.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by

17*th Novr.* 1906. CHATTERJI, J.—This is a suit for the pre-emption of a house in the city of Rawalpindi in which the Courts below have differed in opinion as to the existence of the custom.

The Divisional Judge holds that the sub-division of the city in which the house is situate is *mohalla* Parachian otherwise called *mohalla* Matta or Waris Khan, and that it extends from S rdar Sujan Singh's house on the west to the Murree Road on the east.

On this point the parties are agreed in this Court and respondents' counsel has raised no objection to the finding of the Divisional Judge.

The only question then for determination is whether by the custom of the locality the right of pre-emption is proved to exist. Seven cases were relied on by the plaintiff which are noticed and discussed in the judgment of the Divisional Judge, pages 10 and 11 of the printed paper book. Of these No. 6 is clearly irrelevant and was not referred to in the argument.

In the first Court the plaintiff mentioned another instance which appears to have been cited by the defendant as well in which the claim was dismissed.

It is No. 1 for the defendant mentioned in page 11 of the printed judgment of the Divisional Judge. Of these the Divisional Judge held that Nos. 1, 3, 4 and 7 were cases in the *mohalla* and so also No. 1 cited for the defendant. He holds that No. 2 which corresponds to No. 5 of the first Court did not belong to the *mohalla* and excluded it from consideration. The Subordinate Judge of Rawalpindi in whose Court the case was first tried does not refer to it as one of the cases the locality of which was shown to him when he inspected the spot, and it is not marked in his sketch map. We therefore exclude it from consideration without

going into the disputed point whether Jhangiwala *mohalla* and *mohalla* Parachian are identical. No. 5 which is No. 2 of the first Court is also excluded by the Divisional Judge as it is in *mohalla* Saidpuri, but it is shown in the first Court's map and some of the defendants' witnesses admitted it to be in *mohalla* Parachian. In the map *mohalla* Saidpuri commences to the north of this house. We hold therefore that this is an instance in the sub-division in which the disputed house is situate. Case No. II cited for the defendants was also a case from this *mohalla* according to the finding of the Divisional Judge, but the Courts which decided it held the house then in suit to be situate in *mohalla* Waris Khan which they found was distinct from *mohalla* Parachian and not to be governed by instances in the latter *mohalla* and dismissed the claim on that ground. The Chief Court was unable to interfere with the finding on the revision side and refused to allow the point to be raised before it that the two *mohallas* were identical. This case should be excluded from consideration both because it proceeded upon an erroneous conception relating to *mohalla* Waris Khan and because if we take the judgments as they stand upon the findings arrived at in that case, *mohalla* Waris Khan was distinct from *mohalla* Parachian.

There are thus five cases in this sub-division which appear to be in point, *viz.*, Nos. 1, 3, 4, 5 and 7 of the Divisional Judge cited for the plaintiff and No. 1 cited by the defendant. Nos. 4 and 5 were decided on compromises and in Nos. 3 and 4 relationship was put forward as the ground of claim. Chronologically the cases may be arranged thus: No. 3 in 1872, No. 7 in 1881, No. 4 in 1882, No. 5 in 1889, No. 1 in 1893 and No. 1 for defendant in 1897. In Nos. 1 and 7 for plaintiff the custom of pre-emption was decided but was found to exist after inquiry.

In case No. 7 reference is made to four precedents in Courts in two of which the custom was found to exist and in two there were confessions of judgment and in all four decrees were given to the plaintiff. The Divisional Judge says that from the evidence given before the Court (Mr. Johnston, Assistant Commissioner) one case was from the *Telis' mohalla*. This is not very material as it was a fifth case, and excluding it there still remain the four cases mentioned by Mr. Johnston in which decrees were given, though in two on con-

fessions of judgment. Thus there are at least eight cases in this *mohalla* between 1872 to 1897.

As regards confessions of judgment and admissions they are of course of much less value than contested cases properly decided where custom has been found to exist after due inquiry, but as observed in several judgments of this Court such admissions are not irrelevant and by no means valueless as they may proceed from the consciousness of the existence of the right and the hopelessness of contesting it, see *Ramjas* v. *Bura Mal* (1), *Tugga* v. *Allah Bakhsh* (2), and *Muhammad Nawaz Khan* v. *Mussammat Bobo Sahib* (3), and other cases dealing with the weight to be attached to admissions. Each case must be decided on its own facts. Here it does not appear that there were any special reasons for the admissions made or to detract from their value. We think therefore that these cases should be taken into consideration in disposing of the question of the existence of the custon which we are considering.

The net result is that in this *mohalla* there have been within twenty-five years after 1872 nine cases in which the right has been affirmed directly or indirectly. In four, *viz.*, Nos. 1 and 7 of the Divisional Judge and in two mentioned in the latter case decrees were passed affirming the right after inquiry and in three, *viz.*, No. 5 of the Divisional Judge and two cases mentioned in No. 7 decrees were passed on confessions of judgment. In one, *viz.*, No. 4 of the Divisional Judge, plaintiff gave up his claim on receiving consideration and in No. 3 a decree was passed, but it was a sale by a widow though only pre-emption was claimed. These two cases at least indirectly affirm the right. In regard to the last case it should not be forgotten, that the approved view of pre-emption is that it is the last means by which the heirs can retain the property alienated and though this applies mostly to agricultural land yet pre-emption based on relationship in cities, though rare, is not unknown and was commonly claimed in the early days of British rule. However this may be, we think there can be no rational doubt that these cases show that there is a preponderance of opinion among the residents of *mohalla* Parachian or Matta and those acquainted with its customs that the custom of pre-

(1) 42 *P. R.*, 1905. (2) 69 *P. R.*, 1901.
(3) 44 *P. R.*, 1903.

emption based on vicinage does exist in the *mohalla* and that the general trend of judicial opinion has been in the same direction. Moreover where the right of pre-emption is shown to exist there is *ex necessitate rei* a presumption in favour of vicinage (*Chaudhri Khem Singh* v. *Mussammat Taj Bibi* (1), at page 219). The *mohalla* is an old one and not a new extension of the city of Rawalpindi, and the city itself is largely Muhammadan, and therefore, presumably, saturated with Muhammadan ideas. Cases from other *mohallas* of the city have not been produced but there is no necessity to go into them as at least they would be merely relevant and not be direct proof of the existence of the custom in this *mohalla*. The cases cited for the defendant are not in point and the Divisional Judge shows that case No. II was decided on a misconception as to the locality of the disputed house.

We are of opinion on the whole therefore that the existence of the custom of pre-emption in this *mohalla* Parachian, Matta or Waris Khan is sufficiently proved and that the Divisional Judge has erred in holding otherwise.

We accept the appeal and restore the decree of the first Court with costs in all the Courts. The plaintiff will deposit the purchase money in Court within sixty days from this date failing which his suit shall stand dismissed with costs.

Appeal allowed.

No. 27.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

ISHWAR DAS,—(PLAINTIFF),—APPELLANT,

Versus

DUNI CHAND AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1308 of 1906.

Custom—Pre-emption—Pre-emption on sale of agricultural land on ground of vicinage—Civil Station of Amritsar.

Held, that the custom of pre-emption in respect of sale of agricultural land by reason of vicinage in the Civil Station of Amritsar had not been established.

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(1) 83 *P. R.*, 1888.

Further appeal from the decree of J. G. M. Rennie, Esquire, Additional Divisional Judge, Amritsar Division, dated 9th June 1904.

Gurcharn Singh, for appellant.

Lakshmi Narain and Bakhsi Sohan Lal, for respondents.

The judgment of the Court was delivered by

5th Decr. 1906. CHATTERJI, J.—The material facts of this case are given in the lower Court's judgments. The land in suit is situate in the Civil Station of Amritsar and in *Tukra* No. 6 in the revenue records. Both plaintiff pre-emptor and the defendant purchaser own lands in the same *tukra*, but plaintiff's land is adjacent to the land sold, and it is further stated that while this is agricultural land that belonging to the vendee is building land.

There is no evidence whatever regarding any custom bearing on the right of pre-emption, and it is admitted that the land is within the limits of a municipality. The adjacency of the plaintiff's land goes for nothing, and if the land in suit is held to be within the limits of a town as the lower Courts held the plaintiff's claim fails, and has been rightly dismissed by them.

The only case in which plaintiff can succeed is if the land is decided to be situate in a village and defendant held not to be a landowner because his land is building land while the disputed land and plaintiff's other lands are agricultural land. The evidence absolutely fails to show that the lands in *Tukra* No. 6 are situate in a village or belong to a village community. All we know is that Amritsar is described as a *mausa* and the lands are entered in the Revenue Records in *tukras* of which *Tukra* No. 6 is the one which contains the disputed land with lands of the parties. We cannot on this meagre information hold that *Tukra* No. 6 is situate in a village and that the owners are members of, or belong to a village community. The indications are quite the contrary and *tukra* is entered in the column of "*patti*" and the revenue of each is separate. We accept the reasoning used in *Ram Narain Singh* v. *Sewak Ram* (1), to indicate what is a village or a village community. On the evidence adduced it is impossible to come to a finding in plaintiff's favour on this point, and there is no ground for ordering a further inquiry.

As far as one can gather from the undisputed facts (1) that Amritsar is a large town and (2) that the land in suit is situate within the limits of the municipality of that town the case would appear to be governed by Section 11 of the Punjab Laws Act under which plaintiff has no claim.

(1) 21 P. R., 1906.

On the other point, whether defendant's land being building land he should be held not to be a landowner within the meaning of clause (*d*) of Section 12. The view taken of the meaning of land in this section in *Haidar* v. *Ishwar Das* (1) commends itself entirely to our judgment. Nor is it clear that defendant's land can be absolutely excluded from the category of agricultural land in the ordinary sense of the term. If therefore Amritsar is a village and *tutra* corresponds to *patti* or sub-division of a village we think both parties are equally landowners in the *patti* and their rights equal, so that plaintiff has no priority of claim. It is not shown that defendant vendee's land is not assessed to revenue and even if it is not so assessed he would still be a landowner in the (so called) village, *Jasmir Singh* v. *Rahmatulla* (2).

It would thus seem clear that, even on the assumption that Amritsar is a village within the meaning of Sections 10 and 12 of the Punjab Laws Act, plaintiff's claim cannot succeed. We have said already that there is every indication that Amritsar is a town and the locality of the land is situate within the limits of a town, and that as there is no proof of custom in plaintiff's favour the claim is not tenable under Section 11 of the Act.

Phallu v. *Mukarrab* (3), and *Jasmir Singh* v. *Rahmatulla* (2), have no bearing on this case with reference to its facts.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 28.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

GANGA RAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

ABDUL RAHMAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1184 of 1905.

Civil Procedure Code, 1882, Section 43—Mortgage—Separate covenants for the payment of principal and interest—Distinct causes of action—Competency of mortgagee to institute separate suits for principal and interest when both have fallen due—All claims on same cause to be included.

Held, that when under a mortgage bond both principal and interest have become due, the mortgagee must sue for both together; other-

(1) 22 *P. R.*, 1906. (2) 7 *P. R.*, 1896.
(3) 153 *P. R.*, 1888.

wise he will be debarred under Section 43 of the Code of Civil Procedure from claiming in a subsequent suit, what was not claimed in the prior suit.

The principle of Section 43 is that where several breaches of covenants made under one contract have occurred the cause of action of the various breaches merges into one and renders it obligatory upon a plaintiff to include all claims to which he is entitled under his contract in one action.

First appeal from the decree of Captain A. A. Irvine, District Judge, Simla, dated 24th July 1905.

Gouldsbury, for appellants.

K. C. Chatterji, for respondents.

The judgment of the Court was delivered by

1st Decr. 1906. CHATTERJI, J.—The material facts of this case are briefly these. On 14th August 1897 the defendants-respondents executed a mortgage of certain house property in Simla for Rs. 6,000 in favour of the plaintiffs appellants on the following terms.

The mortgagors were to remain in possession but to pay 15 per cent. per annum interest on the mortgage money and to make payments of amounts due for the same in October and June during the currency of the mortgage, the first payment being made in October 1897 and the next in June following. If instalments of interest were not paid at the stipulated time compound interest would run at the same rate. The principal of the mortgage money was to be paid in half-yearly instalments of Rs. 600 each, commencing from June 1898. If two successive instalments of the principal were in arrears or if the last instalment was not paid in full the plaintiffs mortgagees were to be at liberty to realize the whole sum due to them from the mortgaged property or other property of the mortgagors.

The mortgagees were to be at liberty to sue for unpaid interest or compound interest after due date, or to sue for the same along with the principal.

The mortgage was for one year certain after which mortgagors were to be at liberty to repay the mortgage debt in whole or in part if they were so disposed.

It appears that certain payments on account of interest were made but none towards the principal the whole of which remained outstanding. Plaintiffs brought a suit

for the interest due to them on 23rd August 1904, and obtained a decree. They brought the present suit for the principal and subsequent interest on 17th April 1905.

The defendants pleaded *inter alia* that suit was barred by Section 43 of the Code of Civil Procedure in consequence of the present claim not having been included in the previous suit. Their other pleas need not be recited here.

The District Judge of Simla who tried the suit upheld the objection and dismissed claim as barred by Section 43, Civil Procedure Code, and this is the only point raised in the present appeal. The case has been fully argued and a mass of authorities has been quoted on both sides.

Section 43 requires "that every suit shall include the "whole of the claim which the plaintiff is entitled "to make in respect of the cause of action", and further provides that "if a plaintiff omits to sue in respect of * * "any portion of his claim, he shall not afterwards sue in "respect of the portion so omitted * * ."

The term "cause of action" has been nowhere defined in the Code, and the superior courts in India have therefore derived its meaning from extraneous sources coupled with the context of the sections in which it has been used. The ordinary and most comprehensive sense in which it is understood in England includes every fact which is material to be proved to entitle the plaintiff to succeed and every fact which the defendants would have the right to traverse (*Cook* v. *Gill* (1), *Read* v. *Browne* (2)). Their Lordships of the Privy Council have declared it to have reference to the grounds set forth in the plaint as constituting his right to sue or in other words the *media* on which plaintiff asks the Court to arrive at a conclusion in his favour (*Chandkour* v. *Partap Singh* (3)). In *Haramaire Dossi* v. *Hari Charan Chowdhri* (4), it was held that for purposes of Section 26 of the Code, "cause of action" means merely the facts constituting the infringement of the rights of the plaintiffs and not also those constituting their right. But there is a consensus of opinion that it has the wider signification in Section 43. *Musti* v.

(1) *L. R., VIII C. P.*, 107.
(2) *L. R., XXII Q. B. D.*, 128.
(3) *L. R.*, 15 *I. A.*, 156.,
(4) *I. L. R., XXII Calc.*, 833,

Bholaram (1), *Behari Lal* v. *Poke Ram* (2), *Ram Pershad* v. *Suchi Dosi* (3), *Nawab Muhammad Kabir Khan* v. *Mussummat Bhag Bhari* (4). The mortgage deed appears to create the following primary rights of the plaintiffs against the defendants and the corresponding obligations on the part of the latter.

(*A*) As respects the principal—

(*i*) That it was to be paid in six-monthly instalments of Rs. 600 each.

(*ii*) That the whole was payable within five years.

(*iii*) That if two instalments remained in arrears, the whole sum outstanding was claimable by the plaintiffs.

(*B*) As respects interest.

(*i*) That it was payable at 15 per cent. per annum every six months, the first instalment falling due in October 1897.

(*ii*) That if any instalment remained in arrears compound interest was to be paid on the same at the rate stipulated for the simple interest.

When the first suit for interest was brought the whole of the principal had fallen due under the contract, all the instalments being then overdue.

The plaintiffs contend that every breach of the individual covenants in the deed gives rise to an independent right of action, *i.e.*, is a separate cause of action, and they further rely on the express provisions in the deed as to their being able to sue if default was made in the payment of interest. The following authorities were cited on their behalf: *Ram Bhaj* v. *Devia* (5) *Jeshwant Narain* v. *Vithal Dinkai* (6), *Badi Bibi* v. *Sami Pillai* (7), *Firupati* v. *Nara Sima* (8).

The last case may be disposed of in a few words. It was ruled in it that when a suit had been brought for mesne profits of certain land and dismissed on a technical point, a subsequent suit for possession of the land and mesne

(1) *I. L. R., XVI All.*, 165.
(2) *I. L. R., XXV All.*, 48.
(3) 6 *Calc. W. N.*, 585.
(4) 17 *P. R*, 1897.
(5) 123 *P. R.*, 1881.
(6) *I. L. R., XXI Bom.*, 267.
(7) *I. L. R., XVIII Mad.*, 257.
(8) *I. L. R., XI Mad.*, 210.

profits was not barred by section 43 of the Code. It was held that the suit for mesne profits and the suit for ejectment were not based on identical causes of action, and this was the view taken by a Full Bench of this Court (*Raja Bikrama Singh* v. *Prab Dial* (1)). This case has no bearing on the question before us.

In Jeshwant Narain's case it was held that the breach of a covenant in a mortgage deed to pay interest each year which is not confined to the fixed period of the mortgage is distinct from, and independent of, the claim of the mortgagee to recover the principal sum and the performance of which is secured in a different manner and gives rise to a distinct cause of action, which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not, under Section 43 of the Civil Procedure Code, bar a subsequent suit for principal and interest by sale of the mortgaged property. The mortgage deed which was for a term of five years was dated 24th March 1873 and there was a stipulation to pay interest and the mortgagee was given the right to take possession to secure it, the mortgagee undertaking to pay the surplus if any to the mortgagor. In 1881, the plaintiff sued for arrears of interest up to the end of 1881 and got a decree. In 1882 the mortgagee sued for the principal and remaining interest seeking to recover both from the sale of the mortgaged property and the suit was held not to be barred. The facts of this case are materially analogous to those of the present one, and the judgment is an authority in favour of the plaintiffs. We shall have occasion to refer to it again.

Ram Bhaj v. *Duvia* (2) and *Badi Bibi* v. *Sami Pillai* (3) may be noticed together. In both these were bonds in which terms were fixed for payment of the principal amounts secured by them, and there were stipulations for payment of interest as it accrued from time to time, and clauses providing that if interest was in arrear for a certain time the principal also could be claimed, though the time for payment fixed in the bonds had not arrived. Suits having been brought for interest fallen due, subsequent suits for the principal and further interest after the expiry of the terms for payment were held not to

(1) 129 *P. R.*, 1889. (2) 123 *P. R.*, 1881.
(3) *I. L. R.*, *XVIII Mad.*, 257.

be barred. It was ruled that suits for interest could be brought under the terms of the bonds and that the penal clauses by which the principal became payable on failure to pay interest as agreed did not compel the plaintiff to sue on such defaults as no one is bound to enforce a forfeiture. This does not touch the question before us and the principle laid down in these cases is beyond question. It must be conceded however that in the Punjab case the first suit was brought when the principal of the bond had fallen due under the agreement without reference to the forfeiture clause on non-payment of the interest and it was ruled that the claims under the first and second suits were based on distinct causes of action, the plaintiff having in each instance sued for the whole claim arising *ex una obligatione*. We shall return to this ruling after we have examined all the important authorities cited by counsel to notice.

The other cases quoted for the appellant need not be mentioned here as they do not specially touch the question we are considering.

For the respondents reference was made *inter alia* to *Duncan Brothers, &c.*, v. *Jeetmall Girdhari Lall* (1) following the opinion of Mr. Justice Wilson in *Anderson Wright and Company* v. *Kalagoda Surji Narain* (2). In these cases contracts of sale and purchase of goods had been broken by the purchaser in part by refusal to take delivery and in part by refusal to pay for goods delivered, and it was held that the seller was debarred by Section 43 of the Code from bringing separate suits on the two breaches, his claim being one arising out of the same cause of action and based on one and the same contract.

In *Hikmat Ullah Khan, &c.*, v. *Imam Ali and others* (3), the Allahabad High Court held that, when a mortgage deed provided that possession was to be given that the mortgage was to be for four years certain, and that certain interest should be payable and recoverable from the profits and the mortgagee never obtained possession but sued for interest at the end of three years and obtained a decree, a second suit for the principal instituted after the expiry of the term of the mortgage was barred. The Court considered that the

(1) *I. L. R., XIX Calc.*, 372. (2) *I. L. R., XII Calc.*, 389.
(3) *I. L. R., XII All.*, 208.

only cause of action of the first suit was the non-delivery of possession and that plaintiff had no other for the second suit.

In a recent Madras case *Rangayya Goundan* v. *Nanjappa Rao, &c.* (1), the plaintiffs had previously sued for possession and damages for breach of a contract for the sale of a coffee estate, and their Lordships of the Privy Council held that a subsequent suit by them to enforce specific performance of the contract was barred, in as much as the contract was the only cause of action in both cases.

In a still later case in *Shan Magum Pillai* v. *Syed Ghulam Ghose* (2) the plaintiff had filed a suit under a rent-deed for arrears of rent for *Fasli* 1306 and got a decree, and it was ruled that a subsequent suit for the rent of *Fasli* 1305 under another rent-deed was barred.

The Court held that though there were separate rent-deeds, the cause of action was but one, *viz.*, the non-payment of rent by the tenant to his landlord.

No doubt every breach of a primary right gives rise to a cause of action, and thus where a bond besides fixing a date for the payment of the principal stipulates for payment of interest in a certain manner, the non-payment of the interest in that manner creates a right of suit, as was ruled in *Ram Bhuj* v. *Devia*. But this does not settle the further question whether when several breaches of covenants made under one contract have occurred, suits will separately be on the several breaches. In such a case there appears to be an identity of the causes of action of the several suits and they cannot therefore be separately brought. Taking the comprehensive definition of "cause of action" in *Cook* v. *Gill* and the other authorities mentioned before, it is clear that the contract has to be mentioned and set forth in every case and its existence, scope or validity would be in issue or material in all of them. In Rangayya Goundan's case cited *supra*, the plaintiffs had the right to possession, as well as to completion of the contract of sale and had to rest their claim for relief in both the cases they instituted on the contract, and although the breaches complained of were different it was held by their Lordships of the Privy Council, this did not differentiate their causes of action which was but one,

(1) . *L. R.*, XXIV *Mad.*, 491. (2) . *L. R.*, *XXVII Mad.*, 116.

viz., the deed of contract. Their Lordships have laid down in *Surjomoni Dye* v. *Sadanund Mohapatta* (1), that "the term "cause of action" is to be construed with reference rather to the substance than to form of action."

To take the line of argument followed in *Ram Bhaj* v. *Devia* (2), when the defendants failed to pay interest as stipulated in the bond, the plaintiff if he sued as soon as the first breach occurred would sue for the whole claim *ex una obligatione*, but if a second breach also occurred at the time of suit, the plaintiff suing for his remedy for one only of the breaches, could not be said to do so under the provisions of Section 43. One way of looking at the matter is that at the date of the second breach the right of action based on the first breach, if it is not barred by limitation is merged in that arising out of the second breach, so that he has but a single claim in respect of his cause of action, *viz.*, the bond. To hold that each breach constitutes a cause of action which subsists independently even after a subsequent breach has occurred would be putting a very narrow signification on the expression "cause of action" and be opposed to the view of the Privy Council in the case of *Surjomoni Dye* (3).

This scheme of the Code is at all events against any such argument. The illustration to Section 43 sets it at rest. It contemplates that all the covenants to be performed under any contract before the suit is brought are to be treated as joined and merged into one by the contract and the breach of all the covenants enforceable before that time deemed as one breach. The object is of course to avoid multiplicity of actions. A running account not consolidated into a single liability by a balance struck or account stated is deemed to be a single cause of action, for otherwise a separate suit might be brought on each item of the account.

Ram Bhaj v. *Devia* (2) does not contain anything militating against our view and the learned reasoning of Mr. Justice Rattigan is quite compatible with it. We entirely agree with him that the plaintiff in that case was not bound to create a cause of action by enforcing a forfeiture, but could at his option waive it. The only way in which the judgment seems to tell in favour of the appellants is that the claim there was held not to be barred and was decreed, though the facts were very analogous to those of the pre-

(1) *L. R.*, 15 *I. A.*, 66. (2) 128 *P. R.*, 1881.
(3) *L. R.* 15 *I. A.*, 66.

sent case. The plaintiff brought his suit for interest after the principal had fallen due under the stipulation in the bond and not in pursuance of the penal clause. As to this we can only observe that the learned Judges apparently did not advert to it, and that their reasoning nowhere is based on it, so that it is fair to assume that, had they noticed the fact they probably would not have granted the plaintiff a decree.

The facts of Jeshwant Narain's case are, as already observed, also similar to those of the present one, but the judgment does not notice them, though the reasoning of the learned Judges can be said to cover them. They do not expressly mention the fact that the mortgage debt had fallen due when the suit for interest was brought. The learned Chief Justice draws a distinction in favour of allowing the claim to proceed on the ground that the covenant to pay interest, which was not confined to the fixed period of the mortgage, was distinct from, and independent of, the claim of the mortgagee to recover the principal sum, and its performance was secured in a different manner. "Its breach" * * he says, "gives rise to a cause of action which "can be sued upon without suing for the principal." If the distinction is well founded, which is not very clear to our minds, the case is not on all fours with the present case, and should be excluded from consideration. The learned Chief Judge then refers to covenants to pay interest which is inserted in all well drawn English mortgage deeds for the purpose of enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter. We have considerable difficulty in following this argument, for we are of opinion that though the English Law on the subject may be different (see *Dickinson* v. *Harrison* (1) and *Mugan* v. *Rowlands* (2), there is no means in India of evading the provisions of Section 43 by a contract in direct contravention of its terms. When principal and interest are both due, the section says there can only be one suit for both. This cannot be over-ridden by an agreement between the debtor and the creditor that separate suits might be brought. The last clause of the section relating to collateral securities which introduced an innovation from the pre-existing Indian practice founded on English Law fully illustrates the comprehensive scope of its provisions.

(1) 4 *Price*, 282. (2) *L. R.*, 7 *Q. B. D.*, 493.

In any case we cannot follow this authority in the face of the other rulings we have cited in our judgment and particularly those of their Lordships of the Privy Council. In an earlier case *Anappa, &c.* v., *Ganpati, &c.* (1), the Bombay Court (Westropp, C. J., and Kemball, J.) laid down the same doctrine.

In the present instance the plaintiffs sued for interest alone when the principal had all fallen due according to the terms of the mortgage-deed. Had they sued for interest before that period, even though two instalments of interest were in arrear, the bar would not have arisen for, as laid down in *Ram Bhaj* v. *Devia and Badi Bibi's* case, no one is bound to enforce a forfeiture. But in the circumstances that existed when the plaintiffs' first suit was brought, the cause of action for recovery of the principal had accrued and the cause of action for interest had, under the Code, become merged into one, and the present claim for principal which was omitted from the former claim is clearly barred.

The decree of the District Judge is thus right, and should be upheld. The appeal is accordingly dismissed with costs.

Appeal dismissed.

No. 29.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

FAZAL AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

APPELLATE SIDE. HAYAT ALI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1394 of 1905.

Custom—Alienation—Gift of ancestral property by a sonless proprietor to sister's son who was also the donor's khanadamad *and daughter's son—Khinger Jats of Chakwal* tahsil, *Jhelum District.*

Held, that amongst Khinger Jats of the Chakwal *tahsil*, in the Jhelum District, a gift by a sonless proprietor of his ancestral property in favour of a sister's son who was also the *khanadamad* of the donor in consideration of services rendered by the donee to the donor and a daughter's son in the presence of male collaterals is valid by custom.

Further appeal from the decree of Captain B. O. Roe, Additional Divisional Judge, Jhelum Division, dated 21st October 1905.

Nanak Chand, for appellants.

Dhanpat Rai, for respondents.

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(1) *I. L. R., V Bom.*, 181.

The judgment of the Court was delivered by

CHATTERJI, J.—The material facts are sufficiently given in the judgments of the lower Court and do not require detailed recapitulation. *6th Dec.* 1906.

The parties are Khinger Jats of the Chakwal *tahsil* of the Jhelum District. The Khingers are a section of a larger tribe of Jats, *viz.*, the *Bhattu*. From the genealogical trees given in the judgments of both the Courts below, it appears that plaintiffs are the own nephews of Baz, deceased, and are entitled to one-third of the estate left by him by right of inheritance. The plaintiffs have a third brother, Karam Din, who as well as the descendants of another brother of Baz, have not sued. It is said this is a sort of test case, and the claim of the other relations will depend on the result of the present suit. But Bahadur, one of them, fully supported the alienation by Baz, in the Court of first instance.

The defendant, Hayat Ali, is the sister's son of Baz, and it was admitted by the plaintiff, before the commissioner for local enquiry, appointed after the remand by the Divisional Judge, that he was also *Khanadamad* of the deceased, though the daughter of Baz is now dead. Appellants' counsel stated in this Court that she died before the gift in 1892, but this was denied by the respondents, and there is no evidence in support of appellants' assertion. The other donee is the son of that daughter. The property in suit is ancestral.

The question then is, whether Baz could gift the bulk of his ancestral land to his sister's son and *Khanadamad* or to his daughter's son, for if the gift to either could be lawfully made by custom it must be maintained as a whole.

The case was first decided after taking the evidence of the parties. The Divisional Judge was not satisfied with the inquiry made and returned the case for more. The parties then elected to go upon the evidence already adduced, but the first Court appointed a commissioner accepted by both parties to make a local investigation. The commissioner's finding on the point of custom was in favour of the donee defendants, and apparently no specific objection was taken to the report by the plaintiffs. The lower Courts have concurred with the commissioner's opinion as regards the custom. Counsel for plaintiffs-appellants represents that the inquiry is still incomplete

and that his clients ought to be granted a further opportunity to produce all their evidence. We cannot accede to this prayer under the circumstances of this case, for the plaintiffs had ample opportunity to produce their proofs at the original trial and again when the case was remanded expressly for further inquiry. On the latter occasion they stated that they would not call any further evidence. And they produced what evidence they thought proper before the local commissioner. They did not ask in the first Court to be allowed to adduce further proof when the commissioner made his report nor in the Court of the Divisional Judge. We hold that they cannot claim a fresh inquiry at this stage.

We have thus to decide the case on the existing record. The plaintiffs quote page 8 of Mr. Talbot's General Code of Tribal Customs in the Jhelum District and the presumption arising therefrom, and rely on the fact that the parties are agriculturists and the land ancestral. The lower Courts have relied on *Sher Jang* v. *Ghulam Muhi-ud-din* (1) and *Hassan* v. *Jahana* (2), on the question of *onus*, but a somewhat different view is taken in *Bholi* v. *Fakir* (3). We do not think it necessary to say anything positive here on the question of *onus*, as there is evidence on the record on which the case can, and should, be disposed of.

After giving due weight to Mr. Talbot's record of customs, we are unable to hold that the concurrent views of the first Court after remand and of Divisional Judge supported as they are by the report of the local commissioner are erroneous. The locality being west Punjab and the parties Muhammadans we may reasonably expect some relaxation of the strictness of the rule of agnatic succession in favour of daughters and their issue and a less restricted power of alienation in favour of the latter. There are numerous decisions of this Court upholding such alienations among agricultural tribes of the same District which have a distinct bearing on the point before us, *e.g.*, *Sher Jang* v. *Ghulam Muhi-ud-din* (1), in which, after an elaborate discussion of the evidence in the case and the rulings of this Court, it was held that among Mari Rajputs of the Chakwal *tahsil* a gift of half of the ancestral estate to a daughter's son in the presence of agnates is valid, and, at page 92 of the record, the opinion was expressed that the power of gift in favour of a daughter's son is one very commonly among the

(1) 22 *P. R.*, 1904. (2) 71 *P. R.*, 1904.
(3) 68 *P. R.*, 1906.

Muhammadan tribes of the Jhelum District. * * *. In *Hassan* v. *Jahana* (1), it was found that among Moghals of the *Phipra got* in the Chakwal and Pind Dadan Khan *tahsils* plenary power of gift in favour of relations in the female line exists without the consent of male agnates. A similar power of gift in favour of a *Khanadamad* to the prejudice of male collaterals was found among Janjhuahs of the Jhelum District in *Fazal* v. *Khan Muhammad* (2). In *Nur Husain* v. *Ali Sher* (3), it was held that among Gujars of the same District the owner had power to prefer some near male relations to others of equal degree on account of services rendered by the former. It must be borne in mind that one of the donees here is a *Khanadamad*, and it is proved that he rendered services to the donor. We think these cases show that the power of alienation in favour of the female line or for services is common among these tribes. The instances mentioned by the defendants, though not exactly on all fours with the present alienation if they are critically examined, nevertheless show that alienations to daughter's issue, &c., are frequent in this very tribe, while the plaintiffs have not been able to cite a single instance in restriction of the power. This shows, we think, that the statements in the records of custom recently made should be received with caution, as the value of land having greatly risen in these times the zemindars are naturally seeking to curb the power of alienation. Doubtless if the whole community accepts this view, and it is acted on without demur for some time, it may be good evidence in support of the custom stated, but the change of opinion cannot affect old alienations in any case, and the general consent to the abrogation of the old rule requires to be clearly proved. The replies of the tribesmen of Jhelum on gifts to daughters are dubious and by no means unanimous, *vide* answers to questions 86—89. We find here that the gift made so far back as 1892 has been challenged by the plaintiffs only now, and that even at the present moment the bulk of the relations equally entitled hang back, and one of them has expressly declared himself in favour of the power to gift. We have already observed that there are considerable equities in favour of Hyat Ali, the *Khanadamad*, who was brought from another village and who served the deceased and his widow all his life.

(1) 71 *P. R.*, 1904. (2) 85 *P. R.*, 1904.
(3) 33 *P. R.*, 1905.

On the whole, therefore, we see no reason to think that the question of custom has been wrongly decided by the lower Courts. We accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 30.

Before Mr. Justice Reid.

APPELLATE SIDE.

BAHADUR,—(PLAINTIFF),—APPELLANT,

Versus

ALIA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1259 of 1906.

Punjab Pre-emption Act, 1905—Application of, to rights accrued before that Act came into force—Retrospective enactment.

Held, that the Punjab Pre-emption Act, II of 1905, is a retrospective enactment, and as such affects causes of action which accrued or were acquired before it came into operation.

Further appeal from the decree of Kazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 15th March 1906.

Shah Nawaz, for appellant.

Beechey, for respondents.

The judgment of the learned Judge, so far as is material for the purposes of this report, was delivered by

19th Jany. 1907.

REID, J.—The first question for decision is whether the Punjab Pre-emption Act, II of 1905, which came into force in May 1905, deprived the plaintiff-appellant of the right of pre-emption in respect of a mortgage by conditional sale of agricultural land.

Section 5 of the Act provides that the right arises in respect of agricultural land only in the case of sales, and in respect of other immovable property in the case of sales or of foreclosures of the right to redeem such property : and section 2 (3) provides that notwithstanding anything to the contrary in Section 4 of the Punjab General Clauses Act, 1898, the Act shall apply to every claim to the right of pre-emption, whether that right accrued before or after its commencement, save and except any such right in respect of which payment, tender or deposit has been made or a suit has been brought under any provision repealed by the Act. This suit, instituted on the

4th November 1905, is for possession by pre-emption of 56 *kanals* 8 *marlas* of land, being a ¼th share of 223 *kanals* 19 *marlas*, with share of *shamilat*, mortgaged by conditional sale, the year of grace, after notice of foreclosure, having expired on the 30th September 1900.

Atar Singh v. *Ralla Ram* (1), is authority for holding that the suit was within limitation under Article 120 of the Act. *Sahib Dad* v. *Rahmat* (2) has been cited for the proposition that the Pre-emption Act cannot cancel or destroy a pre-existing cause of action. The authority does not help the appellant, as, at page 341 of the report, it is specifically stated that the Court had to decide "whether there was anything in the Punjab "Limitation Act which clearly and unmistakably indicated "that that Act was to have retrospective as well as prospec- "tive effect," and that it was clearly open to the Legislature to give retrospective effect to enactments and to take away vested rights.

Section 2 (3) of the Act specifically deals with vested rights, and has deprived the appellant of the right to pre-emption in respect of the foreclosure.

NOTE.—The rest of the judgment is not material for the purposes of this report--ED. P. R.

Full Bench.

No 31.

Before Mr. Justice Reid, Mr. Justice Johnstone and Mr. Justice Rattigan.

RAGHU MAL,—(PLAINTIFF),—APPELLANT,

Versus

BANDU,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 812 of 1904.

Estoppel—Decree in favor of plaintiff for a part of his claim—Execution of such decree by plaintiff—Subsequent appeal for remainder.

Held, that a plaintiff who has obtained a decree for a part of his claim and has executed the same is not by the mere fact of his having taken out execution of that decree debarred from prosecuting the appeal as regards the remainder of his claim which had been disallowed by the first Court.

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(1) 103 P. R., 1901, F. B. (2) 90 P. R., 1904, F. B.

Mahomed Khan v. *Fida Mahomed* (1) over-ruled.

First appeal from the decree of H. Harcourt, Esquire, District Judge Delhi, dated 27th May 1904.

Shadi Lal, for appellant,

Muhammad Shafi, for respondent.

This was a reference to a Full Bench made by Johnstone and Rattigan, JJ., to determine whether a plaintiff who has obtained a decree for part of his claim and has appealed as regards the part dismissed is debarred from prosecuting the appeal because he has begun to execute the said decree.

The order of reference was as follows:—

7th Feby. 1906. RATTIGAN, J.—For respondent Mr. Shafi raises a preliminary objection to the effect that as appellant has, since the filing of the appeal, applied for and obtained execution of decree in his favour, the appeal by him in respect of that part of his claim which was disallowed by the lower Court is barred. In support of this contention reference is made to *Mahomed Khan* v. *Fida Mahomed* (1), which has been cited without disapproval in at least two subsequent decisions of this Court (viz., *Muhammad Hassan* v. *Ghous Bakhsh* (2) and *Feroz-ud-din* v. *Ghulam Rasul* (*Civil Appeal No.* 695 *of* 1905).

Mr. Shadi Lal states that his client (the appellant) was compelled to apply for execution owing to the fact that another creditor had taken out execution against the same property; and that he was careful, when applying for execution, to state that he did so without prejudice to his right of appeal. The learned counsel also urges that *Mahomed Khan* v. *Fida Mahomed* (1) was wrongly decided, and that the ruling therein is based on no provisions of law.

We are ourselves inclined to take this view. It seems to us, as at present advised, inequitable that a creditor who has obtained a decree for part of a money claim and who has appealed against that part of the decree which disallowed the remainder of his claim, should be held to have lost his right of appeal simply and solely because he has executed the decree for what it was worth. We fail to understand the principle or justice of such a bar or estoppel. In such cases the appellant is appealing *not* for the part of the decree in his favour, but for the part that is either expressly

(1) 82 *P. R.*, 1868. (2) 49 *P. R.*, 1880.

or by implication adverse to him, and we are unable to understand why his appeal against the latter part of the decree should be held to be barred because he has executed the former part. *Feroz-ud-din* v. *Ghulam Rasul* (*Civil Appeal No.* 695 *of* 1905) was concerned with a very different question, which was whether a vendee who in his appeal urged that a pre-emptor had no right of pre-emption, was debarred from prosecuting his appeal by the fact that subsequently to its institution, he had withdrawn from Court the amount deposited therein by the pre-emptor in accordance with the decree. In this case it was pointed out, with reference to *Muhammad Hassan* v. *Ghous Baksh* (1) "that the utmost benefit that the appellant "could get from the analogy of the latter case would be some "support to a contention that the withdrawal of the purchase-"money could not prevent his prosecuting an appeal on the "ground that the purchase-money was insufficient. That, "however, is not the contention here. There is no mention of "the amount in the grounds of appeal before us, nor was this "point argued."

In *Muhammad Hasan* v. *Ghous Baksh* (1) the appellant had not applied for execution of his decree, and it was in this respect that *Mahomed Khan* v. *Fida Mahomed* (2) was distinguished.

As we are not disposed to follow the ruling of the Division Bench in *Mahomed Khan* v. *Fida Mahomed* we refer the question involved to a Full Bench for determination.

The execution file should be sent for and be placed before the Full Bench at the hearing; also the execution file relating to the claim of the decree-holder, Kaniya, against the same property. Respondent has undertaken to give details regarding the latter file.

The judgment of the Full Bench was delivered by

JOHNSTONE, J.—The question referred to this Full Bench was whether a plaintiff, who has obtained a decree for part of his claim and has appealed as regards the part dismissed, is debarred from prosecuting the appeal because he has begun to execute the said decree. The referring order of the Division Bench, dated 17th February 1906 explains that the reference is a necessary one, because the view that Bench was disposed to take was in opposition to the ruling of

15th June 1906.

(1) 49 P. R., 1880. (2) 82 P. R., 1868.

a Division Bench of this Court in *Mahomed Khan and another* v. *Fida Mahomed* (1).

After hearing Mr. Shafi, who supports the views held in 1868, we find in his arguments no reason for differing from the opinions set forth in the referring order. In our opinion the case *Feroz-ud-din* v. *Ghulam Rasul* (*Civil Appeal No.* 695 *of* 1905) relied on by him is clearly distinguishable, as the referring order shows; and we repel the suggestion that if we agree in the correctness of that decision, it follows we must here hold prosecution of the appeal barred.

In short, we over-rule the *dictum* in *Mahomed Khan and another* v. *Fida Mahomed* (1), and answer the question stated above in the negative. The file will go back to the Divisional Bench, and the appeal will be heard.

No. 32.

Before Mr. Justice Chatterji, C.I.E.

APPELLATE SIDE.

ANWAR ALI, —(JUDGMENT-DEBTOR),—APPELLANT,

Versus

INAYAT ALI AND OTHERS,—(DECREE-HOLDERS),—RESPONDENTS.

Civil Appeal No. 943 of 1905.

Limitation—Decree against several defendants—Appeal by some of the defendants against part of the decree only—Execution of decree—Starting point of limitation from date of appellate decree against all the defendants—Limitation Act, 1877, Schedule II, Article 179 (2).

The plaintiff sued nine defendants jointly for possession by partition of two houses, Nos. 1 and 2, and obtained a decree for certain specific shares in house No. 1 against defendants 1, 2, 3 and 7, and in house No. 2 against defendants 1, 2, 3, 4 and 5. Defendants 6, 8 and 9 appealed in respect of house No. 1, but their appeal was dismissed by the Appellate Court. On a subsequent remand (on further appeal) by the Chief Court this order was after a further inquiry again affirmed. The plaintiff applied for execution in respect of house No. 2 after the expiration of three years from the date of the original decree but within three years from the date of the appellate decree, whereupon defendant 4, who had not joined in the appeal but was a party to all the proceedings, pleaded limitation on the ground that there having been no appeal on his behalf the original decree still existed.

Held that the limitation for execution in respect to the properties found to belong to plaintiff by a single decree began to run against all

(1) 82 P. R., 1868.

the defendants from the date of the final decree of the Appellate Court irrespective of the fact that some of the judgment-debtors were not interested in the appeal.

Clause 2 of Article 179 of the Indian Limitation Act applies to all such decrees against which an appeal has been preferred by any of the parties to the litigation in the original suit.

Abdul Rahiman v. *Mai Din Saiba* (1), *Gopal Chunder Manna* v. *Gosain Das Kelay* (2) followed.

Mashiat-un-Nissa v. *Rani* (3) distinguished and not approved.

Further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 14th November 1904.

Oertel, for appellant.

Sangam Lal, for respondents.

The judgment of the learned Judge was as follows:—

CHATTERJI, J.—This is a very old case and there have been numerous proceedings taken in it and various orders and decrees passed which tend to obscure the understanding of the proper issue involved in the present appeal. It is difficult within a short compass and indeed unnecessary to give a complete *resume* of all of them. I shall, therefore, briefly refer only to such facts as have a bearing on the point raised before me and afford help in properly disposing of it *23rd June* 1906.

The present plaintiffs decree-holders respondents brought a suit for possession by partition of two houses in Lahore called Nos. 1 and 2 in the proceedings, against nine persons, whose names need not be given here, on 21st July 1887 in the District Court of Lahore. Anwar Ali, the present appellant was defendant 4. The pleadings of the parties and the findings of the District Judge are unimportant for the decision of this case, and it is sufficient to state that his final and amended decree was passed on 17th January 1889, by which he awarded plaintiffs a decree for a $\frac{6705}{28912}$ or about a fourth share in house No. 1, excluding therefrom premises marked E (called *Diwankhana*) and F out of the shares belonging to defendants 1, 2, 3 and 7 only and a $\frac{14304}{68423}$ share in house No. 2 which he held to be the joint property of defendants 1, 2, 3, 4 and 5.

The decree against defendant 4, appellant in this appeal, was *ex parte*.

(1) *I. L. R., XXII Bom.*, 500. (2) *I. L. R., XXV Calc.*, 594.
(3) *I. L. R., XIII All.*, 1, *F. B.*

Defendants 6, 8 and 9 appealed from the decree as to house No. 1 which was dismissed by the Divisional Judge on 28th June 1889. They applied for revision in the Chief Court but were unsuccessful.

Plaintiffs applied for execution in 1893 in respect of house No. 1, but their application was rejected by the first Court and the Divisional Judge. It was, however, accepted by the Chief Court and remanded to the lower Court. In consequence of an expression of opinion in the judgment that defendants 6, 8 and 9 might apply for revision of the order of the Chief Court, an application for review was filed which was accepted and the case remanded for redecision, by the Divisional Judge, of the first appeal to the Divisional Court by order, dated 21st June 1899. The Divisional Judge Mr. A. Kensington, after a remand for further enquiry, upheld the previous order dismissing the appeal of defendants 6, 8 and 9, though on different grounds, on 31st March 1901. This decree was maintained by the Chief Court.

On 7th February 1902 plaintiffs asked for execution of the decree in respect of house No. 2. Their application was dismissed in default and on 17th June the present application was filed.

The only question argued before me was whether or not the application is barred by time. The lower Courts have held that it is not. This is the only point for determination.

Defendant 4 is the only appellant before me. He is jointly interested in house No. 2 and has no interest in house No. 1, but he has been a party to all the proceedings mentioned before.

The argument for the appellant divided itself into two heads—(1) that the present application is barred under Section 230, Civil Procedure Code, and (2) that it is barred under Article 179 of the Indian Limitation Act, XV of 1877.

Both contentions appear to me to be untenable. The order in appeal taking the language of clause (*a*) of Section 230, Civil Procedure Code, literally, was passed on 31st March 1901 when the Divisional Judge, after a remand by the Chief Court and after a fresh inquiry by the first Court, upheld the original decree of the Divisional Judge passed in appeal in 1889. Appellant contends that he was not interested in the application of the plaintiffs for execution in which the Chief Court's order for remand was passed as he had no share in house No. 1. But clause (*a*) merely speaks of a decree affirming the decree

sought to be enforced, and the decree of Colonel Wood in 1889 maintained by Mr. Kensington in March 1901 comes within the category.

A similar question arises under clause (2) of Article 179 which runs thus "(where there has been an appeal) the date "of the final decree or order of the Appellate Court". Appellant contends that the appeal to the Divisional Court related to house No. 1 which did not concern him and not to house No. 2 to which the present application for execution relates. The argument under Section 230, Civil Procedure Code, and Article 179 (2) of the Limitation Act is thus practically identical.

Now there was but a single decree passed by the District Judge and not two, though all the defendants were not interested in both the properties in respect of which the decree was passed. The suit was filed on the allegation that both properties were joint and ancestral of the parties, but the decree made a distinction among the defendants and granted relief to plaintiffs in respect of the two houses specifying the defendants from whom plaintiffs were to get their share of each house. Defendants Nos. 1, 2 and 3 were made jointly liable with defendant No. 7 with respect to one house and with defendant No. 4 (present appellant) and defendant 5 with respect to the other.

Reading the language of the two enactments in their plain grammatical sense which is imperative on me in construing all statute law in general and limitation law in particular, I am unable to introduce any addition in the section and article by which I can split the decree into two portions and differentiate the limitation applicable to each portion with reference to the decree in appeal. In my opinion we have no right to introduce any refinements in the plain language of the Legislature which have the effect of varying its meaning. This view was taken in respect of clause 2 of Article 179 by the Bombay High Court in *Abdul Rahiman, etc.*, v. *Mai Din Saiba, etc.* (1), and I entirely agree with the reasoning adopted by the Court.

The second clause of explanation 1 to Article 179 has no bearing in appellants' favour. There were two properties no doubt included in the decree and the liabilities of the various defendants distributed in two groups were somewhat different, but the decree was nevertheless joint against defendants 1, 2 and 3 in respect of both houses and No. 4 was joined with them

(1) *I. L. R., XXII Bom.*, 500.

as regards house No. 2. This clause relates to the effect of applications for execution and not to the effect of appeal. "There is a vast distinction to use the language of Mahmud, "J., in *Mashiat-un-Nissa* v. *Rani* (1), *vide* p. 7 between cases in which an application for execution is made, there having been no appeal from the decree and cases in which there has been an appeal as contemplated by clause (2), Article 179. I am of opinion, therefore, that it is useless to employ the analogy of applications for execution in decrees mentioned in the 2nd clause of the explanation in interpreting clause 2 of the article. They have no connection with each other and apart from the fact that the language of clause 2, which is plain, makes no distinction between joint decrees and several decrees against separate judgment-debtors included in single decrees, it is difficult to ignore the inference deducible from the fact that whereas the explanation has been inserted to make the distinction in respect of applications for execution mentioned in clause 4, no corresponding explanation or reservation is introduced in respect of clause 2. The Allahabad case is cited as an authority in favour of the appellant, but its facts are not exactly similar, the decree having been not joint but several against the defendants individually and the ruling of the majority of the Judges was differed from in a recent Calcutta Full Bench judgment, *Gopal Chunder Manna* v. *Gosain Das Kelay* (2) in which a similar interpretation to that I am disposed to put on clause 2 of Article 179 was approved and laid down. I agree with the learned Chief Justice in the last mentioned case in preferring the reasoning and the conclusion of the two dissenting Judges in the Allahabad case to the view of the majority.

There are many authorities bearing more or less on the point before me, but I deem it useless to swell the bulk of this judgment by discussing them in detail as I have mentioned the most recent and authoritative. There is no ruling of this Court exactly in point, *Ralla Mal* v. *Mussammat Malan* (3) cited by the respondent, having no direct bearing on the present discussion, and I am glad that I am comparatively less fettered in the free exercise of my own judgment in construing the clause.

I accordingly hold that limitation runs both under clause (*a*) of Section 230, Civil Procedure Code, and clause 2 of Article

(1) *I. L. R., XIII All.*, 1 *F. B.* (2) *I. L. R., XXV Calc.*, 594.
(3) 8 *P. R.*, 1905.

179 of the Limitation Act, 1877, from the last order in appeal, *viz.*, that of Mr. Kensington on 31st March 1901, and that the respondent's application is within time.

The appeal is dismissed with costs.

Appeal dismissed.

No. 33.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

NIHAL CHAND,—(PLAINTIFF),—APPELLANT,

Versus

BHAGWAN SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 777 of 1906.

Custom—Alienation—Alienation by sonless proprietor—Locus standi of reversioner—Bedi Khatris of Kalewal, tahsil *Dasuha, Hoshiarpur District—Hindu Law—Burden of proof.*

Held, that the plaintiff upon whom the *onus* lay had failed to establish that in matters of alienation a sonless Bedi Khatri of Kalewal, *tahsil* Dasuha, in the Hoshiarpur District, was governed by custom and not by Hindu Law.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 25th May 1906.

Golak Nath, for appellant.

Sohan Lal, for respondents.

The judgment of the Court was delivered by

JOHNSTON, J.—Defendant 2 sold the land in suit on 26th May 1898 by registered deed for Rs. 500, the vendor being a Bedi Khatri of Kalewal, *tahsil* Dasuha, district Hoshiarpur. Plaintiff, who is admittedly a reversioner, has sued for the usual declaration. Defendant vendee pleaded time-bar, and also contended that the Bedis are not bound by agricultural custom and so plaintiff has no right to sue. He also lastly urged that the sale was for consideration and "necessity." The first Court found the suit within time, held, on the strength of *Uttam Singh and others* v. *Jhanda Singh and others* (1), that these Bedis do follow agricultural custom; and that of the consideration money only Rs. 65 is proved to have passed. Plaintiff got his declaration accordingly, and the vendee appealed to the Divisional Judge.

12th Jany. 1907.

(1) 31 P. R., 1906.

That officer held the suit within time, but went on to find that these Bedis do not follow agricultural custom restricting a male owner's power of alienation. The suit having been dismissed in accordance with this finding, plaintiff appeals further to this Court, attacking only the actual finding of the lower Appellate Court regarding the non-applicability of agricultural custom to the case. There are not many published rulings relating to Bedis and their customs, and it seems to me impossible to lay it down that any general rule applies to them all. They are to be found in many districts in different parts of the Province. In *Khazan Singh* v. *Maddi* (1) Bedis of Mohla Wahidpur, *tahsil* Garhshankar, district Hoshiarpur, are spoken of as a non-agricultural class, though in that case holding land as *malikan kabizan*; and it was held that the burden of proving a custom whereby alienations by a deceased collateral male proprietor were liable to be contested by reversioners had not been discharged. It was said that Bedis are more on a level with Sayads, Brahmins and Khatris than with ordinary agriculturists.

In *Surup Singh* v. *Mussammat Jassi* (2) the Bedis of Gurdaspur were treated as a sub-division of the Khatris. After a special further enquiry it was held that these Bedis could adopt a wife's brother, an act that would be valid under Hindu Law, but not under Jat custom. The Hindu Law was not specifically followed; but this was the result. In *Uttam Singh* v. *Jhanda Singh* (3) we have a case of Bedis of Pindori Bawa Das in the Hoshiarpur District. The case was one of gift by a sonless proprietor, and the gift was held invalid. The case of Khazan Singh quoted above was distinguished on the score of the different circumstances of the Bedis concerned in it. In Khazan Singh's case the Bedis were a small group of *malikan kabza*, and it was not proved that they followed agricultural custom. In the case of 1896 the whole village belonged to Bedis whose ancestors founded it some generations back. They form a compact body, the judgment says, "and whatever the pursuits of their ancestors may have been they are certainly now agriculturists."

In Civil Appeal 480 of 1903, decided by a Division Bench of this Court, it was held that certain Bedis who came and settled in Una and followed pursuits other than agriculture, did not follow general Punjab custom. The test, then, as regards presumption appears to be whether a body of Bedis have adopted

(1) 122 *P. R.*, 1893. (2) 22 *P. R.*, 1891.
(3) 22 *P. R.*, 1896.

agriculture for some generations past as their mode of earning a livelihood. It they have, the presumption is that they follow agricultural custom; if not, that they follow Hindu Law, the burden of proof of a special custom being on him who asserts it.

This village belonged originally to the Gujars; but on their failure to pay revenue, Ajaib Chand, father of plaintiff and of the vendor, bought it. He is said to have come from Lutiyan, district Hoshiarpur, in S. 1931-A. D. 1874-75. We have no evidence as to the custom or law followed by the Bedis of Lutiyan; and thus, as matters stand, it can hardly be said that, in the matter of alienation, any custom can as yet have been adopted or followed by this family in regard to alienation of ancestral estate. Plaintiff and his brothers are the first Bedi holders of ancestral estate in the village. The *onus* of proof is thus on plaintiff, and he has in no way discharged it.

It is not suggested that an enquiry at Lutiyan would help much.

I would agree with the learned Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

No. 34.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Rattigan.

MAHARAJ NARAIN,—(DEFENDANT),—APPELLANT,
Versus
BANOJI AND OTHERS,—(PLAINTIFFS),—RESPONDENTS. } APPELLATE SIDE.

Civil Appeal No. 586 of 1901.

Custom—Adoption—Adoption by widow without authority from her husband—Validity of such adoption—Kashmiri Pandits of Punjab—Hindu Law.

Held, that Kashmiri Pandits of the Delhi District are proved to be governed in matters of adoption by custom and not by the principles of the *Mitakshara* form of Hindu Law, and that amongst the members of that tribe a widow has full power after her husband's death, and without his express permission in this behalf, to adopt any boy whom she selects provided he is of the same tribe.

First appeal from the order of Lala Chuni Lal, District Judge, Delhi, dated 30th November 1900.

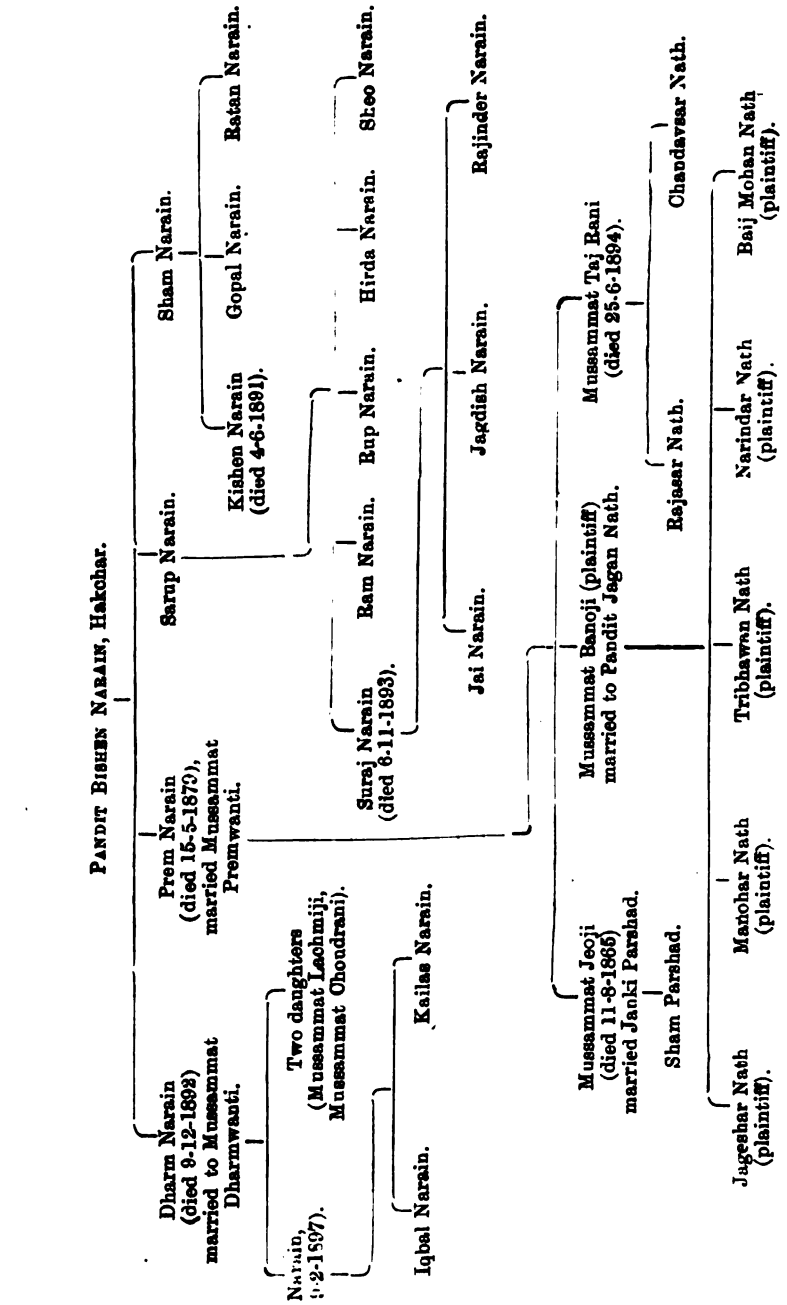
Shadi Lal, for appellant.

Grey and Balwant Rai, for respondents.

18*th Decr.* 1906.

The judgment of the Court was delivered by

RATTIGAN, J.—The parties to this case are Kashmiri Paudits of the Delhi and Gurgaon Districts and the following table will help to explain the facts :—



Pandit Prem Narain died in May 1879 leaving a widow, Mussammat Premwanti, and a large amount of property. After her husband's death and for many years thereafter, Mussammat Premwanti entrusted the management of her affairs to Pandit Janki Parshad, who had married her eldest daughter, Mussammat Jeoji. In or about the year 1885, it is alleged on behalf of defendant, Maharaj Narain, Mussammat Premwanti sent her servant Balik Ram to Kashmir in order to procure for her a boy suitable for appointment as an adopted son. It is said that Balik Ram succeeded in inducing one Seth Ram, also a Kashmiri Pandit, to allow his son, the said Maharaj Narain (present defendant) to be so adopted, and that the adoption was thereafter celebrated with all due ceremonial. The natural father of the boy is said to have received about Rs. 500 from Mussammat Premwanti as a gift in return for handing over his son to the lady. In 1889 the *janao* (or sacred thread investiture) ceremony is alleged to have been performed, in respect of the said boy, either directly or indirectly, through Mussammat Premwanti. Upon this occasion it is asserted on behalf of defendant, that various members of the family were present, and received the usual dues presented at such times, and that Kailas Narain (the grandson of Dharm Narain) as the representative of the eldest branch of the family, invested defendant with the sacred thread. Among those who are said to have been participators in this ceremony was (so it is alleged) Mussammat Banoji, the present plaintiff.

In August 1894 Mussammat Premwanti presented an application, under Act VIII of 1890, to the District Judge, praying for the guardianship of the person and property of the defendant, who, according to the statements made in this application, had been born in 1880 and was consequently a minor at the time. In this application Mussammat Premwanti asserted that the minor was the duly adopted son of her late husband Pandit Prem Nath. A certificate of guardianship was accordingly granted to Mussammat Premwanti on the 8th December 1894.

In February 1896 defendant was married, through the instrumentality of Janki Pershad purporting to act in this behalf for his mother-in-law, Mussammat Premwanti, to the sister of Pandit Basheshar Nath, Hangal, a pleader of Akbarpur in the Fyzabad District. At this ceremony Mus-

sammat Premwanti was admittedly present and so also was her son-in-law Janki Pershad. It is also alleged that plaintiff, her husband (Jagan Nath) and her sons as well as other members of the family were also present at, and took part in, the ceremony. In 1895 Mussammat Premwanti executed two deeds whereby she conveyed two houses to defendant whom she described therein as her adopted son. In May 1897 the aforesaid Janki Pershad, as agent of Mussammat Premwanti, applied to the Revenue authorities praying that mutation of names might be effected in favour of defendant, as regards certain lands in *mauza* Bopas, Gurgaon District, which Mussammat Premwanti held as mortgagee. The *tahsildar* directed that an enquiry upon this subject should be made of Mussammat Premwanti "by means of interrogatories" (14th June 1897), and subsequently directed that in accordance with her wishes as expressed in answer to the said interrogatories the mutation asked for should be granted (23rd December 1897).

On the 20th January 1898 a similar application for mutation in favour of defendant was made by Janki Pershad in respect of the lands held in proprietary right by Mussammat Premwanti in *mauza* Gopalpura, in the same district. This application was granted on the 27th January 1898, it being remarked in the *tahsildar's* order that Janki Pershad supported the application. In both of these applications defendant was described as the adopted son of the late Pandit Prem Narain, and in each case the application was alleged by the *patwari* to have been duly proclaimed in the village. Defendant alleges that shortly after the date of this mutation, differences arose between him and Janki Pershad with the result that litigation against him was forthwith started. In March 1900 Ram Narain, the son of Pandit Sarup Narain, sued for a declaration that the alienations effected by Mussammat Premwanti in favour of present defendant were invalid as against him, he being the adopted son of the deceased Pandit Prem Narain. The District Judge found that Ram Narain's alleged adoption was not proved and this finding was upheld by this Court, though the suit was actually dismissed, on the ground that it was barred by limitation (see *Ram Narain* v. *Maharaj Narain* (1). The present suit was launched against defendant on the 14th April 1900. The plaintiffs are Mussammat Banoji (the

(1) 8 *P. R.*, 1904.

daughter of Mussammat Premwanti) and her five sons. The plaint runs as follows :—

"(1) Rai Bahadur Pandit Prem Narain died intestate at "Delhi on the 15th May 1879, leaving no male issue. There "remained after him Mussammat Banoji, the plaintiff, and "his other daughter, Mussammat Jai Rani, and Pandit Sham "Parshad, the son of his third daughter, Mussammat Jeoji, "deceased.....He (Prem Narain), left some "immoveable property, twenty-nine currency notes and other "moveable property, all being his self-acquired property.

"(2) On his death, he was succeeded by his widow, "defendant No. 2 (*i.e.*, Mussammat Premwanti) on a life tenure "according to Hindu Law. She under Act XVII of 1860 "obtained a succession certificate in respect of the estate of "her deceased husband from the Court of the Judicial Assistant "Commissioner, Delhi, on the 14th July 1879, and took "possession of all the moveable and immoveable property as "well as of the currency notes. She is still in possession "thereof.

"(3) Defendant No. 2 has become very old and weak of "intellect. She declared defendant No. 1 as the adopted son "of Rai Bahadur Prem Narain by the following acts on her "part :—

"(*a*) On the 14th December 1894 she declaring defendant "No. 1 to be an adopted son, obtained a certificate of "guardianship from the Court of the District Judge, "Delhi.

"(*b*) She caused mutation of names in respect of *mauzas* "Bopas and Gopalpura, in *tahsil* Rewari, district "Gurgaon, to be effected in favour of defendant No. 1 "as adopted son of Rai Bahadur Prem Narain "in the months of December 1897 and January "1898.

"(*c*) In the year 1895 she executed two deeds of "sale in respect of two houses.....in favour "of defendant No. 1 as adopted son of the said "Rai Bahadur.

"(4) Defendant No. 1 was not as a matter of fact adopted by Rai Bahadur Pandit Prem Narain nor could he "be adopted according to law. He (defendant No. 1) has "no relationship or connection with the family in question, "nor is defendant No. 2 competent to make any adoption "in the presence of plaintiffs. Defendant No. 2, who has a

" mere life interest, has no right to affect an alienation of " the property in favour of defendant No. 1, and the " alienations made are null and void.

" (5) Plaintiff No. 1 daughter and plaintiffs Nos. 2—6, " grandsons (daughter's sons) of the deceased, are his surviving " heirs. The plaintiffs' rights are in danger on account of the " acts of the defendants mentioned in paragraph 3 of this " plaint. Cause of action accrued to the plaintiffs against the " defendants from December 1894 to 1898 at Delhi.

(6) Plaintiffs therefore pray—

(*a*) for a declaration to the effect that defendant No. 1 " was never actually adopted by Rai Bahadur " Pandit Prem Narain, that he could not be " adopted according to law, and that the alienations, " which have been mentioned in paragraph 3 of this " plaint, and which were made by defendant No. 2 in " favour of defendant No. 1, in respect of the estate of " the deceased are null and void;

" (*b*) Any other relief to which, in the opinion of " the Court they may be entitled, may be granted " to them ;

" (*c*) the costs of the case may be awarded to plain- " tiffs from the defendants. "

Defendant No. 1 at the time of suit was a minor, and " Mussammat Premwanti was appointed his guardian *ad* " *litem*. Purporting to act on his behalf, she filed the follow- " ing written statement in answer to the plaint :—

" The defendants admit paragraph 1 of the plaint, but there " is a misjoinder of the plaintiffs in the case.

" (2) The defendants admit paragraph 2 of the plaint, but " defendant No. 2 does not possess a life interest only. " She is heir with full powers.

" (3) The defendants deny the allegations in paragraph 3 of " the plaint to the effect that defendant No. 2 is old " and weak of intellect but they admit the other allegations " set forth therein.

" (4) The defendants totally deny paragraph 4 of the plaint.

" (5) Defendant No. 2 adopted defendant No. 1 " according to the custom of the tribe, and she was under " the law and custom fully competent to make such an " adoption. She adopted defendant No. 1 with the consent

"of all the family members as well as with that of the "female plaintiff No. 1 and consequently plaintiff No. 1 cannot now object to the adoption. Defendant No. 1 is the lawful adopted son of Pandit Prem Narain, hus- "band of defendant No 2.

"(6) ..... (immaterial).

"(7) The plaintiffs are not entitled to any relief what- "ever. It is, therefore, prayed that plaintiffs' claim may be "dismissed." This written statement was signed in Nagri characters by Mussammat Premwanti and her thumb impression was also taken thereon.

The following issues were framed :—

"(1) Had Mussammat Premwanti, defendant No. 2, "power to make the adoption in dispute under custom or "Hindu Law, which the parties follow.

"(2) Had she an absolute indefeasible right in the "property which she could part with in favour of "defendant No. 1, or only a life interest, subject to the "reversionary rights of plaintiffs ?

"(3) Did plaintiffs give expressed or implied consent "to the adoption, so as to debar their present claim ?

"(4) To what relief or reliefs are plaintiffs entitled in "view of the decision of the above issues ?"

The *onus probandi* as regards all the issues was laid upon the defendant. One witness, Balik Ram, was examined on his behalf on the 23rd July 1900, and testified to the effect that he had, at the request of Mussammat Premwanti, induced the natural father of defendant No. 1 to allow his son to be adopted by that lady ; that defendant No. 1 was so adopted with all due ceremony ; that Mussammat Premwanti some years later had the *janeo* ceremony performed as regards the boy ; that Pandit Dharm Narain's son (Kailas Narain) invested the boy with the sacred thread, and that subsequently Mussammat Premwanti had the boy's marriage ceremony performed. On the 24th July 1900 (*i.e.* to say, the day after the examination of Balik Ram) an application was made to the District Judge for the removal of Mussammat Premwanti from the guardianship *ad litem* of defendant No. 1, and for the appointment of some one else in her place, it being alleged in this application that Mussammat

Premwanti was not "defending the minor's interests properly." This application was granted on the same date and the Court Nazir was appointed guardian *ad litem* in her place. It seems that the new guardian *ad litem* did not produce any further evidence on behalf of the minor on the 24th October 1900, the date fixed for the hearing of any such evidence. The case was accordingly adjourned to the 29th November, on which date the guardian *ad litem* informed the Court that his ward was over 20 years of age and fully able to look after his own interests; that he had not received any instructions from him since the previous September, and that he had, in consequence, no evidence to produce. The District Judge thereupon held that the defendant had failed to produce evidence to prove the truth of the allegations made on his behalf, and that the suit must, therefore, be decreed. This was on the 30th November 1900, and a decree was passed accordingly.

On the 2nd January 1901 the guardian *ad litem* prayed that the said decree might be set aside on the ground that the minor was ill at the time when the hearing was fixed for the 29th November 1900, and that there was now ample evidence available to refute the plaintiffs' claim. This application was rejected, the District Judge holding that the proper course was for the guardian *ad litem* to either apply for review of judgment or appeal against the decree if not time-barred (see order dated 20th March 1901). Accordingly an appeal was presented to this Court on the 17th June 1901, and was accepted by the order dated 4th December 1903, it being held by the learned Judges that sufficient cause (within the meaning of Section 5 of the Limitation Act, 1877) had been shown for not presenting the appeal within the ordinary period prescribed for appeals and the appeal was admitted to a hearing.

As regards the merits of the case the Court observed "it "appears that no evidence has been produced on behalf of appellant "and it is hardly possible that there was none to be adduced." The learned Judges accepted appellant's explanation that he was unable owing to illness to instruct his guardian *ad litem* (the said Court Nazir) regarding the witnesses to be called in support of his defence, and considered that "a sufficient "case had been made out for permitting him to adduce his "evidence." The Court's order proceeds; "We return the case to "the District Judge in order that all the evidence of the appellant "on the issues framed may be taken and also any evidence that

"plaintiffs respondents may wish to produce. It was stated "by the appellant in the lower Court that he had been adopted "by Mussammat Premwanti under authority given by her hus- "band. No issue was framed on this point and we request "the District Judge to examine the appellant upon it, and if he "is able to make a definite statement to put it in issue and to "allow both sides to produce evidence on it. The remand is "made under Section 566 and Section 568 of the Code of Civil "Procedure as amended by Section 68 of the Punjab Courts Act. "The lower Court is requested when sending the evidence to give "its opinion as to its credibility and value and its findings on "the points in issue."

In compliance with this order the District Judge examined Maharaj Narain, appellant, with reference to the alleged authority to adopt given by her deceased husband to Mussammat Premwanti, and finding that the appellant could make no definite statement on the point, the learned Judge decided that there was no need for a "fresh issue." The parties were, however, given every opportunity of adducing evidence and a very large number of witnesses were examined, some in Court and others through interrogatories. The District Judge has duly considered this evidence and his opinion is that the Kashmiri Pandits of Delhi are proved to be governed in matters of adoption by custom and not by the principles of the *Mitakshara* form of Hindu Law; that there is good evidence of the fact of Maharaj Narain's "adoption"; that "there is overwhelming evidence that he has for many years "been treated as the adopted son of Pandit Prem Narain by "Mussammat Premwanti, by the family of Pandit Prem Narain "and the clan of Kashmiri Pandits generally;" and finally, that the said adoption is valid by the custom obtaining in the tribe to which the parties belong

For respondents Mr. Grey objects that the opinion of the District Judge is inadmissible and should be disregarded altogether, inasmuch as the remand was made under Section 568, and not under Section 566 of the Code. It is true that this Court in its order of the 4th December 1903 did not frame any issue for trial nor did the District Judge deem it necessary to frame a fresh issue. The remand was consequently not properly one under Section 566 and the opinion expressed by the District Judge cannot amount to a finding with regard to any of the issues upon which evidence has been taken. But in a case such as the present, when practically no evidence was given at the time of the original trial and the whole of the

case had to be sent back for trial, we see no reason why we should be debarred from taking into consideration the opinion expressed by the District Judge as regards the credibility and value of the evidence taken by him. We do not regard his observations as amounting to distinct findings. They are merely the expressions of opinion of the officer who recorded the evidence, and it is merely in that light and to that extent that we have referred to them. We shall, of course, ourselves have to decide the points which call for determination, but as a guide to our decision we are, we consider, fully justified in having regard to the District Judge's opinion as to the credibility or otherwise of the witnesses. To come now to the questions upon which we have to give a decision. They are as follows:—

(*a*) Whether Maharaj Narain was in fact adopted by Mussammat Premwanti, and if so, when such adoption took place;

(*b*) Whether an adoption by a widow, who had obtained no authority in that behalf from her deceased husband in the latter's life-time is valid among Kashmiri Pandits of the Delhi District; and whether there is in such cases any distinction recognized between the adoption of a boy who is a stranger and of a boy who is a member of the deceased husband's family; and *thirdly*

(*c*) Whether in any event the suit should be dismissed (1) on the ground of plaintiffs' acquiescence in the alleged adoption; (2) as being barred under Article 118 of the second Schedule to the Indian Limitation Act, 1877.

We will proceed to deal with these questions *seriatim*.

(*a*) In our opinion the *factum* of the adoption is most clearly and conclusively established. It appears that about five or six years after the death of Pandit Prem Narain, his widow, Mussammat Premwanti, a lady who was, as the evidence shows, of singularly forceful character, decided to adopt a boy, and with this object commissioned an old servant of the family, the witness Balik Ram, to procure her a suitable youth from Kashmir, that being the country from which these Kashmiri Pandits originally come and

from which (according to the majority of the witnesses, see as to this the evidence of Lachmi Narain, Pandit Prem Nath, Pandit Pran Nath, Pandit Bishan Narain, Pandit Tribhawan Nath, Pandit Janki Pershad Shanghi, Pandit Gayotri Pershad, Pandit Pujare Lal, Pandit Maharaj Kishen, Pandit Hari Kishen) it is usual to get boys for adoption when there is any difficulty in obtaining a boy belonging to the family.

Balik Ram testifies as follows:—"After I had been in "Kashmir for one month, Ram Chand, my brother, now deceas-"ed, indicated one Pandit Seth Ram as a person likely to "give one of his sons for adoption. I called upon Seth Ram, "who agreed on the condition that his debts were paid to the "extent of Rs. 500. I wrote to the widow Mussammat "Premwanti and she agreed to pay Rs. 500, and wrote a letter "to me which I have now got. She sent Rs. 200 out of which "I paid Rs. 100 to Seth Ram on account. Seth Ram agreed "to give Maharaj Narain, then aged five, for adoption, and he "brought the said Maharaj Narain with him to be so given and "I came with them. Seth Ram stopped here for about 15 days "and gave the said son to Mussammat Premwanti and received "Rs. 450 from her as also a *goshwara* and two pieces of muslin. "Since then the boy has been with Mussammat Premwanti "and has been brought up with her." This evidence is corroborated by that of Mussammat Premwanti herself, and that too at a time when she was admittedly hostile to the claims of Maharaj Narain and had in fact brought a suit to have it declared that the said Maharaj Narain was not the adopted son of the late Pandit Prem Narain. In her evidence given on the 31st July 1904, the lady admitted that she had had Maharaj Narain brought from Kashmir about 17 or 18 years previously. She no doubt adds that he was merely a *lapalak* and treated as such, but, as we shall presently show, this part of her evidence is clearly false.

Next we have the evidence of Pandit Lachmi Narain who is the *guru* or family priest of the parties. He deposes as follows:—"I know defendant. I have known him since he "came here. It is nineteen years since he came from Kashmir. "Pandit Prem Narain's widow called him. He was called "for adoption. He was adopted. I witnessed the adoption "ceremonies. Defendant was four or five years old at the time.

" At the adoption, the daughters of Pandit Prem Narain were " present. Mussammats Banoji and Jairani were both present. " Janki Pershad, son-in-law of the widow, was there too. A " feast was given to the brotherhood and sweets were distribut- " ed.....When Maharaj Narain was adopted, Pandit Bishen " Narain (the father of the deceased Pandit Prem Narain) " and his three sons were alive. They knew of the adoption, " but raised no objection to it. Dharm Narain having only " one son, explained that he could not give away that son in " adoption. At the adoption sweets were distributed and the " boy was put in the lap of Mussammat Premwanti." We see no reason to disbelieve the evidence of this witness, nor did Mr. Grey disclose any in the course of his argument. The witness is a person who would in the natural course of things have been present on an occasion of this kind, and it is hardly likely that he, the family priest of the parties, would go out of his way to perjure himself on behalf of one who was in no sense member of that family.

In support of the adoption, there is also evidence of Pandit Janki Nath, Madan Rai Bahadur, Pandit Gobind Lal, Pandit Janki Nath (son of Pandit Ram), Pandit Murli Dhar, Pandit Man Mohan Lal, and Pandit Pirthi Nath. These witnesses are intimately acquainted with the affairs of Pandit Bishen Narain's family, and as regards them also no valid reason was given for discrediting their evidence which on its face, at all events, appears to be true and straightforward.

Then, again, Pandit Janki Pershad, the son-in-law of Mussammat Premwanti and the person who is alleged to have stirred up this litigation, stated in the case brought by Mussammat Premwanti against Maharaj Narain, to which we have already referred, " Maharaj Narain *ko mutbana bhi main ne Kashmir se baqimat Rs.* 500 *lagakar karaya tha.*" We have also pointed out that Mussammat Premwanti when giving evidence in this case asserted that she had not adopted Maharaj Narain and that she regarded the latter merely as a *lapalak.* In the written statement, however, which in her capacity of guardian *ad-litem* she filed on behalf of defendant, the lady distinctly stated that she had adopted " defendant No. 1," (*i.e.*, Maharaj Narain) " according to the custom of the tribe " and " with the consent of all the family members, as well as with that of the female plaintiff, No. 1 (Mussammat Banoji)," and " that defendant No. 1 as the lawful adopted son of Pandit

Prem Narain, husband of defendant No 2" This written statement was duly signed by Mussammat Premwanti and her thumb impression was taken thereon. Again, it has, we think, been fully established (see evidence of Gobind Lal, Lachmi Narain, Murli Dhar, Man Mohan Lal, Pirthi Nath, Pandit Prem Nath) that Mussammat Premwanti had the *janeo* (sacred thread investiture) ceremony performed in 1889 for Maharaj Narain; that the sacred thread was put on the boy by Kailas Narain, the grandson of Dharm Narain; that members of the families of Pandit Prem Narain and of Mussammat Premwanti were present on the occasion and received customary dues which they certainly would not have received unless the boy had actually been adopted by Mussammat Premwanti as a son, and that Pandit Dharm Narain's wife gave alms to Maharaj Narain. These facts are testified to by a large number of witnesses and their evidence upon those points is not seriously challenged. Even Mussammat Premwanti, in her evidence, was forced to admit its truth, though she had also to admit that "correspondence" was taking place between plaintiff, Mussammat Banoji, and herself with reference to this case and that "as she directs me so I represent it in Court."

It is alleged that about Rs. 10,000 were spent in connection with this *janeo* ceremony and the *barat* or procession through the city which followed it. (See evidence of Lachmi Narain, Pandit Prem Nath and Mussammat Premwanti, the latter admits that about Rs. 2,000 were spent). There is no refutation of this allegation, and if such a large sum was actually spent, it is impossible to believe that the boy was not regarded as the adopted son of Mussammat Premwanti, just as it is inconceivable that Kailas Narain would have invested him with the sacred thread or Mussammat Dharmwanti would have presented him with alms, had he been a mere *lapalak* of Mussammat Premwanti.

Mussammat Premwanti has further to admit that in 1896 she had Maharaj Narain married to the sister of the witness, Bashasher Nath, *Hungala*, pleader of Akbarpur in the Fyzabad District. On this occasion also several members of the family were present and participated in the ceremonies.

It is asserted on behalf of defendant and strenuously denied by plaintiff, Mussammat Banoji, that she and her husband were also present at both the *janeo* and the marriage ceremonies. It is noticeable in this connection that plaintiff's

husband who admittedly figures in the group of persons whose photograph was taken the day after the marriage has not come forward to deny the allegation that he took part in the latter ceremony. Upon a careful consideration of the evidence we have no doubt ourselves that Mussammat Banoji and her husband participated in both ceremonies. (See evidence of Gobind Lal, Lachmi Narain, Murli Dhar, Man Mohan Lal, Pirthi Nath, Pandit Prem Nath, Pandit Bishambar Nath, Pandit Hirde Narain, Pandit Bashasher Nath Thakur Gujraj Singh). There is a mass of respectable evidence to that effect and as regards the *janeo* ceremony, the accounts produced to show what sums were paid and to whom on that occasion, disclose certain payments to Mussammat Banoji. These accounts are in the handwriting of Pandit Janki Pershad. Mussammat Banoji's explanation to account for the fact that she did actually receive some money at the time when the ceremony of *janeo* was performed is not at all clear nor does it carry conviction. Mussammat Lachmiji daughter of Pandit Dharm Narain on the other hand admits that she did receive the usual dues on the occasion of the *janeo*, and we see no reason to suppose in the face of the accounts that Mussammat Banoji did not receive her share also. Taking everything into consideration we find it impossible to believe plaintiff's statement that she had nothing to do with and in no wise participated in the defendant's *janeo* and marriage ceremonies. Under these circumstances it would be difficult for plaintiff No. 1 to succeed in the present case, even if it were proved that the adoption of Maharaj Narain was not valid by the law observed by members of the Kashmiri Pandit community. Her acquiescence in this particular adoption for so many years would have been a serious bar to her present claim. But for the moment we are not dealing with this aspect of the case and we merely allude to plaintiff's presence at the two ceremonies with the object of showing that Maharaj Narain had actually been adopted by Mussammat Premwanti and had for years been regarded as that lady's adopted son by the members of the family. Additional facts to support our conclusion in favour of the *factum* of adoption are these :—(*a*) In 1894 Mussammat Premwanti applied under the provisions of Act VIII of 1890 to be appointed guardian of the person and property of Maharaj Narain and in her application described the minor as her adopted son. (*b*) On the 22nd May 1895 Pandit Janki Parshad petitioned the Revenue authorities with a view to having mutation of names in respect of lands in *mauza* Bopas effected in favour of Maharaj

Narain, who was stated in the application to be the adopted son of Pandit Prem Narain. Upon this application, the *tahsildar* directed that enquiry should be made of Mussammat Premwanti by means of interrogatories as she resided at Delhi and the application was made by her general agent. Enquiry was made accordingly, and Mussammat Premwanti expressed her consent to the "gift of the land in question." Mutation of names was therefore ordered in favour of Maharaj Narain (23rd December 1897). (*c*) A similar application was made in January 1898 by the said Pandit Janki Pershad, (who again represented himself to be the general agent of Mussammat Premwanti), as regards mutation in respect of lands in *Mauza* Gopalpura. In this application too Maharaj Narain was described as the adopted son of Pandit Prem Narain. (*d*) Pandit Bashasher Nath, *Hanjal*, deposes that before he consented to the marriage of his sister with Maharaj Narain, he had full inquiries made regarding his sister's intended husband, and was assured by Pandit Prem Narain's family and others that the adoption had taken place and that Maharaj Narain was recognized by the members of that family as one of themselves. There is no reason why we should not credit this evidence. The enquiry would be a very natural one as the witness himself belongs to a very respectable family, and a marriage of one of the ladies of that family would scarcely be allowed to take place unless and until proper enquiries had been made regarding the position and family of the proposed husband. It is in the highest degree improbable that Pandit Bashasher Nath would have consented to the marriage of his sister with an unknown waif and stray, and we can only conclude that he is speaking the truth when he tells us that he gave his consent to the marriage because he was assured by relatives and friends of the Hakchar family that Maharaj Narain was the adopted son of the late Pandit Prem Narain. (*e*) Finally, there is no doubt that until the present litigation at all events Maharaj Narain has been always regarded as one of the Hakchar family. Upon this point in addition to the evidence of the witnesses, to whom we have already referred, there is the evidence of Pandits Hirde Narain and Bishambar Nath. Moreover, it is proved that two witnesses whose evidence is otherwise distinctly hostile to defendant, *viz.*, Pandits Janki Parshad (page 23 of the paper book) and Suraj Narain, Kaul, have in post-cards and letters addressed to defendant described him as Hakchar. When asked to explain this, Pandit Janki Pershad said that he so described the defendant because Hakchar is the caste of his mother, and he added "I admit him to be the adopted

"son of his mother and not of his father." The witness did not further explain how a boy who was the adopted son of Mussammat Premwanti, and yet not the adopted son of Mussammat Premwanti's husband, could take the family name of the latter. Pandit Suraj Narain, Kaul, (page 81 of paper book) is the son-in-law of Pandit Sarup Narain, who was the brother of the late Pandit Prem Narain. He is then also the brother-in-law of Ram Narain whose claim to be the adopted son of Pandit Prem Narain was dismissed as not proved. He explains that he addressed Maharaj Narain as Hakchar because the "post-card was meant for a woman of the Hakchar family," and he thought that by addressing defendant as Hakchar the card would reach its destination more surely. It seems to us that both these explanations are singularly lame, and that the real reason why defendant was addressed as Hakchar was because he was at that time recognized by the Hakchar family as one of their member.

For the above reasons we find that defendant Maharaj Narain was actually adopted by Mussammat Premwanti, and that the adoption took place about the year 1885. For respondents Mr. Grey argued that it was very hard to meet defendant's case upon this point as the allegations as to the time when the adoption occurred had varied from time to time. In support of this argument, the learned counsel referred us to para. 3 of the written statement filed by Mussammat Premwanti on behalf of defendant where it is stated that except as regards the alleged incapacity of defendant No. 2 the other allegations in para. 3 of the plaint are admitted. In para. 3 of the plaint it was, no doubt, pleaded that "defendant No. 2" had declared defendant No. 1 as the adopted son of Rai Bahadur "Prem Narain" by certain acts therein specified, and the argument is that defendants conceded that it was by reason of these acts and of these acts alone that defendant No. 1 asserted his adoption, we cannot however put this strict construction on para. 3 of the written statement. On the contrary we think that the obvious meaning of defendants was that they admitted that Mussammat Premwanti had done the acts specified in third para. of the plaint. They certainly did not intend to admit further that no adoption had taken place before the date of the first of these acts, for the only witness called for the defence (before the remand) was examined with the object of proving that defendant Maharaj Narain had been brought from Kashmir in or about 1885, and had then and there been adopted by Mussammat Premwanti.

Mr. Grey's next contention was that according to some of the witnesses who were examined after the remand, Maharaj Narain's adoption was effected with all due ceremony shortly after his arrival from Kashmir whereas other witnesses, if they did not in so many words expressly say so, at all events implied that the adoption was actually effected by the performance of the *janeo*. We are again unable to accept the argument. Taken as a whole, all that the evidence goes to show is that the boy was brought from Kashmir and duly adopted, and that he was thereafter treated by Mussammat Premwanti and the other members of the family as one of themselves. No witness either says or, in our opinion, implies that it was the *janeo* ceremony which effected the adoption of the defendant; they all certainly refer to this ceremony, but they do so because they were all of the opinion that it would not have been performed by Mussammat Premwanti or have been participated in by Kailas Narain and the other members of the Hakchar family unless the defendant had previously thereto been recognized as the adopted son of the late Pandit Prem Narain.

(*b*). The next question is whether the adoption of Maharaj Narain, which was admittedly made without the permission of Pandit Prem Narain, is valid by the law obtaining among the Kashmiri Pandits of the Delhi District. These Kashmiri Pandits are high caste Brahmins and are in most respects governed by the Hindu Law and by the principles of this law (as stated in the *Mitakshara*), it is clear that an adoption such as that of Maharaj Narain would be invalid. Under these circumstances it was clearly incumbent upon defendant to prove that his adoption was valid on the ground in this particular, the custom of the parties' tribe had modified the principles of the Hindu Law. We held that the *onus probandi* rested heavily on him, and we accept without reservation the *dicta* in *Bama Nead* v. *Surgiani* (1) (at page 223) to the effect that evidence in support of the alleged custom must be such as shows that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have "enforced their right under the general law." Conceding this we are of opinion that in this case defendant has succeeded in proving that in the matter of such adoption as the one with which we have to deal the Kashmiri Pandits of the Delhi District do not follow the strict principles

(1) *I. L. R., XVI All.*, 221.

of the Hindu Law. The evidence shows that amongst them their women folk exercise a great deal of power and that (in the words of one of the witnesses, Pandit Janki Nath), their women "have more authority than their men," or, as the same witness rather pathetically adds, they are "the slaves" of their women. A very striking illustration of the truth of this remark is to be found in this very case, for we have it on record that Pandit Prem Narain in his lifetime wished to adopt Ram Narain, the son of his own brother Sarup Narain, but was unable to give effect to his wishes owing to the opposition of his wife Mussammat Premwanti, who "sent back" that boy. Having regard to the extraordinary influence possessed and exercised by the ladies we do not find it difficult to believe that in a matter which so nearly affects the ladies of the family as that of the adoption of a son, the principles of the Hindu Law have been very considerably departed from by these Kashmiri Pandits. If the ladies are as powerful as the evidence shows them to be, it is no matter for surprise to find that in the selection of boys to be adopted their voice is conclusive. And if a lady of this tribe can arbitrarily refuse to accept as an adopted son a boy whom her husband wishes to adopt, it almost necessarily follows that she can after her husband's death adopt as a son any boy whom she desires to adopt. And this is the purport of the evidence upon this issue in the present case. Reading this evidence, we can come to no other conclusion. The witnesses on both sides, and they are nearly all persons of the most unimpeachable character, are practically unanimous in asserting that, whatever may be the rule of the Hindu Law, among the members of the Kashmiri Pandits tribe a widow is competent by long established usage to adopt any boy, provided he is of the same tribe, and that in order to validate such adoption it is not necessary that she should have received her late husband's permission in this behalf. The more respectable of plaintiff's own witnesses practically concede this. Diwan Pandit Narindar Nath, for example, gives the following answers to the questions put to him. "According to the *Dharmshastra*," he says, "as far as I know, "a widow cannot make an adoption, without the permission "of her husband, but among the Kashmiri Pandits there is "a practice contrary to the above. The point whether the "violation of the rules of *Dharmshastra* in this behalf amount "to custom can be disposed of by a Court." He adds that practically "the principles of the *Dharmshastra* are not followed "in the matter of adoption" and that "there are many instances

in which widows made adoptions without the permission of their husbands, and of these instances he proceeds to give three which occurred to his knowledge. Pandit Narindar Nath, who holds high executive office in this Province, is unable himself to say whether this custom would or would not be recognised as valid by the Courts, but he adds that Kashmiri Pandits "are "not men of litigious character; moreover they think it a sort "of disgrace to go to Courts for fighting cases relating to family "quarrels. They are prepared to make alterations in their "customs according to the change of time. In many matters they "appear to have violated the principles of the *Dharmshastra*, but "as far as I think these violations have not as yet been declared "as customs by the Courts of the British Government." With reference to these remarks, we may observe before proceeding that the reason why no authoritative decisions regarding these "violations" of the principles of the *Dharmshastra* has hitherto been given by the Court is obviously because the members of the tribe have accepted them without demur and no appeal has, till the present case was instituted, been made to the Courts. It is surely a strong point in favour of the instance of the custom and its recognition in the tribe that no such appeal has been made, although admittedly in this particular the principles of the *Dharmshastra* have been very frequently "violated." Another most respectable witness for plaintiffs is Diwan Pandit Ram Nath, who was for many years a District Judge. He says, "custom has super-"seded *Dharmshastra*. In some cases we follow *Mitákshara*, but "in each and every case custom has preference. In my opinion a "widow cannot make an adoption without the permission of her "husband, according to *Dharmshastra*..... ....., but according "to the custom of our own sect widows made adoptions of their "own accord. The adopted boys became heirs and the "reversioners took no steps,..... .....I have stated above that "a custom has come into force according to which a widow can "make an adoption without the permission of her husband." Pandit Ram Nath there gives four instances of such adoptions. Pandit Janki Pershad, Deputy Collector, 1st grade, is a witness by no means favourably disposed to defendant, and his grandson is betrothed to plaintiff's daughter. But even he has to admit that widows made adoptions in respect of "moveable property "without the permission of their husbands," and no "near "collateral came forward with a claim." This is the same person who wrote a post-card to defendant and addressed the latter thereon as Hakshar. Another witness for plaintiff s is Pandit

Bishambar Nath, a pleader of the Allahabad High Court. He admits that "the members of our caste are governed "by the *Mitakshara Shastra*, and the custom which is lawful "is also followed, and is, in my opinion, enforceable." He states that in accordance with the *Mitakshara* a widow cannot, without the permission of her husband, lawfully "adopt a "boy," but he also admits that as far as he heard, and learnt from experience, "adoptions" are made according to custom in our sect, but I cannot say how far the "custom opposed to *Mitakshara Shastra* can be held valid. In "my opinion, the principles of *Mitakshara* are not fully "followed." He further states that to his knowledge there have been several instances in which widows made adoptions of their own accord and without the permission of their deceased husbands, and that he remembers that "some adopted boys have "received the inheritance of the widow's husbands on account of "there being no dispute."

In addition to the above evidence which was given by plaintiff's own witnesses there is a mass of evidence adduced by defendant in support of his allegation that such an adoption as his is valid. Pandit Prem Nath, who was lately an Examiner of Accounts, P. W. D., for example gives no less than 14 instances of such adoptions, and defendant has been able to prove some 60 instances in all. The witnesses who depose to the custom in his favour are almost all of them persons of position and of the highest character, and we can see no reason for refusing to believe their testimony, corroborated as it is by the evidence of plaintiff's own witnesses. It will be observed that nearly every witness who deposes to the custom is able to point to concrete cases in which effect has been given to the custom within his own knowledge.

Mr. Grey criticised this evidence and argued that the witnesses did not give full details as to the nature and extent of the property inherited by the adopted boy, or as to the existence of collaterals entitled to object. The learned counsel urged that it might well be that in some cases the collaterals gave their consent to the adoption, and that in other cases the property was of such trifling value that the collaterals did not consider it worth their while to contest the adoption. But this criticism does not appear to us to carry much weight in view of the fact that no attempt whatever

was made by plaintiffs to refute or explain the instances testified to by the witnesses. In almost every case, the witness concerned gave such particulars as would have enabled plaintiffs to produce evidence (if such had been available) to show that the instance referred to was of no value as a precedent, or was explainable on grounds which did not exist in the present case. But no evidence was given in rebuttal and the only possible inference is that plaintiffs were unable to produce such evidence. Nor do we consider the fact that in many cases the collaterals are said to have raised no objection to the particular adoption, a point necessarily in favour of the contention that such adoptions cannot be valid without the consent of the collaterals. On the contrary, when we find, as we do here, that a large number of adoptions have been made by widows without the permission of their husbands, and that in no one instance has any objection been raised by the husband's collaterals, we can but conclude that the reason for the collaterals acquiescing in the adoptions was because the custom of the tribe recognised their validity. In connection with the question of the validity of this custom, it is a noticeable fact also that none of the male members of Pandit Prem Narain's family have contested defendant's adoption and that plaintiff herself took no steps to challenge it for very many years. Even according to her own allegations, she must have known of the adoption in 1894, when Mussammat Premwanti applied for a certificate of guardianship and yet the present suit was not instituted until April 1900.

Mr. Grey also criticised the custom as being neither certain nor of any antiquity. The first objection is not altogether intelligible to us as we can find nothing uncertain in the incidents of the custom. The second ground is also untenable. There is in this Province no rule of law which prescribes any period during which a custom in order to be valid and enforceable must have been observed. It is sufficient to show that the custom actually prevails and is generally observed in the tribe to which the parties belong and there is no necessity to go further and to attempt to prove the impossible, *viz.*, that it has been observed in the tribe from a period to which "the memory of men runneth not to the contrary." There is, however, on the record a great deal of evidence to the effect that the custom has been in vogue for generations, and that it very generally prevails

among Kashmiri Pandits throughout the Province, (see *e.g.*, the evidence of Pandits Prem Nath Thesu, Pran Nath, Bishen Narain, Tribhawan Nath, Hirde Narain, Janki Pershad Shangla, Gayotri Pershad, Maharaj Kishen Chakhosh, Bishambar Nath, Rajan).

There is one other argument of Mr. Grey's to which we must briefly refer. The learned counsel contended that according to the evidence there was no religious principle or element involved in these adoptions by widows and that the sole object for which they were recognised was for the purpose of gratifying the whims of the ladies. This being so, it followed that an adoption such as that of defendant was not an irrevocable act, but could be set aside by the widow at any time. In the present case Mussammat Premwanti, if she ever adopted Maharaj Narain, had in the most unequivocal manner disowned him before the institution of this suit and consequently he could not after her disclaimer be regarded as her adopted son. We do not think that this argument is justified by the evidence. The witnesses alleged that the object of these adoptions is either to perpetuate the family name or to have some one who can take the place of a real son and perform those ceremonies which are essential for the spiritual welfare of the widow's deceased husband, *e.g.*, *shradh*, *tarpan*, etc. Some witnesses assert that such adoptions are effected for both purposes, and none of the witnesses assert that the only object in view is to please the widow. It would however be utterly repugnant to Hindu feelings and principles that a boy whose *janeo* ceremony had been performed in a certain family should be liable to be thereafter declared not a member of that family simply and solely because the widow who had adopted him and made him a member of the family subsequently wished to disown him and to turn him out of the family circle.

After giving the case our most careful consideration, we must hold that defendant has clearly and conclusively proved that he was actually adopted by Mussammat Premwanti; that the adoption took place when he was a boy of about 4 or 5 years of age; that the adoption was recognised by the members of Pandit Prem Narain's family, who thereafter treated defendant as one of themselves; and, finally, that the said adoption, even though effected by the widow without her late husband's permission, is valid by the custom pre-

vailing among Kashmiri Pandits of the Delhi District which in this respect makes no distinction between boys who are, and boys who are not, members of the deceased husband's family, provided always that the adopted boy must be a Kashmiri Pandit.

Upon these findings it is obviously unnecessary to discuss the questions whether the present suit is barred under Article 118 of the Limitation Act, or whether plaintiffs, or at all events plaintiff No. 1, have or has so acquiesced in the defendant's adoption as to disentitle themselves or herself to the relief claimed.

For the reasons given we accept the appeal and dismiss the suit with costs throughout.

Appeal allowed.

No. 35.

Before Mr. Justice Lal Chand.

LAKHA SINGH,—(DEFENDANT),—APPELLANT,

Versus

JOTA SINGH,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 794 of 1904.

Custom—Alienation—Suit by reversioner to enforce his right in respect to land on the ground that the alienation had been without necessity which alienation had already been challenged by his father on the ground of pre-emption only—Locus standi—*Estoppel by acquiescence.*

Held, that the fact that at the mutation of a sale of ancestral immovable property by a childless male proprietor the nearest reversioner expressed his readiness to take it over on payment of the sale price, but abstained from taking any action whatsoever in respect to it during his lifetime, is evidence to prove that it had been acquiesced in as a valid sale, and consequently the son of such reversioner is debarred from suing to impeach the sale as invalid for want of necessity.

Miscellaneous further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 8th June 1904

Turner, for appellant.

Dhan Raj Shah, for respondent.

The judgment of the learned Judge was as follows:—

8th Decr. 1906. LAL CHAND, J.—The question for decision in this appeal is whether the sale sought to be impeached by the plaintiff was accepted by his father, and plaintiff is therefore estopped from suing for possession of the property sold on the ground that the sale was not effected for necessity. The lower Courts have differed, but it appears to me that the lower Appellate Court has not correctly referred to the contents of the mutation proceedings of 1888 in connection with the question of waiver. Plaintiff's father Jamiat Singh did not then simply object to the sale, but he objected to the sale on the ground that he was ready to pay the money and he was accordingly directed by the officer conducting the proceedings to sue for pre-emption. This he failed to do, nor did he sue for a declaration that the sale will not affect his reversionary rights as being without necessity. On the other hand a declaratory suit impeaching the validity of a subsequent sale by Fateh Singh in 1891 was instituted in 1898 by the present plaintiff through his guardian. Under the circumstance I am of opinion that the sale in question has been acquiesced in as a valid sale and such acquiescence estops plaintiff from suing or possession. This view is supported by *Amir* v. *Zebo* (1), *Labh Singh* v. *Gopi* (2), and *Muhammadi Begam* v. *Fais Muhammad Khan* (3), (an unreported judgment in Civil Appeal No. 1201 of 1905) quoted by the learned counsel for appellant. It was laid down in *Amir* v. *Zebo* that subsequent silence may amount in some cases to conduct precluding a suit to set aside the alienation, and the same view was concurred in and given effect to in the unreported judgment quoted for appellant. *Labh Singh* v. *Gopi* was a case where a suit instituted for pre-emption of the property sold, but dismissed on account of failure to deposit the purchase money, was held to debar the pre-emptor's grandson from suing to impeach the sale as invalid for want of necessity. The present case is not much different from the case in *Labh Singh* v. *Gopi*. Here no suit for pre-emption was brought and allowed to be dismissed, but plaintiff's father challenged the sale not for want of necessity but on the ground that he was ready to pre-empt which he never did, though he survived the sale at least for seven years. His omission at mutations to attack the sale as unnecessary and readiness to take it over on payment of price coupled with his subsequent silence and

(1) 42 P. R., 1902. (2) 15 P. R., 1902.
(3) See page 155 infra.

plaintiff's own action, though through a guardian impeaching a subsequent sale in which he was successful and taking no action as regards the sale now in suit till two years after attaining majority are circumstances in the case which prove that the sale sought to be impeached has been acquiesced in as a valid sale. I therefore accept the appeal, set aside the order of remand and restore the decree passed by the first Court dismissing plaintiff's suit with costs throughout.

Appeal allowed.

NOTE.—The following is the unpublished case referred to in the above judgment:—

Before Mr. Justice Chatterji, C.I.E., and
Mr. Justice Rattigan.

MUHAMMADI BEGAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS

Versus

FAIZ MUHAMMAD KHAN,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 1201 of 1901.

Harris, for appellants.

Devi Dial, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—The parties are Afghans of the Jhajjar Tahsil, Rohtak District. Briefly the facts of the case are that on the 5th June 1897, one Saadula Khan, the paternal uncle of plaintiffs, sold his house to defendant for a sum of Rs. 160, and on the 16th March 1900 he sold certain land to the same vendee for Rs. 50. The property so sold was admittedly ancestral. *7th Novr.* 1906.

After the death of the vendor, his nephews brought the present suit (on the 24th October 1903) for possession of the aforesaid property on the ground that the sales in question were without consideration and necessity and therefore not binding upon them. The defendant pleaded that the sales impeached were valid; that there was consideration and also necessity therefor, and that in any event by the custom of the parties' tribe, a proprietor had an unrestricted power of alienation even in respect of ancestral property.

The first Court held all defendants' pleas to be well founded and dismissed the suit. This decree was upheld by the Divisional Judge on appeal, but the learned Judge decided the case on the point of custom alone, and held that among the Afghans of the Rohtak District a sonless proprietor had an absolute right to dispose of his property, ancestral or acquired, as he pleased. Upon this finding it was obviously unnecessary for the lower Appellate Court to give any decision upon the questions of consideration and necessity. Plaintiffs have preferred a further appeal to this Court, and it has been strenuously argued on their behalf that the alleged custom is entirely opposed to the general rule obtaining among agricultural tribes in the Punjab, and that the *Rivaj-i-am* and Tupper's Customary Law (Volume II, page 178) do not support the conclusions of the learned Divisional Judge. We do not, however, feel called upon to determine this question as we are of opinion that the first Court was fully justified under the circumstances of the case in assuming that consideration and necessity were sufficiently established.

It is to be noted that at the date of the first sale (in 1897) the father of the plaintiffs was alive, and it is admitted that he did not die until about a year after the date of the second sale. He was the real brother of the vendor and had sons of his own, and it is difficult to believe that he would have taken no steps to invalidate those alienations as against his and his sons' reversionary interests had he not realised that in effecting the alienations his brother was acting prudently and economically, and that the sales were for "necessary purposes" In point of fact he seems to have acquiesced in the sales, and it is admitted that he took no action whatever, during his lifetime, to impugn their validity. It is only after his death and after the death of the vendor that this suit is instituted, some seven years after the date of the first sale. We can find no ground for suspecting collusion between plaintiff's father and the vendor. On the contrary, it was obviously in the interests of the former to challenge the sales had he not been assured of their validity. His abstraction from taking proceedings is therefore *per se* a good ground for presuming that he was satisfied that his brother had "necessity" for alienating the property. Then, again, there is the fact that the two sales were for small amounts, the consideration in the one case being Rs. 160 and in the other Rs. 50. We fail to see any ground for suspecting that these small sums were raised for

no sufficient purposes. Taking everything into consideration, and in view especially of the facts that plaintiffs' father apparently accepted the sales as valid, and that no steps were taken to impeach their validity until seven years after the date of the first sale, we do not think that plaintiffs can expect from defendant any more definite and clear proof of necessity than has been given in this case.

We do not feel called upon to give any opinion, under these circumstances, as to the power of a sonless proprietor in this tribe and *tahsil* to dispose of his ancestral property at his pleasure. The customary rule alleged by defendant is without doubt exceptional, but on the other hand it is well known that Afghan settlers, especially in those parts of the Punjab which were brought within the limits of this Province only after 1857 and then for administrative purposes, do not observe in their entirety the customary rules which are generally in vogue among the agricultural tribes of Punjab proper. The customs of the tribes in the Rohtak District as summarised in the volume of Tupper's "Customary Law" above referred to are not, we think, very clearly set forth, and the answers to questions do not appear to be altogether consistent (see paras. 24, 25, 27). Nor is it an easy task to construe the provisions of the vernacular *Riwaj-i-am* prepared by Pandit Maharaj Kishen, so far, at all events, as this question of the power of disposition possessed by a sonless proprietor is concerned. But upon the whole it would certainly seem that in this district such a proprietor is conceded rights which are considerably more extensive than the rights recognised by custom in other parts of this Province. As already observed we refrain from giving any definite opinion upon this point, and we merely allude to the subject for the purpose of pointing out that it may have been for this reason that plaintiff's father abstained from taking any action in respect of his brother's sales. For our own part we consider that it was more probably because he felt that these sales were for valid necessity that he acquiesced in them; but whatever may have been the reason for his inaction, we are of opinion that the first Court was justified in holding that the sales were valid and binding upon plaintiffs. We accordingly dismiss the appeal with costs.

Appeal dismissed.

No. 36.

Before Mr. Justice Johnstone and
Mr. Justice Muhammad Shah Din.

APPELLATE SIDE.

NIHAL DEVI AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

SHIB DIAL,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 1238 of 1905.

Hindu Law—Family debt—Sale of ancestral dwelling house in execution of decree—Wife or widow's right of residence.

Held, that the right of a Hindu wife or widow to reside in the ancestral family dwelling house is as a general rule superseded by debts incurred by her husband in the ordinary way of business and living.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 8th May 1905.

Beni Pershad, for appellants.

Bodh Raj, for respondent.

The judgment of the Court was delivered by

22*nd Decr.* 1906. JOHNSTONE, J.—The sole question for decision in this case has been thus stated by the learned Judge who admitted the petition for revision under Section 70 (1) (*b*) of the Act.

When a Hindu owner possesses one house (family house) only, are alienations made by him to be considered always subject to his wife's right of residence as wife or widow, or under what circumstances would this be or not be the case ?

He calls it the main question in the case. Inasmuch as the first ground in the petition has been abandoned it is now the sole question.

Ghasita Mal was the owner of the house. So far as I have been able to ascertain it from the record, the history of the house in suit has been as follows. [I may first note that the late Ghasita Mal's family are Khatris and subject to Hindu Law, as it is understood in the Punjab.]

Before 1895 Ghasita Mal was already in debt to the tune of Rs. 800, and for this sum a house (*not in suit*) was already mortgaged. On 14th November 1895 he borrowed of plaintiff Rs. 900 on a mortgage of that same house to pay off that

debt, the rest being taken for litigation and family expenses. On 26th July 1900 plaintiff, having sued Ghasita Mal, obtained a decree for Rs. 1,323, and costs in the Court of Additional District Judge. He proceeded to execute, and objections made to attachment and sale were disallowed under Section 281, Civil Procedure Code. The mortgaged property was sold by auction for Rs. 1,125, of which Rs. 1,068-12 net, came to plaintiff. There still remained Rs. 235 due, and under two other decrees Rs. 195 was also due. In consideration of these two items (to which was added Rs. 20 registration, etc., expenses) Ghasita Mal mortgaged *the house in suit* for Rs. 450 on 26th July 1901. These decrees were all against Ghasita Mal. On 7th August 1903 plaintiff filed a suit upon the deed just mentioned, and on 31st August 1903 obtained a decree for Rs. 506-10 and costs chargeable on the house. Execution was sued out in October, and soon after Ghasita Mal died on 17th February 1904 plaintiff asking successfully that his minor son (now defendant No. 3) be substituted for him. Meantime the widow (defendant No. 1) in December 1903 had filed objections toexecution against the house, but these were dismissed for default on 18th March 1904. Again, on 1st June 1904, the widow filed objections under Section 332, Civil Procedure Code, and on 11th August the executing Court ruled that her rights of residence must be reserved in the auction sale of the house. On 30th August 1904 plaintiff brought this present claim for a declaration that the house was liable to attachment and sale in execution of his decree without any reservation of the lady's right of residence and he made the lady and her minor son and daughter defendants.

We have been referred to a number of rulings and also one or two text-books. Mayne's ideas regarding widow's right of residence in the ancestral house are given at para. 465 of the 7th Edition of his book on Hindu Law and Usage, the preceding paras. being taken up with a discussion of her right to maintenance from her husband's estate. In Banerji on Hindu Law of Marriage and Stridhan (1879), pages 150, *et seq*, the same questions are discussed at length, and at page 204 a distinction is drawn between a widow's claim upon the ancestral residence when it is in the hands of a member of the family, or in the hands of an outsider to whom it has been alienated in order to defeat her just claims, and her claim upon it when it has been alienated to an outsider in the ordinary way for payment of family debts.

On behalf of the widow appellant Mr. Beni Pershad has quoted the following rulings : *Bhikan Das* v. *Pura* (1), *Talemand Singh* v. *Rukmina* (2), *Venkatammal* v. *Andyappa Chetti* (3), *Fakir Chand* v. *Mussammat Chiranji* (4), *Jowahir Singh* v. *Mussammat Ram Devi* (5).

On the other side we have had our attention drawn to Civil Appeal No. 945 of 1900 (Chief Court), *Jamna* v. *Machul Sahu* (6), *Soorja Kaer* v. *Nath Bakhsh Singh* (7), *Natchiarammal* v. *Gopala Krishna* (8), *Ramamaden* v. *Rangammal* (9), *Manilal* v. *Baitara* (10), *Mussammat Karam Kaur* v. *Mussammat Kishen Devi* (11), *Shri Bihurilalji* v. *Bai Rajbai* (12), *Mussammat Gomti* v. *Chuttan Lal* (13).

These are relied upon chiefly to establish the distinction that, when the ancestral house has been alienated for *family* debts, the widow's right of residence is not recognised.

In *Bhikhan Das* v. *Pura* (1), the question was whether in view of the widow's claim to reside in the ancestral house, a mortgage of it by the late male owner could be enforced by its attachment and sale. This was decided in the affirmative; but the further question whether the auction purchaser could eject the widow was not decided. This case helps neither party here.

In *Talemand Singh* v. *Rukmina* (2), the facts are somewhat complicated and the judgment very brief. The finding is that the widow of a member of a joint Hindu family can claim a right of residence in the family dwelling house and can assert such right against the purchaser of such house at a sale in execution of a decree against another member of such family. The house was owned jointly by the widow's late husband and a cousin of his. The debt was the latter's debt and the decree was against him alone. The widow had resided in the house after her husband's death and before the decree aforesaid was passed or executed. This ruling then does not seem to me to conflict with the theory, relied

(1) *I. L. R., II All.*, 141
(2) *I. L. R., III All.*, 353.
(3) *I. L. R., VI Mad.*, 130.
(4) 84 *P. R.*, 1883.
(5) 112 *P. R.*, 1888.
(6) *I. L. R., II All.*, 315.
(7) *I. L. R., XI Cal.*, 102.
(8) *I. L. R., II Mad.*, 126.
(9) *I. L. R., XII Mad.* 250, *F. B.*
(10) *I. L. R., XVII Bom.*, 398.
(11) 39 *P. R.*, 1896.
(12) *I. L. R., XXIII Bom.*, 342.
(13) 190 *P. R.*, 1889.

on by the respondents in the present case, of the non-recognition of the widow's rights when the alienation was for family debts.

In *Fakir Chand* v. *Mussammat Chiranji* (1), we find the same thing. The alienation was found to have been effected for purposes not binding on the family; and a similar finding in *Jowahir Singh* v. *Mussammat Ram Devi* (2), renders that ruling also useless to appellants. There the debt was an extravagant one for the purpose of the marriage of one of the two sons of the deceased husband of the lady claiming residence, and it was incurred by the two sons and not by the deceased.

In *Venkatammal Andyappa Chetti* (3), it was held that in the *circumstances* of that case the widow's right of residence must be recognised and that the house, about to be sold for a mortgage-debt, must be sold subject to that right. Here again we must take the *dictum* as applying to the facts of the case itself and to similar states of facts only. The debts were incurred by the lady's son after her husband's death in certain large transactions, not for the joint benefit of the son and the lady.

Turning to the cases quoted by Mr. Sawhney for respondent, I note that Civil Appeal No. 945 of 1900 (Anderson and Robertson, Judges), lays it down that a widow "should not "be turned out of the family house unless the debts on "account of which alienation is being made have been "shewn to the satisfaction of the Court to be *bonâ fide* family "debts;" and on the facts the finding was that the consideration for the alienation was unjustifiable, if not immoral. With the dictum in this ruling I fully agree. It seems to me to provide a simple, intelligible and just rule; and it applies in the present case, for I have no doubt at all that the debt here was a family debt, incurred by Ghasita Mal himself in the ordinary way of such things, for no immoral purpose and with no similar design to injure the widow or the children. The Muhammadan wife or widow is a *creditor* of her husband on account of her dower, which is a debt: and she is perhaps, as regards his estate, a creditor preferred to all other creditors. But a Hindu wife or widow is no creditor on account of her maintenance or right of residence. If the estate has dwindled to nothing as a consequence of family expenditure and family debts incurred by her

(1) 84 *P. R.*, 1883. (2) 113 *P. R.*, 1888.
(3) *I. L. R.*, *VI Mad.*, 130.

husband in the ordinary way of business and living, I cannot see that any thing remains for her any more than for her husband or her husband's heirs.

These being my views I need hardly discuss at length any more of Mr. Sawhney's precedents. I will, however, merely state that in *Jamna* v. *Machul Sahu* (1), the husband had made a gift of his whole estate to his nephew, and of course the widow's rights were held not destroyed; that in *Natchiaramal* v. *Gopala Krishna* (2) a sale for a family debt was held sufficient to protect property sold in satisfaction of that debt from widow's claim to maintenance, that *Ramanadan* v. *Rangammal* (3), distinguishing *Venkatammal* v. *Audyappa* (4), lays it down that where the debt was a just family debt, the widow's right of residence in the house sold for that debt is not recognised; that in *Manilal* v. *Baitara* (5), the test in such cases was stated to be whether the mortgage was for the benefit of the family or was in any way in fraud of the widow's rights; that in *Mussammat Karam Kaur* v. *Mussammat Kishen Devi* (6), the debt was a just family debt and apparently another house was available for the widow, who therefore was held not entitled to claim residence in the ancestral house even from a purchaser with notice of her claim. The other cases I need not mention at all.

My view, then is that this appeal must fail. I would dismiss it with costs.

Appeal dismissed.

No. 37.

Before Mr. Justice Robertson and
Mr. Justice Lal Chand.

APPELLATE SIDE.

DEVI DIAL AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

UTAM DEVI AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 150 of 1905.

Res judicata—*Alienation by widow—Suit by reversioner to have such alienation declared null and void—Compromise of such suit between the widow in possession and the reversioner—Subsequent suit by the son of such reversioner—Estoppel.*

Where a person entitled to object to an alienation made by a widow brought a suit to have such alienation declared null and void and ultimately

(1) *I. L. R., III All.*, 315. (4) *I. L. R., VI Mad.*, 130.
(2) *I. L. R., II Mad.*, 126. (5) *I. L. R., XVII Bom.*, 396.
(3) *I. L. R., XII Mad.*, 260, *F. B.* (6) 89 *P. R.*, 1896.

entered into a compromise in good faith with the widow, *held* that he and his successors in title were bound by it and that a similar suit by the son of such reversioner was barred by the rule of *res judicata*.

First appeal from the decree of Lala Kidar Nath, District Judge, Jhang, dated 10th November 1904.

Sukh Dial, for appellants.

Ishwar Das, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts of this case are as follows:— *7th Decr.* 1906.
The plaintiffs sue for a declaration that the transfer of certain lands, houses and date groves by Mussammat Uttam Devi, defendant No. 1, in favour of Bhoja Ram, defendant No 2, who is her and her husband's daughter's son shall not affect their reversionary rights after the death of Mussammat Uttam Devi.

The defendants pleas are that on 7th June 1873 the plaintiffs or their predecessors in title brought a suit for a declaration of a similar nature, that this suit was settled by a compromise under which the then plaintiffs got immediate possession of certain property which they have enjoyed for more than thirty years and to which otherwise they would have had no claim until the death of Mussammat Uttam Devi, and gave up all claim in present or in future as regards the balance of the property. The defendants plead in virtue of these facts that the plaintiff's suit is barred as *res judicata*.

The parties who brought the suit in 1873 were in fact Ram Jas, father of plaintiffs Nos. 1, 2, 3, and the plaintiffs Nos. 4 and 5 themselves, by Ram Jas, their next friend, Ram Jas being their full uncle.

When plaintiffs Nos. 4 and 5 came of age they never attempted to repudiate the compromise or to restore to the *status quo ante*, on the contrary they proceeded to deal with the property acquired in virtue of the compromise only as their own and to alienate it, and they are, it is urged, clearly estopped from trying to set the compromise aside now.

The plaint of the 1873 case has been destroyed, but it is clear that, the parties being Brahmans, there was a conflict of interest between the plaintiffs and Bhoja Ram, the daughter's son of the deceased Ram Narain whose property was in dispute, and of Uttam Devi, his widow. The plaintiffs brought a suit, they and the widow at that time represented the

whole estate, and they in good faith entered into a compromise which may have been exceedingly beneficial to them. Upon no principle of equity could they be allowed to back out of it without disgorging the proceeds of the property which they have enjoyed for over thirty years. If they seek justice they must do it, and first make restitution, which they do not in any way propose to do.

The learned pleader for the appellants addressed us at very great length, but his two principal arguments appeared to be, first that all the recorded decisions which are dead against the highly inequitable doctrine set forward, deal with compromises, regarding specific acts of alienation, and secondly, that the reversioners in 1873 were not competent to "improve" the widow's estate, and to make it, as regards some part of the estate into an absolute one instead of the ordinary widow's estate for life. Neither of these propositions appears to us to carry any weight. The same principles apply whether the alienation is one of a part or of the whole estate, and here it is clear that in 1873 the whole estate was concerned and that some cause of action had actually arisen. The plaintiffs themselves insisted that the order of the court should be under Section 98 of the Act then in force, Act VIII of 1859, and the judgment recites the terms of the settlement. It is clear, therefore, that the decision is evidence of the compromise and did not require registration. The point that the document required registration indeed was not strongly pressed in the appeal.

In 1873 the whole of the reversioners then having any apparent rights sued and entered into a compromise in *bonâ fides*. They and their successors in title are clearly bound by their action; such action can only be attacked by a more remote or subsequent reversioner on the ground of *mala fides*. The principle that in respect of ancestral land, succession is a right derived from the common ancestor who first acquired the land, is not one which interferes with the ordinary application of the principles of *res judicata*, limitation and the like. If it were so held the result would be monstrously inequitable, and there would never be any finality in regard to such cases as that now before us.

In *Labh Singh* v. *Gopi and others* (1), the learned Judges say: "The person in enjoyment of property, or entitled to

(1 15 P. R., 1903.

"the right to object to the alienation, must be allowed a "certain latitude of judgment as to the mode in which the "property or the right should be protected when invaded or put "in jeopardy by others, and in our opinion his successors and "descendants must be held to be bound by the action so taken "by him." It would be intolerable and would put an end to all "finality in proceedings in a court of justice if it were otherwise. In *Buta* v. *Khuda Bakhsh and others* (1), the learned Judges say :—

"It appears to us that the right of the present plaintiff "to sue depends entirely upon the question whether his father's "action was taken *bonâ fide* for the protection of the estate....." and finding that the father's action had been *bonâ fides* they held the son to be bound by a compromise which his father had entered into.

With these views we entirely concur, holding them to be the only possible principles upon which justice can be administered in fairness and equity. As regards the second point we may simply add that it is quite immaterial whether the compromise did or did not have the effect of improving the widow's estate as regards the property left to her. The plaintiffs are bound by the compromise whatever its effect in that respect. The compromise is a complete answer to the claim.

The present claim appears to us to be particularly inequitable, not to say impudent. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 38.

Before Sir William Clark, Kt., Chief Judge.

ISHAR,—(DEFENDANT),—APPELLANT,

Versus

PARTAP SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1247 of 1905.

Suit by a reversioner for possession of immovable property—Defendant in possession under an alleged adoption—Limitation Act, 1877, Article 118—Starting point of limitation.

Held, that Article 118 applies to every suit filed for whatever purpose where the validity or invalidity of an adoption comes into question, and

(1) 97 P. R., 1906.

the time begins to run from the date the alleged adoption became known to the plaintiff.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Jullundur Division, dated 30th August 1905.

Golak Nath, for appellant.

Muhammad Shafi, for respondent.

The judgment of the learned Chief Judge was as follows :—

14th Decr. 1906. CLARK, C. J.—The facts of this case are that on 17th December 1889 Bhup Singh executed and registered a deed by which he made Ishar Singh, defendant, his daughter's son, his heir.

Bhup Singh died on 25th December 1890 and mutation of names was made in favour of his widow, Mussammat Kirpo; she died on 6th July 1893, and on her death mutation of names was made in favour of defendant in August 1893.

On 17th August 1904 plaintiff as reversioner of Bhup Singh brought this suit for possession of Bhup Singh's land.

The first question for decision is whether the deed of 17th December 1889 was an adoption or a will. The document describes itself as a will and was registered as a will. Its terms are that Bhup Singh had no son but a daughter's son, age 12, whom he had brought up as a son and who had been living with him for a long period, and whose marriage he had made, and who had cared for him in the past, and was likely to care for him in the future, which no reversioner was likely to do; he therefore wills his land to him after his death.

This is, no matter how described, with which Bhup Singh probably had nothing to do, simply the ordinary deed of appointment of an heir, and there was prior and subsequent treatment as heir.

The deed in *Bhupa* v. *Nagahia* (1), also described itself as a will, whereas it in reality was an appointment of an heir.

In the mutation proceedings on the death of Mussammat Kirpo it was as adopted son so described, that mutation was made in favour of Ishar Singh. I am therefore of opinion that the deed should be treated as a deed of appointment of heir or customary adoption.

(1) 68 *P. R.*, 1903.

It is argued that as it was registered as a will a copy could not be obtained till Bhup Singh's death but as Bhup Singh died in 1890, this is not of much consequence, and it is clear that in 1893, when mutation was made Ishar Singh's claim as adopted son was well known.

It also appears that in June 1891 the present plaintiff by his mother sued one Man Singh to set aside an alienation made in his favour by Bhup Singh, and the fact of adoption was pleaded by Man Singh as barring plaintiff's right to sue. The finding was that the adoption was not valid, but that finding is of no force against Ishar Singh, who was no party to the suit, and it shows clearly that plaintiff must have known of the adoption as far back as 1891.

Plaintiff appears to have attained majority in 1895, he entered the army in 1901, and no good reason is put forward for his not having sued before.

The question then arises whether plaintiffs' suit is barred by limitation under Article 118, Schedule II of the Limitation Act.

There are numerous decisions of this Court holding that such suit is barred by limitation.

They are all quoted in *Bhupa* v. *Nagahia* (1).

The matter was also discussed at some length in *Heru* v. *Sidhu* (2). Two of the Judges (Chatterji and Anderson, JJ.) were of opinion that such suits for possession were barred by limitation when the suit had not been brought within the period prescribed in Article 118.

The question with reference to adoption did not actually arise in the case. I expressed no opinion on the substantive question. I only expressed an opinion that the remarks of the Privy Council in *Mukherjus's* case (3), should not be taken to lay down any new principle or do anything more than re affirm what was laid down in *Jagadamba Chaudhrian* v. *Dakhina Mohun Roy Chowdhri* (4).

On the substantive question I see no sufficient reason for departing from the course of decisions of this Court and I hold that plaintiff not having sued within the period prescribed by Article 118, his suit is barred by limitation. It remains to deal with one argument used on behalf of plaintiff.

(1) 68 P. R., 1903.
(2) 66 P. R., 1903, F. B.
(3) I. L. R., XXV Bom., 357, P. C.
(4) I. L. R., XIII Calc., 308, P. C.

It was argued that as Mussammat Kirpo died in 1893, no suit would lie after that date for a declaration that the adoption was invalid; that only a suit for possession would lie, and that therefore Article 118 could not apply: the fact that plaintiff was a minor at the time preventing the limitation from beginning to run between the execution of the deed and 1893.

It is not possible to say that suit for declaration of invalidity of adoption would not lie, though possession of the land would be a consequence of success, yet it would not be the only consequence, and such suit might be brought for other reasons than possession of the land, *ex gr.*, for the honour of the family, or to prevent collateral succession.

Besides the Privy Council ruling in Jagadamba's case was that a suit for possession where there was an effective adoption in dispute was a suit to set aside an adoption and attracted the consequence that the time for suing ran from the date of adoption. I therefore overrule this argument.

I accept the appeal and holding the claim barred by limitation, I dismiss the suit with costs throughout.

Appeal dismissed.

No. 39.

Before Mr. Justice Johnstone and Mr. Justice Shah Din.

PURAN SINGH AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

KESAR SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 770 of 1905.

Mortgage—Mortgage for a fixed period—Representative of the mortgagor not allowed to redeem before the expiry of the term—Long term alone does not amount to clogging the equity of redemption.

Held, that a period fixed for redemption by the parties in a mortgage bond cannot be regarded as one fixed without legal necessity and as such inequitable and unenforceable on the mere ground of its being unusually long, and the representative of the mortgagor cannot be allowed to redeem before the term fixed on that behalf especially where it is shown to have been fixed by the mortgagor in good faith and with due regard to his best interests.

Further appeal from the decree of Kazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 24th March 1905.

Gouldsbury, for appellants.

Sukh Dial, for respondents.

The judgment of the Court was delivered by

SHAH DIN, J.—The facts of this case are briefly as follows :— *22nd Decr.* 1906.

By a registered deed, dated 9th September 1903, Karam Singh, father of the plaintiffs, mortgaged 141 *kanals* 1 *marla* of his ancestral land to the defendants for Rs. 1,467 for a period of twenty years. Prior to this mortgage Karam Singh had mortgaged 174 *kanals* 3 *marlas* of land to Bhagwan Singh and others for Rs. 1,287, and 14 *kanals* 18 *marlas* of land to Ishwar Singh, defendant No. 2, for Rs. 120, the total area of the land covered by these two mortgages being 189 *kanals* 1 *marla*. It was out of this area that Karam Singh in 1903 mortgaged to the present defendants 141 *kanals* 1 *marla* for twenty years, the latter agreeing as one of the stipulations of the contract of mortgage to redeem both the previous mortgages referred to above. By this arrangement Karam Singh intended to get back 48 *kanals* of his land free from encumbrance, which, added to the 15 *kanals* which he already was possessed of out of his ancestral holding of 203 *kanals*, would have amounted to a suitable area of agricultural land out of which he could have hoped to make a living. The present mortgagees were, it appears, obliged to institute a suit against Bhagwan Singh and others, prior mortgagees, for redemption of 174 *kanals* 3 *marlas* of land, and succeeded in getting a decree for redemption of the entire area on payment of Rs. 1,319. Meanwhile, Karam Singh, the original mortgagor, appears to have died ; and his minor sons have brought the present suit for possession of the land mortgaged by their father to the defendants, alleging that the mortgage in dispute was effected without consideration and legal necessity and praying that possession be decreed to them without payment of any sum or, in the alternative, on payment of such sum as the Court may deem proper to fix. It is noteworthy that Bhagwan Singh, one of the prior mortgagees, against whom the defendants got a decree for redemption not long before the institution of the present suit, appeared in the first Court as the special agent of Mussammat Rami, next friend of the minor plaintiffs.

The first Court found that the mortgage was effected for legal necessity so far as the amount of the mortgage money was concerned, but it held that the period of twenty years fixed for redemption of the mortgage was improper an inequitable and should not be enforced against the present plaintiffs. The plaintiffs' claim for present possession was, therefore, decreed on payment of Rs. 1,499-8-0. The plaintiffs accepted this decree, but the defendants mortgagees appealed to the lower Appellate Court, which upon a full consideration of the facts as set out above, has held that the term of twenty years embodied in the mortgage deed is not, under all the circumstances of the case, inequitable, and that the plaintiffs are bound by the mortgage as it stands.

The plaintiffs have appealed to this Court. Before I dispose of the appeal on the merits, I must consider the question of the amount of Court fee leviable on the memorandum of appeal, which has been raised by Mr. Gouldsbury on behalf of the appellants. It seems to me that the suit as laid was clearly one for possession of land, pure and simple and not one for redemption of mortgage on payment of a certain sum due as mortgage money. In my opinion the nature of the suit as originally brought is in no way affected by the fact that the first Court decreed possession of the land on payment of a certain amount, and that so far as that amount is concerned the decree was accepted as correct by the plaintiff. The value of the suit for purposes of Court fee was therefore correctly stated as being Rs. 55-2-6, and the amount of the fee leviable on the memorandum of appeal is Rs. 4-8-0. So far I accept Mr. Gouldsbury's argument as sound, but I cannot find any provision of the Court Fees Act (VII of 1870) under which this Court is empowered to direct the refund of the additional Court fee paid by the appellants on demand by the taxing officer of this Court.

On the merits, after giving full weight to the arguments of the learned counsel for the appellants I am unable to hold that the term of twenty years in question was not fixed by Karam Singh in perfect good faith with due regard to his best interests or to that of his heirs, or that it is of such an inequitable character that it should not be enforced in this case. There is absolutely no evidence on the record to show, nor was there the remotest suggestion made in the course of the argument in this Court, that Karam Singh was in any way inimically disposed towards his sons, the present plaintiffs, or that he

intended to clog the equity of redemption with a view to deprive them of their means of livelihood so far as those depended upon the income of the land in suit. There is also considerable force in the suggestion that it is at the instigation of Bhagwan Singh against whom the defendants obtained a decree for redemption, that the suit has been brought in the name of the minor sons of the mortgagor. It is also worthy of remark that, whereas the plaintiffs came into Court alleging that the mortgage was wholly without consideration and devoid of legal necessity, they accepted as correct the decree of the first Court which made them responsible for payment of the entire mortgage debt. Moreover it is clear, as the lower Appellate Court has observed, that so far from the mortgage in question having been effected, as an act of wanton waste, the plaintiffs' father was a gainer by the transaction, which resulted in 48 *kanals* of land being left to him and his heirs unencumbered. The evidence on the record is in my opinion insufficient to show, as has been contended for the appellants, that the market value of the land in suit is more than Rs. 200 per *ghumaon*, or that it could have been mortgaged for Rs. 1,500 without a definite period being fixed before the expiry of which redemption could not take place. The evidence of the *patwari* is wholly inconclusive on this point for the simple reason that the instances of mortgage and sale to which he refers are of no value without there being detailed particulars thereof which are admittedly wanting in this case.

The rulings relied upon by Mr. Gouldsbury do not in my opinion help him. In *Sher Muhammad* v. *Fatteh Din* (1), the facts were peculiar and it was in view of those facts that this Court held that the term of fifty years as embodied in the mortgage deed in that case was inequitable, and could not therefore be enforced. Moreover, there the market value of the land was found to be about Rs. 6,000 and the mortgage money was only Rs. 1,300. In the decided cases cited with approval and followed in *Sher Muhammad* v. *Fatteh Din* (1), *Sukh Dial* v. *Anant Ram* (2), *Sayad Abdul Hak* v. *Gulam Jilani* (3), *Kanaran* v. *Kuttooly* (4), the facts were wholly dissimilar to those of this case, and the conditions in restraint of the right of redemption which formed the subject of dispute in those cases were obviously of such an onerous and inequitable character that hardly any court in this country could have enforced them. The decisions

(1) 6 *P. R.*, 1902.
(2) 131 *P. R.*, 1894.
(3) *I. L. R. XX Bom.*, 677.
(4) *I. L. R.*, *XXI Mad.*, 110.

really in point are those cited by the learned pleader for the respondents, *viz.*, *Milkhi and others* v. *Fattu and others* (1) (Civil Appeal No. 11 of 1899 unpublished), and Civil Appeal No. 846 of 1904 unpublished (2), and following these decisions, I hold that the term of twenty years agreed upon between the plaintiffs' father and the defendants in this case was neither inequitable nor one fixed without legal necessity, and cannot be set aside as unenforceable between the parties.

I would, therefore, confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

No. 40.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

SHAH NAWAZ AND OTHERS,—(Defendants),—APPELLANTS,

Appellate Side.

Versus

AZMAT ALI,—(Plaintiff),—RESPONDENT.

Civil Appeal No. 493 of 1905.

Custom—Alienation—Sale by sonless proprietor—Locus standi *of reversioner—Gilani Sayads of* Mauza *Masania*, tahsil *Batala*, *Gurdaspur District —Muhammadan Law—Religious purposes, justification for.*

Held, that in matters of alienation and succession Gilani Sayads of *mauza* Masania, *tahsil* Batala, Gurdaspur District, who have for nine generations past followed agriculture as a land-holding occupation, were governed by the general rules of agricultural customs of the Province and not by the Muhammadan Law, and that the alienation of ancestral land by such a proprietor was consequently subject to restriction, but he was justified in raising money in order to perform the *aqiqa* ceremony of his deceased son and in alienating a small portion of his ancestral land for that purpose.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 1st February 1905.

Muhammad Shafi, for appellants.

Pestonji Dadabhoy, for respondent.

The judgment of the Court was delivered by

19*th Decr.* 1906. Lal Chand, J.—The parties to this suit are Gilani Sayads of *mauza* Masania in *tahsil* Batala, district Gurdaspur. On 28th February 1895 Madad Ali, defendant, sold 112 *kanals*

(1) *P. L. R.*, 40, 1903. (2) *P. W. Reporter*, p. 152.

and 12 *marlas* of land to Muhammad Hussain, defendant 2, for Rs. 1,500 as entered in the sale deed. Defendants 3 and 4 sued for pre-emption and obtained a decree for possession on payment of Rs. 1,200 which was held to be the price fixed and paid for the sale. The present suit was instituted in May 1902 by Azmat Ali, plaintiff, brother of Madad Ali, vendor, for a declaration that the sale was not effected for consideration and necessity, and shall not affect his reversionary interest. The Divisional Judge has held that there was no necessity for an out and out sale, but that the sum of Rs. 1,200 was *bonâ fide* and that there is reason to infer from plaintiff's silence that it was a valid and genuine transaction. He has accordingly decreed the suit subject to payment of Rs. 1,200. Both parties have appealed. It is contended for defendant appellants that Madad Ali, vendor, had an unrestricted power to alienate and that in any case the whole sum of Rs. 1,200 being found to have been borrowed for necessity, the sale ought to have been upheld as an absolute and permanent alienation. For the plaintiff it is contended that no valid necessity for the whole amount of Rs. 1,200 is made out, and a decree should have been passed subject to payment of Rs. 500 only as due on prior encumbrances. After hearing arguments and referring to the record, we have very little difficulty in holding that Madad Ali had only a restricted power of alienation, and that plaintiff, his brother, is competent to question the validity of the sale in suit. It is admitted that the whole village of Masania is owned by the Sayads as a village community. It was founded by a common ancestor, nine generations back, and it is proved on the record that these Sayads cultivate their own lands personally and of others as tenants. They occasionally receive gifts from religious disciples, but the income so earned is not shown to form their principal source of livelihood. Their chief occupation evidently is agriculture, and they have been classed as agriculturists in the district under the Land Alienation Act. The facts, therefore, are in the main similar to *Uttam Singh* v. *Jhanda Singh* (1), a case of Bedis of Hoshiarpur, and the mere fact that the parties are Sayads by caste, is altogether inconclusive, as in several cases in different parts of the Province Sayads have been found to follow agriculture as their calling and the customs of agricultural tribes as the dominant rule of their personal law. Moreover, it is proved on the present record that in several matters

(1) 21, *P. R.*, 1896.

relating to succession and alienation these Sayads have adopted agricultural customs, and a separate *Riwaj-i-am* incorporating their usages was prepared and attested at settlement in 1868. There is, therefore, ample reason for holding that the parties are agriculturists and that the initial presumption against an unrestricted power of alienation is applicable to them. It was, however, contended for defendants that such presumption, if any, was rebutted in the present case by a number of alienations effected in the village which was never challenged. These alienations, altogether seventeen in number, were proved by filing certain extracts from the mutation register, but as pointed out by the first Court no attempt was made to indicate the circumstances under which these alienations were effected. It is quite conceivable that some may have been effected for necessity and certain others with consent or in favour of the next reversioners. Such instances in no way rebut the initial presumption against an unlimited power of alienation. It is not sufficient to rebut such presumption that a number of alienations were effected by members of the tribe to which the parties belong, unless it is further proved that the alienations effected were such as are unauthorised by the customary law. We, therefore, hold that the defendants have not succeeded in rebutting the initial presumption that Madad Ali had only a restricted power of alienation. Plaintiff, therefore, is competent to question the validity of the sale in dispute and the further question for consideration is whether the sale was effected for necessity. There was not such delay in instituting the suit as would support an inference of acquiescence. It is further unnecessary to decide in this case whether the Divisional Judge was justified in cancelling the sale and in passing only a conditional decree having found necessity for the entire amount for we are inclined to hold on plaintiff's appeal that the whole amount of Rs. 1,200 was not paid or borrowed for necessity. Only two items are in dispute, *viz.*, Rs. 200 alleged to have been spent by Madad Ali on the *aqiqa* ceremony of his son and marriage of his first cousin, and Rs. 500 which is stated to have been invested some four months after sale in a mortgage which was admittedly redeemed three years later. As regards the last item we fail to see any necessity. There obviously existed no necessity for such investment when the sale in dispute was effected, especially as Madad Ali then held and owned other lands which he had purchased from his brother in 1892 for Rs. 700. The investment could not be treated even as an act

of proper management in this case as only a temporary mortgage was taken four months later which after redemption left the money again in Madad Ali's hands as altogether uninvested. We cannot, therefore, hold that there was any necessity for Rs. 500. As regards Rs. 200 stated to have been spent by the vendor on the *aqiqa* ceremony of his son and the marriage of his first cousin we see no good reason to disallow the amount either as unproved or as unnecessary. The expenditure incurred for a religious ceremony is a necessity and there is no allegation here that the amount so spent was extravagant. As regards the money defrayed on marriage of Mussammat Fatima, first cousin of the vendor, we hold that it was a necessity in this case as Madad Ali received the inheritance which would have gone to Fatima's father but for the circumstance that he died during the life-time of his father, the common ancestor of the parties. Plaintiff himself has shared in the inheritance so left, and it is not open to him to contend that the marriage expenditure to which he was bound to contribute equally was unnecessary. We, therefore, hold that there was necessity for Rs. 700 including Rs. 500 due to prior encumbrances, and decree plaintiff's appeal accordingly. The defendants' appeal is dismissed and plaintiff's accepted so far as to reduce the amount held payable by him from Rs. 1,200 to Rs. 700. Under the circumstances we leave the parties to bear their own costs throughout as they have succeeded about equally.

No. 41.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

AMRIT LAL AND ANOTHER,—PLAINTIFFS,

Versus

BHAGWANA AND OTHERS,—DEFENDANTS.

} REFERENCE SIDE.

Civil Reference No. 27 of 1906.

Jurisdiction of Civil or Revenue Court—Arrears of rent of land—Suit upon bond given for arrears of rent—Punjab Tenancy Act, 1877, Section 77 (3) (n).

Held that a suit based upon a bond executed for arrears of rent of land is one cognizable by the Civil Courts, and does not fall under clause (n) of Section 77 (3) of the Punjab Tenancy Act, 1887.

Case referred by S. Clifford, Esquire, Divisional Judge, Delhi Division, on 13th April 1906.

This was a reference to a Division Bench made by Rattigan, J., to determine whether a suit based upon a bond alleged to have been executed for arrears of rent of land is cognizable by a Civil or Revenue Court.

The order of reference by the learned Judge was as follows :—

21st May 1906. RATTIGAN, J.—Defendant executed a bond for Rs. 66-12-0 in favour of plaintiff, the consideration being arrears of rent. Plaintiff sues on this bond. Is the suit cognisable by a Civil or a Revenue Court? In my opinion, it is clearly cognizable by a Civil Court as being a claim based upon a bond, the claim for rent having merged in the right given by the bond which was executed in satisfaction of the claim for rent. This was, I understand, the view adopted by Chatterji, J., in Civil Reference No. 95 of 1905, but as Frizelle, J., has taken a different view in Civil Reference No. 55 of 1897, and as the question is one which should be authoritatively settled, I refer the case to a Division Bench.

The judgment of the learned Judges who constituted the Division Bench was delivered by—

9th Jany. 1907. JOHNSTONE, J.—Arrears of rent of land became due to plaintiff by defendant, who thereupon executed a bond in favour of plaintiff for the amount of those arrears. Plaintiff asserts this and sues on the bond. There being a conflict of rulings by this Court in regard to the question of jurisdiction of Civil as opposed to Revenue Courts in such cases, the Munsif before whom the case was pending has made a reference to this Court on the point, giving his own opinion that the suit is a revenue one and falls under Section 77 (3) (*n*), Punjab Tenancy Act, 1887.

The conflicting rulings are that of Frizelle, J., in Civil Reference No. 55 of 1897, decided on 20th November of that year, and that of Chatterji, J., in Civil Reference No. 95 of 1905, decided on 13th December 1905. In the former order no reasons whatever are given, and the reasoning in the reference itself does not commend itself to us. But Chatterji, J., in the latter ruling held, on grounds which appear to us quite sound, that a suit of this kind is really a Civil suit. He said : "The suit is laid "on the bond and it clearly lies in the Civil Court." The claim "for rent has been discharged by the bond, and plaintiff, if he

"had sued for it, would have been successfully met by the plea "that a bond with one surety had been given in lieu of it."

We fully endorse this reasoning and we return the papers to the learned Munsif and direct him to hear the case.

No. 42.

Before Mr. Justice Johnstone.

HARI SINGH,—(DEFENDANT),—PETITIONER,

Versus

NIKA SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

REVISION SIDE.

Civil Revision No. 2057 of 1905.

Valuation of suit—Suit to declare an alienation of land to be not binding after alienor's death—Value for purposes of further appeal—Punjab Courts Act, 1884, Section 40 (b).

Held that for purposes of Section 40 (b) of the Punjab Courts Act, 1884, the value of a suit for a declaration that a mortgage by a widow of agricultural land would not be binding after the alienor's death, is the value of the land calculated at thirty times the revenue and not the amount of the encumbrance in dispute.

Bakhu v. *Jhanda* (1) followed.

Petition for revision of the order of Captain B. O. Roe, Additional Divisional Judge, Ferozepore Division, dated 14th February 1905.

Roshan Lal, for petitioner.

Duni Chand, for respondents.

The judgment of the learned Judge so far as is material for the purposes of this report was as follows :—

JOHNSTONE, J.—The first question in this case is whether an appeal lies or not The suit is for a declaration that a certain mortgage deed in which the consideration was stated at Rs. 300 but the land mortgaged by which is worth, according to the 30 times *jama* rule, only Rs. 60-3-6, shall not affect the reversionary rights of the plaintiff. I take this to be in effect a suit for a declaration that plaintiff is reversioner to land, worth Rs. 60-3-6 according to the said rule, regardless of any encumbrance created by the widow defendant (1). *7th Jany.* 1907.

(1) 145, *P. R.*, 1892.

The first Court dismissed the claim, but the lower Appellate Court decreed it, and the mortgagee came to this Court with a revision petition. In calling for files my brother Kensington noted that an appeal lay as of right, and this opinion was repeated by my brother Rattigan, when the case came up with files. Now that the case has come on for regular trial the point has been raised by the respondent's counsel and I am entitled and indeed bound to deal with it. He relies upon *Bakhu* v. *Jhanda and others* (1), while Mr. Roshan Lal for the mortgagee relies on *Ghulam Ghaus* v. *Nabi Bakhsh* (2).

The former ruling has been referred to in the latter, and has been also followed and has been declared good law in very recent rulings of this Court. The suit there was also for a declaration against an alienation for Rs. 1,300, the value of the land by the 30 times *jama* rule being Rs. 770. The critical value in that case was Rs. 1,000. It was held that Rs. 770 was the value. In *Ghulam Ghaus* v. *Nabi Bakhsh* three cases were under consideration. The first two were pre-emption suits, and from them it is not suggested that we can deduce any authority to govern cases like the present. The third was a claim by a mortgagee for possession of land, in which it was found by the Court below that the sum of money, on payment of which the mortgagor might redeem, was over Rs. 1,000, while the value by the 30 times *jama* rule was under Rs. 1,000. Here it was held that the value of the property in suit should be taken as over Rs. 1,000. In the second paragraph of the head note this suit is called a suit for redemption, which is clearly a misdescription.

In my opinion I must follow *Bakhu* v. *Jhanda and others*. The ruling of Ghulam Ghaus is not directly in point: there the value of the property was no doubt over Rs. 1,000, inasmuch as no one could take it from the mortgagee plaintiff without paying him more than that sum. Here plaintiff according to the decree now attached will, on the death of the widow, get the land without reference to the mortgage-money or its precise amount. There is no connection between the decree and the *amount* of the mortgage-money.

I rule, then, that no appeal lies, as the value of the suit and the value of the property involved must be taken as less than Rs. 250.

Note.—The rest of the judgment is not material to this report.—Ed.

(1) 145, *P. R.*, 1892. (2) 24, *P. R.*, 1903, *F. B.*

No. 43.

Before Mr. Justice Rattigan.

GURDITTA,—(DEFENDANT),—APPELLANT,

Versus

NARAIN DAS,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 949 of 1906.

Mortgage—Redemption—Suit by mortgagor for redemption—Dismissal of suit for default—Subsequent suit for the same object—Civil Procedure Code, 1882, Sections 102, 103.

Held, that a dismissal under Section 102 of the Code of Civil Procedure of a suit by a mortgagor for redemption of mortgaged property precludes the plaintiff under Section 103 from bringing a fresh suit for the redemption of the same property.

Shankar Bakhsh v. *Daya Shankar* (1), *Mam Raj* v. *Chandwa Mal* (2), and *Imdad Ali* v. *Hurmat Ali* (3), referred to.

Further appeal from the order of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 11th July 1906.

Sohan Lal, for appellant.

The judgment of the learned Judge was as follows:—

RATTIGAN, J.—On the 20th March 1896 present plaintiff sued present defendant for redemption of a certain house on payment of Rs. 40. This suit was dismissed in default under Section 102, Civil Procedure Code, on the 8th March 1897. *5th Jany.* 1907.

On the 14th December 1905 plaintiff instituted the present suit for redemption of the said house on payment of the said sum of Rs. 40. The suit was dismissed by the Munsif, 1st class, as barred by the provisions of Section 103, Civil Procedure Code, but this decision was reversed on appeal by the Divisional Judge, who held that "the present and the former cause of "action are different, for a mortgagor can at any time claim "redemption." The case was accordingly remanded under Section 562, Civil Procedure Code, for decision on the merits.

Defendant has appealed to this Court, and I have heard his learned pleader and plaintiff (who appeared in person) in support of their respective cases.

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(1) *I. L. R., XV, Calc.*, 422. (2) 117, *P. R.*, 1891.
(3) 32 *P. R.*, 1905.

The allegations in the present plaint are identical with those set out in the previous plaint, with the exception that in paragraph 4 of the present plaint, the plaintiff alleges that within four months of suit he requested defendant to accept the sum of Rs. 40 and give up the house, and that defendant has refused to comply with this demand. I do not consider this addition as material or as, in any respect, altering the cause of action which is the denial of plaintiff's alleged right to redeem the property. With the exception, however, of this addition, the allegations in the two plaints and the reliefs sought in the former and the present suit are, as I have said, absolutely the same. The question, then, is whether the Divisional Judge's view is correct that the dismissal of the former suit under Section 102, Civil Procedure Code, is no bar, under Section 103 of the Code, to the present suit because a mortgagor can at any time claim redemption. For this very sweeping statement of the law I can find no authority nor does the learned Judge refer to any. On the other hand, the terms of Section 103 are clear :—"When "a suit is wholly or partially dismissed under Section 102, "the plaintiff shall be precluded from bringing a fresh suit "in respect of the same cause of action." If, then, a mortgagor sues for redemption and his suit is dismissed under Section 102, and he thereafter brings a fresh suit for redemption of the same mortgage is the cause of action in the second suit the same as, or different from, the cause of action in the first suit? To this question there can be only one answer, for the very question has been decided by their Lordships of the Privy Council in *Shankar Bakhsh* v. *Daya Shankar* (1). The head note to this report runs as follows :—

"To a suit brought in 1883 for redemption of a mort-"gage made in 1853 villages in Oudh subsequetly included-"in the mortgagee's *talukdari* estate and *sanad*, the "defence was that the mortgagor having brought a suit in "1864 to redeem, and not having appeared at the hearing, "in person or by pleader, judgment was passed, the mort-"gagee having appeared to defend against the plaintiff under "Section 114 of Act VIII of 1859. *Held*, "that, although the plaintiff, who had claimed "in the prior suit the under proprietary "right in virtue of a sub-settlement, the superior proprietary

Corresponding Sections 102, 103 of the present Code.

(1) I. L. R., XV, Calc., 422.

"right, the difference in the mode of relief claimed "did not affect the identity of the cause of action which "was, in both cases, the refusal of the right to redeem, "and that under Section 114 of the Act, the judgment of "1864 was final." Their Lordships at the conclusion of their judgment remark: "Various questions have been raised "and very fully argued before their Lordships in order to "show that the cause of action in the two suits is not the "same, and that the present suit is for a new cause of "action. Their Lordships have fully considered those argu- "ments, and they are unable to come to the conclusion "that the causes of action are not the same and that the "judgment of the Additional Judicial Commissioner, who "held that the suit was barred under the provisions of Section "44, is wrong." This decision was followed by this Court in *Mam Raj* v. *Chandwa Mal* (1). In this case one Budhu, the original mortgagor, appears to have brought a suit in 1884 for redemption of the mortgage, but his suit was dismissed under Section 102 of the Civil Procedure Code. Subsequently the heirs of Budhu sued for redemption of the same mortgage, and this Court held that the second suit (though brought not by the original plaintiff but by his representatives) was not maintainable, being barred by the provisions of Section 103 of the Code, (*cf.* also *Imdad Ali* v. *Hurmat Ali* (2). Plaintiff has referred me to several cases but they do not in any way support the contention that the present suit is maintainable. In Ram Chandra Jiwaji's Case (3), the facts were entirely different. To quote from the judgment:—"In the first suit against the second "defendant alone, plaintiff alleged that he was the owner "of the equity of redemption by purchase from the first de- "fendant and, as such, was entitled to redeem the second "defendant's mortgage. In this suit his case is that he "contracted for the purchase of the property from the first "defendant, the latter undertaking to clear it of the second "defendant's mortgage; that the second defendant has since "purchased the equity of redemption from the first defen- "dant with full knowledge of the said contract, and he sub- "stantially, though not in strict form, seeks that both the "defendants may be compelled to specifically perform the "contract. Under these circumstances we do not think that

(1) 117 *P. R.*, 1891. (2) 32 *P. R.*, 1905.
(3) *I. L. R.*, 10 *Bom.*, 28.

"Section 103 precludes plaintiff from bringing his present "suit." Here clearly the two causes of action were in no sense identical. The plaintiff has cited a large number of authorities (*Shibbu Mal* v. *Paira Singh* (1) *Nathu Singh* v. *Rura* (2), *Sami* v. *Soma Sundra* (3), *Perindi* v. *Angappa* (4), *Muhammad* v. *Manu Lal* (5), *Ramani* v. *Bramma* (6), which lay down the proposition that when a suit for redemption has been instituted and a decree has been passed for redemption but not executed a subsequent suit for redemption of the same mortgage is maintainable. It is a question whether this is a correct proposition and there are an equal number of authorities which decide that in such cases a subsequent suit is *not* maintainable: *Vide Vedapuratti* v. *Vallabha Valiya Raja* (7), *Gan Savant Bal Savant* v. *Naryan Dhond Savant* (8), *Maloji* v *Sagaji* (9), *David Hay* v. *Razi-ud-din* (10). As observed by Sir A. White, C. J., in the Vedapuratti's case at page 307), the right to redeem might be a subsisting right until it is duly forclosed, but it does not follow that it is enforcible by a second redemption suit. But whether the principle laid down in *Shibbu Mal* v. *Paira Singh* (1), and the other cases relied upon by plaintiff is correct or not, it is obvious that these authorities are not in point in the present instance, whereas the two cases referred to on behalf of appellant are direct authorities for holding that the present suit is barred by the provisions of Section 103, Civil Procedure Code. I therefore accept the appeal and, reversing the order of the lower Appellate Court, dismiss the suit with costs throughout.

Appeal allowed.

No. 44.

Before Mr. Justice Johnstone and Mr. Justice Shah Din.

APPELLANT SIDE.

GULDAD KHAN,—(PLAINTIFF),—APPELLANT,

Versus

GUL KHAN AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 561 of 1906.

Custom—Pre-emption—Value of wajib-ul-arz Chakwar—*Conflict between earlier and later* wajib-ul-arz.

Held, that the *wajib-ul-arz Chakwar* of Pindi Gheb Tahsil, District Rawalpindi, is not a part of the record of rights and so has attaching to it

(1) 86 *P. R.*, 1877.
(2) 14 *P. R.*, 1881.
(3) *I. L. R.*, *VI Mad.*, 119.
(4) *I. L. R.*, *VII Mad.*, 423.
(5) *I. L. R*, *XI All.*, 386.
(6) *I. L. R.*, *XV Mad.*, 366.
(7) *I. L. R.*, *XXV Mad.*, 300, *F. B.*
(8) *I. L. R.*, *VII Bom.*, 467.
(9) *I. L. R.*, *XIII Bom.*, 567.
(10) *I. L. R.*, *XIX All.*, 202.

no presumption of correctness under Section 44, Punjab Land Revenue Act, and that its evidential value is small, inasmuch as it states the custom of pre-emption which is always a *local* custom, *by tribes*.

Held also that the value even of a genuine Wajib-ul-arz favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom, followed by a later Wajib-ul-arz in which the "law" or Act IV of 1872 is stated to contain the rule of pre-emption, is so small that even negative indications the other way are sufficient to reduce its value to nothing.

Muhammad Imam Ali Khan v. *Husain Khan* (1), *Gajjan* v. *Bhopa and Nand Singh* (2), *Dilsukh Ram* v. *Nathu Singh* (3), *Mastu* v. *Pohlo* (4), *Muhammad Umar* v. *Kirpal Singh* (5), *Jowahir* v. *Radha* (6), *Ali Muhammad* v. *Piran Ditta* (7), and *Karam Shah* v. *Tara Shah* (8)—referred to.

Further Appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 19th May 1905.

Sukh Dial—for appellant.

Muhammad Shafi—for respondents.

The judgment of the Chief Court was delivered by—

JOHNSTONE, J.—This case has been referred for disposal to a Division Bench by the Hon'ble Mr. Justice Chitty on the ground that questions of difficulty and importance arise in it; and he has put those questions in this way—(1) whether a *Chakwar wajib-ul-arz* is a record of rights within the meaning of the Punjab Land Revenue Act, 1887; (2) If so, whether there is any presumption in favour of the correctness of an earlier *wajib-ul-arz* where a new one has been substituted for it (see Section 44 of the Act). *2nd January* 1970.

The suit was one for pre-emption of land in the village of Nakka *Dakhili* Haddowali, the grounds being stated as the agnatic relationship of plaintiff to the vendor and plaintiffs being a *jaddi malik* in Nakka, whereas vendee was a *malik* by purchase and not related to vendor. The village is undoubtedly *bhaya chara* and so to prove that relationship helps him, plaintiff must prove a special custom in this behalf. The first Court held, in effect, that no such special custom was established; and in reference to a dispute as to the real sub-divisions of the village, it held that Nakka was a single sub-division and not divided further into four sub-divisions, and so, though plaintiff was owner

(1) *I. L. R., XXVI Cal.*, 81 *P. C.*
(2) 27 *P. R.*, 1893.
(3) 98 *P. R.*, 1894 *F. B.*
(4) 52 *P. R.*, 1896.
(5) 78 *P. R.*, 1904.
(6) 85 *P. R.*, 1905.
(7) 70 *P. R.*, 1905.
(8) 87 *P. R.*, 1905.

in the same pretended further sub-division as that in which the land in suit lies, while plaintiff was not, yet, inasmuch as both parties were owners in Nakka, plaintiff's rights were no better than the vendee's. The decision as to custom proceeded upon the fact of the village being a *bhaya chara* one and upon a judgment of the Divisional Judge of Rawalpindi in a previous case. The *wajib-ul-arz* Chakwar of 1868 and the *wajib-ul-arz* of the village of 1886 were not even mentioned, the former not having been relied upon by the plaintiff.

The learned Divisional Judge, when the case came before him on appeal, considered both the statement of rights of 1868 and that of 1886. Put briefly, the former gives a superior right of pre-emption, in the case of lands held by Pathans in the whole Tahsil of Pindigheb, to collaterals as compared with persons not related to the vendor. It is a *Kaumwar* statement for the whole Tahsil. The document of 1886 is the ordinary village administration paper of Mauza Haddowali, and the statement of custom in it is for the village and not for any particular tribe. As regards pre-emption the entry is that it follows the law (which means Act IV of 1872). The Divisional Judge also found against the plaintiff.

My own opinion is that the Chakwar *wajib-ul-arz* is not properly speaking part of the Settlement record, which is a *village* record; that therefore no presumption of correctness attaches to it under Section 44, Punjab Land Revenue Act; that, even if it be taken to form part of the settlement record, the circumstance that it states custom as *tribal*, whereas pre-emption is peculiarly a *local* custom, deprives the entry of nearly all its presumptive value, *cf. Muhammad Imam Ali Khan* v. *Husain Khan* (1), (at page 92, last para., 3rd sentence); that though the village *wajib-ul-arz* of 1886 does not exclude custom, yet, inasmuch as it states no custom, the party alleging a special custom must prove it; and that on a review of the evidence on the record, in the light of precedents and authorities, no special custom is established. I should note here that it has not been alleged that in the *wajib-ul-arz of the village* of 1868 any reference whatever is made to pre-emption or to the statement of custom in the Chakwar *wajib-ul-arz*; also that plaintiff did not in the first Court rely upon or even mention the latter document.

Section 31 (2), Land Revenue Act, lays down what a "record of rights" shall include. Clause (*b*) of the sub-section

(1) *I. L. R.*, 26, *Cal.*, 81, *P. C.*

runs—"a statement of customs respecting rights and liabilities "in the estate": and in the Financial Commissioner's instructions, issued with the approval of Government,—see page 95, Malan Gopal's Punjab Land Revenue Act, 2nd Edition—these words are repeated. It seems to me, then, that a document in which customs are stated for a whole Tahsil, tribe by tribe, inasmuch as it does not deal with rights and liabilities *in an estate*, cannot be said to fall within clause (*b*) aforesaid. Having no *pre-sumptive* value, then, it may have, and has, *only* such *evidential* value as *a riwaj-i-am* has been held to have. It has been often ruled that *a riwaj-i-am* does not *prove* customs stated in it; it *helps* to prove them, and it serves as a guide to enquiry, but actual instances of enforcement of the customs stated are necessary.

We have been referred to a number of published and unpublished rulings in connection with these questions of the value and use of the *wajib-ul-arz* generally and the relative value of an earlier and a later *wajib-ul-arz* of a village. I will discuss them all now, and will shew that they do not overthrow the propositions I have stated above.

Gajjan v. *Bhopa and Nand Singh* (1), was a Ludhiana case. The earlier *wajib-ul-arz* (1852) gave preference, in pre-emption, to relatives. The later one (1883) declared that pre-emption follows the law, as here; and it was found that the earlier entry had never been followed in practice, and that the only judicial decision (of 1890) had been the other way. The result was a finding that no special custom had been made out. In *Dilsukh Ram* v. *Nathu Singh* (2), it was laid down that an entry in a *wajib-ul-arz* favouring the pre-emptive rights of relatives was not an "agreement" but a statement of custom, and that, where no instances had ever occured, the entry was not sufficient *proof* of the custom.

In *Masta* v. *Pohlo* (3), there were the *wajib-ul-arz* of 1864 and that of a later settlement. In the first was a statement in favour of relatives as pre-emptors, in the second, silence. It was held that the earlier statement of custom was not cancelled by the more recent one, and that the party denying the correctness of the earlier statement must prove its incorrectness.

(1) 27 *P. R.*, 1893. (2) 98, *P. R.*, 1894, *F. B.*
( ) 52, *P. R.*, 1896

In *Muhammad Umar* v. *Kirpal Singh* ( ) it was laid down that *Dilsukh Ram* v. *Nathu Singh* (2) must not be taken as holding that, where a later *wajib-ul-arz* is inconsistent with an earlier one, the earlier one still remains in force. This is undoubtedly sound; but I doubt whether the additional *dictum* is correct, that there is any necessary inconsistency between a statement in favour of the pre-emptive rights of relatives and a statement that pre-emption follows Act IV of 1872. The next ruling, *Jowahir* v. *Radha* (3), seems to lay it down that there is no such inconsistency and that the earlier of two such statements of custom has a certain presumption of correctness attaching to it. In *Ali Muhammad* v. *Piran Ditta* (4) also entries in effect similar to these were held not mutually contradictory.

All these cases are concerned with two genuine successive *wajib-ul-arzes*. In the present case in my opinion the earlier statement of custom is not on the same footing as a village *wajib-ul-arz* and so is not part of the "record of rights," but I have discussed these cases because I wish to explain that, even if the Chakwar *wajib-ul-arz* has attaching to it the presumption afforded by Section 44, Land Revenue Act, that presumption is extremely weak, and is virtually rebutted by the facts of the case.

And here I should mention the following unpublished judgments of this Court dealing with similar questions, *viz.*, *Raldu*, v. *Sharaf Ali and Saudagar* (Civil Appeal, 991 of 1896). *Umar Din and others*, v. *Sohna and others* (Civil Appeal 1015 of 1905). *Bahadar Singh* v. *Bhola and others* (Civil Appeal, 743 of 1899). *Wazir Bakhsh*, v. *Karm Dad and others* (Civil Appeal 89 of 1900).

The first of these comes from Hissar. In the *wajib-ul arz* of 1864 pre-emption on mortgages was affirmed; in the later *wajib-ul-arz*, silence. It was held that, though the old *wajib-ul-arz*, cannot be said to be of no value, it was before Act IV of 1872, and the facts of absence of instances under it and of silence of new *wajib-ul-arz* showed that the alleged custom had no existence.

In Umar Din's case (Lahore) the *wajib-ul-arz* of 1856 was in favour of relatives, and the later settlement records of

(1) 78, *P. R.*, 1904.
(2) 98, *P. R.*, 1894.
(3) 35, *P. R.*, 1905.
(4) 70, *P. R.*, 1905.

custom were silention the point. It was held that the alleged custom was not proved. Up to 1856 there had been no sales at all. Bhadur Singh's case (Lahore) was similar, except that several sales had taken place since 1856 without reference to the rule laid down in that year.

In *Wazir Baksh* v. *Karam Dad* the Court, upon circumstances similar to those of *Gaijan* v. *Bhopa* (1) quoted above, found in the same sense.

I think all these cases shew that the value even of a genuine *wajib-ul-arz* favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom followed by a later *wajib-ul-arz* in which the "law" of Act IV of 1872 is stated to contain the rule of pre-emption, is so small as to be virtually *nil*. Technically the value is not *nil*, for see *Masta* v. *Pohlo* (2) and *Jowahir* v. *Radha* (3), but even negative indications the other way are sufficient to reduce its value to nothing.

Now let us turn to the cases in which the value of a *wajib-ul-arz* Chakwar is directly or indirectly dealt with: *Karam Shah* v. *Tara Shah* (4) which is really a Division Bench case and not, as printed, a single Judge case) comes from the Fatteh Jang Tahsil of the Rawalpindi District. The Judgment is a brief one. If finds in favour of the party relying on the Chakwar *wajib-ul-arz*; but it does so (partly at least) on the ground that there are three instances in support of it. It nowhere says that the Chakwar *wajib-ul-arz* is part of the record of rights or has any *presumption* attaching to it. The view of the learned Judges as to its value appears to be that it has some *evidential* value, but, even so, much less value than an ordinary village *wajib-ul-arz*.

Next comes *Nawab Khan* v. *Muhammad Khan and others* (Civil Appeal 127 of 1899), from Pindigheb Tahsil as in present case. Indirectly the old *wajib-ul-arz* Chakwar seems to have been treated as on the same footing as the new village *Wajib-ul-arz*, for it is said that the new entry of custom does not cancel the old; but it is held that the alleged custom must be proved by instances, and it was held so proved by one case in which the *same vendee* admitted the custom.

(1) 27, P. R., 1893. (2) 35, P. R., 1905.
(3) 52. P. R., 1896. (4) 87, P. R., 1905.

In Civil appeal 1330 of 1905 and 1171 of 1905 (one case) the same *wajib-ul-arz* Chakwar was held not cancelled by later village *wajib-ul-arz*, and *on the evidence in the case* it was found that the custom as stated in the former prevailed.

It seems to me fair to say that in none of these cases was it found, after direct discussion of the point, that the Chakwar document formed part of the record of rights with the presumption of correctness stated in Section 44, Land Revenue Act, attaching to it. The most that was found was that the entry had certain evidential value; and I have no hesitation in saying that that value is so small that no decree should be based on it.

Mr. Sukh Dial, in his argument for the plaintiff, has not pretended that there is on the record any actual proof of custom in favour of relatives in Mauza Haddowali. The learned Divisional Judge has given two contrary precedents. It is needless to say more. I would dismiss this appeal with costs.

Appeal dismissed.

No. 45.

Before Mr. Justice Johnstone and Mr. Justice Shah Din.

REFERENCE SIDE.

KALU,—(DEFENDANT),—PETITIONER,

Versus

PARTA MAL,—(PLAINTIFF),—RESPONDENT.

Civil Reference No. 19 of 1906.

Punjab Tenancy Act, 1887, *Section* 100—*Reference to Chief Court—Validation of proceedings where there had been no mistake as to jurisdiction.*

Where a Commissioner, on appeal, in a suit which as framed was cognizable by a Revenue Court, after coming to the conclusion that the plaintiff had failed to substantiate his claim as laid, but that on the facts as proved he could have brought a suit on a different cause of action which would be cognizable by a Civil Court, referred the case to the Chief Court with a suggestion that the decree of the Assistant Collector might be registered as the decree of the District Judge: *held* that the suit as framed being exclusively cognizable by a Revenue Court, and there having been no mistake as to Jurisdiction the reference did not fall within the scope of Section 100 of the Punjab Tenancy Act, and consequently the Chief Court was not competent to order the decree of the Assistant Collector to be registered as that of the District Judge.

Case referred by R. E. Younghusband, Esquire, Commissioner, Lahore Division, on 9th March 1906.

This is a reference under Section 100 of the Punjab Tenancy Act, 1887, by the Commissioner of Lahore Division.

The order of reference by the learned Commissioner was as follows :—

On the 23rd August 1890 Kalu, Defendant, executed a mortgage deed for 10 Ghamauns, 5 *Kanals* and 1 *marla* (wrongly described at the commencement of the deed as 50 *Ghamauns*, 6 *Kanals* 1 *Marla without possession*) in favour of Parta Mal, Plaintiff, for Rs. 400 Defendant agreed to pay Re. 1-8-0 per cent. monthly interest and hypothecated the land as security for the debt. On the 15th January 1899 Defendant executed a deed described as a '*Kabuliyat*' to the following effect. After referring to the mortgage deed of 1890 the deed goes on to say :—"I have settled up accounts to date. From to-day instead of interest, I have agreed to pay Rs 72 as '*Malikana*' of the above-mentioned land to the mortgagee. I will pay Rs. 50 in *Jeth* 1955 and Rs. 22 in *Katak*. I have taken the land for one year from Lala Parta Mal for cultivation. After the period (of one year) I will give up the land or execute a fresh agreement." This agreement was on an eight-anna stamp and was not registered.

Plaintiff sued for Rs. 216 as rent for 3 years and for possession of the land, but subsequently struck out the claim for possession. In the First Court Defendant admitted execution of both deeds, but pleaded (1) as to the mortgage deed that he had not received any consideration for it, and (2) as to the *kabuliyat* that he did not know the contents of it, and thought it referred to something quite different. The First Court found that whether or no the *kabuliyat* was duly executed by Defendant, Plaintiff, was not shown as landlord in the revenue papers and was therefore not entitled to sue for rent. The Lower Appellate Court found that the *kabuliyat* was duly executed by Defendant and that in consequence the relation of landlord and tenant existed between them, and that it was immaterial whether mutation of names had been effected or not.

It seems to me that in this case it has not been shown how and when Plaintiff became landlord of the land. I am referred to the *kabuliyat* and to Section 116 of the Evidence Act. But that does not solve the difficulty. Section 116 lays down that a tenant may not deny his landlord's title, but the point at issue is whether the parties are landlord and tenant. Under the mortgage deed of 1890 Plaintiff clearly did not become mortgagee with possession or 'landlord,' I am told that the '*kabuliyat*' constituted him mortgagee with possession and landlord. But an unregistered agreement on an eight-anna stamp is insufficient to convert the holder of a mortgage with possession into a mortgagee with possession. It seems to me that the '*kabuliyat*' should be read as not affecting the land in any way, but simply as an agreement to pay Rs. 72 a year, *viz.*, Rs. 50 in *Jeth* and Rs. 22 in *Katak* as interest on the loan of Rs. 400 instead of the interest, formerly agreed upon, that a suit lies for interest not for rent, and that the decree which has been passed by the Lower Appellate Court should have been not a decree for Rs. 216 on account of rent, but a decree for Rs. 216 on account of interest for three years.

The record of the case is submitted to the Chief Court with the suggestion that the decree of Lala Moti Ram should be registered as the decree of the District Judge.

* * * * * * *

The Judgment of the Chief Court was delivered by—

11*th Dec.* 1906. SHAH DIN, J.—After giving our very best consideration to the arguments addressed to us by the pleader for the petitioner, we agree with Mr. Justice Chatterji, who has ordered this reference to be laid before a Division Bench for disposal, that, upon the findings recorded by the Commissioner, it was not competent to him to make a reference to this Court under section 100 of the Punjab Tenancy Act (XVI of 1887). The suit as laid was clearly one cognizable by a Revenue Court, and the Commissioner does not hold that upon the allegations contained in the plaint the Assistant Collector had no jurisdiction to try the suit. If, as the Commissioner appears to us to hold, the relation of landlord and tenant did not exist between the parties under the mortgage deed of 1890, and if, as is found by him, the *Kabuliyat* of 1899 did not create any such relation, the only correct order that could have been passed in the case was one dismissing the plaintiff's suit on the merits, leaving the plaintiff, if so advised, to sue in a Civil Court for recovery of Rs. 216 due (as the Commissioner thinks) on account of interest for 3 years, and not on account of rent. According to the view that apparently commended itself to the Commissioner, the plaintiff ought to have instituted a suit in a Civil Court upon allegations different from those with which he came into the Revenue Court, but from this it by no means follows that if the plaintiff came into the Revenue Court with a suit properly framed as a Revenue suit, the Revenue Court had no jurisdiction to try it. It is now well established by authority that of a general rule the jurisdiction of a Court in which a suit is instituted is to be determined by reference to the allegation contained in the plaint supplemented in some instances by statements made by the plaintiff in the course of the pleadings.—(See *Mewa Singh* v. *Nathu* (1), *Sohna* v. *Mosam* (2), *Ram Singh* v. *Jowala Singh* (3), and *Mula* v. *Gandu* (4), at pages 398—399.) The allegations made in the plaint in the suit out of which the present reference has arisen are specific and explicit, and upon those allegations, we think, it is clear that the Assistant Collector had jurisdiction to hear and determine the suit.

(1) 22, *P. R.*, 1894. (3) 55, *P. R.*, 1896.
(2) 23, *P. R.*, 1895. (4) 92, *P. R.*, 1902.

For the above reasons, we cannot, we think, entertain this reference as one properly falling within the scope of Section 100 of the Punjab Tenancy Act, and we consequently return the record to the Commissioner who will dispose of the case with reference to the foregoing remarks.

No. 46.

Before Mr. Justice Shah Din.

SOCHET SINGH,—(PLAINTIFF),—APPELLANT

Versus

DIAL SINGH AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 998 of 1906.

Mortgage by conditional sale—Foreclosure—Regulation XVII of 1806 *—Notice under section* 8*—Non-existence of such notice on foreclosure file—Presumption as to its regularity—*

In a case for redemption the defendant pleaded that the alleged mortgage had been foreclosed so far back as 1881. The plaintiff denied this allegation and urged that no prescribed notice had ever been issued or served on him. The file of the foreclosure proceedings having been brought up, it was discovered that *nathi* B, including the notice in question had been destroyed, but from the documents in *nathi* A, it appeared that a notice had been ordered to be issued to the mortgagor and that the latter had attended the District Court, when the Judge passed the following order:—

"Parties present, defendant (present plaintiff) has been thoroughly "warned that within one year he should have the land redeemed, thereafter "no excuse will be listened to."

Held that the non-existence of the notice was a fatal defect to the validity of the foreclosure proceedings, as it could not be presumed on the strength of the above order of the District Judge that the notice issued to the mortgagor had been served upon him or that it complied with all the requirements of procedure as laid down in Section 8 of the Regulation.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 20th June 1906.

Morrison, for appellant.

Fazal-i-Ilahi, for respondents.

The judgment of the learned Judge was as follows:—

SHAH DIN, J.—The facts are fully stated in the judgments of the Courts below and need not be repeated. The sole question *3rd Jany.* 1907.

for determination in this appeal is, whether, the plaintiff who mortgaged the land in suit by way of conditional sale to the predecessor in interest of the defendants in 1871, has lost his right of redemption by reason of the mortgage having been foreclosed in 1882 under Regulation XVII of 1806.

After hearing counsel for the parties I think that this appeal must succeed. The notice of foreclosure, which is alleged to have been issued to the mortgagor in 1881, is not on the record of the foreclosure proceedings, and the question for decision is whether in the absence of that notice the Court can, in the present suit, presume, on the strength of the order of the District Judge, dated 1st August 1881, on the foreclosure file, not only that the notice was served upon the mortgagor, but also that the notice if so served complied with all the conditions of foreclosure as laid down in Section 8 of the Regulation. I agree with the counsel for the appellant that no such presumption can in law be made, and that in a suit such as the present, it is for the mortgagee who relies on foreclosure proceedings having worked a forfeiture of the estate of the mortgagor, *to prove affirmatively the due performance of every condition* necessary to be established under the Regulation before the foreclosure can attach upon such estate. This proposition is now too firmly established by an unbroken current of published decisions of this Court to need an elaborate discussion, and I consider it therefore sufficient to cite only a few of those decisions in order to show that the position taken up for the appellant is an unassailable one: see *Mussammat Lachmi* v. *Totu* (1), *Kirpa Ram* v. *Bhagwana* (2), *Wasawa Singh* v. *Rura* (3), *Hira Singh* v. *Sher Singh* (4), *Fazal Ilahi* v. *Hazari Singh* (5), and *Malla* v. *Rallia Ram* (6). The lower Appellate Court remarks that the words of the Regulation have been made quite a fetish of by the Courts in this country, but it overlooks the fact the latter have in this respect only followed (as indeed they were bound to follow) the judicial pronouncements of no less a tribunal than the Privy Council, which has ruled more than once that, in view of the vast importance to the mortgagors of the notification under the Regulation and of the consequences that follow, it is absolutely essential that all the requirement of the law in regard to foreclosure proceedings

(1) 16 *P. R.*, 1888.
(2) 106 *P. R.*, 1889.
(3) 24 *P. R.*, 1895.
(4) 29 *P. R.*, 1898.
(5) 48 *P. R.*, 1902.
(6) 71 *P. R.*, 1903.

be strictly complied with (see *Norendra Narain Singh* v. *Dwarka Lal Mundor* (1), and *Madho Pershad* v. *Gojudar* (2). It is somewhat difficult to see how in the face of the decisions of such high authority, it is open to a court in this country to presume (without affirmative proof by the mortgagee) that the imperative provisions of the Regulation have in a case like the present been satisfied.

The order of the District Judge, dated 1st August 1881, only shows that the plaintiff appeared in person before the Judge, whether after service of notice upon him or otherwise it is impossible to determine, and was warned that if he shall not redeem the land within one year (from what date is by no means clear), he will be precluded from raising any objection (*usr*) thereafter. Surely it does not follow from this *ex necessitate rei* that the notice that had been issued to the mortgagor was in proper form as to its contents, that it was accompanied by a copy of the mortgagee's petition for foreclosure, and that it bore the seal and the official signature (not merely the initials) of the District Judge. If in any one of these particulars the notice was defective the foreclosure proceedings were bad in law and they do not avail the defendants in this case. Moreover the mortgagee's petition, dated 27th June 1881, does not state that a demand for payment had been made from the mortgagor before the petition was filed, and it is now well established that the omission to make such a demand is fatal to foreclosure proceedings. For these reasons I accept this appeal and decree the plaintiff's claim. The parties will bear their own costs throughout.

Appeal allowed.

No. 47.

Before Mr. Justice Johnstone and Mr. Justice Chitty.

MAHTAB SINGH,—(DEFENDANT),—APPELLANT,

Versus

NIAZ ALI,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1396 of 1905.

Custom—Pre-emption—Right of pre-emption claimed by virtue of ownership of house opposite but separate from that sold—Katra *Kanhayan, Amritsar City—Burden of proof—Punjab Laws Act*, 1872, *Section* 11.

Held, that although the custom of pre-emption in respect of sales of house property by reason of vicinage has been established to prevail

(1) *I. L. R., III Cal.*, 397 *P. C.* (2) *I. L. R., XI Cal.*, 111 *P. C.*

in *Katra* Kanhayan of the city of Amritsar, the plaintiff has failed to prove the special incident whereby he as owner of a house opposite to the house sold but separated from it by a road or lane had a right to claim pre-emption against the vendee who was a mere stranger.

Ali Muhammad v. *Kadir Bakhsh* (1), not followed. *Mela Ram* v. *Prema* (2), and *Ilahi Bakhsh* v. *Miran Bakhsh* (3), followed.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 13th October 1904.

Ishwar Das, for appellant.

Kamal-ud-din, for respondent.

The judgments of the learned Judges were as follows:—

3rd Novr. 1906. CHITTY, J.—The plaintiff sued for possession by pre-emption of a house situate in *Katra* Kanhayan in Amritsar City. The plaintiff's house, by virtue of which he claimed the right, is situate opposite to the house in suit, on the other side of a narrow *gully*. The plaintiff succeeded in proving that the custom of pre-emption prevails generally in *Katra* Kanhayan but he did not prove that it would apply in the case of houses not adjoining or contiguous but opposite to one another. The only point for our determination is whether the plaintiff has carried his case far enough. The Courts below relying on the ruling in *Ali Muhammad* v. *Kadir Bakhsh* (1), that "it is not necessary to prove contiguity of houses and that "ordinarily vicinage is sufficient" decided in the plaintiff's favour. It is to be regretted that they did not also refer to the case of *Mela Ram* v. *Prema* (2), which is to be found two pages below in the same volume, for there a very different view of the law is given. The question however has been recently discussed by a Division Bench of this Court (of which I was a member); see *Ilahi Bakhsh* v. *Miran Bakhsh* (3). In that case the *dictum* in the case relied upon by the Courts below (*Ali Muhammad* v. *Kadir Bakhsh*) was expressly dissented from. The Division Bench case appears to me to be not distinguishable in principle from the case now before us, and I need only say that I adhere to the conclusions at which we then arrived after a full consideration of the various authorities. The learned pleader for the respondent has cited another recent ruling of this Court *Jai Devi* v. *Naubat*

(1) 107 P. R., 1900. (2) 109 P. R., 1900.
(3) 68 P. R., 1906.

Rai (1). That was a case of rival claimants and preference was given to one who owned nearly half the house along with the vendor in preference to the vendee who owned a house across a lane. That case, in my opinion, has no bearing on the present. It does not help the respondent in any way. Adhering to the ruling in Ilahi Bakhsh's case I would hold that it was incumbent on the plaintiff to prove, not only the general custom, but such special incident's as would make it applicable to his case, namely, that of a house opposite to and not adjoining the house in dispute. The plaintiff having failed in that respect, his suit should be dismissed.

I would allow this appeal and dismiss plaintiff's suit with costs throughout.

JOHNSTONE, J.—I agree with my learned colleague that Ilahi Bakhsh's case must be followed here. After considering the contention set up by Mr. Kamal-ud-din against the soundness of that judgment—a contention by no means devoid of force—I hold that we should not dissent from that judgment. I would like, however, to state this part of Mr. Kamal-ud-din's argument so as to show exactly what it is that we overrule in it. 3rd Novr. 1906.

He argues that, leaving out Ilahi Bakhsh's case, the series of rulings on the subject of pre-emption in towns when analysed yield three categories of cases, namely—

(1) Contest between neighbour and stranger.

(2) Contest between neighbour and neighbours.

(3) Contest between neighbour and co-sharer.

Under (1) come *Ralia Ram* v. *Kallan Khan* (2), *Muhammad Salamatulla* v. *Jalal-ud-din* (3), *Ali Muhammad* v. *Kadir Bakhsh* (4), and *Jai Devi* v. *Naubat Rai* (1). In all these cases, he asserts, no stringent proof of custom was required, it being held sufficient that the custom of pre-emption did prevail in the part of the town concerned.

Under (2) came *Mehtab Roy* v. *Amir Chand* (5), *Chaudhri Khem Singh* v. *Mussammat Taj Bibi* (6), *Nawab Muhammad Mumtaz Ali Khan* v. *Khan Ali Khan* (7), and *Mela Ram* v. *Prema* (8). In all these cases he asserts, stringency of proof

(1) 71 *P. R.*, 1905.
(2) 108 *P. R.*, 1886.
(3) 24 *P. R.*, 1887.
(4) 107 *P. R.*, 1900.
(5) 189 *P. R.*, 1882.
(6) 83 *P. R.*, 1888.
(7) 36 *P. R.*, 1897.
(8) 109 *P. R.*, 1900.

was demanded, because both claimants—pre-emptor and vendee —were neighbours and the plaintiff should show that his special kind of vicinage was superior.

Category (3) I need not comment upon.

There is a certain plausibility about this suggestion that a neighbour of any kind—neighbour by contiguity or neighbour by mere proximity—should in a tract where pre-emption prevails, merely because of being a neighbour, be preferred to a complete stranger. But I think it is safer not to allow the suggestion to be applied to cases of proximity across a road as here. I would hold that, where the plaintiff's house is separated from the house in suit by a road or lane, there even if the custom of pre-emption prevails in the Mohalla or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove by instances in the usual way that he has such a right. I am not called upon to lay down any rule to govern cases in which plaintiff's house is not across a road from but (say) back to back with that in dispute. I am not sure that in such a case Mr. Kamal-ud-din's suggestion would not be fully applicable, I confine my decision to the precise case now before us.

The result is that the appeal is accepted and the suit dismissed with costs throughout.

Appeal allowed.

No. 48.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

APPELLATE SIDE.

ACHHRU AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

LABHU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1018 of 1906.

Pre-emption—Purchaser with right of pre emption equal to plaintiff's associating in the purchase persons with inferior right—Right of such purchaser to defeat plaintiffs' claim—

Held, that if a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of the

pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase.

Ram Nath v. *Badri Narain* (1), dissented from.

Imam Din v. *Nur Khan* (2), *Murad* v. *Mine Khan* (3), and *Kesar Singh* v. *Punjab Singh* (4) followed.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 28th May 1906.

Sukh Dial, for appellants.

Dharm Das, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—This was a suit for pre-emption upon a sale of land and houses to defendants 2 to 6 by defendant 1. It is settled that defendants 2 and 3 had equal rights of pre-emption with plaintiffs, but that the rights of defendants 4 to 6 were inferior. The property was sold for Rs. 4,000 (figure in the deed); and it was stated in the deed that the shares of the vendees were these — 12*th Jany.* 1907.

Defendant 2	⅓
Defendant 3	⅓
Defendants 4 to 6	⅓

The first Court found that plaintiffs could pre-empt only the last share. Fixing the real value at Rs. 3,200 it gave plaintiffs a decree for possession of ⅓rd on payment into Court by a certain date of ⅓rd of 4,000 or Rs. 1,066-10-8.

On appeal the learned Divisional Judge came to the same general conclusion but fixed the value at Rs. 3,381 from which sum he deducted Rupees 183 due to a mortgagee and not yet paid by the vendees. He thus arrived at the figure, Rs. 3,198, and directed that the sum to be paid in by plaintiffs for ⅓rd of the property was Rs. 1,066.

Plaintiffs appeal on the main question and claim the whole bargain. There is no longer any dispute as to price to be paid.

After hearing arguments and consulting authorities we find in favour of plaintiffs appellants. On the one side we have three Division Bench rulings of this Court, *Imam Din* v. *Nur Khan* (2), *Murad* v. *Mine Khan* (3), and *Kesar Singh* v. *Punjab Singh* (4). In all of these the view put forward by plaintiffs

(1) *I. L. R., XIX All.*, 148 *F. B.* (3) 94 *P. R.* 1895.
(2) 10 *P. R.*, 1884. (4) 66 *P. R.*, 1896.

is the one adopted. On the other side we have *Ram Nath* v. *Badri Narain* (1), and a single Judge ruling, Civil Appeal 660 of 1900, in which the previous rulings of this Court were not even noticed. After carefully considering the arguments in the Allahabad ruling we find ourselves opposed to it. In our opinion the sale is one and indivisible, and, inasmuch as defendants 2 and 3 have joined with themselves defendants 4 to 6 as vendees, the latter having no rights equal to those of plaintiffs, we think, following the above quoted Division Bench rulings of this Court, that plaintiffs are entitled to take over the whole bargain.

For these reasons we accept the Appeal and give plaintiffs, in modification of the decree of the lower appellate Court, a decree for possession of the whole property in suit on payment into Court, within 2 months, of Rs. 3,198, Rs. 183 being still due to the aforesaid mortgagee. The defendants will pay plaintiffs' costs throughout, if the latter pay in the money in the time. If default is made in payment by plaintiffs, the suit will stand dismissed with costs.

Appeal allowed.

No. 49.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

Appellate Side.

JAMNA DEVI,—(Defendant),—APPELLANT,

Versus

MUL RAJ,—(Plaintiff),—RESPONDENT.

Civil Appeal No. 875 of 1906.

Hindu Law—Marriage—Wife's conversion to Islam—Dissolution of marriage.

Held, that apostacy of one of the parties does not in the case of Hindus *per se* dissolve their marriage, and a Hindu wife cannot therefore deprive her husband of the legal rights which accrued to him at marriage by simply renouncing Hinduism in favour of Islam.

Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 1st May 1906.

Fazl-i-Husain, for appellant.

B. R. Sawhney, for respondent.

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(1) *I. L. R., XIX All.*, 148, *F. B.*

The facts of this case are fully set out in the following judgments :—

JOHNSTONE, J.—In this case, Mul Raj, plaintiff, an Arora by tribe and Hindu by religion, has brought a suit against defendant 1, his wife, and defendant 2, a Muhammadan, for custody of the former. Defendant 2 denies that the lady is with him ; and defendant 1, while admitting her marriage to plaintiff, states that she has embraced Islam, that it is impossible for her, as a sincere Muhammadan, to live with plaintiff as a wife should live with a husband, and that she has been cruelly treated ; and so asks that the suit be dismissed. *9th Jany.* 1907.

The first Court absolved defendant 2 from all liability, and went on to hold that plaintiff had not been guilty of any cruelty towards the lady such as would debar him from claiming her company. Then the Court discussed the question whether the fact of her turning Muhammadan is a bar to a suit like this, and in the end found against the plaintiff. On the strength of the ruling *Mussammat Jawali* v. *Karam Singh* (1), the Court ruled that the granting of such a decree as that prayed for is discretionary with the Court, that the woman is now a genuine Muhammadan, that the husband will stick at nothing to reconvert her and may even murder her, that as a Muhammadan she cannot live with a Hindu husband, and that for these reasons the relief asked for must be refused.

The learned Divisional Judge, when the husband appealed to him, took a different view. He thought that the first Court's fears for the lady's safety were merely imaginary ; that she was undoubtedly the wife of the plaintiff and had never been ill-treated, and so must return to him. The suit having been decreed, the lady has filed a further appeal, and we have heard an elaborate argument on both sides of the case.

The conclusion at which I have arrived is that the decree for custody must stand. My reasons are briefly these, that the marriage is admitted and is indissoluble, that, though the granting of decree is discretionary, that discretion must be exercised with due regard to the law and to equity and good conscience; that marriage and the rights and duties arising out of it being the very basis of the social fabric,

(1) 47 *P. R.*, 1892.

only very cogent reasons can justify any tampering with the institution or ignoring of those rights and duties; that it is against justice to allow a Hindu woman simply by changing her religion to deprive her husband of the rights he acquired at marriage; that in the present case plaintiff has done nothing which would warrant this Court in refusing him those rights; that conjectures regarding how he may possibly treat her if he gets her back, are not an appropriate basis for a decision of such a suit as this; that though no doubt the situation is an unpleasant one for defendant 1, as a sincere believer in Islam, the Court should not take this aspect of the case into account, inasmuch as the balance of justice is decidedly in favour of the husband, who has adhered to the faith he held at time of marriage, who has done no wrong, and who simply asks for his natural and legal rights, rather than in favour of the wife, who has, by an act of her own, done against his wishes, created the difficulty and now desires to rob him of those rights. I may also say that in my opinion to decide in favour of the lady on facts such as we have in the present case would render the Hindu wife virtually independent of her husband: whenever he and she had a difference of any kind, she could say she was a Muhammadan and so could emancipate herself from his control. Such a state of affairs would lead to countless troubles.

In one part of his argument the learned counsel for the plaintiff dealt with the case from the point of view of the strict ancient Hindu Law; but I do not intend to follow him. It is enough for me that by Hindu Law a marriage is indissoluble. *The Government of Bombay* v. *Ganga* (1), and *in the matter of Ram Kumari* (2), the counsel for the lady admits this; that marriage in all civilised systems of law implies the creation of rights and duties in the husband and rights and duties in the wife; that in Hindu Law, as in all laws, the right of the husband is that his wife must live with him as a wife, if he so wishes and if he has not lost this right through some cause, immanent in him or proceeding from him, calculated to render the enforcement of the right opposed to the principles of justice, equity and good conscience.

Mr. Fazl-i-Husain, for defendant 1, began by arguing that this was a case of conflict of laws, the man following Hindu Law and the woman Muhammadan Law, and that

(1) *I. L. R., IV Bom.*, 330. (2) *I. L. R., XVIII Cal.*, 264.

the law of the defendant should prevail (*Muhammad Sidick* v. *Haji Ahmed* (1), *2nd para. of head-note*). I am inclined to agree with Mr. Sawhney, for plaintiff, that the case is not properly speaking one of conflict of laws; and even if it is, it seems to me in keeping with justice to hold, on the facts of the present case, that law should so far as possible be applied which the parties were governed by at the time of the marriage. If Muhammadan Law is applied the marriage is dissolved by the mere fact that the woman is a Mussalman and the man a Hindu: this is not denied. But it must be taken that at time of marriage the woman, marrying as a Hindu, knew and intended, as her husband did also, that the marriage could in no may whatever be dissolved. I do not think that the English statutes, 21 Geo. III, Chap. 70, Section 17; 4 Geo. IV, Chap. 71, Sections 7, 17, quoted at pages 5 and 6 of West and Buhler's Digest of Hindu Law, 3rd Edition, Volume I, and relied upon by Mr. Fazl-i-Husain, have really any bearing on such a case as the present. It follows, then, that the Hindu Law should not be thrown over in this case. It cannot be directly applied, for it does not explicitly provide for such cases as the present, so far as I know, and thus we must fall back upon the well-known Section 5, Punjab Laws Act, 1872, and the rule of justice, equity and good conscience. That rule cannot be said to be followed in a case like this if we throw over the Hindu Law under which the parties were married and to all his rights under which plaintiff is still entitled.

Reading to us the *dicta* and opinions to be found in Tagore's Law Lectures, 1870, p. 3, last para. Siromani's Hindu Law, pp. 39, 40, Banerjee's Hindu Law of Marriage and Stridhan, Edition 1896, p. 19, &c., &c., Mr. Fazl-i-Husain argued that, when a Hindu abjures his faith, he is outside the pale of Hindu Law, which no longer governs him; and from this he deduced the contention that his client's abjuring of the Hindu religion puts her outside that pale and so she cannot be subject to that law. This reasoning appears to me unsound. She may be outside the pale of Hindu Law in the sense that she could not enforce rights accruing to her, or rather which she formerly had, under that law; but she cannot get rid of her already existing liabilities and she cannot be permitted to destroy her husband's already acquired rights, in this way.

(1) *I. L. R.*, X *Bom.*, 1.

Mr. Fazl-i-Husain then quoting, as an indirect authority, *Sinam Mal* v. *The Administrator-General of Madras* (1), and Banerjee's book mentioned above, pages 122, 123, suggested that, because an apostate from Hinduism cannot enforce conjugal rights against the husband (or wife) who remains a Hindu, the converse proposition also holds good. (See also Ghose's Principles of Hindu Law, 2nd Edition, p. 694, line 2.) There is no authority for this, and for the reasons already given I reject the suggestion.

Next Mr. Fazl-i-Husain presses the point that, as matters stand, his client cannot perform wifely duties towards plaintiff who is an orthodox Hindu. He cannot eat food cooked by her or let her touch his food or drink; he cannot let her join him in any religious ceremony or act of worship, and so forth. (See Ghose's Principles of Hindu Law, p. 664, opening sentences.) From this he argues that a decree for custody could be of no real use to plaintiff except perhaps to give him an opportunity of forcing her to renounce her new faith; and he contends that to give a decree in this case is thus tantamount to laying it down that a Hindu woman has no right to freedom of conscience and can never renounce Hinduism, whatever her real sentiments may be. I am not sure that we, sitting as a Court of Justice, need formally repute such an argument as this. It is sufficient for me to say that, if plaintiff is really an orthodox and conscientious Hindu, he will, until, if ever, his wife returns to the fold, simply keep her in some part of his house and try to persuade her to abjure her new faith; or if he is not orthodox, he will try to persuade her to perform the functions of a wife, and will risk excommunication from his communion. In neither case would she, in law, have any grievance; but if he ill-treats her, the Courts are open and she might have a cause of action for a separation. At present I can see no reason in all this for refusing him the decree he has asked for and has obtained. The above reasoning, in my opinion, disposes of all the arguments based on such statements of law as are to be found in Siromani's Book, p. 99, para. 14, Narasimmiah, pp. 18 and 27, and Banerji, pp. 186-189.

Some stress was laid by Mr. Fazl-i-Husain upon the *dictum* in *Imam Din* v. *Hasan Bibi* (2), to the effect that the conversion of a Muhammadan woman to Christianity operates to dissolve absolutely her marriage to her Muhammadan husband; but I am unable to see how this helps his client,

(1) *I. L. R. VIII Mad.*, 169. (2) 85 *P. R.*, 1906.

the Hindu Law being so entirely opposed to the Muhammadan in this matter.

Only two more points call for remark. First, is there any reasonable ground to apprehend that defendant will be cruelly treated if she returns to her husband ? After carefully considering the evidence on the record I find myself unable to hold that there is any such ground. Past cruelty is not proved ; and as regards the future plaintiff merely says he will try to reconvert her. I cannot assume that this will involve cruelty : if it does, the Courts are open.

Secondly, it is suggested that the decree should be saddled with conditions. It is not explained precisely what conditions are claimed and I do not see how the Court can frame any conditions which it could enforce. In my opinion we cannot rightly insert in the decree, for instance, that plaintiff must refrain from his marital privileges and must keep the lady as he would keep a sister ; or that he must not ask her to cook his food, if he should wish her to do so ; or that he must not attempt to get her back to Hinduism. He must, of course, refrain from cruelty ; but that is understood in every decree for custody or restitution of conjugal rights.

I have not discussed the views laid before us by Mr. Sawhney except indirectly, inasmuch as in my opinion the above exposition adequately disposes of the case. I would dismiss the appeal with costs.

RATTIGAN, J.—I entirely agree and have but little to add to my learned brother's judgment. There are, however, a few observations which I would like to make as t e subject is one of considerable importance. I am unable to accept the argument that the marriage tie between the parties was *ipso facto* dissolved when the appellant renounced Hinduism. No doubt, from the Hindu point of view, she thereby suffered degradation : it may even be that a strictly orthodox Hindu could not, consistently with his religious scruples, thereafter consort with her. But, as remarked, in the case of *Administrator-General of Madras* v. *Anundachari* (1 according to Hindu Law, the degradation can be atoned for, and the convert re-admitted to her *status* as a Hindu, if she hereafter renounces Islamism and performs the rights of expiation of her caste. But, however this may be, the great weight of authority is clear that apostacy of one of the parties

(1) *I. L. R.*, 9 *Mad*, 470.

does not in the case of Hindus *per se* annul the marriage, (see the case above cited and *Government of Bombay* v. *Ganga* (1), *Bisheshur* v. *Mata Ghilam* (2), *In re Millard* (3), *In re Ram Kumari* (4), *Suldari Letani* v. *Pitambari Letani* (5) *Crown* v. *Mussammat Gulam Fatima* (6). In support of the opposite view, Mr. Fazl-i-Husain relied upon *Rahmed* v. *Raheya Bibi* (7), and *Sinammal* v. *Administrator-General of Madras* (8), but as pointed out by the learned author of "Hindu Law of Marriage and Stridhan, Doctor Gooroo Das Banerjee, these authorities are opposed to the cases above referred to, and cannot be accepted as correctly stating the law on this point. I might add that the learned author was himself one of the Judges who decided the case of *In re Ram Kumari*.

I am also unable to accede to the proposition that in a case of this kind, the question at issue should be decided in accordance with the law which governs the defendant. The parties were originally both Hindus and their marriage was solemnised in accordance with the Hindu Law. The husband, the present plaintiff, is still a Hindu. Surely, under such circumstances it would be repugnant to equity and good conscience to hold that the rights which accrued to him under that law at the time of his marriage must be deemed to have been lost because his wife has subsequently renounced the Hindu religion and adopted a faith which forbids her from cohabiting with a Hindu husband? The case of *in re Millard*, above cited, is a direct authority for holding that under such circumstances the rights of the husband cannot be regulated by the Muhammadan Law. And in this connection I would also refer to the remarks of Doctor Banerjee at page 28 of the work to which I have already made reference. He says: "The importance of the institution of marriage is too "well recognised to require any comment. It is the source of "every comfort from infancy to old age; it is necessary for the "preservation and well-being of our species; it awakens and "develops the best feelings of our nature; it is the source of "important legal rights and obligations, and, in its higher forms, "it has tended to raise the weaker half of the human race from "a state of humiliating servitude. To the Hindu, the importance "of marriage is heightened by the sanctions of religion. By no "people, says Sir J. Strange, is greater importance attached to "marriage than by the Hindus. In Hindu Law it is regarded

(1) *I. L. R., IV., Bom.*, 330.
(2) 2 *N. W. P.*, 300.
(3) *I. L. R., X., Mad.*, 218.
(4) *I. L. R., XVIII Cal.*, 264.
(5) *I. L. R., XXXII Cal.*, 871.
(6) 32 *P. R.*, 1870, *Cr.*
(7) 1 *Nortons Leading Cas.* 12.
(8) *I. L. R., VIII Mad.*, 169.

" as of the ten *sunskars* or sacraments, necessary for regeneration " of men of the twice born classes and the only sacrament for " women and Sudras. "

Mr. Fazl-i-Husain in his able argument laid great stress on the hardship that would ensue if the appellant were compelled, against her conscience, to return to cohabitation with her Hindu husband. I admit the hardship and I fully realise the unfortunate position in which the appellant is placed. But I cannot on this account refuse to grant the respondent the relief to which he is by law entitled. He has himself done nothing to forfeit those rights. He would be entitled, if he so wished, to " desert " his wife by reason of her apostacy and under the personal law which must be taken to govern the case, he need do no more than allow her what is called a " starving maintenance." But if he prefers to enforce his marital rights, the Courts must, I conceive, give him their assistance. The position would be very different if the person who asked for relief of the kind now prayed for, happened to be the apostate spouse. In that case there is ample authority for holding that a decree for restitution of conjugal rights should be refused, (see Banerjee's " Hindu Law of Marriage and Stridhan," at pages 122, 123). But in the present case it is the non-apostate spouse who is asking for relief and I know of no authority which would justify us in refusing him the decree to which he is by law entitled in the absence of any fact disentitling him thereto. For these reasons and for the reasons given by my brother, I agree that the appeal should be dismissed, and the order of this Court is accordingly that the appeal is dismissed with costs.

Appeal dismissed.

Full Bench.

No. 50.

Before Mr. Justice Reid, Mr. Justice Chatterji, C.I.E., Mr. Justice Robertson, Mr. Justice Rattigan, and Mr. Justice Chitty.

JODH NATH,—(PLAINTIFF),—APPELLANT
Versus
SADHU RAM,—(DEFENDANT),—RESPONDENT.
} REFERENCE SIDE.
Civil Reference No. 76 of 1906.

Chief Court—Jurisdiction of, to hear Civil Appeals transferred by Judicial Commissioner of North-West Frontier Province—Regulation VII of 1901, Section 87 A.——Punjab Courts Act, 1884.

Held by the Full Bench that the Chief Court of the Punjab has, by virtue of the provisions of Section 87 A of the North-West Frontier Province Law and Justice Regulation No. VII of 1901 as amended by Regulation I of 1906, no jurisdiction as a Court of Civil Appeal to entertain hear and decide any Civil appeal transferred to it for determination by the Judicial Commissioner of the North-West Frontier Province.

Case transferred under Frontier Regulation No. VII of 1901 *as amended by Regulation No. I of* 1906 *by the Judicial Commissioner, North-West Frontier Province, on 28th February* 1906.

This was a reference to a Full Bench to determine whether the Chief Court of the Punjab has jurisdiction to entertain, hear and decide any Civil appeal transferred to it for determination by the Judicial Commissioner of the North-West Frontier Province by virtue of the Provisions of Clause 87 A of the North-West Frontier Province Law and Justice Regulation No. VII of 1901 as amended by Regulation No. I of 1906.

The following opinions were recorded by the learned Judges constituting the Full Bench :—

15*th Oct.* 1906. Rattigan, J.—As I understand it, the question before the Full Bench is, whether the Chief Court of the Punjab has jurisdiction to entertain, hear and decide certain Civil appeals transferred to it for determination by the Judicial Commissioner of the North-West Frontier Province who, in this behalf, purports to act under the provisions of clause 87 A of the North-West Frontier Province Law and Justice Regulation No. VII of 1901 as amended by Regulation No. I of 1906. In my opinion it has not such jurisdiction.

The Chief Court of this Province was first constituted and its jurisdiction and power were conferred and defined by Act IV of 1866, which was an Act passed by the Governor-General in Council at meetings for the purpose of making laws and regulations. As I shall presently point out, this authority was an expension of the Governor-General's executive council and was constituted by the Indian Councils Act, 1861, in supersession of the legislative body established under the Charter Act of 1833 (3 and 4 Will, IV C. 85). The official title given to this authority is cumbrous and for purposes of convenience and brevity I shall hereafter refer to it as the Governor-General in Legislative Council. By Section 2 of the Act above mentioned, it was provided that the Chief Court was to consist of two or more Judges to be appointed by the Governor-General in Council, and that it was to be

"the highest Court of appeal from the Civil and Criminal "Courts in the Punjab," and, subject to certain provisions, was to be "the only Court exercising appellate jurisdiction "in such cases.....as are subject to appeal to the highest "Civil and Criminal Court in the Punjab by virtue of any "law or practice now in force or as shall become subject to "appeal to the Chief Court by virtue of any law hereafter "made by the Governor-General in Council."

By Section 1 of the said Act "Punjab" was defined to mean the territories for the time being under the Government of the Lieutenant-Governor of the Punjab and its Dependencies. Act IV of 1866 was repealed by Act XVII of 1877, Section 4 of this Later Act provided that besides the Courts established under any other enactment for the time being in force, there shall be eight grades of Courts, namely :—

(1) the Chief Court, etc.

The Chief Court thus re-constituted was to consist of three or more Judges to be appointed by the Governor-General in Council (Section 5) "and was to be deemed for the purposes "of all enactments for the time being in force to be the "highest Civil Court of appeal in the territories to which this "Act extends" (Section 14), or, in other words, "all the terri-"tories for the time being under the administration of the Lieute-"nant Governor of the Punjab." Act XVII of 1877 was in its turn repealed by Act XVIII of 1884 which is the Act now in force. This Act "extends to the territories for the time "being under the administration of the Lieutenant-Governor of "the Punjab" (Section 1 (21), and Section 4 thereof provides that "there shall continue to be a Chief Court, consisting of "three or more Judges who shall be appointed by the Governor-"General in Council. Section 6 further enacts that such Chief "Court shall be deemed for the purposes of all enactments "for the time being in force to be the highest Civil Court of "appeal in the territories to which this Act extends."

Both the Acts referred to above (*viz.*, Act XVII of 1877 and Act XVIII of 1884) were passed by the same authority which passed Act IV of 1866, *i.e.*, to say, the Governor-General in Legislative Council.

Having regard to the provisions of this Act, I opine that there can be no question as to the correctness of the following propositions, *viz.* :—

(1) that the Chief Court, as a Civil Court of appeal, was constituted by the Governor-General in Legislative Council;

(2) that the power of appointing the Judges of that Court was by the said authority conferred upon "the Governor-General in Council," that is to say, the Governor-General in Executive Council, by whom the power has since always been exercised

(3) that this Court was given jurisdiction as such Court of appeal in the territories for the time being under the administration of the Lieutenant-Governor of the Punjab; and

(4) that no jurisdiction was granted to this Court by the authority which constituted it, in places outside the aforesaid territories.

In 1901 certain parts of the territories heretofore administered by the Lieutenant-Governor of the Punjab were by proclamation removed from such administration and were taken by the Governor-General in Council, with the sanction and approval of the Secretary of State for India in Council, under his immediate authority and management, and a Chief Commissioner was appointed for the administration thereof "as a separate province" (Regulation No. VII of 1901, preamble).

For this "separate province" there was also appointed a Judicial Commissioner, and by clause 6 of the said Regulation it was provided as follows:—

"Save as otherwise expressly provided by this Regulation "or by any other enactment for the time being in force, in "every enactment passed before the commencement of this "Regulation and continuing in force or hereby declared to "be in force in the North-West Frontier Province or in any "part thereof, and in every appointment, order, scheme, "rule, bye-law, notification or form heretofore made or "issued thereunder, and for the purpose of the application "of such enactment, appointment, order, scheme, rule, bye-law, "notification or form to the said province—

"(*a*) * * * * * ;

"(*b*) * * * * * ;

"(*c*) all references to the High Court or to the Chief "Court of the Punjab shall be construed as "referring to the Judicial Commissioner, save as "regards European British subjects or persons "jointly charged with European British subjects "and as regards proceedings under the Indian "Trustees Act, 1866; the Trustees and

"Mortgagees, Power Act, 1866, the Indian Divorce "Act, 1869, the Inventions and Designs Act, "1888, or Sections 57 to 60 of the Indian Stamp "Act, 1899, in respect of which proceedings the "Chief Court of the Punjab shall be the High "Court."

The Chief Court having under the Punjab Courts Act jurisdiction as a court of appeal only in such territories as are for the time being administered by the Lieutenant-Governor of the Punjab, it must necessarily follow that such Court *ipso facto* ceases to have jurisdiction (so far as the provisions of the said Act are concerned) in any part of those territories which may be removed from the administration of the Lieutenant-Governor of the Punjab and transferred to some other administration. By virtue of special provisions in some Acts, the jurisdiction of the Chief Court as a High Court may be retained even in such territories, but in all these cases such jurisdiction, which is of an exceptional nature, is derived from the provision of those Acts which either *per se* confer that jurisdiction upon the Court or empower the Governor-General in Executive Council to declare that Court to be the High Court for the peculiar purposes of the Act in question (see, *e.g.*, the definition of "High Court" in the Criminal Procedure Code, the Indian Divorce Act, 1869, and in the Inventions and Designs Act, 1888). In the case under reference, the Chief Court has, for special purposes, been declared to be the High Court by the proviso inserted in Clause 26 of Regulation No. VII of 1901, and it seems to me immaterial whether in such case the declaration by the Governor-General in *Executive* Council is made by notification *simplicitor* or in a regulation made by him in his executive capacity. In either case, he derives his power to make such declaration from the authority of the Governor-General in *Legislative* Council. But apart from these special proceedings under what authority has the Chief Court jurisdiction, or can it be *empowered* to exercise jurisdiction, as Court of Civil Appeal in respect of cases from territories to which the provisions of the Punjab Courts Act does not extend? The sole authority relied upon by the learned Government Advocate is clause 87 A. which was added to Regulation No. VII of 1901 by Regulation No. I of 1906. This clause runs as follows:—

"(1). When an appeal or an application for revision is pre- "ferred to the Judicial Commissioner in respect of any decree

"or order which was passed by him in another capacity "or in which he is personally interested, he shall, unless all "the parties request him to dispose of the case himself, transfer "it for disposal to the Chief Court of the Punjab at Lahore, "or to such officer as the Governor-General in Council may "appoint to be an Additional Commissioner for the disposal "thereof.

"(2). When an Additional Judicial Commissioner is "appointed under sub-section (1) he shall, in disposing of "any case transferred to him thereunder, have all the powers "of the Judicial Commissioner under this Regulation."

For the first remark I have to make with reference to this clause is that while the Judicial Commissioner is in express terms empowered to transfer the cases therein specified to the Chief Court for disposal, there is a significant omission to provide that the Chief Court shall have jurisdiction to entertain and dispose of these cases. This omission I think I am justified in regarding as significant not only for the reason to be presently given but also because sub-clause (2) of the clause in specific terms declares that when those cases are transferred to an Additional Judicial Commissioner the latter officer shall have all the powers of the Judicial Commissioner under the Regulation to hear and decide such cases.

Assuming, however, for the moment that it was *intended* that the Chief Court should in such cases have, and be bound to exercise a jurisdiction which does not ordinarily appertain to it, and that it must be taken that such jurisdiction is (or rather purports to be) conferred upon it by necessary implication, the question arises whether such jurisdiction has been so conferred by competent authority. Obviously, and admittedly, this authority is not the authority which created the Chief Court and conferred upon it its ordinary jurisdictional powers, and under these circumstances the Courts are not only competent, but bound, to inquire whether such extraordinary jurisdiction has been conferred by proper authority.

"The Indian Legislature has powers expressly limited "by the Act of the Imperial Parliament which created it, and "it can, of course, do nothing beyond the limits which circum- "scribe these powers. The established Courts of Justice when "a question arises whether the prescribed limits have been "exceeded, must, of necessity, determine that question, and the "only way in which they can properly do so is by looking to

"the terms of the instrument by which affirmatively the "legislative powers were created and by which regulatively "they are restricted" (*per* Lord Selborne, L. C., in *Queen* v. *Burah* (1).

The Regulation which purports to confer this extraordinary jurisdiction upon the Chief Court was made, on the recommendation of the Chief Commissioner of the North-West Frontier Province, by the Governor-General in Executive Council (see the preamble to the Regulation and clause 1 thereof). The question then is whether the Governor-General in Executive Council has, in purporting to confer the jurisdiction, acted within the limits which circumscribe his powers of legislation in such capacity, and in order to determine this question, it is necessary to look to the history of legislation in this country and to the terms of the Statute under the provisions of which the Regulation in question was made. The office of Governor-General of Bengal was first created in 1773 when the Statute 13, George 3, C. 63 (commonly known as the first Regulating Act) was passed (Ilbert's Government of India, p. 53). In the words of an eminent authority, "the provisions "of the Act of 1773 are obscure and defective as to the nature "and extent of the authority exercisable by the Governor-General "and his Council," and as to other matters, but it was clearly intended that the whole of "the civil and military governments "of the Presidency of Bengal and the ordinary management "and government of all the territorial acquisitions in the king-"dom of Bengal, Behar and Orissa" should be vested in the Governor-General of Bengal and his Council of 4 members, which was also the creation of the said Act. The Governor-General and his Council were further given a general power of control over the governments of the Presidencies of Bombay, Madras and Bencoola and the supremacy of the Bengal Presidency over the other presidencies was definitely declared (Ilbert's Government of India, p. 47). The said Statute provided that "the Governor-General and Council were to "have powers to make and issue such rules, ordinances, "and regulations for the good order and civil government "of the Company's settlement at Fort William and the subor-"dinate factories and places as should be deemed just and "reasonable and should not be repugnant to the laws of the "nation, and to set, impose, inflict and levy reasonable fines

(1) *L. R.*, 3 *App. Cas.*, 889.

"and forfeitures for their breach. But these rules and regu-
"lations were not to be valid until duly registered and publish-
"ed in the Supreme Court with the assent and approbation of
"the Court, and they might in effect be set aside by the King
"in Council." (*Ibid* pp. 50, 51). In 1781 a statute was passed (21 George 3, C. 70) with the object of settling some of the questions that had arisen out of the Act of 1773, and the Governor-General and Council were empowered "from time to "time to frame regulations for the provincial courts andcouncils." Copies of these regulations were to be sent to the Court of Directors and the regulations might be disallowed or amended by the King in Council, but were to remain in force unless disallowed within two years. In the same year the Governor-General and Council "issued a revised Code superseding all "former regulations. If these regulations were made under "the powers given by the Act of 1773 they ought to have been "registered. But it does not appear that they were so "registered, and after the passing of the Act of 1781 the "Governor-General and Council preferred to act under the "powers which enabled them to legislate without any reference "to the Supreme Court. However notwithstanding the limited "purpose for which the powers of 1781 were given, it was "under these powers that most of the regulation laws for "Bengal purported to be framed" (*ibid* pp. 61, 62).

In 1793 a revised Code of regulations was published, and up to the year 1833 the only authorities which empowered the Governor-General and his Council to legislate were the wo statutes above referred to. "At that date" (*i.e.* in 1833) "there were" (according to Cowell's Tagore Lecture of 1872) "five different bodies of statute law in force in the empire. "First, there was the whole body of statute law existing, "so far as it was applicable, which was introduced by the "Charter of George 1, and which applied, at least, to the "presidency towns. Secondly, all English Acts subsequent "to that date which were expressly extended to any par of "India. Thirdly, the regulations of the Governor-General's "Council which commence with the Revised Code of 1793 "containing forty-eight regulations, all passed on the same "day (which embraced the result of twelve years' antecedent "legislation), and were continued down to the year 1834. "They only had force in the territories of Bengal. Fourthly, "the regulations of the Madras Council, which spread over "the period of thirty-two years from 1802 to 1834, and we

"in force in the presidency of Fort St. George. Fifthly, the "Regulations of the Bombay Code, which began with the "Revised Code of Mr. Mountstuart Elpinstone in 1827, com- "prising the results of 28 years' previous legislation and "were also continued till 1834, having force and validity "in the Presidency of Fort St. David."

"In 1833" (continues Mr. Cowell) "the attention of "Parliament was directed to three leading vices in the frame "of Indian Government The first was in the nature of the "Laws and Regulations; the second was in the ill-defined "authority and power from which these various Laws and "Regulations emanated, and the third was the anomalous "and sometimes conflicting judicatures by which the laws "were administered." As a result, the Charter Act of 1833 (3 and 4 Will. IV, C. 85) was passed, and under its provisions the superintendence, direction and control of the whole Civil and Military Government of the territorial possessions of the Company were vested in a Governor-General and Councillors who were to be styled "the Governor-General of India in "Council." This Council was increased by the addition of a fourth ordinary member who was not to be one of the Company's servants and whose duty was confined entirely to the subject of legislation, he having no power to sit or vote except at meetings for the purpose of making laws and regulations (Ilbert, *ibid* pp. 84, 85). Under the Act of 1833 the legislative power of the Indian Government was vested exclusively in the said Governor-General of India in Council, and the four presidential Governments were merely authorized to submit to that authority "drafts or projects of any laws "or regulations which they might think expedient." Laws made by the Governor-General in Council under the powers given by the Act were to be subject to disallowance by the Court of Directors, acting under the Board of Control, but, when made, were to have effect as Acts of Parliament, and were not to require registration or publication in any Court of Justice. Such laws were known as "Acts" and took the place of the "Regulations" made under the previous statutes (*ibid* pp. 86—89).

It is thus in 1833 for the first time that the power of legislation was not confined exclusively to the Governor-General and his Executive Council, though as pointed out by Sir Barnes Peacocke in his minute, dated 3rd November 1859, the position of the fourth member of the Council was anomalous and unsatis-

factory as " it was only by courtesy and not by right that he was " allowed to see the papers or correspondence or to be made ac- " quainted with the deliberations of Government upon any " subject not immediately connected with legislation ". Moreover, his concurrence might be wanting to a law and the law might notwithstanding be good and valid, and his absence from the Council would not vitiate the law (Ilbert, *ibid* p. 543). Thus even after the enactment of the 3 and 4 Will. IV. C. 85, the power of legislation for all practical purposes remained with the Governor-General and his executive councillors.

This system despite complaints regarding its drawbacks and incompleteness, continued in force till 1853 when the last of the Charter Acts (16 and 17 Vict., C. 95) was passed. This statute made a very considerable and important alteration in the machinery for Indian legislation. " The ' fourth ' or " legislative member of the Governor-General's Council was " placed in the same footing with the older or ordinary members " of the Council by being given a right to sit and vote at " executive meetings. At the same time the Council was " enlarged for legislative purposes by the addition of legislative " members, of whom two were the Chief Justice of Bengal and " one other Supreme Court Judge, and the others were Com- " pany's servants of 10 years' standing appointed by the several " local Governments. The result was that the Council constitut- " ed for legislative purposes under the Act of 1853 consisted " of 12 members, namely,—

" The Governor-General,

" The Commander-in-Chief,

" The 4 ordinary members of the Governor-General's " Council,

" The Chief Justice of Bengal,

" A puisne Judge,

" Four representative members (paid) for Bengal, Madras, " Bombay and the North-Western Provinces (Ilbert, " p. 93)."

In 1854 was passed the Act (17 and 18 Victoria, C. 77), under the provisions of which the Governor-General of India in Council is empowered, with the sanction of the proper authority, to take by proclamation under his immediate management and control any part of the territories of British India, and thereupon to give all necessary orders and directions respecting the

administration of that part or otherwise provide for its administration. It was in virtue of these powers that the territories now forming the North-West Frontier Province were removed from the administration of the Lieutenant-Governor of the Punjab, taken under the Governor-General in Council and constituted a Chief Commissionership.

The legislative machinery introduced by the Charter Act of 1853 was found in the course of time to be far from satisfactory, and in 1861 it was decided to provide a substitute for it. The then Secretary of State for India (Sir C. Wood) in his speech on the first reading of the Bill, which was ultimately passed as the Indian Councils Act, 1861 (24 and 25 Victoria, C. 67) made the following observations :—" Among the " various proposals which have been made for the Government " of India is one that the power of legislation should rest " entirely in the executive, but that this should be a consultative " body ; that is that the Governor-General should assemble, from " time to time, a considerable number of persons, whose opinions " he should hear, but by whose opinions he should not be bound ; " and that he should himself consider and decide what measures " should be adopted. In the last session of Parliament, Lord " Ellenborough developed a scheme approaching this in character " in the House of Lords ; but honorable gentlemen will see in the " despatches which have been laid upon the table that both Lord " Canning considers this impossible, and all the members of his " Government, as well as all the members of the Indian Council, " concur in the opinion that, in the present state of feeling in " India, *it is quite impossible to revert to a state of things in which* " *the Executive Government alone legislated* for the country. The " opposite extreme is the desire which is natural to Englishmen " wherever they be, that they should have a representative body " to make the laws by which they are to be governed. I am sure, " however, that every one who considers the conditions of India " will see that it is utterly impossible to constitute such a " body in that country."

As a compromise between the two extremes referred to by the Secretary of State in this speech, the following scheme was adopted. A fifth ordinary member was added to the Governor-General's Executive Council, and the Council, for legislative purposes, " was reinforced by additional members, not less than 6 " nor more than 12 in number, nominated by the Governor-General " and holding office for 2 years. Of these additional members,

" not less than one half were to be non-official, that is to say, " persons not in the Civil or Military services of the Crown. " One Lieutenant-Governor of a province was also to be an " additional member whenever the Council held a legislative " sitting within his province" (Ilbert, p. 103). This statute is a landmark in the history of Indian legislation, for it was now for the first time that practical effect was given to the theory that the power of legislation should not rest with the executive authority. The constitution of the legislative machinery as now constituted is sufficient proof of this proposition, but there are in the provisions of the statute further proofs. In the first place there is the provision which validated the rules, laws and regulations made before the passing of the statute by the Governor-General in Council and other authorities otherwise than in conformity with the provisions of the Charter Acts. The very fact that it was deemed necessary to validate these " laws " shows that the Governor-General in Executive Council had, or was supposed to have had, no power to legislate otherwise than in strict accordance with the provisions of the statute which conferred powers of legislation upon him in that capacity. But while it was provided that ordinarily legislation should for the future be effected only by the Governor-General in Legislative Council, it was realised that *in times of emergency* it might be necessary to legislate in a more summary manner, and it was accordingly provided (by Section 23 of the said Statute) that " the Governor-General may in cases of emergency make " and promulgate ordinances for the peace and good Govern- " ment of British India or any part thereof, and any ordinance " so made has, for such period not exceeding six months from " its promulgation as may be declared in the notification, the " like force of law to a law made by the Governor-General " in Council at a legislative meeting ; but the power of making " ordinances under this section is subject to the like restric- " tion as the power of making laws at legislative meetings ; " and any ordinance made under this section is subject to " the like disallowance as a law passed at a legislative meeting, " and may be controlled or superseded by any such law." The power thus conferred is of a most exceptional character, and, according to the despatch of the Secretary of State, should be exercised only on urgent occasions.

From the provisions of the Indian Councils Act of 1861 it is, I think, clear that, except for very special and most

exceptional purposes, the power of legislation, originally vested in the Executive authorities, has been transferred to a body which is in constitution entirely distinct from the Governor-General in Executive Council. In some very important particulars these provisions have been considerably modified by the Indian Councils Act of 1892 (55 and 56 Victoria, C. 14), but for the purposes under reference these modifications are not relevant and the general proposition is true that the power of the Executive Council of the Governor-General to legislate is now extremely circumscribed and very strictly defined. But in 1870 further powers of legislation were, under specified circumstances, conferred upon the Governor-General in Council. It was found as a matter of experience that legislation in the ordinary manner was extremely difficult, if not impracticable in the case of *new and backward territories* acquired by the Crown, and upon the suggestion of Sir H. S. Maine, the then legal member of Council, a statute was passed (33 and 34 Victoria, C. 3) which *for this purpose* and to this extent restored to the Governor-General in Executive Council the summary power of legislation originally possessed by him in that capacity. This statute, which was enacted "with the object of providing "a more summary legislative procedure for the more backward "parts of British India," (Ilbert 214) provides as follows (Sections 1 and 2): "Every Governor of a Presidency in Council, "Lieutenant-Governor or Chief Commissioner, whether the "Governorship or Lieutenant-Governorship or Chief Com-"missionership be now in existence or may hereafter be "established, shall have power to propose to the Governor-"General in Council drafts of any regulations, together with "the reasons for proposing the same, for the peace and govern-"ment of any part or parts of the territories under his govern-"ment or administration to which the Secretary of State for "India shall, from time to time, by resolutions in Council, "declare the provisions of this section to be applicable from any "date to be fixed in such resolution."

"And the Governor-General in Council shall take such "draft and reasons into consideration; and when any such draft "shall have been approved of by the Governor-General in "Council, it shall be published in the *Gazette of India* and in "the local Gazette, and shall thereupon have the like force of "law and be subject to the like disallowances as if it had been "made by the Governor-General of India in Council at a "meeting for the purposes of making laws and regulations."

It is under the provisions of this statute that Regulation No. I of 1906, which adds clause 87 A to Regulation No. VII of 1901, purports to have been made. In my humble opinion, this clause, if it was intended to confer jurisdiction on the Chief Court in respect of the cases therein specified, is *ultra vires*. The statute has been declared by the Secretary of State for India in Council applicable to certain districts which are now included in the North-West Frontier Province (see Notification No. 2101, dated 2nd December 1870), but it has not been declared by such authority to be applicable to the Punjab. Clearly, therefore, under its provisions direct action could not be taken as regards persons, bodies or things in the Punjab. Equally clearly the Chief Commissioner of the North-West Frontier Province has no power of his own authority to confer jurisdiction extra-territorially on the Chief Court of the Punjab which is situate beyond the limits of the territories under his administration. And it was, no doubt, for this reason that the "draft" submitted by him to the Governor-General in Council (which said draft the Governor-General has been given no power to amend) contained no provision conferring such jurisdiction on the Chief Court. It was argued, however, that inasmuch as the draft regulation has been approved of by the Governor-General in Executive Council, the Chief Court must be taken by necessary implication, to have been given this extraordinary and extra-territorial jurisdiction. I confess I fail to follow the argument. The statute, under the provisions of which Regulation No. I of 1906 was made, does not apply to the Punjab. Its application is strictly and expressly limited to such places as the Secretary of State shall, from time to time, by resolution in Council, declare its provisions to be applicable, and it has not been so declared applicable to this province. Further, the powers of legislation possessed by the authority which made the Regulation (*i.e.*, to say, the Governor-General in Executive Council) are extremely circumscribed and very narrowly limited and in order to be *intra vires* and valid a legislative measure enacted by that authority must fall clearly within those powers. As I have endeavoured to show by the summary above set out, there is now no general power of legislation vested in the Governor-General in Executive Council ; and there is in this respect a very marked distinction between the powers possessed by the Governor-General in Legislative Council and the powers possessed by him in Executive Council. In this connection I might, for example, refer to Sections 3, 4 and 6 of another

statute (28 and 29 Victoria, C. 18). Under those provisions the Governor-General in Executive Council is, under certain conditions, empowered by order to alter the local limits of the jurisdiction of any High Court, but he can do so only by transferring any territory or place from the jurisdiction of one High Court to the jurisdiction of any other High Court. It is expressly added, however, that nothing in these provisions is to affect any power of the Governor-General in Council in Legislative meetings, the proviso making it clear that even in this particular matter the latter powers are far wider and more general than the powers conferred by the statute on the Governor-General in Executive Council.

In my opinion, then, the approval by the Governor-General in Executive Council of the draft submitted to him under the provisions of 33 and 34 Victoria, C. 3, cannot give to the Chief Court a jurisdiction which it was not competent for the Chief Commissioner himself to give the Court, either by express provision in the draft or by necessary implication from its other provisions. Of course within the limits of the territories to which the statute (33 and 34 Victoria, C. 3) has been duly declared to be applicable, a draft approved by the Governor-General in Council has, under the provisions of the statute, like force of law as if it had been made by the Governor-General in Legislative Council, but I cannot read these words as meaning that the Governor-General in Executive Council can, by giving his approval to a draft made under the statute, legislate in respect of persons, bodies or things outside those limits as effectually as if the measure had been one passed by the Governor-General at a meeting of the Council for the purpose of making laws and regulations.

The learned Government Advocate contended that clause 87 A of the Regulation under consideration does not in reality affect the Punjab as it merely provides for the disposal of cases sent to the Chief Court from the North-West Frontier Province. But I venture to think that this argument is fallacious, for if the Chief Court has in reality no jurisdiction under the clause to entertain these cases, it is obvious that the clause in purporting to give such jurisdiction legislates in respect of a corporate body which is not subject to the Chief Commissioner of the North-West Frontier Province.

Summarising my argument, I am of opinion that the question referred to the Full Bench should be answered in the

negative for the following reasons :—

(1) Apart from certain special proceedings which are otherwise duly provided for, the Chief Court, as a Court of appeal in Civil cases, has jurisdiction under its Constitutive Act only within the territories which are for the time being under the administration of the Lieutenant-Governor of the Punjab ;

(2) the cases transferred to the Chief Court for disposal by the Judicial Commissioner of the North-West Frontier Province are cases which under ordinary circumstances the Chief Court would admittedly have no jurisdiction to entertain and decide;

(3) there is in Regulation No. 1 of 1906 and in Regulation No. VII of 1901, no express provision to the effect that the Chief Court shall have, or be compelled to exercise, jurisdiction in such cases ;

(4) if by necessary implication, clause 87 A (added to Regulation VII of 1901) can be taken to mean that jurisdiction in such cases is conferred on the Chief Court, and that the Chief Court is able in these cases to exercise such jurisdiction, the clause is in my opinion *ultra vires* inasmuch as it was made under the provisions of a statute which is not in force in, and has no applicability to, the territories for the time being under the administration of the Lieutenant-Governor of the Punjab.

The Chief Court's jurisdiction as a Court of Civil Appeal has been defined by its Constitutive Act, and in respect of certain special proceedings this jurisdiction has been enlarged by Acts emanating from the same authority which constituted the Court and defined its jurisdictional limits. It has no other jurisdiction as such Court of appeal, and I cannot agree that this jurisdiction can be extended extra-territorially by a Regulation made under a statute which is not in force in the Province in which the Court is situate and by an authority whose powers of legislation are exceptional, special and strictly limited under that statute.

I would therefore reply to the reference that the Chief Court has no jurisdiction to entertain and decide the cases referred to it by the Judicial Commissioner of the North-West Frontier Province.

REID, J.—I concur in the reasons and conclusions recorded by my brother Rattigan and in his reply to the reference. Although the Judges of this Court are individually subject to the orders of the Governor-General in Executive Council the jurisdiction of the Court, as a body, can, in my opinion, be extended or diminished by order only of the authority which constituted it, the Governor-General in Legislative Council. 25th Oct. 1906.

CHATTERJI, J.—I have carefully perused the exhaustive judgment of my learned brother and on the whole agree with his conclusions. I have come to this opinion not without some hesitation for the point before the Court is one of considerable difficulty and obscurity, and with some reluctance as one effect of our decision will be to throw doubt on the validity of some of the legislation of the same character by the Government of India. 11th Nov. 1906.

Nevertheless I feel that it is hardly possible for us to resist the reasoning of my learned brother that the Chief Court as a corporate body or legal entity has its powers as a Court of Civil Appeal strictly limited and defined by its Constitutive Act XVIII of 1884, and that its jurisdiction as such Court cannot be extended or modified except by an Act of the Legislature. I consider that the Court does not exist as a Court of Civil Appeal except under the Act. The expression "Chief Court" in Section 87 A of Regulation VII of 1906 means of course the Court as a legal body and not the collection of individual Judges who are its members. The jurisdiction purporting to be conferred by the Regulation is moreover not general jurisdiction or jurisdiction over a specified class of cases concurrent with that of the Judicial Commissioner of the North-West Frontier Province, but jurisdiction over particular cases on the happening of a certain contingency and is conferred by the Act of the Judicial Commissioner and is dependent on his pleasure for as I read Section 87 A he has the power of transfer to the Chief Court even if an Additional Judicial Commissioner is appointed by the Governor-General in Council.

Clause (2) of the section declares that when an Additional Judicial Commissioner is appointed, he shall exercise, in respect of the cases transferred all the powers of the Judicial Commissioner under the Regulation, but there is no corresponding clause empowering the Chief Court to dispose

of such cases. It is doubtful therefore whether the Chief Court would in ordinary circumstances be held to have the power conferred on it by implication. But when we consider that the Court is absolutely incompetent to try any Civil Appeal not arising within the territories of the Lieutenant-Governor of the Punjab for the time being and that its Constitutive Act cannot be affected by legislation falling under a different category and enacted by a wholly different authority, the doubt appears, in my opinion, to be much enhanced.

For these and the other reasons given by Mr. Justice Rattigan I concur in the reply he proposes to give on the question before the Full Bench.

ROBERTSON, J.—After very careful consideration and at first some doubt, I concur in the view expressed by my brother Rattigan.

13th Nov. 1906. CHITTY, J.—I concur in the judgment of my brother Rattigan and in the reply proposed to be given to the question before us.

No. 51.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

APPELLATE SIDE.

HARJALLU MAL,—(DEFENDANT),—APPELLANT,

Versus

NATHU RAM,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 230 of 1905.

Custom—Pre-emption—Pre-emption of existence of right in a town in respect to agricultural land assessed to land revenue—Una, Hoshiarpur District—Punjab Laws Act, 1872, Sections 10, 11, 12.

Held that the custom of pre-emption cannot be presumed to exist in Una, District Hoshiarpur, inasmuch as it is a town and not a village, and that there can be no presumption as to the existence of a custom of pre-emption in a town even in respect to assessed and cultivated land.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 13th February 1905.

Shadi Lal, for appellant.

Shelverton, for respondent.

The facts of this case appear from the following judgment:—

JOHNSTONE, J.—In this case it appears that Hira Singh and Mussammat Gulab Devi sold 14 *kanals* of land to Harjallu Mal for Rs. 620. Nathu Ram has sued for pre-emption. The land is within the limits of Una Municipality in the Hoshiarpur District. It is agricultural, *i.e.*, culturable land and is assessed to land revenue. Nathu Ram claims on the ground that the custom of pre-emption prevails, and that his rights are superior to the vendee's. Other questions also arose in the first Court, such as the application of the Punjab Alienation of Land Act; and in the end the first Court, assuming that the custom of pre-emption did prevail, held that vendee, inasmuch as, in the opinion of the Court, he did, at time of sale in suit, own agricultural land in Una, was as much a proprietor in Una as plaintiff and so dismiss ed the suit, saying the right of vendee was as good as the right of plaintiff. 9th *Jany.* 1907.

The learned Divisional Judge, also assuming that the custom of pre-emption must be presumed to exist, inasmuch as the land is agricultural land, found that at date of sale in suit the vendee was not a proprietor of agricultural land in Una. He therefore found for plaintiff on the main question and going into the questions of price and market value, finally gave plaintiff a decree conditional on payment of Rs. 250-4-0 down, the land being subject to a mortgage of Rs. 369-12-0 in addition, total Rs. 620.

Vendee defendant has appealed, and the learned Judge before whom the case came in Chambers has referred it to a Division Bench.

The first question is whether in such a place as Una the custom of pre-emption should be presumed to exist. The distinction drawn in the Punjab Laws Act, 1872, in this connection is not between agricultural land and non-agricultural land but between land "in a village" and land "in a town". This seems to have been lost sight of in the Courts below. Even as regards sites in the *abadi* of a "village" the custom of pre-emption is presumed to exist: *cf.* meaning of "land" in pre-emption sections of Punjab Laws Act, as explained in *Haidar and others* v. *Ishwar Das and others* (1). Equally in a "town," even as regards assessed and cultivated land the custom is not to be presumed, but must be proved.

(1) 32 P. R., 1906.

Una became a Municipality in 1874. It seems always to have had between 4,000 and 5,000 inhabitants. We are told by Mr. Shelverton, and this has not been denied, that there is in Una, though not within the limits of the Municipality, an area of some 700 *ghumaos* of agricultural land assessed to land revenue. There is a description of the place with an account of its history in the Revised (1904) Gazetteer of the Hoshiarpur District, of the facts stated in which we may, I think, take judicial notice, see pages 24, 63, 227, and 228. It was founded by the great-great-grandfather of the present Bedi. The writer of the Gazetteer calls it a "town" and says it has one main street of shops, mostly built of masonry, the remaining houses being chiefly of mud. "A fine flight of stone steps leads "down to a stream on the east. Una used to be the emporium "for the hills of all articles of commerce: now, however, much of "the traffic passes through the town without breaking bulk." The cause of this is said to be the increase of shops in the hills and the practice of dealing direct with Amritsar.

I know of no definition of "town" as opposed to "village"; but I am inclined to call Una a town. Mr. Shelverton suggests that it was a village once, and that it is for the other side to show how and at what stage it became a town. In my opinion it was certainly already a town when it was an emporium for the trade of the hills years ago; and I cannot see that it has ceased to be a town because trade or certain kinds of trade may have diminished in volume, especially as the population has kept up (it is now 4,746) see page 24 of Gazetter and evidently a large part of the population is non-agricultural.

The custom of pre-emption must therefore be *proved* to exist, if plaintiff is to have his decree. But it has not been proved to exist. Indeed, everything is against the allegation that it exists. The sales of land have been very numerous—over 50, admittedly—there are said to have been only two pre-emption suits, and not a single suit has been successfully brought with regard to land within municipal limits; and as far back as 1873, in a suit, *Jangi* v. *Mussammat Ram Devi*, decided on 9th June 1873 by the Deputy Commissioner (also, no doubt, District Judge) of the District, it was stated that no custom of pre-emption exists in Una.

I might also point out that, inasmuch as vendee defendant owns houses in Una *with their sites* since 1872 and 1873 as see deed of sale and auction certificate on the file and inasmuch as

"land" in the pre-emption law of 1872 means land in the dictionary sense (*Haidar and others* v. *Ishwar Das and others* (1); defendant vendee is in as good a position as regards pre-emption in Una as plaintiff, even if we take it that Una is a village and that the custom of pre-emption prevails. I agree with the learned Divisional Judge that defendant vendee was not owner of *agricultural* land in Una when the sale in suit was effected; but he was owner of "land." It is not, however, necessary to insist upon this.

Mr. Shadi Lal has referred us to the peculiar and special cases of Jahan-numa, a suburb of Delhi, *Ankar Lal* v. *Baij Nath* (2) and *Karam Ilahi* v. *Bahna Mal* (3); of Ludhiana *Kadir Bakhsh* v. *Ghulam* (4); of Jullundur (Civil Appeal 202 of 1905) and so forth; but it is unnecessary to consider them.

I would accept the appeal on the grounds that Una is a town, the custom of pre-emption cannot be presumed to prevail in it, and that no such custom has been proved; and I would dismiss plaintiff's suit with costs throughout. Civil Revision 457 of 1905, heard along with this, succeeds on exactly the same ground.

RATTIGAN, J.—I agree. The judgment in *Ishwar Das* v. *Dumi Chand* (5) is a further authority, in support of the view taken in *Haidar and others* v. *Ishwar Das and others* as to the meanings of "land" and "landowner" in Section 12 of the Punjab Laws Act. The appeal is accepted and plaintiff's suit dismissed with costs throughout. *9th Jany.* 1907.

Appeal allowed.

No. 52.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

SOHAN SINGH,—(DEFENDANT),—PETITIONER,

Versus

JAHANDAD KHAN,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Miscellaneous No. 188 of 1906.

Appeal to Privy Council—Appeal from an order of remand—Final decree—Civil Procedure Code, 1882, *Section* 595.

Held, that an order under Section 562 of the Code of Civil Procedure remanding a case to be tried on merits is not a final decree within

(1) 22 P. R., 1906. (2) 21 P. R., 1900.
(3) 108 P. R., 1899. (4) 74 P. R., 1897.
(5) 27 P. R., 1907.

the meaning of clause (*a*) of Section 595 and therefore no appeal lies from such an order to the Privy Council.

Tetley v. *Jai Shankar* (1), *Habib-un-nissa* v. *Munawar-un-nissa* (2), *Aben Sha Sabit Ali* v. *Cassirao Baba Sahib Holkar* (3), and *Mahant Ishvargar Budhgar* v. *Candasama Amar Singh* (4), followed.

Sayad Mazhar Hussain v. *Mussammat Bodha Bibi* (5), distinguished.

Application for leave to appeal to the Privy Council from a decree of the Chief Court of the Punjab, dated 27th February 1906.

Ishwar Das, for petitioner.

M. S. Bhagat, for respondent.

The judgment of the Court was delivered by

15*th Feby.* 1907. JOHNSTONE, J.—This is an application for leave to appeal to the Privy Council, such an application can only be granted if it falls under one of the clauses of Section 595, Civil Procedure Code. In this case this Court, holding that the Court below had decided the suit on a preliminary point (*viz.*, *locus standi*), reversed the finding on that point as erroneous and passed an order of remand under Section 562, Civil Procedure Code. The "value" here is sufficient to warrant an appeal under clause (*a*) of Section 595 read with Section 596; and the real question therefore is whether the order passed by us can be said to be a final decree, see Section 595, clause (*a*). Mr. M. S. Bhagat on behalf of plaintiff urges that it is not a final decree. It is certainly a "decree" for the purposes of Chapter XLV of the Code—see Section 594; but we hesitate to call it a final decree. It does not dispose of the case; and in *Tetley* v. *Jai Shankar* (1), *Habib-un-nissa* v. *Munawar-un-nissa* (2), *Aben Sha Sabit Ali* v. *Cassirao Baba Sahib Holkar* (3), and *Mahant Ishvargar Budhgar* v. *Candasama Amar Singh* (4), such an order has been treated and spoken of as little more than an interlocutory order. In *Sayid Mazhar Hussain* v. *Mussammat Bodha Bibi* (5), an appeal to the Privy Council was allowed against a remand order under Section 562, Civil Procedure Code; but this was because it was found that the order really disposed of the whole case and that the remand should not have been so made. If the final decision is against petitioners in this country they can still, in appealing to the Privy Council, ask that tribunal, to take up the question

(1) *I. L. R., I All.*, 726. (3) *I. L. R., VI Bom.*, 260.
(2) *I. L. R., XXV All.*, 629. (4) *I. L. R., VIII Bom.*, 548.
(5) *I. L. R., XVII All.*, 112.

of *locus standi*, which alone has so far been decided against them. Therefore, we also think that we should not grant a certificate under clause (*c*), inasmuch as petitioners have in our opinion another remedy much more convenient for all parties, and further because they may succeed in their case on the merits, in this country, in which circumstances an appeal now upon our order would be a mere waste of money.

Petition refused with costs.

Application dismissed.

No. 53.

Before Mr. Justice Reid.

SHAHABAL SHAH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

GANESH DAS AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1018 of 1904.

Abandonment of land—Suit to recover possession—Absentee—Adverse possession.

Held, that mere non-occupation and non-cultivation of unculturable land for a long period does not, in the absence of a motive or evidence of intention to abandon or of adverse possession for the statutory period, constitute abandonment.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Shahpur Division, dated 9th August 1904.

Muhammad Shafi, for appellants.

Pestonji Dadabhai and Nanak Chand, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—The facts are stated in the judgments of the Courts below :— *15th Feby.* 1907.

I see no reason for interference. The vendor's father, Gul Shah, certainly acquired the land in suit on a compromise of the suit between him and Ghulam Shah, ancestor of the appellants in 1855, and in 1856 it was consequently entered in the name of Gul Shah at settlement.

In 1874, in the course of a suit between Gul Shah and Jindwada, father of the appellants, Jindwada stated that Gul

Shah had no land except that now in suit, and neither Gul Shah nor his son, the vendor, expressly abandoned the land, or discontinued possession 12 years before suit.

Counsel for the appellants relied on *Ilahi Bakhsh* v. *Shamas-ud-din* (1) and *Mohima Chander Mazoomdar* v. *Mahesh Chandar Neoghi* (2). In the latter case their Lordships of the Privy Council held that plaintiffs in a suit for possession, based on their title, had to prove their possession within 12 years of suit; and in the former case it was held that a claimant, the sole recognisation of whose rights was the record of his father's name in a list of absconders attached to paragraph 8 of the record of rights in 1854, had failed to establish the discontinuance of his possession. The suit was instituted in November 1890. Neither of these authorities helps the appellants.

It is admitted that the land in suit was not assessed to Government revenue, and the owners consequently did not abandon it to evade payment of revenue. In the absence of motive for abandonment, and of evidence of intention to abandon or of adverse possession of the appellants for the statutory period, the suit is not barred by Article 142 or Article 144 of the Limitation Act, and the record does not contain any satisfactory evidence of such motive or intention or adverse possession. Failure to cultivate unculturable land does not constitute abandonment. *Ramzan Ali* v. *Basharat Ali* (3), and very little, if any, of the land was culturable. As pointed out by the lower Appellate Court, mutation was effected in favour of the vendor in 1901, on his father's death, after the appellant Shahid Shah had been asked what the facts were, and this was after the vendor had been recorded as an absentee and the appellants had been recorded as in possession during the settlement of 1901-02. The suit was instituted in 1902.

In my opinion neither the vendor nor his father abandoned the land in suit and neither of them discontinued possession or were ousted twelve years before suit.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 199 P. R., 1899. (2) I. L. R., XVI Calc., 478, P. C.
(3) 105 P. R., 1901.

No. 54.

Before Mr. Justice Robertson.

SUNDAR SINGH,—(PLAINTIFF),—APPELLANT,

Versus

MEHR SINGH,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 1293 of 1906.

Custom—Pre-emption—Pre-emption on sale of shops—Katra *Ramgarhian, Amritsar city—Punjab Laws Act*, 1872, *Section* 11.

Held, that the custom of pre-emption in respect of sale of shops by reason of vicinage in *Katra* Ramgarhian of the city of Amritsar has not been established.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Amritsar Division, dated 23rd January 1906.

Ram Bhaj Datta, for appellant.

Sukh Dial and Roushan Lal, for respondent.

The judgment of the learned Judge was as follows :—

ROBERTSON, J.— The sole question for decision is, does the right of pre-emption obtain as regards shops in the *Katra* Ramgarhian of the Amritsar city ? *8th Jany.* 1907.

It is quite clear that it lay upon the plaintiff to prove affirmatively that the custom does obtain. The learned Additional Divisional Judge has held that the evidence offered in proof of its existence is insufficient.

Proof that a custom exists in regard to houses is not sufficient to show that the custom exists as regards shops. The building, which it is sought to pre-empt in this case, is a shop pure and simple.

There is one instance quoted in which in 1899 the Munsiff, 2nd class, held that the custom of pre-emption did exist in regard to shops, but this is the only instance in regard to shops pure and simple.

There are two other instances, one in 1882 and one in which Mussammat Ram Kaur was plaintiff, mentioned by the witnesses in which the right of pre-emption was successfully asserted in regard to tenements which were partly dwelling-houses and partly shops.

The other instance relates to dwelling-houses only.

No evidence was offered by the defendants but the question is whether or not the plaintiff has succeeded in proving conclusively that the custom does obtain.

I agree with the learned Divisional Judge that he has not, and reject the appeal with costs.

Appeal dismissed.

No. 55.

Before Mr. Justice Lal Chand.

CHIRAGH DIN,—(Plaintiff),—APPELLANT,

Versus

Appellate Side. NIZAM DIN AND OTHERS,—(Defendants),—RESPONDENTS.

Civil Appeal No. 741 of 1906.

Res judicata—*Suit for declaration of ownership of land by purchase—Dismissal of suit on merits—Subsequent suit for possession by same plaintiff as heir—Different causes of action—Civil Procedure Code*, 1882, *Section* 13.

Held, that the dismissal of a suit for a declaration that the plaintiff was the sole owner in possession of certain land by purchase is not *res judicata* in a subsequent suit brought for the possession of the same property on the ground that the plaintiff was entitled to the said land not as an owner but as heir and adopted son of the last male owner inasmuch as his title as an heir being an inconsistent claim could not have formed an alternative ground of attack in the former suit without creating confusion.

Although a party is bound to put forward all grounds of attack as have reference to the same cause of action but where several independent grounds are available to him he is not bound to unite them all in one suit.

Further appeal from the decree of J. G. M. Rennie, Esquire, Additional Divisional Judge, Amritsar Division, dated 25th May 1904.

Oertel and Zia-ud-din, for appellant.

Nabi Bakhsh, for respondents.

The judgment of the learned Judge was as follows :—

25th June 1906. Lal Chand, J.—The lower Courts have dismissed this suit as barred by Section 13, Civil Procedure Code, under the following circumstances.

One Kutba, who was entered in the revenue papers as owner and mortgagee of portions of the land in suit, died childless on

12th February 1903. Mutation of names having been effected in defendants' favour as reversioners of Kutba, the present plaintiff sued the present defendants on 24th July 1903 for a declaration that he was sole proprietor in possession of the land entered in Kutba's name as owner. The suit was based on the foundation of a sale deed, dated 3rd June 1887, on which plaintiff relied to support his title. The defendant pleaded that Kutba was the true owner, and that the sale deed relied upon by plaintiff to support his title was caused to be executed *benami* in plaintiff's favour by Kutba. The Court held that the sale deed was *benami* and that Kutba was the true owner, and on these findings dismissed plaintiff's suit on 25th January 1904. On 11th February 1904 the present suit was instituted by plaintiff-appellant for possession of land claimed in the former suit and for additional 7 *kanals* and 17 *marlas* held by Kutba as mortgagee alleging his title to recover possession as heir and adopted son of Kutba. The lower Courts have dismissed the suit as barred by Section 13, Civil Procedure Code, on the ground that the plaintiff ought to have included his claim as an adopted son in the former suit as an alternative claim. I am unable to agree with the view taken by the lower Courts. It appears to me that the lower Courts have failed to notice that the plaintiff is not now litigating under the same title as in the former suit. His former suit was based on an allegation that he was owner of the land then sued for by reason of his purchase in 1887, and he produced and relied upon the sale deed, dated 3rd June 1887, as the foundation for his title. According to the allegations made in the former suit Kutba never owned or held the land in dispute. On the other hand, in the present suit, plaintiff admits Kutba's title and claims as his heir. It is inconceivable how under the circumstances plaintiff could have included such inconsistent claims in one plaint in the former suit without creating confusion. Moreover, the decree passed in the former suit disposed of plaintiff's title as then set up, *viz.*, that he was owner of the land by purchase. This decision by implication decided against plaintiff all grounds whether urged or not by which he might or ought to have supported his claim as owner by purchase. But the decree then passed could by no means be held to have disposed of the ground or title now alleged, *viz.*, that plaintiff was entitled to recover possession not as owner in spite of Kutba but as his heir and adopted son. Explanation II to Section 13 on which the lower Courts and respondents' pleader have relied is altogether inapplicable to such a case. Explanation II merely explains a matter directly and substantially in issu

in a suit, but it does not dispense with the necessity of finding in a particular case the other equally essential requirements of the section such as that the parties were litigating under the same title and that the matter in issue was finally heard and decided. It is true that a matter which was not alleged but might and ought to have been alleged would not ordinarily be expressly heard and decided in the former suit, but it might be disposed of by implications, *i.e*, the gist and nature of the decision might be such as to include by implication a final decision of that matter. Any how Explanation II is merely an explanation of a part of Section 13 and cannot be treated as over-riding or dispensing with the other equally essential provisions of the section. I therefore hold that Section 13 is not applicable to the present case. The view I take is supported by the following authorities :—

Pala Mal and others v. *Maya* (1), *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2), *Veerana Pillai* v. *Muthu Kumara Asary* (3), *Woomesh Chandra Maitra* v. *Barada Das Maitra* (4), and *Kailash Mondul* v. *Baroda Sundari Dasi* (5).

For the respondents reliance was placed on *Kanhaya Lal* v. *Charati Lal* (6), *Badar Din* v. *Bura Mal* (7), *Banne Shah* v. *Karm Chand* (8), *Kesar Singh* v. *Jawand Singh* (9), *Kaka* v. *Bhola* (10), *Pala Mal* v. *Maya* (11), *Nek Muhammad* v. *Sattar Muhammad* (12), *Zafaryah Khan* v. *Fatteh Ram* (13), *Imam Khan* v. *Ayub Khan* (14), *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (15), *Dost Muhammad Khan* v. *Said Begam* (16), and *Pulandar Singh* v. *Jwala Singh* (17), but they are inapplicable.

(1) *Kanhaya Lal* v. *Charati Lal* (6), distinctly proceeded on the ground that *the claim in each suit being by inheritance*, the plaintiffs in the previous suit might and to have asserted their title as collateral failing their exclusive title as grandsons.

(2) *Badar Din* v. *Bura Mal* (7), was a case of a defendant held bound to resist the claim on all grounds available at the time and his case was held distinguishable from a plaintiff's

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(1) 146 *P. R.*, 1890.
(2) *I. L. R.*, *XXVI Mad.*, 760.
(3) *I. L. R.*, *XXVII Mad.*, 102.
(4) *I. L. R.*, *XXVIII Calc.*, 17.
(5) *I. L. R.*, *XXIV Calc.*, 711.
(6) 4 *P. R.*, 1899.
(7) 4 *P. R.*, 1903.
(8) 39 *P. R.*, 1881.
(9) 142 *P. R.*, 1884.
(10) 96 *P. R.*, 1881.
(11) 146 *P. R.*, 1890.
(12) 63 *P. R.*, 1896.
(13) 100 *P. R.*, 1898.
(14) *I. L. R.*, *XIX All.*, 517.
(15) *I. L. R.*, *XX Calc.*, 79.
(16) *I. L. R.*, *XX All.*, 81.
(17) *I. L. R.*, *XX All.*, 516.

case who may not be bound to sue for relief on all the previous causes of action which he may claim to possess.

(3) *Banne Shah* v. *Karm Chand* (1) was a similar case where defendant failed to set up all his pleas in the former suit for possession which was decreed and defendant was held precluded from suing to recover possession of the same property on a ground which was not pleaded by him in the former suit.

(4) *Kesar Singh* v. *Jawand Singh* (2) proceeded on the same principle as *Badar Din* v. *Bura Mal* (3) already noted.

(5) *Kaka* v. *Bhola* (4), proceeded on the ground that the claim for compensation made in the suit was a condition precedent to ejectment and therefore ought to have been made a ground of attack in a suit to contest notice of ejectment.

(6) *Pala Mal* v. *Maya* (5) distinctly laid down the principle that where several independent grounds of action are available a party is not bound to unite them all in one suit though he is bound to bring before the Courts all grounds of attack available to him with reference to the title which is made the ground of action.

(7) *Nek Muhammad* v. *Sattar Muhammad* (6). Section 13, Explanation II, was applied on the ground that the matter alleged in the subsequent suit was actually decided in the previous suit against the plaintiff though not raised by him.

(8) *Zafaryah Khan* v. *Fatteh Ram* (7). Full Bench merely laid down that Section 13 would apply if the material issue in both suits be identical although the subject-matter may be different.

This case was quoted with reference to claims for 7 *kanals* 17 *marlas* held by Kutba as mortgagee, but is wholly inapplicable as the material issue in the two suits is entirely different and not identical.

(9) *Imam Khan* v. *Ayub Khan* (8) is more to the point. Plaintiff first sued for possession as owner which

(1) 39 *P. R.*, 1881.
(2) 142 *P. R.*, 1881.
(3) 4 *P. R.*, 1903.
(4) 96 *P. R*, 1881.
(5) 146 *P. R.*, 1890.
(6) 63 *P. R.*, 1896.
(7) 100 *P. R.*, 1898, *F. B.*
(8) *I. L. R., XIX All.*, 517.

failed and then sued for possession as mortgagee which was held barred under Section 13, Explanation II. This case, however, was decided with reference to the judgment of their Lordships of the Privy Council in *Kameswar Pershad* v. *Rajkumari Rattan Koer* (1) which as pointed out in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2), has been misapprehended and misapplied in certain cases. I am inclined to believe that it was misapplied in the Allahabad case under reference. It was apparently over-looked that in the Privy Council case the title under which the plaintiff sued in the former and the subsequent suit was identical by his title as a mortgagee. He, however, omitted in the former suit to urge defendant's personal liability for the claim on a ground which he urged in the subsequent suit, and under the circumstances it was held that Section 13, Explanation II, applied. It was pointed out: "Where matters are so "dissimilar that their union might lead to confusion, the "construction of the word 'ought' would become important; "in this case the matters were the same. It was only an "alternative way of seeking to impose a liability and there-"fore ought to have been made a ground of attack in the "former suit and therefore that it should be deemed to have "been a matter directly and substantially in issue in the "former suit and is *res judicata*"

It is obvious that this judgment is altogether inapplicable to support respondents' contention in the present case and it does not seem to me to support the view taken in the Allahabad case under reference which appears further to be directly opposed to the decision in Ramaswami's case.

(11, & 12). Two more cases *Dost Muhammad Khan* v. *Said Begam* (3) and *Pulandar Singh* v. *Jwala Singh* (4), were relied upon. Both these cases were of omission to plead a certain ground in defence and were analogous to *Badar Din* v. *Bura Mal* (5) already explained.

(12) The second case however was expressly over-ruled by Full Bench judgment of the same High Court in *Ram Chand* v. *Durga Prasad* (6), and is moreover opposed to the view taken in *Khairati* v. *Akko* (7) where it was held that

(1) *I. L. R., XX Calc.*, 79, *P. C.* (4) *I. L. R., XX All.*, 516.
(2) *I. L. R., XXVI Mad.*, 760. (5) 4 *P. R.*, 1903.
(3) *I. L. R., XX All.*, 81. (6) *I. L. R., XXVI All.*, 61.
(7) 108 *P. R.*, 1882.

the subsequent suit for pre-emption by the same plaintiff who failed to set aside a sale as a reversioner was not barred under Section 13, Explanation II.

It is thus clear that none of the cases quoted for respondents support the view taken by the lower Courts and the single case which is somewhat analogous, *viz.*, *Imam Khan* v. *Ayub Khan* (1) proceeded, I venture to think, on a misapprehension and misapplication of the judgment of their Lordships of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (2).

I therefore hold that the suit is not barred under Section 13, Civil Procedure Code.

The appeal is accepted and case remanded under Section 562, Civil Procedure Code, for decision on the merits. The Court fee on appeal will be refunded and other costs will be costs in the cause.

Appeal allowed.

No. 56.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

AJUDHIA PERSHAD AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

AHSAN-ULLAH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 902 of 1903.

Pre-emption—Purchase money—Good faith—Punjab Laws Act, 1872, Section 16 (c).

Held, that the fact that the consideration for a transfer of property which is subject to right of pre-emption consisted of old debts made up largely of interest is not in itself a sufficient reason for finding that the consideration entered in the deed of sale was not fixed in good faith.

In such a case, where the vender owns other property and is not insolvent, and there has evidently been a conscious adjustment of value and not merely a wiping out of debt regardless of amount in exchange for the land, there is no natural presumption that the price was fixed in bad faith.

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(1) *I. L. R., XIX All.*, 517. (2) *I. L. R., XX Calc.*, 79.

Phumman Mal v. *Kema* (1) and *Nanak Chand* v. *Ram Chand* (2) followed.

Vir Bhan v. *Mattu Shah* (3) considered and distinguished.

Further appeal from the decree of Kozi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 17th June 1903.

Shah Din and Ganpat Rai, for appellants.

Sheo Narain, for respondent.

The judgment of the Court was delivered by

14*th March* 1906. JOHNSTONE, J.—This is a pre-emption suit, the land sold being described as 449 *bighas* odd *kham* or 150 *bighas pukhta*. The price stated in the deed being Rs. 4,000, the first Court gave plaintiff a decree for possession on payment of Rs. 3,800. The plaintiff having appealed for a reduction of the figure and defendants having filed cross-objections, the learned Divisional Judge rejected the latter and, accepting the appeal, reduced the price to be paid to Rs. 1,621-14-0, making a calculation on the basis of Rs. 10-13-0 *per bigha pukhta*, which was apparently the average rate of a number of sales reported by the Patwari at time of settlement.

Defendants, vendees, now appeal and ask this Court to raise the figure again to Rs. 3,800.

It has been laid down over and over again that before a Court proceeds to assess market value in pre-emption cases and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith. Here the price stated in the deed is made up of Rs. 1,300 principal, *i.e.*, hard cash, *plus* Rs. 2,700 interest.

Three rulings have been quoted in connection with this matter of the assessment of price to be paid in pre-emption cases, *viz.*, *Phumman Mal* v. *Kema* (1), *Vir Bhan* v. *Mattu Shah* (3), and *Nanak Chand* v. *Ram Chand* (2). In the first of these cases the learned Judges said that the law of pre-emption, though it does operate to keep down the price of property to some extent by hampering transfers, is not intended to have that effect but merely aims at protecting the prior

(1) 75 *P. R.*, 1901. (2) 68 *P. R.*, 1902.
(3) 77 *P. R.*, 1901.

rights of purchase of certain persons on specific grounds, and as it stands cannot be interpreted to deprive the owner of the right to make the most he can of his property, and there is nothing improper to demand or to pay a price much above the market value. Therefore, they continued, in a case for pre-emption, where the price entered in the deed of sale, though considerably above the market value, was not shewn to be fictitious, and where there was no proof nor indication that any portion of it was refunded or otherwise appropriated it must be held that the price was fixed in good faith. In *Nanik Chand* v. *Ram Chand* (1), the above ruling was quoted and generally approved, and the Division Bench held that the law of pre-emption does not allow pre-emptor to take objection to a price actually and genuinely paid on the ground that it is a fancy price, the market value being no test of what should be paid by a pre-emptor until the price mentioned in the deed is shewn to have been fixed not in good faith. It was also held that the motive which prompted a vendee to pay a fancy price was immaterial.

In *Vir Bhan* v. *Mattu Shah* (2), it was laid down that in a case for pre-emption, where the transfer was in satisfaction of old debts, if the market value of the property does not appear to differ very materially from the amount of the debts due by the vendor, and the price actually paid is the cancellation of all the liabilities mentioned in the deed, the price so paid may be held to have been paid in good faith ; but that where the disparity between the market value of the property and the sum in satisfaction of which it has been accepted is very great, and the debtor is clearly insolvent, and the property was practically the debtor's only asset, the market value of the property is the proper test of what the pre-emptor should pay.

This ruling rather turns the flank of the law than actually grapples with the difficult question of the meaning of the words "good faith" in clause (*c*), Section 16, Punjab Laws Act, but the case is so different from the present one in several particulars that it is no guide for us here. Here the debt up to Rs. 3,800 at least is genuine, though most of it is interest. Then there was actually a mortgage for Rs. 2,000 in October 1892, a sum larger than what the learned Divisional Judge has allowed as the proper price. The land is not the vendor's only asset by any means and he is not apparently

(1) 68 *P. R.*, 1902. (2) 77 *P. R.*, 1901.

insolvent. Nor was it the intention to wipe off all vendor's liabilities to vendee, for the item of Rs. 1,230 in the deed is only part of a decretal sum of Rs. 1,300 and the remainder Rs. 520, it is understood, remained due. Thus, there seems to have been a sort of adjustment of value in a manner to suit vendor and vendee and not a wholesale wiping out of all debts, however much they might be in exchange for the land.

In these circumstances we are unable to see where "bad faith" comes in, and we accept the appeal and, setting aside the decree of the lower Appellate Court, give plaintiff a decree for possession by pre-emption on payment of Rs. 3,800 as directed by the first Court, the money to be paid within three months. On default, the suit to stand dismissed with costs. Otherwise parties to bear their own costs in the first Court, but plaintiff to pay vendee's costs in Divisional and Chief Courts.

Appeal allowed.

No. 57.

Before Mr. Justice Reid, Chief Judge, Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

APPELLATE SIDE.

RAJAB-UN-NISSA,—(PLAINTIFF),—APPELLANT,

Versus

HABIB BAKHSH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 854 of 1906.

Res judicata—*Matter directly and substantially in issue—Unnecessary finding—Pro formâ defendants—Civil Procedure Code*, 1882, *Section* 13.

'A' died leaving four sons and six daughters. One of the four sons brought a suit impleading all his brothers and sisters for partition and possession of a one-fourth share in the deceased's property, first by enforcement of an award against his brothers and sisters, the latter having, according to his contention, consented to the reference, and failing that for partition (*a*) under a custom by which daughters were excluded from inheritance, and (*b*), if no custom was proved, in accordance with the personal law of the parties. The Court found that the sons were bound by the award, but that the daughters had been duped into signing an agreement consenting to the reference and were therefore not bound by the award. It then took up the question of the rights of the daughters and came to the conclusion that they were excluded by custom and, consequently, their consent to the reference being immaterial, decreed substantially in accordance with the award.

No declaration against the daughters was prayed for or given in the decree. No part of the property in dispute was alleged or found to be in their possession nor were they required by the decree to surrender any. Subsequently four out of the six daughters instituted separate suits for possession by partition of their shares of the estate left by their deceased father in accordance with Muhammadan Law. The defence pleaded that the suit was *res judicata* under the decree in the previous case, inasmuch as it was thereby found that daughters were excluded by custom and as they did not appeal from that adjudication it had become final.

Held by a majority (Johnstone, J., dissenting) that on the facts as found the suit was not barred either under Section 13 of the Code of Civil Procedure or on the general principles of *res judicata*, the issue relating to daughters' rights in the former judgment being unnecessary for the decision of the case on the ground on which it proceeded, *viz.*, the award being binding on the brothers who had all the property in suit in their possession, and not being raised by the pleadings, such rights not being in question in the claim upon the award, but by the Court gratuitously after it had held the award to be binding on the brothers; and that the finding on it could consequently not be pleaded as a bar to the present suit.

Held, also, that a party setting up a plea of *res judicata* is bound to establish it and the court competent to examine, whether the point was necessary for the decision of the case upon the ground upon which the final decision ultimately proceeded and was directly in issue in the former litigation.

First appeal from the decree of Maulvi Muhammad Hussain, District Judge, Delhi, dated 26th June 1901.

Muhammad Shafi, for respondents.

At the first hearing of this appeal the following judgments were delivered :—

CHATTERJI, J.—This appeal and Civil Appeals Nos. 855 and 958 of 1901 and 145 of 1902 are intimately connected being claims by four daughters of one Malik Karim Bakhsh for their individual shares in the property left by their father under Muhammadan Law. The plaints and pleadings are practically the same in all the cases, and they have been disposed by the District Judge by one judgment. I propose to deal with them similarly in this Court. *3rd August* 1905.

The plaintiff appellant in this appeal, Mussammat Rajab-un-nissa, sued in *formâ pauperis* for one-thirteenth of her father's estate substantially on the following allegations:—

That Malik Karim Bakhsh left property of the value of Rs. 86,000, when he died on 5th March 1890, and that defendants 1 to 7 are in possession. That owing to the death of Wali-un-nissa, one of the daughters of Karim Bakhsh, plaintiff was entitled to a thirteenth share.

That defendants 1 to 7 decline to give plaintiff her share. She therefore claimed her share of the property in defendants'

possession and of the sale-proceeds of a house sold by the defendants for Rs. 10,000, as well as for her share of mesne profits and other ancilliary reliefs.

The three other plaintiffs brought exactly similar claims.

The pleas are practically the same except that Habib Bakhsh, defendant, alleged that the share of the deceased Wali-un-nissa was inherited by him, the brother, and the sisters of the whole blood of the deceased and not by Rajab-un-nissa. The main preliminary plea, however, was that the suit is *res judicata* under the decree of the District Judge, Delhi, dated 30th June 1893, in a previous suit brought by Rahman Bakhsh, defendant, against the other sons and the daughters of Karim Bakhsh, including the plaintiff. In that suit it was found that daughters do not succeed to the property of their father according to the custom of the family and the plaintiffs were held entitled to nothing. The plaintiffs did not appeal from that adjudication which has therefore become final.

This preliminary plea, however, was urged in the first instance by Rahman Bakhsh, *vide* page 12 of the printed record. It was not urged by Kadir Bakhsh and Rahim Bakhsh, defendants, whose written pleas are given at pages 13 and 16 of the printed record. Habib Bakhsh raised it, see page 19, para. 6. I shall discuss hereafter whether it is competent to the last defendant to urge the objection.

The District Judge has dismissed the suits of all the plaintiffs on the ground of *res judicata* against all the defendants, and this is the sole question for determination in all the four appeals.

In order to properly understand the bearings of this question in these suits it is necessary to go carefully into the history of the former case. A *resumé* of the facts of that case is given in *Mussammat Fakhar-un-nissa* v. *Malik Rahim Bakhsh* (1), pages 98—101, and as it is essential to recapitulate them in some detail for the proper elucidations of the points raised in the arguments of counsel I make the following extracts from that judgment :—

" Malik Karim Bakhsh of Sabzi Mandi, one of the suburbs " of Delhi, died on 5th March 1890, leaving a large property in " land, houses and moveables and the following descendants :—

" (1) By his first wife Mussammat Faiz Bi, three sons Rahim Bakhsh, Rahman Bakhsh and Kadir Bakhsh, and two " daughters Mussammats Diljan and Najam-un-nissa.

(1) 23 *P. R.*, 1897.

" (2) By his second wife Mussammat Khanam, one son " Habib Bakhsh and four daughters Mussammat Alabandi, " Shams-un-nissa, Wali-un-nissa and Fakhr-un-nissa.

" Just before his death Karim Bakhsh is said to have " appointed one Aziz Din, arbitrator, to divide his property " among his sons, to fix reasonable amounts of maintenance for " his daughters in case of necessity, *vide* documents P. III and " P. IV, dated the 15th and 16th January 1890, respectively, " (pages 218 and 220 of the printed record). The former is " witnessed by all the four sons, and simply directs the division " of the property among them. The latter is a sort of post- " script to it and recites that by the custom of the family of the " executant his daughters are excluded from sharing in his " property, and requests the arbitrator to provide a suitable " scale of maintenance for them should they ever be in need " thereof. It must be stated here that the genuineness of these " exhibits is disputed by the present appellant, but this question " will be discussed in its proper place. There is another agree- " ment, dated 25th March 1890, printed at page 218 of the " record, which purports to have been executed by all the " daughters, reciting the fact of the reference to arbitration " for division of their father's property among their four bro- " thers, and agreeing to the arbitrator's fixing proper mainten- " ances for themselves according to family custom. The genuine- " ness and validity of this document is also contested and forms " two of the main points for decision in this case. There is one " other agreement which requires to be mentioned here, *viz.*, " that printed at page 216 of the printed record which was " executed by the sons. It is dated the 13th March 1890, and " by it the sons ratified the act of their father referring the " division of his property to the decision of the arbitrator Aziz " Din, and it is upon this agreement that the latter has professed " to act.

"" The arbitrator gave his award on 28th March 1890, and " shortly after Rahim Bakhsh, one of the sons, put in an " application under Section 525, Civil Procedure Code, to have " it filed and a decree given in accordance therewith in the " Court of the District Judge of Delhi. The issue of Karim " Bakhsh by his first wife accepted the award, but the children " of the second disputed it, and the daughters denied having " made the reference at all. The District Judge, Mr. Clifford, " found that the last named defendants had executed but had " not given their free consent to the agreement, dated 25th

" March 1890, and that the award was in consequence not " binding on them. He therefore dismissed the application.

" On 21st March 1892 Malik Rahman Bakhsh, one of the " sons of Karim Bakhsh, by his first wife, instituted a suit in " the District Court of Delhi, claiming division of the paternal " property in terms of the award, but failing this, in accordance " with Muhammadan Law. The plaint, after reciting all the " facts, stated (para. 8) that by the custom of the family to " which the late father of parties referred, the plaintiff is entitled " to one-fourth share of the entire estate, but if the daughters " are entitled to share according to Muhammadan Law, then " plaintiff is entitled to two out of fourteen shares and " wound up by asking for the following reliefs (para. 10); " that it be declared—

" (*a*) Whether all the parties to the suit are bound " by the award. If not, are any so bound; if " so, who?

" (*b*) If the award is to be binding on none, then " for a decision as to whether the parties " are governed by custom or by Muhammadan " Law?

" (*c*) If it be decided that *shara* has to be followed " and daughters entitled to a share, then all the " estate be divided among all the sharers, and " plaintiff be given his one-seventh share by " partition and possession, etc., etc.

" On 13th April 1892, the present plaintiff-appellant " sued for partition and possession of her one-fourteenth " share according to Muhammadan Law and the custom of " the tribe, and for an account of the income and expendi- " ture of the estate since her father's death.

" The pleas of Rahim Bakhsh and Qadir Bakhsh were " substantially the same in both cases and they admitted " that by family custom plaintiff, Rahman Bakhsh, was " entitled to one-fourth of the paternal estate, but denied " that daughters were entitled to anything besides main- " tenance.

" Malik Habib Bakhsh pleaded, in the present suit, that " certain properties, *viz.*, *Mauza* Koreni and Sirdarakhti of " the Ghazi-ud-din garden were his exclusive property under " gifts made by his father, and were not liable to partition, that " with the exception of one house occupied by him as his

" residence he had no ancestral property in his possession, that " Rahim Bakhsh and Kadir Bakhsh held the whole and were " alone accountable, that the materials of two shops belonged to " him and that he had never objected, nor did now object, to " give plaintiff her share under Muhammadan Law. The above " is the substance of two written statements filed by him on the " 21st April and the 21st May 1892, respectively. His pleas in " Rahman Bakhsh's suit were essentially the same.

" Mussammats Alabandi, Shams-un-nissa and Wali-un-nissa, " own sisters of the plaintiff, admitted her claim and set up " their own rights in reply to Rahim Bakhsh's claim, and " plaintiff also did the same in that suit.

" Mussammats Diljan and Najam-un-nissa did not defend " either suit, and proceedings against them were *ex parte*.

" Both suits were tried together, and by consent, the evi- " dence taken in the proceedings under Section 525, Civil " Procedure Code, was treated as evidence in them."

The District Judge drew ten issues of which the following alone are important for purposes of the present appeals.

2. Was Aziz-ud-din duly appointed to arbitrate the dispute between the parties ?

3. And if so, is the award, dated the 28th March 1890, by him binding on all the parties to the suit and to what extent ?

4. If not, what is the rule of inheritance among them, that is, whether *shara* or custom·

5. If custom, what are the daughters entitled to under the same ?

He found on issues 2 and 3 that the sons of Karim Bakhsh had duly appointed Aziz-ud-din arbitrator under deed, dated 13th March 1890, but that the daughters had been duped to sign an agreement of a similar purport, dated 25th March 1890, and that the agreement and the award were not in consequence binding on them.

He then went on to say " there are some awards in which " those who executed the agreement referring to arbitration can " be bound by the award, but this is an award which, if the " daughters are entitled to succeed in accordance with Muham- " madan Law in the property can be binding on all or none". These words are important to be borne in mind for they contain to my mind the main foundation for contention of *res judicata* advanced in this case.

He found on issue 4 that the parties were Arains and governed by custom by which daughters were excluded from inheritence, and on issue 5 that they are entitled to suitable maintenance according to the custom of the family. He then went back to issue 3 and held that as the daughters had no claim and the estate was to be divided among the sons, they were bound by the award of the arbitrator appointed by them. He divided the property in terms of the award among the four sons and three items of moveable property of the value of Rs. 205 omitted from the award equally among them.

The sons were satisfied with the decree but Mussammat Fakhr-un-nissa, the daughter, who had filed a suit claiming her share under Muhammadan Law and whose claim was dismissed by the District Judge in consequence of the above findings, appealed to the Chief Court against the decree in her own case.

An objection was taken at the hearing in the Chief Court that the questions raised in her appeal were *res judicata* because she had not filed an appeal against the decree in Rahman Bakhsh's case. This was over-ruled after a consideration of the precedents cited by both sides, see pages 102—104 of the judgment, and it was held after an elaborate examination of the evidence and precedents that no custom of exclusion of daughters was established. Mussammat Fakhr-un-nissa was accordingly awarded a decree for a one-fourteenth share under Muhammadan Law.

An application for review on both points was subsequently filed and was dismissed after a fresh discussion of the question of *res judicata*, see *Malik Rahim Bakhsh* v. *Mussammat Fakhr-un-nissa* (1).

It may be noted here that no part of the property of Karim Bakhsh was in the possession of any of the daughters. No relief was prayed for in respect of any property against them nor granted by the Court.

A careful examination of the plaint and statements of the plaintiff, Rahman Bakhsh, in the former case appears to show as pointed out in *Malik Rahim Bakhsh* v. *Mussammat Fakhr-un-Nissa* (1) that his suit was based on at least two causes of action in the alternative and was for different reliefs claimable distinctively on them. There was some moveable property included in the claim the bearing of which will be noticed hereafter. The word

(1) 31 P. R., 1898.

cause of action means every fact which it is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have the right to traverse—*Cooke* v. *Gill* (1).

It refers entirely to the *media* upon which plaintiff asks the Court to arrive at a conclusion in his favour, *Chand Kaur* v. *Partab Singh* (2).

It does not *depend* on the relief claimed, but I apprehend the reliefs claimed may be looked at in order to throw light on plaintiff's meaning in the body of the plaint where it is not otherwise perfectly explicit. It is necessary, however, that facts pertaining to one cause of action should not be mixed up with those properly belonging to another though both are included in the same plaint.

Considering the language of the plaint on this principle I take the plaintiffs' suit apart from the claim for moveable property to have been of a twofold character in the alternative—

(1). To enforce the award and to have the property awarded to himself and his three brothers in accordance with it after supplying certain alleged defects in it; paras. 2. 3, 4, 6, 7, 9 and heads of reliefs A and D.

(2). To partition the property, *if the award was not binding on any one* among the four brothers on the ground that daughters were excluded by custom, but if this was not proved among all the issue, male and female, of Karim Bakhsh according to Muhammadan Law: paras. 5 and 8 and reliefs heads B and C.

Properly speaking the latter suit alone was a partition suit. The former was not, as the Court was required therein not to partition the disputed property itself but to enforce the award. This suit was one falling under Section 30 of the Specific Relief Act.

The issues framed by the District Judge also appear to me to bear out this view.

The decree was one in accordance with the award. The alternative on which plaintiff sued for partition under custom or law was on the award being not binding at all. This appears to be clear from the plaint relief B as well as issue (4). That alternative never arose, for the Court held the sons to be bound by the award and divided the property in accordance with it.

(1) *L. R.*, 8 *C. P.*, 107. (2) *L. R.*, 15 *I. A.*, 156.

There is nothing in the plaint to suggest the inference that the plaintiff asked the Court, if the award was held binding on the sons and not on the daughters to declare that the daughters were excluded by custom from all participation in their father's property. No such declaration was prayed for and none was granted. Relief A was somewhat obscurely worded, but I am willing to concede that taken in connection with D, it meant to ask the Court to enforce the award among those who were bound by it. But to add the words stated above is obviously impossible. The Court also never thought so nor tried the case on that basis.

The daughters were proper parties to the case on the award as they were said to have agreed to the reference and signed a document to that effect. This is not clearly stated in the plaint but evidence was adduced and the Court treated it as included within the scope of the 3rd issue and gave a finding on it in favour of the daughters, holding them to have been duped into signing the document. The plaint refers to the abortive proceedings under Section 525, Civil Procedure Code, in which the document was also referred to, so the allegation of the daughters being parties to the award may well be understood to be part of the plaintiffs' case. Thus the impleading of the daughters is no criterion that a general partition of the paternal property irrespective of the award was the real intention of the plaintiff and was accordingly tried. A general partition was prayed for in which they were made parties as interested persons, but this was to be effected only in the event of the award not being binding on any one and failing altogether. I can interpret the words "if not" in Relief B and in issue 4 only in this way and in no other.

The claim on the award did not fail but was decreed. The Court made no partition but simply gave effect to the award except as to three small items of moveable property aggregating Rs. 205 in value which the arbitrator had omitted to divide, in regard to which the principle adopted by the arbitrator was followed.

I have omitted to state at the proper place that the combination of two causes of action in the *alternative* in the same plaint in respect of the same subject matter is hardly contemplated in the Code of Civil Procedure, and to my mind is illegal, see *Mussammat Fatima Begam* v. *Muhammad Zakaria* (1). If this view is correct Rahman Bakhsh could not in the same suit claim enforcement of the award and if that was not possible,

(1) 96 *P. R.*, 1895.

partition of the paternal estate in accordance with customary or personal law. The defect, if it is one is one of jurisdiction and any finding properly pertaining to the latter claim and cause of action would not be conclusive if the former claim alone was adjudicated on.

The previous case then stands thus. The claim on the award was decreed in accordance with the award. In that claim no question arose whether the daughters are or are not excluded by custom and a decision on the fourth issue was not required, and under the wording of the issue itself it did not arise until the decision on the 3rd issue was adverse to the award altogether. I have already shown above that the issues were rightly drawn in this way on the pleadings subject to one reservation to be mentioned hereafter, I may say that the question of the daughter's right was thus not directly in issue in the former suit, and cannot bar the trial of the same issue in the present suit which is for partition and based on inheritance. It would have been directly in issue had the claim on inheritance in the former suit laid in the alternative in the event of the award being held not binding, been tried and decided, which it clearly was not. If the decision of the daughter's right was considered proper in order to settle all disputes bearing on the claim on the award the decision was nevertheless not required to give effect to that claim on the facts and pleadings of this case and the issue would therefore be an incidental and collateral one, at best.

The key to the solution of the present controversy is, I think, to be found in the remarks of the District Judge in the former case which I have quoted at length in a former part of the judgment in which he says that though some awards which are not binding on others could be enforced against those who had agreed to the reference, this was an award which could be binding on all or none if the daughters had shares by inheritance. Having laid this down he took up the question of the rights of the daughters by inheritance which was the subject of the fourth issue and came to the conclusion that they were excluded by custom. Having thus removed all obstacles from his path he went back to the third issue again and held that the brothers were bound by the award and enforced the award among them.

In my opinion the remarks in question cannot be treated as an adjudication of a matter in issue. No such question was raised by the pleadings nor was any issue framed whether of the award was not binding on the daughters, the sons could be

bound by it. They were due to a confusion of thought in the mind of the District Judge as to the nature of the claim before him and the points expressly or impliedly in issue and an omission to pay due regard to the latter. I have no difficulty in saying that they were quite wrong in law for obviously there was nothing in the case to take it out of the rule that an award is binding on those who are properly parties to the reference though others, who are professed parties, are shown to have been really no parties and are not bound by it. As I have said already the whole property in dispute was in the hands of the sons and none of it with the daughters, so that there was no difficulty of any kind in giving full relief to the plaintiff on the claim based on the award. The District Judge himself quoted no law supporting the distinction he drew, and in my opinion it is wholly unfounded. If we disregard this erroneous view of the District Judge on a point not raised in the issues nor involved in the pleadings and brought into the case gratuitously and of his own motion by himself the unnecessary character of the adjudication on issue 4 and its impropriety becomes at once apparent.

The next question for consideration is are we bound by this statement of the law erroneous as it is and the adjudication of the fourth issue by the District Judge which was the consequence of his mistake. For if we have to accept the District Judge's ruling implicitly, some sort of case may be said to be made out for the adjudication being treated as that of a necessary issue though even this is not quite clear upon the pleadings. But I do not think we can be held to be so bound when the question arises whether an issue was a necessary one, the finding on which is set up as a bar to a fresh trial of the same issue, the Court has power to examine the pleadings and the facts of the former case and the grounds of decision and to see for itself whether the issue was a necessary one, or, in other words, whether the matter pleaded as *res judicata* was directly in issue before. For this purpose the Court must judge for itself whether the issue was a necessary one with reference to the grounds of adjudication. The fact that the Court in the former suit thought the issue to be a necessary one is not conclusive for few Courts ever come to findings on points that they know or admit to be unnecessary. An erroneous finding of fact or law on a point that was directly in issue in a former case may be conclusive but the Court trying the subsequent suit has and must have independent power of judgment to decide for itself whether a particular point was directly in issue before. This is in fact the matter

which the party setting up the plea of *res judicata* has to establish and he has to satisfy the Court trying the later suit that it is substantiated. Thus the power of the Court to go into the point is *ipso facto* evident, see *Narain Das* v. *Faiz Shah* (1), remarks at page 555 " necessary " means " necessary for the " decision of the case upon the ground on which the final " decision ultimately proceeds." See also the remarks in *Jamait-un-nissa* v. *Lutf-un-nissa* (2), at page 611, though I do not mean by this quotation to accept all that was laid down in that case. Other authorities may be cited in support of the position. It appears to me to be beyond question that in trying to find out what is necessary with reference to the ground on which the final decision in the former case ultimately proceeds we must have power to question a statement of law like the above by the District Judge in the former case which besides being wrong is not required on the pleadings and that the power is not restricted because such statement happens to give an air of necessity and relevancy to an issue which is otherwise unnecessary. In short we must have authority to find out what was really necessary.

If this is conceded as I think it must be, all semblance of necessity and directness of the fourth issue with reference to the case on the award which was decreed disappears.

It is argued that the plaintiff in that case wished to put an end to all dispute and hence impleaded his sisters who had successfully resisted the previous application by another brother under Section 525, Civil Procedure Code. I have already pointed out that the daughters were properly necessary parties to the case on the award as they were sought to be bound by the award and evidence was again adduced of their consent, but the Court found in their favour on this question and the suit on the award failed against them, I have also shown that the suit on the award could have proceeded against the sons alone and was enforced among them in the decree, so that the case on inheritance never properly came to trial. The District Judge in the present suit has failed to observe the true character of the former suit and to analyse and keep in view the statements made in the plaint and the pleadings as well as the grounds of decision. He is quite wrong when he says the former decree was not on the award. He has mixed up the suits of Rahman Bakhsh and Mussammat Fakhr-un-nissa. In the latter the issue of custom *directly* arose and there was no question of the award

(1) 157 *P. R.*, 1889, *F. B.* (2) *I. L. R.*, *VII All.*, 606.

being binding, and though the two suits were for convenience sake tried together, this distinction is palpable. The fact that the issue was a necessary one in the latter suit did not make it so in the former with reference to the ground on which the judgment in that suit proceeded.

To put the matter shortly the plaintiff in the former case sued (1) to enforce the award against his brother and sisters, the latter having according to his contention consented to the reference and (2), if the award failed, to partition property on the ground of inheritance, among the brothers only if the custom set up was proved, or among all the children of Karim Bakhsh if it was not. This would be the natural course adopted by any ordinary suitor under the circumstances. It never occurred to him to ask, under the first head, for a declaration about the exclusion of daughters by custom and their having in consequence no interest in the paternal property, in case their consent to the reference was not established. This is really a refinement that did not strike the plaintiff at the time, but is now put forward in order to get the benefit of the rule of *res judicata*. But to succeed in the attempt, the point must be shown to have been clearly taken or directly involved in the former pleadings, which it was not.

There remains only one point for consideration which though not put forward in the appeal in this court in the former case or in the present appears to me to be of some difficulty. This is the decision in respect of three items of immoveable property in the former suit. They were valued at Rs. 205 and were in the possession of Rahim Bakhsh and Kadir Bakhsh, co-defendants. They were divided among the four brothers but were not covered by the award. I may mention here in passing that there were other properties claimed, but out of those such as were proved to exist, *viz.*, Nos., 4, 5, 6 and 7 were disposed of as virtually included in the award, can it not be said that the partition of these three items of property not actually included in the award among the four sons *in effect* decided that the daughters were entitled to no share?

I cannot say that this matter is quite clear, but I am disposed to doubt whether it would be right to split the fourth issue into two parts and to hold it to be unnecessary as respects the first alternative claim on the award and to say at the same time that it was partly necessary on account of this claim. Neither the District Judge nor the parties ever paid the least regard to this small property or *consciously* put the

decision regarding it on the finding on the fourth issue. The best proof of this is that no reference was ever made to this property by counsel at any time in their elaborate arguments. Further, I do not think there is any necessity to refer the decision as respects this property to the fourth issue as no reference is made to it by the District Judge. He never tried the case based on inheritance and went into that issue simply in order to see whether there was any obstacle to the award being binding. He may have meant to divide it among the sons simply because they had got all the other property under the award. I say this because no special reasons are given.

Apart from this I think if we take the view that this property was sued for on the ground of inheritance, we must hold that the inheritance was split into two parts, one of which was sued for in the alternative in case the award failed, and the other, *viz.*, this property, *in addition* to that covered by the award. The joinder of the latter to the claim on the award was permissible but not the splitting of the claim on inheritance. Waiving this objection as not one to be taken cognizance of at this stage, the difficulty still remains whether the daughters could appeal from the decree. This forms a part of the ground of decision in *Mussammat Fakhar-un-nissa* v. *Malik Rahim Bakhsh* (1), and *Malik Rahim Bakhsh* v. *Mussammat Fakhar-un-nissa* (2), and in the present case I see no good reason to recede from the position taken up in my former decision. The important bearing of the right of appeal on the question of *res-judicata* is set forth in *Malik Rahim Bakhsh* v. *Mussammat Fakhar-un-nissa* (3), and in *Shamas Din* v. *Ghulam Kadir* (4). It is true that the High Courts are not quite unanimous on this question : See *Vitthilinga Padayachi* v. *Vithilinga Mudali* (5), *Govind* v. *Dhondbarav* (6), in which this view is taken, and *Rai Charan Ghose* v. *Kumud Mohun Dutt Chawdhry* (7), *Bhugwanbutti Chowdhran* v. *Forbes* (8), where it was dissented from or not followed, but the authorities referred to in the judgments quoted appear to me to be of great weight, and particularly the views of that eminent Judge Mr. Justice West in *Bhola Bhai* v. *Adesang* (9), who cites the opinion of the great German Jurist Savigny in support of his opinion. I think I am bound to follow the views of the Full Bench judgment just cited : see also the opinion of their

(1) 23 *P. R.*, 1897.
(2) 31 *P. R.*, 1898.
(3) 20 *P. R.*, 1891, *F. B.*
(4) *I. L. R.*, XV *Mad.*, 111.
(5) *I. L. R.*, *XV Bom.*, 104.
(6) *I. L. R.*, *XXV Calc.*, 571.
(7) *I. L. R.*, *XXVII Calc.*, 78.
(8) *I. L. R.*, *IX Bom.*, 75.

Lordships of the Privy Council in *Misir Raghobar Dial* v. *Sheo Bakhsh Singh* (1), at p. 444.

I still find difficulty in understanding how an appeal by the daughters in the former suit could have been preferred or could have been valued: could they appeal on full stamp on the value of their shares? They could have got nothing from the Appellate Court as they had not sued. They could not have appealed for a declaration for there was none granted against them, and they could get none themselves as their obvious remedy was to sue. They could not appeal from the finding on the fourth issue which was not embodied in the decree. I am not saying that the latter fact has any necessary *bearing on the question of res-judicata* generally, but I am here considering only the right of appeal. The learned counsel for the respondent quotes *Jamna Das* v. *Udey Ram* (2), but I am doubtful about the correctness of that ruling, and it is to some extent distinguishable. Moreover, the suit might possibly have been dismissed altogether as against the first assignees. The view I take of the matter is that the daughters here were *pro formâ* defendants as far as this part of the case was concerned, and their only remedy was by way of a regular suit for their shares. The case might be different if a different view is taken of the bearing of the right of appeal, but I think we are bound to accept the view that it is essential to the creation of the bar of *res judicata* I have already pointed out, that the award was thrown out as against the daughters. The objection based on the absence of the right of appeal applies to the whole case.

The rule of *res judicata* is a wholesome one but it ought not to receive an undue extension nor be too stringently applied, particularly in India, *Missir Raghobar Dial* v. *Sheo Bakhsh Singh* (1), at p. 444. A plea of *res judicata* is a technical objection and may well be met by arguments of the same character. It cannot be established on broad general grounds, and without a careful analysis, and a critical examination of the previous proceedings. Upon such a consideration of the former case I am of opinion that the plea is not established against the present appellants. At all events it is very doubtful whether it is, and if there is doubt, the right to proceed should be conceded. The plaintiffs here have a judgment of a Bench of this Court giving a finding favourable to them on

(1) *I. L. R., IX Calc.*, 439. (2) *I. L. R., XXI All.*, 117.

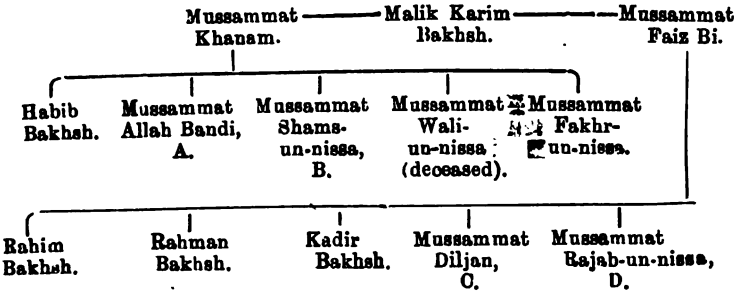
the question of custom, and taking this into consideration, and the fact of their being daughters of the late owner, they should be allowed to carry on their suits unless the bar is clearly and unequivocally made out, and it lay on the defendants to do this.

It is necessary also to point out here that as far as Habib Bakhsh, defendant, is concerned, the bar appears not to arise at all. He and the present plaintiffs were co-respondents in the former suit and their defences were not adverse to each other but to the plaintiff and the two other defendants, Rahim Bakhsh, and Kadir Bakhsh who really sided with the then plaintiff. The District Judge has failed to notice this and dismissed the suit against Habib Bakhsh also, though he states rightly in his judgment that Habib Bakhsh in the former case favoured the claims of the sisters. This is obviously wrong. It will be seen that I have to a certain extent modified my views as expressed in the two published judgments in the former case, but this was because I had to reconsider the whole case afresh, on the present occasion. It was done after a careful analysis of the former proceedings.

I would accept the appeal and, setting aside the decree of the District Judge on the question of *res-judicata*, return the case to him for a decision on the merits.

JOHNSTONE, J.—I have some difficulty in accepting the views of my learned colleague in this case. I have delayed recording my final opinions, and have thought over the case long and anxiously, but in the end I find myself unable to see eye to eye with him, and I reluctantly suggest that the case be referred to a third Judge for opinion. *24th Oct.* 1905.

The parties in suit are connected thus—



There are four suits and four appeals by the ladies A., B., C. and D., respectively. Each of them, apart from slight variations and partial renunciations in appeal, claims $\frac{1}{4}$s

share of the estate of Malik Karim Bakhsh, asserting the applicability of Muhammadan Law, under which each of the four sons is entitled to $\frac{2}{13}$ and each of the five surviving daughters $\frac{1}{13}$.

There have already been three law suits about the estate, in all of which the whole of the surviving family of Malik Karim Bakhsh have been parties—first, application by Rahim Bakhsh, under Section 525, Civil Procedure Code, to have Aziz Din's award filed and a decree passed on it; secondly, suit by Rahman Bakhsh claiming division in terms of the award, *i.e.*, equal division between the four sons or failing this, a declaration whether custom or Muhammadan Law applies, and, if the latter, then actual partition in accordance therewith, it being asserted that by custom daughters were excluded by sons; thirdly, a suit by Mussammat Fakhr-un-nisa for $\frac{1}{14}$ share, Mussammat Wali-un-nissa being then alive.

The first of these suits, the application under Section 525, Civil Procedure Code, was dismissed on the ground that the daughters did not give free consent to the arbitration. The other two suits were tried together by the District Judge, who held that the daughters did not give free consent to the arbitration; that the family followed custom and not Muhammadan Law; that by custom sons excluded daughters; and, in effect, that thus the absence of consent of the daughters was immaterial; the persons really entitled to share having all joined in the reference. Upon these findings the District Judge naturally held the award enforceable, and passed a decree substantially in accordance with it. Against this decree in her own case Mussammat Fakhr-un-Nissa appealed to the Chief Court, which over-ruled the Court below, and in her suit gave her a decree for $\frac{1}{14}$ as prayed, holding that, it *was not proved* that custom excluded daughters. The other daughters did not appeal.

The question for decision is whether the plaintiffs are barred by Section 13, Civil Procedure Code, from raising the question whether they are entitled to share along with their brothers.

There are, of course, certain propositions laid down by my learned colleague in which I fully concur; but there are others from which I am reluctantly obliged to dissent. As the third Judge, to whom the case will now go, will probably find it convenient to have the points in which I dissent from my brother

Chatterji plainly stated, I will now go through his judgment bit by bit and state my own views.

At an early stage my learned colleague remarks: "It "may be noted here that no part of the property of Karim "Bakhsh was in the possession of any of the daughters, no "relief was prayed for in respect of any property against them "nor granted by the Court." (This relates to the second suit of the three suits described above.) The remark is true, but I do not myself think the fact material or the use made of it legitimate. Later on it is used to enforce the suggestion that the daughters, apart from *Mussammat* Fakhr-un-Nissa, could not have appealed in her case or in Rahman Bakhsh's case. They were formal defendants in *Mussammat* Fakhr-un-Nissa's case and had nothing to appeal about; but I see no reason why they could not have appealed in the other case. In my opinion Rahman Bakhshs' suit was not wrongly framed according to the rules in force in India for the framing of suits. I know of no law under which it was illegal for Rahman Bakhsh to sue on the award and at the same time to implead the daughters, who were in opposition to him, and to ask that his dispute with them also, should be settled. It is true that the daughters were not in possession of any of the property; but their claims to share were over-ruled, and, though the decree did not direct them to surrender any property, it did in effect declare them not entitled to share in the estate. It is asked on what stamp they would have appealed I do not think I need answer the question: I do not think the circumstance that the amount of the proper stamp is difficult to decide has any bearing on the question whether they could appeal or not. In my opinion they could have appealed, and have asked this Court to hold—

(*a*) that the family did not follow custom but Muhammadan Law;

(*b*) that therefore they were sharers;

(*c*) that therefore, as the Court had held that they had not consented freely to the arbitration, the award should not interfere with their rights;

(*d*) that the first of the two alternative claims of Rahman Bakhsh was thus inadmissible; and

(*e*) that the second claim was sound, *viz.* partition according to Muhammadan Law.

Rahman Bakhsh had by implication admitted that, if the award was not binding and Muhammadan Law applied, the property was joint of all the brothers and sisters, the case being then one of partition and thus finally the daughters

might in appeal have demanded—

(*f*) *that partition under Muhammadan Law should be carried out.*

They did not appeal, and in my opinion the matter became *res-judicata* against them.

My learned colleague's view, in connection with this aspect of the case, would seem to be that, if Rahman Bakhsh had sued the sisters separately for a declaration that they had no share in the property and had got a decree, and had then sued his brothers to enforce the award, the daughters would be bound; but that, as he chose, and the Court allowed him, to combine the whole thing in one suit, they are not bound, because the Court found the award binding and so the question, Muhammadan Law *versus* Custom did not properly arise. With much reluctance I find I cannot assent to this proposition, which I hope does not misrepresent my learned colleague's position. In my view Rahman Bakhsh virtually asked the Court to find for the award on two alternative grounds first, that the daughters agreed to the arbitration; secondly, that, if they did not, the want of their consent was immaterial, inasmuch as they were not sharers under the custom which governed the family. (Of course, he also asked in the alternative that, if the award was not to operate at all, the Court should proceed to deal with the estate as a matter of intestate succession.) It seems to me that this is the true meaning of the reliefs (*a*), (*b*) and (*c*) detailed in my learned brother's judgment, and the manner in which the District Judge adjudicated on the case seems to me to shew that this was so. I recognise the awkwardness and obscurity of the words "binding on none" in relief (*b*), but I do not think Rahman Bakhsh meant by them quite what my learned colleague supposes. It seems to me fairly clear that it never occurred to Rahman Bakhsh that the award would be binding as such on the brothers even if the daughters (*a*) had shares and (*b*) had not consented to the arbitration. I think he meant to imply that in these circumstances (*i.e.*, if the conditions (*a*) and (*b*) held good) the award would naturally be treated as inoperative altogether. Thus, in my humble opinion, the question Muhammadan Law *versus* Custom did arise and had to be decided.

Connected with the above is the meaning of issue 3 and of the words "if not" in issue 4. Issue 3 ends with the words "and to what extent." In my opinion these words do not mean "and on which parties," the wording of the issue pre-

cludes this view. The substantive words are—"is the "award binding on *all* the parties." The issue does not go on —"*if not*, then to what extent;" or "if not, then on which parties." The words "and to what extent" are either surplusage or they refer to disputes regarding certain specific parcels of the estate. It follows that the words "if not" in issue 4 mean —"If the award is not binding on all, *i.e.*, if all the parties "did not make the reference to arbitration with free consent." And thus it becomes clear that the intention of issues 4 and 5 was to enable the Court to decide the following question—If the daughters did not give free consent to the arbitration, then are they entitled to object to the award; that is, have they shares in the inheritance: that is, does Muhammadan Law, under which they would certainly have a share, apply; or does any custom apply, and does that custom give them a share or not?

In my opinion, where it is reasonably possible to do so, Courts should take it that a plaintiff, who impleads all possible defendants in his suit, intends to ask for a complete adjudication upon all issues that can arise, in connection with the subject-matter of the suit, between him and those defendants. Neither our Courts nor our petition-writers habitually write with the perfect finish of trained lawyers, and I think we should not ignore what must have been the *intention* of Rahman Bakhsh, especially as the Court trying the case realised that intention, saw it embodied in the obscure and slipshod phraseology of the plaint, and gave effect to it in its manner of dealing with the case; especially also as the daughters, seeing the view the District Judge took of the matter as shewn in the issues, did not raise any objections and did not insist upon a strict interpretation of the phraseology of relief (*b*). Had they done so, the District Judge would certainly have questioned Rahman Bakhsh and would, inasmuch as Rahman Bakhsh would undoubtedly have said he wanted a complete settlement of all questions, have made him clear up the obscurity in the wording of his reliefs.

I am unable to see how the issue as to the daughters' rights in this family to a share was merely a collateral or incidental one. To me it seems a substantial issue and one that had to be disposed of. It *was* disposed of, and by the decision the daughters were told they were not entitled to share with the sons. The mere fact that upon this the property was given to the sons on the basis of the award and not on the basis of custom seems to me in no way to alter the effect of the decision against the daughters' rights.

In 1893 the District Judge laid down the proposition that if the daughters have shares by inheritance, the award must be binding on all or on none; *i.e.*, it cannot bind the sons unless it binds the daughters also. My learned brother demurs to this; but in my opinion even if it can rightly be said that the award, which actually divided up the estate into parcels among the sons and allots one parcel to one son and another to another, binds the brothers, but that the sisters may nevertheless be each entitled to $\frac{1}{13}$ of the estate as a whole, this does not to my mind alter the fact that a competent Court has found definitely that the sisters are entitled to no share and has passed a decree which it arrived at, and could only have arrived at, after recording that definite finding. I do not agree with my learned colleague—if this is really his meaning—that because Rahman Bakhsh *might* have asked simply for a decree to bind only those bound by the award, therefore even though he asked for a complete settlement of his dispute with his sisters too, he must be taken to have got only an adjudication binding on those bound by the award as such.

I assent to the general proposition that an unnecessary expression of opinion by the District Judge on a point of law would not bind us in dealing with a question of *res judicata*, and I agree that the aforesaid proposition of the District Judge regarding the award was unnecessary, and perhaps erroneous; but even if we over-rule it, I think the question of the rights of the plaintiffs-appellants is *res judicata*.

I have said that the District Judge's proposition is perhaps erroneous. In theory, as a matter of academic logic, it may be erroneous. It may be said that each daughter could get her $\frac{1}{13}$th share out of each brother's allotted share; leaving the brothers' shares untouched *in relation to each other*; but in practice it would be almost impossible—perhaps quite impossible so—to deal with the matter. Perusal of the details of the award makes this quite clear.

Passing on, I think I need say nothing about the 3 parcels of property valued at Rs. 205. They have not been referred to in appeal, and I understand my learned colleague, though he discusses the matter, does not suggest any action with reference thereto. I agree as to the importance of the question of right to appeal in cases like the present. If the position of the daughters in Rahman Bakhsh's case was such that they could not appeal, probably nothing decided in that case could be *res judicata* against them; but I have already shewn why I

think they could have appealed. I also agree that the plea of *res judicata*, being a technical plea, can be met by merely technical pleas, and that the bar must be unmistakably made out before the right of a plaintiff to proceed can be denied; but here I think the bar is made out.

I agree with Mr. Shadi Lal that Section 13, Civil Procedure Code, should not be used so as to work hardship; but here the appellants have had ample opportunity of proving that they were entitled to shares. They failed in 1893 in the first Court and never appealed; and thus, apart from the technical side of the controversy, they seem to me to have no grievance. The litigation of 1892-93 was clearly a trial of strength between the brothers and the sisters, and the sisters were worsted.

Finally, as to the peculiar position of Habib Bakhsh, it is said that he was, in the suit by Rahman Bakhsh of 1892-93, siding with the present appellants against Rahman Bakhsh, Rahim Bakhsh and Kadir Bakhsh. This appears to be true. Rahim Bakhsh and Kadir Bakhsh were certainly against the daughters, and therefore as regards them the mere fact that they were co-defendants with the daughters is, in my opinion, no bar to the application of the doctrine of *res judicata*. And even as regards Habib Bakhsh I *think* he can now take his stand on what was decided in 1893. He has done so—see para. 6 of his written statement in Shams-un-nissa's case and the opening sentence in his written statements in the other three cases. No doubt he discusses further points in case Section 13, Civil Procedure Code, should be held inapplicable, but this is immaterial.

A difference of opinion having arisen between the learned Judges of the Division Bench (Chatterji and Johnstone, JJ.) the case was referred to a third Judge by the following order :—

CHATTERJI, J.—There being a difference of opinion on a point of law the record will be placed before the learned Chief Judge in order to be referred to a third Judge. *30th October* 1905.

It is not my object to restate the reasons for my opinion on the question before us nor to offer any criticism on the grounds of my learned brother's judgment, but I think he has not quite correctly apprehended my meaning on certain points, and I think it right to point this out here in order that I might be properly understood.

I have held upon a careful analysis of the plaint and pleadings in the former suit of Rahman Bakhsh that such suit was

based on two perfectly distinct causes of action in the alternative, (1) on the award and (2) for partition if the award was not enforcible. The daughters were proper parties in both claims, in that on the award as they were said to be parties to the reference—*vide* issue 2, word " parties " and finding thereon, and also partly on issue 3, pages 403 and 405 of Mr. Harris' judgment; in that for partition as they had an ostensible right under Muhammadan Law. The decree of Mr. Harris was passed on the award and in the judgment after laying down that this award would be binding on none if daughters were entitled to succeed under Muhammadan Law, he went on to say that " it may be that if the daughters are found to be governed by custom " this award may be perfectly binding on the sons * * * "— see lines 37 and 38, page 405. This showed to my mind that he went into the question in order to decide whether the award could be held binding on the sons, having laid down, what I think is a perfectly wrong proposition, that the award could not be binding otherwise. The plaintiff, however, did not raise any such contention or ask that the rights of the daughters by custom might be gone into, (if they were not consenting parties to the award) and decided and the award *thereafter* enforced among the sons if the daughters were found not entitled. I therefore said that this issue raised by the District Judge himself and not by the pleadings was not a necessary issue, nor the finding on it *res judicata* as the award could be enforced among those who were parties to it without reference to the daughters who, it may be again noted, had admittedly no property in their possession. The issue thus was at best a collateral or incidental one. I did not say as my learned brother states in his judgment that Rahman Bakhsh could not have so framed his suit on the award as to include a prayer for declaration that the daughters whether consenting to the award or not had no right to the paternal property by custom. Nor did I say that it was necessary for him to claim such relief in a separate and prior suit. I do not think my language admits of any such interpretation ; but if it is capable of being so understood I take this opportunity to make my meaning clear as above. What I have said is that Rahman Bakhsh *in fact* did *not* ask for any such relief, and that the language used by him in the plaint and the pleading do not rationally admit of this construction. The point for consideration then is whether I am correct in my interpretation of that language.

It follows that I do not mean to say " that because Rahman " Bakhsh *might* have asked simply for a decree to bind only those

"bound by the award, therefore even though he asked for a "complete settlement of his dispute with his sisters too, he must "be taken to have got only an adjudication binding on those "bound by the award" which my learned brother seems to think I wished to say and to which he cannot agree. I simply hold that Rahman Bakhsh never asked for a complete settlement of *this kind* with reference *to the award*, and that the language used by him does not support any such theory but negatives it. His intention must be gathered from the words he actually uses, and not attached to the latter on considerations of general convenience, etc.,

As respects the right of appeal, I did not mean that no appeal could be *filed* but that no relief could be given as it did not really lie. I opine that the appellate Court, if it acted in strict accordance with law, and my argument necessarily proceeds on this hypothesis, would have said with respect to the enforcement of the award that it could not interfere as the award was good and enforcible among the sons, and the daughters were not required to surrender any property, and as respects the opinion on the daughters' right by custom, and I hold that it is nothing more, that opinions *are* not the subject of appeal. There was no declaration given against the daughters and there was none to be set aside on appeal. The daughters' remedy was by suit to recover their shares if any, and they would in all probability have been referred to such suit.

As regards Habib Bakhsh I would point out that the former judgment was one *in personam* and *res-judicata* is a plea *inter partes*. Habib Bakhsh was ranged on the same side as the daughters, the present plaintiffs, and admitted their right and no issue arose between them and him. He cannot therefore raise the plea now merely because the former judgment was adverse to the claims of daughters supposing its legal effect to be really so.

JOHNSTONE, J.—The office should now lay this before the Hon'ble Chief Judge. I have nothing more to say, except that, apart from certain apparent misapprehensions on my part of Mr. Justice Chatterji's views, my views on the main points in the case are wholly unchanged. *31st October* 1905

The judgment of the third Judge was deliverd by—

REID, C. J.—This appeal, and Civil Appeals 855 of 1901, 958 of 1901 and 145 of 1902, were referred to me, in consequence *10th August* 1906.

of a difference of opinion between the learned Judges before whom they were originally argued.

The appeals have been argued at considerable length, and I have had the advantage of reading the judgments of my brother Chatterji and of my brother Johnstone.

The Court below found that the suits were barred by Section 13 of the Code of Civil Procedure, by reason of a finding, in a previous suit between the same parties, that the plaintiff-appellants were not entitled to share in the property in suit, left by their father, the parties being governed not by Muhammadan Law but by custom. The facts have been dealt with in the judgments of my brother Chatterji in the present cases and in *Mussammat Fakhr-un-nissa* v. *Malik Rahim Bakhsh* (1) in *Malik Rahim Bakhsh* v. *Mussammat Fakhr-un-nissa* (2) and need not be repeated in detail.

The relief sought in the previous suit, by one of the brothers, was divided into 10 heads, including a general prayer for relief and for costs, and ran as follows :—

The plaintiff sues that it be declared—

(*a*) Whether all the parties to suit are bound by the award? If not, are any so bound; if so, who?

(*b*) If the award is to be binding on none then for a decision as to whether parties are governed by custom or by Muhammadan Law?

(*c*) If it be decided that *shara* has to be followed and daughters entitled to a share, then all the estate be divided among all the sharers, and plaintiff be given his ¼th share by partition and possession.

(*d*) If it be held that daughters are not entitled to a share, then plaintiff be put into possession of his fourth share by partition.

(*e*) If the award be upheld, then defendants Nos. 1 to 3 be ordered to pay three-fourths mortgage of the house in Gali Gullian which came to plaintiff's share, and plaintiff be put into possession of the property awarded to him by the arbitrator.

(1) 23 *P. R.*, 1897. (2) 31 *P. R.*, 1898.

(*f*) The *Sardarakhti* of *Bagh* Ismail Khan in Rajpur and of *Bagh* Malik Sahib Jan and expenditure on *makan diwankhana*, referred to in paragraph 3 of the plaint which are joint of all the brothers, be partitioned between plaintiff and defendants Nos. 1 and 2, and plaintiff be put in possession of his separate share.

(*g*) If held by the Court that the property in (*f*) is part of estate of deceased Malik, then partition, &c., be granted in accordance with above reliefs.

(*h*) Account be taken from defendants Nos. 1 to 3 of income and expenditure of joint estate, and profits be distributed.

(*i*) Other reliefs.

(*j*) Costs.

The issues bearing on the question of *res-judicata* have been set out in the judgment of my brother Chatterji, and it is noticeable that whereas part of the relief sought was a declaration whether the award was binding on all or any of the parties and, if binding on none, a declaration whether the parties were governed by custom or by Muhammadan Law, the 2nd and 3rd issues framed were whether the award was binding on all the parties to the suit and to what extent, and, if not, whether Muhammadan Law or custom governed the parties.

The authorities cited are the following :—

For the appellants—

Narain Das v. *Faiz Shah* (1), in which it was held that no matter can be said to be directly and substantially in issue or to have been finally decided unless a decision thereon is necessary for the decision of the case upon the ground on which the final decision ultimately proceeds.

Mussammat Fatima Begam v. *Muhammad Zakaria* (2), in which it was held that a plaintiff, who alleged two distinct causes of action, the first being an agreement to sell, and the second a subsequent sale which gave him a right of pre-emption, if it were not rendered nugatory by the alleged agreement, could obtain relief on one only, as his claim to pre-empt could be considered only if his claim on the agreement was defeated : *Mussammat Fakhr-un-nissa* v. *Malik Rahim Bakhsh* (3) and *Malik Rahim Bakhsh* v. *Mussammat Fakhr-un-nissa* (4), in which it

(1) 157 *P. R.*, 1889, *F. B.*
(2) 96 *P. R.*, 1895.
(3) 28 *P. R.*, 1897.
(4) 81 *P. R.*, 1898.

was held that in the previous suit by the brother, respondent to this appeal, the sisters need not have been impleaded, having no property in suit in their possession, though it was doubtless convenient to implead them, and that the issue as to their right did not necessarily arise in those causes of action upon the pleadings of the impleaded brothers. *Labhu* v. *Hira Singh* (1), in which it was held that a practical test for determining whether a matter has been directly and substantially in issue in a previous suit, is furnished by effecting a separation of the discussions and findings on the various groups of issues dealt with in the judgment, and that, if, after eliminating all but one such group, the judgment still remains intelligible and in itself sufficient for the adjudication of the suit, and the decree is in entire harmony with it, the matter so dealt with was directly and substantially in issue.

Mula v. *Ganda* (2), in which it was held that a question of jurisdiction, taken by the Court *suo moto* and not put in issue, was not *res judicata*: *Cooke* v. *Gill* (3) and *Chand Kaur* v. *Partab Singh* (4), in which cause of action was defined, as stated by my brother Chatterji.

Jamait-un-nissa v. *Lutf-un-nissa* (5), in which a majority of 3 to 2 held that if a decree is, upon the face of it, entirely in favour of a party to a suit, that party has no right of appeal, the decree, and nothing else, being appealable. Mahmud, J., held that a finding on an issue adverse to the party, in whose favour the decree was, might constitute the finding *res judicata* and consequently make it appealable. *Bhola Bhai* v. *Adesang* (6), in which it was held that a decree which was not appealable could not make an issue, framed in a suit, from the decree in which an appeal lay *res judicata*:

Govind v. *Dhondbarar* (7) to the same effect.

Vithilinga v. *Vithilinga* (8) to the same effect.

Somasundara v. *Kulandaivelu* (9), in which it was held that a co-sharer, who was made a defendant in a suit by his co-sharers because he would not join as plaintiff, was not bound by the decision, being unable to benefit by it or to appeal, and not having had the conduct of the suit in his hands.

Ohuni Lal v. *Mussammat Amir Bibi* (10), in which it was held that a suit by a widow for possession of her share of her husband's

(1) 41 *P. R.*, 1899.
(2) 92 *P. R.*, 1902, *F. B.*
(3) *L. R.*, 8 *C. P.* 107.
(4) *L. R.*, 15 *I. A.* 150
(5) *I. L. R.*, *VII All.*, 606, *F. B.*
(6) *I. L. R.*, *IX Bom.*, 75.
(7) *I. L. R.*, *XV Bom.*, 104.
(8) *I. L. R.*, *XV Mad.*, 111.
(9) *I. L. R.*, *XXVIII Mad.*, 457.
(10) 39 *P. R.*, 1900.

property, which she had allowed her step-sons to cultivate, on condition of their giving her maintenance out of the profits, was not barred by Section 13 by reason of her having been made a party to a suit by a person who had obtained a mortgage from the step-sons, and had sued for possession, the question of her right to possession on non-payment of maintenance not having been raised or decided in that suit.

Jogal Kishore v. *Chammu* (1), in which it was held that, where two rival pre-emptors filed identical suits for pre-emption and decrees were passed giving one pre-emptor preference, the unsuccessful pre-emptor was not barred from appealing against the decree, in the suit in which he was plaintiff, by reason of his failure to appeal against the decree in the suit in which he was defendant.

For the respondents—

Krishna Behari Roy v. *Banwari Lal Roy* (2), in which it was held that where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot be again tried in another suit between them. Their Lordships followed a previous decision in *Soorjee Monee Dayee* v. *Suddamind Mahapatter* (3), in which it was said, after reference to Section 2, Act VIII, 1859, "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference "rather to the substance than to the form of action, and they "are of opinion that in this case the cause of action was in "substance to declare the will invalid on the ground of the want "of power of the testator to devise the property he dealt with "But, even if this interpretation were not correct, their Lord-"ships are of opinion that this clause in the Code of Procedure "would by no means prevent the operation of the general law "relating to *res judicata*, founded on the principle *nemo debet bis* "*vexari pro eadem causa*. This law has been laid down by a "series of cases in this country..... It has probably never been "better laid down than in a case which was referred of "*Gregory* v. *Molesworth* (4), in which Lord Hardwicke held "that where a question was necessarily decided in effect, though "not in express terms, between parties to the suit, they could "not raise the same question as between themselves in any "other suit in any other form; and that decision has been

(1) 85 *P. R.*, 1905, *F. B.* (3) 12 *B. L. R.*, 304, *P. C.*
(2) 9 *L. R.*, 1 *Cal.*, 144 *P. C.* (4) 3 *Atk.*, 617.

"followed by a long course of decisions, the greater part of "which will be found noticed in the very able notes of Mr. Smith "to the case of the Duchess of Kingston."

Gobind Chunder Koondoo v. *Taruck Chander Bose* (1), in which it was said, "We have therefore to see whether the right "and title which is the subject of claim in this suit was not "the very same right and title which was in issue between the "same parties, and determined in the former suit. When once "it is made clear that the self-same right and title was sub-"stantially in issue in both suits, the precise form in which the "suit was brought, or the fact that the plaintiff in the one case "was the defendant in the other, becomes immaterial."

Lachman Singh v. *Mohan* (2), in which a majority of a Full Bench held that certain defendants could appeal from a decree which merely dismissed the plaintiffs' suit for possession "as it at present stands," an issue as to the defendants' title having been decided against them in the body of the judgment, in which it was held that they were entitled to possession as tenants under an unexpired lease. *Dwarka Das* v. *Kameshar Prasad* (3), in which it was held that, where a claimant-objector makes the judgment-debtor a defendant to his suit under Section 283 of the Code of Civil Procedure, and does not limit his claim, he claims both in form and substance against the judgment-debtor a declaration of his title to the whole of the property, the title to which is in issue in the suit: that a decree in such suit, declaring the liability or non-liability of the property to attachment and sale in execution of the creditor's decree, must necessarily, unless the suit be decided on a ground not involving the question of title, decide and determine all questions of title on which the parties to the suit could rely, and that such decision would operate in any future suit between the parties as *res judicata* on those questions of title, though such subsequent suit might relate to property not in question in the suit under Section 283, provided the second suit is within the jurisdiction of the Court which decided the first suit.

Jamna Das v. *Udey Ram* (4), in which it was held that, where plaintiffs as second assignees of a debt, sued for recovery of the debt and impleaded their assignors, the original debtors and certain persons whom they alleged to have been prior assignees of the debt, but to have lost the benefit of their assignment through non-fulfilment of the conditions on which

(1) *I. L. R., III Cal.*, 145, *F. B.* (3) *I. L. R., XVII All.*, 69.
(2) *I. L. R., II All.*, 497. *F. B.* (4) *I. L. R., XXI All.*, 117.

it was made, and the Court gave the plaintiffs a decree against the original debtors, the first assignees could appeal, inasmuch as the decree, though not against them by name, necessarily implied a finding that the assignment to them, upon the basis of which they resisted the plaintiffs' claim, had became void.

Rai Charan Ghose v. *Kumud Mohun Dutt Chowdhry* (1), in which it was held that an appellate judgment in a suit operated as *res-judicata*, although no second appeal to the High Court lay in that suit and a second appeal would have lain in the second suit, Section 13 of the Code, containing nothing to indicate that the judgments in the two suits must be open to appeal in the same way, in order that the decision on any issue in the earlier, can bar the trial of the same issue in the later suit.

Phugwanbutti Chaudhrani v. *Forbes* (2), in which it was held that the course of appeal does not affect the question of *res-judicata*.

Ananta Balacharya v. *Damodhar Makund* (3), in which it was held that, where the decree depends on an issue, the finding on that issue effects *res-judicata*, although the finding does not appear upon the face of the decree. *Wasdeo* v. *Rup Chand* (4) in which it was held that, inasmuch as a decree for partition is a joint declaration of the rights of all the co-sharers interested in the property of which partition is sought, each co-sharer is entitled to obtain possession of the share allotted to him under the decree, whether he be plaintiff or defendant.

Ghesa v. *Ranjit* (5), in which it was held, by a Full Bench, that, when a common question, such as the tenure of a village Community arises between the members of a community and one of such members sues the rest, the determination of such common question will not bind the whole of the defendants as *res-judicata*, so as to bar the question being raised among themselves in a subsequent suit, unless they have been distinctly at issue on the point in the suit, and acting as opposite parties and the order made is one affecting the rights of the defendants among themselves.

Nihal Singh v. *Chanda Singh* (6), in which it was held that, where there is a conflict of interest between defendants

(1) *I. L. R., XXV Cal.*, 571.
(2) *I. L. R.*, 28 *Cal.*, 78.
(3) *I. L. R.*, 13 *Bom.*, 25.
(4) 23 *P. R.* 1905.
(5) 121 *P. R.*, 1880, *F. B.*
(6) 140 *P. R.* 1890.

inter se, an adjudication of rights may be *res-Judicata* between them as well as between the plaintiff and the defendants.

Was deo v. *Rup Chand* (1), in which it was held that, as a decree for partition is a joint declaration of the rights of all the co-sharers interested in the property of which partition is sought each co-sharer is entitled to obtain possession of the share alloted to him under the decree, whether he may be a plaintiff or a defendant. *Sheikh Khoorshed Hossein* v. *Nabbee Fatima* (2), in which it was said "we are of opinion that "a decree for partition is not like a decree for money or for "the delivery of specific property, which is only in favour "of the plaintiff in the suit. It is a joint declaration of the "rights of persons interested in the property of which parti-"tion is sought, and, having been so made it is unnecessary "for these persons who are defendants in the suit to come "forward and institute a new suit to have the same rights "declared under a second order made. It must be taken "that a decree in such suits is a decree, when properly drawn "up, in favour of each share-holder, or set of share-holders, "having a distinct share."

Buseun Lal Shookul versus *Chundee Dass* (3), in which it was held that, where A had brought a suit against B for arears of rent and B admitted the sum claimed, but contended that the rent was due for a larger area of land than that specified in the plaint, and an issue was framed on such contention and decided against B, a subsequent suit by B to have it declared that a sum of money equal in amount to the sum paid on admission in the former suit, comprised the rent due on all the lands held by him under A, was barred, being *res-judicata*.

Kali Krishna Tagore v. *Secretary of State for India in Council* (4), in which it was held that, to apply the law of estoppel by judgment under Section 13, Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided, and that, for this purpose, the judgment must be looked at, the decree being usually insufficient for the purpose inasmuch as, according to the Code, it only states the relief granted if any, or other disposal of the suit, without the ground of decision and without affording information as to what may have been in issue and decided.

(1) 23 *P. R.*, 1905.
(2) *I. L. R.*, 3 *Cal.*, 551.
(3) *I. L. R.*, 4 *Cal.*, 686.
(4) *I. L. R.*, 16 *Cal.*, 173, *P. C.*

Phundo v. *Jangi Noth* (1), and other authorities for the established rule that where a Judicial decision, pleaded as constituting *res-judicata* in all respects fulfils the requirements of Section 13 of the Code of Civil Procedure, and it has become final, it is immaterial whether it is or is not sound law.

In my view of the law and the facts it is unnecessary to consider the authorities above cited on the question whether the right of appeal or the course of appeal affects the question of *res-judicata*.

The case for the plaintiff in the previous suit was that the award bound all or some of the defendants.

The property in suit was in possession of the male defendants. The female defendants were impleaded because they were alleged to be bound by the award, and because they would be necessary parties on the issues which would arise in the event of the award not binding the male defendants. If the award bound the latter the issue as to custom or Muhammadan law did not arise; inasmuch as the male parties to the suit could not re-open issues which had been concluded by the award, and the award had adjudicated on their respective rights in the estate.

All that the Court below had therefore to do in the previous suit was to pass a decree against the male defendants in the terms of the award, on the finding that it bound them, and the decision on the question of status with reference to Muhammadan law or custom was *ultra vires*, inasmuch as that issue did not arise: *Mussammat Indra Boi* v. *Gadu Dhar* (2), and *Mula* v. *Gandu* (3). Of the authorities cited above for the defendant-respondents, the case of *Krishna Roy* v. *Bunuari Lall Roy* (4) does not help them, inasmuch as the rule laid down therein applies only to cases in which the issue tried was material and arose on the pleadings. The substance of the suit was to establish the award and obtain a decree in the terms thereof against those bound by it, and the other issues would arise only on a finding that the award did not bind the defendants in possession of the property.

Gobind Chunder Koondoo v. *Tarack Chunder Bose* (5), is inapplicable because the question substantially in issue previously was whether the males in possession were bound by the award.

(1) *I. L. R.*, 15 *All.*, 327. (2) 92 *P. R.*, 1902, *F. B.*
(3) 29 *P. R.*, 1895. (4) *I. L. R.*, 1 *Cal.*, 144, *P. C.*
(5) *I. L. R.*, 3 *Cal.*, 145.

Shib Charan Lal v. *Ragu Nath* (1), is inapplicable because the parties to the award could not go behind its terms, if binding on them.

Wasdeo v. *Rup Chand* (2), is inapplicable because the question of the rights of the females did not arise on the finding that the award bound the males, and the same may be said of *Ghisa* v. *Ranjit* (3), *Nihal Singh* v. *Chanda Singh* (4), *Sheikh Khoorshed Hossein* v. *Nabbee Fatima* (5), *and Kali Krishna Tajore* v. *The Secretary of State for India in Council* (6). For these reasons I concur with my brother Chatterji in holding that the subsequent suits were not barred by Section 13 of the Code of Civil Procedure, and in decreeing the appeals and setting aside the decrees below, and in remanding the suits under Section 562 of the Code of Civil Procedure for decision in accordance with law.

Court fees on the memoranda of appeal will be refunded and costs will be costs in the cause. No question as to property not dealt with by the award was argued before me.

Appeal allowed.

No. 58.

Before Mr. Justice Rattigan.

GHULAM MUHAMMAD,—(Plaintiff),—PETITIONER,

Versus

Revision Side.

JANGBAZ and the MUNICIPAL COMMITTEE of JULLUNDUR,—(Defendants),—RESPONDENTS.

Civil Revision No. 1340.

Municipal Committee—Discretion of, to take action under Section 120 *E—Suit by person aggrieved for injunction—Jurisdiction of Civil Court to restrain action of Municipality—Punjab Municipal Act,* 1891, *Section* 120 *E.*

Although under the powers given by the Legislature a local body may act perfectly *bonâ fide* and *intra vires* in issuing a certain order, still if that order injuriously affects the rights of any person the latter can undoubtedly appeal to the Civil Courts for protection and to that protection he will be entitled if he can prove that the order in question was made wantonly or without any reasonable justification. Therefore, where a Municipal Committee, at the instance of a discontented neighbour, issued a notice under Section 120 E of Act XX of 1891, directing the plaintiff to close his old drain and to make a new one

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(1) *I. L. R.*, 17 *All.*, 174.
(2) 23 *P. R.*, 1905.
(3) 121 *P. R.*, 1880.
(4) 140 *P. R.*, 1900.
(5) *I. L. R.*, 3 *Cal.*, 551.
(6) *I. L. R.*, 16 *Cal.*, 173. *P.*

in its place along a different alignment, without any proper enquiry as to whether the existing drain was a menace to the health of the people surrounding it or the general public.

Held, that the Civil Court should under such circumstances interfere by injunction to restrain the Committee from carrying out its order which was inequitable and pretended to proceed on an alleged danger to health which was in no way proved.

Ollivant v. *Rahimtulla Nur Mohamed* (1), *Damodar Das* v. *Municipal Committee Delhi* (2), *Badri Das* v. *Municipal Committee, Delhi* (3), *and Duke* v. *Rameswar Malia* (4), referred to.

Petition for revision of the order of Captain B., C. Roe, Divisional Judge, Jullundur Division, dated 10th January 1906.

Shah Nawaz, for petitioner.

Sheo Narain, for respondents.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—The Municipal Committee of Jullundur by notice issued under Section 120 E of Act, XX of 1891, (as amended by Punjab Act, III of 1900) directed plaintiff to close an old drain and to make arrangements for a new drain along a different alignment. Plaintiff appealed from this order to the Commissioner of the Division ; but his appeal was rejected, and he now sues for an injunction to restrain defendents—(who are the said Committee and two other persons) from giving affect to the directions contained in the notice. 18*th Feby.* 1907.

The District Judge, while holding that the Committee acted without *mala fides*, granted plaintiff the relief prayed for on the ground that the order was not equitable and that "it pretends to proceed on alleged danger to health which "is by no means proved." The District Judge further found that the old drain had existed for over 25 years, that plaintiff had acquired an easement in respect of it, and that defendant No. 2 (who is married into plaintiff's family and resides next door) "wants to extinguish that easement, and finding "he cannot do so at law, shelters himself behind an order "of the Committee."

From the order of the District Judge, defendant No. 2, appealed to the Divisional Judge, who accepted the appeal and dismissed plaintiff's suit on the ground that as the Committee in issuing the order under Section 120 E, had

(1) *I. L. R., XII Bom.*, 474.
(2) 27 *P. R.*, 1901.
(3) 90 *P. R.*, 1898.
(4) *I. L. R., XXVI Cal.*, 811.

not been proved to have acted *ultra vires* or *mala fide* or without authority the Civil Courts had no jurisdiction to entertain the present suit.

Plaintiff applies to this Court to revise this latter order and on his behalf his learned counsel contends that Civil Courts have undoubted jurisdiction to interfere in such cases when the order of the local authority is unreasonable, malicious, wanton or oppressive. It is contended that in the present instance the order impugned is obnoxious on all those grounds, and that there was no possible justification for the Committee in issuing it. Mr. Shah Nawaz also contends that the Divisional Judge has erred in dismissing the suit without considering whether the order was or was not reasonable. In support of his contentions the learned counsel relies upon *Ollivant* v. *Rahmitulla Nur Mohamed* (1), at pages 474 and 494; *Damodar Das* v. *Municipal Committee, Delhi* (2), at page 90, and *Badri Das* v. *Municipal Committee, Delhi*, (3). In reply Mr. Sheo Narain urges that this being a petition for revision this Court is bound by the finding of the Lower Courts on the facts; that there is no proof whatsoever that the Committee acted *mala fide* or maliciously: that on the contrary there is evidence to show that the order was issued in consequence of the committee having reason to believe that the existence of the drain was "a menace to health"; that in his plaint the plaintiff made no allegation that the order was oppressive, wanton, capricious or unreasonable and that the Civil Courts should be chary of interfering with orders passed by local authorities in exercise of the powers conferred upon them by the legislature. The learned pleader cited *Badri Das* v. *Municipal Committee Delhi* (3), and *Duke* v. *Rameswar Malia* (4), as authorities in favour of his arguments. I quite agree that the Civil Courts should not interfere, save on good and substantial grounds, with the orders of Local Bodies passed in the *bonâ fide* exercise of the discretionary powers conferred upon them by the legislature. I also quite agree that in cases such as the present the findings of the Lower Courts should (except, again, for substantial reasons) be accepted by this Court when adjudicating as a Court of revision. But while admitting this, I think that a Court is bound in all these cases to see whether the discretionary powers vested in local authorities have been, in

(1) *I. L. R., XII Bom.*, 474.
(2) 27 *P. R.*, 1901.
(3) 90 *P. R.*, 1898.
(4) *I. L. R., XXVI, Cal.*, 811.

any particular case, exercised *bonâ fide* and reasonably. I do not mean to say that the Court is to over-rule the orders of the local authority simply because it may itself consider that the order impugned was unnecessary or open to objection. That is not the true test. Before a Court is justified in interfering it must find that the order in question was given *mala fide*, or that it was *ultra vires* or oppressive, wanton or altogether unreasonable. Very wide powers are given by the Legislature to local authorities and with the exercise of these powers, if exercised reasonably, the Courts rightly refuse to interfere. But if in any case the person aggrieved thereby can satisfy the Court that the order was one for which there is on the record no justification whatever, I consider that it is alike the right and the duty of the Civil Court to interpose its authority to prevent the local body from abusing the powers conferred upon it (see *Damodar Das* v. *Municipal Committee, Delhi*, (1), at page 90). In the present case the District Judge after himself inspecting the spot came to the conclusion that the order issued to the petitioner was inequitable and that it pretended to proceed on an alleged danger to health which was in no way proved. As the District Judge further points out in his judgment there can be no doubt that it was owing to the machinations of defendant No. 2, who is inimically disposed towards plaintiff, that the order came to be passed. And that this is so, and that the Municipal Committee are not themselves really interested in this case is, I think, apparent from the fact that the only person who appealed from the order of the District Judge, granting plaintiff's prayer for an injunction, was the said defendant No. 2. The Municipal Committee, who were co-defendants in the suit, accepted the District Judge's finding and order. There is moreover absolutely no trustworthy evidence to show that plaintiff's drain which has been in existence for over 25 years has endangered the health of the public or of his neighbours, and no reason is given by the Municipal Committee for ordering its closure. Under these circumstances I think the District Judge was right in giving plaintiff the relief for which he asked. The Divisional Judge has not attempted to discuss this aspect of the question and has reversed the order of the District Judge simply on the ground that the Committee had not been shown to have acted *Mala fide* or *ultra vires*. This is an entirely erroneous view of the law. A local body may act perfectly *bonâ*

(1) 27 *P. R.*, 1901.

fide and *intra vires* in issuing a certain order, but if that order injuriously affects the rights of any person, the latter can undoubtedly appeal to the Civil Courts for protection and to that protection he will be entitled if he can prove that the order challenged was made wantonly or without any reasonable justification. In the present case I can upon the materials before me come to no other conclusion than that the Municipal Committee issued the order at the instance of defendant No. 2 and solely for his benefit and without any proper inquiry as to whether the drain was a menace to health. Had the Committee really been of the opinion that the existence of the drain endangered the health of the petitioner's neighbours or the public, I have no doubt that they would have themselves appealed against the order of the District Judge.

This being the view which I take of this case I have no hesitation in setting aside the order of the Divisional Judge, who dismissed the suit upon the erroneous ground that in such cases the Civil Courts have no jurisdiction to question the orders of the local authorities. The respondent Jangbaz Khan must pay the costs of the proceedings in this Court and in the Lower Courts.

Application allowed.

Full Bench

No. 59.

Before Mr. Justice Reid, Mr. Justice Robertson and Mr. Justice Lal Chand.

GOKAL CHAND AND ANOTHER,—(PLAINTIFF'S)—APPELLANTS,

APPELLATE SIDE.

Versus

RAHMAN AND OTHERS.—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 616 of 1906.

Mortgage—Non-payment of consideration according to agreement—Incomplete transaction—Lien—

Held by the Full Bench that in the absence of a specific contract postponing payment, failure to pay full consideration as agreed upon whether to the mortgagor or to a prior incumbrancer after such payment has been demanded by the mortgagor avoids the mortgage and destroys the mortgagee's lien and right to possession, even on subsequent [illegible]

of the unpaid consideration, it being immaterial whether the non-payment has or has not caused inconvenience or loss to the mortgagor.

Ala Bakhsh v. *Shama* (1), *Chandan Lal* v. *Nihal* (2), *Mangal Singh* v. *Jumdan* (3), *Gopal Sahai* v. *Mussammat Hussain Bibi* (4), *Saudagar Singh* v. *Sant Ram* (5), referred to.

Gomess v. *Mela Ram* (6), *dissented from.*

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 23rd March 1906.

Harris for appellants.

Bodhraj Sawhney for Respondents.

This was a reference to a Full Bench made by Chatterji, J., to determine whether a mortgage with possession where for some reason or other a portion of the consideration money specified in the deed remains unpaid is capable of enforcement and carries lien with it.

The Order of reference by the learned Judge was as follows:—

CHATTERJI, J.—In this case the consideration for the mortgage, dated 9th April 1900, was mostly money to be paid to previous mortgagees and creditor. One of these items was a sum of Rs. 93 payable to Chanan Shah. All the mortgage money was paid, but Chanan Shah's debt, which was secured by two deeds, could not be paid in full. One deed for Rs. 68 was paid off and the remaining amount in the mortgagees' hands, Rs. 25, was insufficient to redeem the other mortgage. The money remained with the mortgagees and now they sue after the lapse of about five years for possession of the land under the terms of the deed, offering, if necessary, to pay the 25 rupees to the mortgagees. *23rd July* 1906.

The suit has been thrown out by the Divisional Judge on the ground that there was no complete mortgage as the plaintiffs did not pay the full amount of the mortgage money but kept back Rs. 25 which they ought to have paid to the mortgagor, if it was insufficient to redeem the other mortgage to Chanan Shah. He has followed *Gopal Sahai* v. *Mussammat Hussain Bibi and others* (4).

The rulings on the question as to the right of the mortgagee under the mortgage where for some reason or other a portion of the mortgage money specified in the deed, remains unpaid, are conflicting. See *Alla Baksh and another* v. *Shama*

(1) 153 *P. R.*, 1882.
(2) 153 P. *R.*, 1882, *Note.*
(3) 27 *P. R.*, 1886
(4) 100 *P. R.*, 1889.
(5) 103 *P. R.*, 1906.
(6) 16 *P. R.*, 1884.

and another (1), *Gopal Sahai* v. *Mussammat Hussain Bibi* (2), and *Saudagar Singh* v. *Sant Ram* (3), on the one hand and on the other *Gomes and another* v. *Mela Ram* (4) and the judgment of Mr. Justice Chitty in Civil Revision No. 355 of 1906 which I understand is supported by a Division Bench ruling of which I have not been able to obtain the particulars. The weight of authority is in favour of the view propounded in the first set of rulings, which is, that the mortgage is in that case wholly avoided and carries no lien with it. I am myself not free from doubt as to the correctness of this opinion and the point is an important one, which frequently comes up for decision. I regard the law on this point as in an unsatisfactory state as far as this province is concerned, and think that it ought to be clearly propounded by a Full Bench.

I accordingly refer the question to a Full Bench. It is sufficiently set out in the foregoing judgment.

I leave on record that after hearing counsel I over-rule the grounds of appeal relating to the capacity of Rahman, respondent, to affect a valid mortgage of his minor brother's share, and hold that he has no such power and that the minor has not in any case received full benefit from the mortgage.

The Full Bench reference arises only in the case between Rahman and the mortgagees.

The following opinions were recorded by the learned Judges constituting the Full Bench :—

9th Feby. 1907. REID, J.—The question referred is the effect, on a mortgage with possession, of failure by the mortgagee to pay off the prior incumbrances, payment of which constituted part of the mortgage consideration : *Gomes* v. *Mela Ram* (4), and Civil Revision 335 of 1906 have been relied on for the appellant as authority for the proposition that in spite of failure to pay the whole consideration promptly the mortgagee was entitled, in the absence of a special contract to the contrary, to possession, the remedy of the mortgagor being a suit for damages for breach of the contract to pay the consideration. Elsmie, J., who was a party to the Judgments in *Ala Bakhsh* v. *Shama* (1), and *Gomes* v. *Mela Ram* (4), distinguished the latter case from the former on the ground that in the latter there was no contract as to the time for payment, and tender of the unpaid balance was made within 1 a „*prima facie* reasonable time."

(1) 153 *P. R.*, 1882. (2) 108 *P. R.*, 1906.
(3) 100 *P. R.*, 1889. (4) 16 *P. R.*, 1884.

Plowden, S. J., drew no such distinction, and held that failure to pay promptly afforded no defence to a suit by a mortgagee for possession, coupled with tender of the consideration due. In Civil Revision 335 of 1906 Chitty, J., distinguished the facts from those in *Gopal Sahai* v. *Mussammat Hussain Bibi* (1), in that the mortgagee in the 1906 case undertook to pay off certain prior incumbrances and the amounts so payable were not to pass through the mortgagor's hands, and no time was fixed for these payments. The learned Judge held that the mortgagors could not plead that the mortgage was incomplete merely because the prior incumbrances had not been paid off, and they had themselves paid some of them. I regret that I am unable to concur in these expositions of the law. Prior incumbrancers are not bound by the contract between the mortgagor and a puisne incumbrancer, and the failure of the latter to pay off prior incumbrances exposes the mortgagor to the risk of suits by prior incumbrancers. In my opinion the rule applicable is the same whether payment to the mortgagor or to a prior incumbrancer is contracted for. In either case the mortgagor is entitled to prompt payment, and failure to pay promptly avoids the mortgage. The rule contended for by counsel for the appellant would deprive the mortgagor of the benefit to be derived by him from the mortgage, *viz.*, the realisation of money or the freedom from the claims of prior incumbrancers; and in my opinion, the mortgagee cannot put the mortgagor to the risk of inconvenience by delay in payment without losing the benefit of his contract and his right to possession. The mere undertaking to pay a third party does not constitute payment, *Ala Bakhsh* v. *Shama* (2), and *Chaitan Lall* v. *Nihal* (3), *Mangal Singh* v. *Jindan* (4), *Gopal Sahai* v. *Mussammat Hussain Bibi* (5), *Saudagir Singh* v. *Sant Ram* (6), are authority for the conclusion that delay in payment, either to the mortgagor or to a prior incumbrancer, after such payment has been demanded by the mortgagor, avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, in the absence of a specific contract postponing payment, it being immaterial whether the delay has or has not caused inconvenience or loss to the mortgagor. This is my answer to the reference, and the result admittedly is that the appeal fails and is dismissed with costs, no other point having been left undecided by my brother Chatterji, who made the reference.

(1) 100 *P. R.*, 1889. (2) 158 *P. R.*, 1882, *Note.*
(3) 153 *P. R.*, 1882. (4) 27 *P. R.*, 1886.
(5) 103 *P. R.*, 1906.

12th *Feby.* 1907. ROBERTSON, J.—I agree in the reply to the reference. There may be cases in which the consideration for a mortgage is, in whole or in part, an undertaking on the part of the mortgagee to take the discharge of prior incumbrances on his shoulders. In such a case the result might be different. But where the consideration is cash and a certain portion of the money is left with the mortgagee for prompt payment to a third person, failure to pay such sum within a reasonable or specified time in my opinion voids the mortgage. With these remarks I concur in the reply of my brother Reid to the reference.

13th *Feby.* 1907. LAL CHAND, J.— I agree that failure to pay the consideration money as agreed upon whether to the mortgagor or to a prior incumbrancer avoids the mortgage. I further consider that in the absence of any express and direct stipulation in the deed of mortgage postponing payment for a specified time it will be presumed that payment is intended to be made immediately or within a reasonable time according to the facts and circumstances of each particular case. With these remarks I concur in the answer given to the reference by my learned colleagues and in dismissing the appeal with costs.

Full Bench.

No. 60.

Before Mr. Justice Chatterji, C.I.E., Mr. Justice Robertson and Mr. Justice Rattigan.

APPELLATE SIDE.

JALLA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

GEHNA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 53 of 1905.

Valuation of suit—Suit to declare an alienation of land to be not binding after alienor's death—Value for purpose of further appeal—Punjab Courts Act, 1884, Section 40 (b).

Held, by the Full Bench that for the purposes of Section 40 (b) of the Punjab Courts Act, 1884, the value of a suit for a declaration that a sale by a male proprietor of ancestral agricultural land would not be binding after the alienor's death, is the value of the land calculated at thirty times the revenue, and not the amount of the consideration of the sale in dispute.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 19th October 1904.

Duni Chand, for appellant.

Tirath Ram, for respondents.

This was a reference to a Full Bench made by Robertson and Rattigan, JJ., to determine the value for purposes of Section 40 (*b*) of the Punjab Courts Act, 1884, of a suit for a declaration that a sale of ancestral agricultural land by a male proprietor would be void after the alienor's death.

The facts of this case are as follows :—

Plaintiff sued for a declaration to the effect that a sale of land effected by their father in favor of defendants 2 and 4 by a deed of sale, dated 8th November 1900, for an alleged consideration of Rupees 400 should not affect their reversionary rights.

The first Court dismissed the suit with costs, but the Divisional Judge on appeal reversed this finding and decreed the claim as prayed. Defendants preferred a further appeal to the Chief Court; but as the subject matter of the suit was agricultural land assessed to land revenue, which amounted to Re. 1-12-0 only, the plaintiff contended that no further appeal lies. Thereupon the question whether under the circumstances of the case a further appeal lay to the Chief Court under Section 40 (1) (*b*) (*i*) of the Punjab Courts Act, 1884 as amended, was referred by the learned Judges of the Divisicr Bench to a Full Bench.

The judgment of the Full Bench, so far as is material for the purposes of this report, was delivered by—

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RATTIGAN, J.—Our answer to the reference is that the rule as laid down in *Bakhu* v. *Jhanda* (1) is correct and that in accordance therewith it must be held that no further appeal lies in this case, the value of the land for jurisdictional purposes being, under the rules made under Section 3 of the Suits Valuation Act, less than Rs. 250. *15th June* 1906.

(1) 145 *P. R.*, 1899.

Full Bench.

No. 61.

Before Sir William Clark, Kt., Chief Judge, Mr. Justice Reid, Mr. Justice Chatterji, C.I.E., Mr. Justice Robertson, Mr. Justice Kensington, Mr. Justice Johnstone, Mr. Justice Rattigan, Mr. Justice Chitty and Mr. Justice Lal Chand.

GANGA RAM,—(Plaintiff),—APPELLANT,

Versus

DEVI DAS,—(Defendant),—RESPONDENT.

Civil Appeal No. 1021 of 1905.

Legal practitioners—Back fee—Payment to be made contingent on success—Illegal and improper contract—Public policy—Contract Act, 1872, Section 23.

Held by a majority (Chatterji and Lal Chand, JJ., dissenting) that agreements between legal practitioners and their clients making the remuneration of the legal practitioner dependent to any extent whatever on the result of the case in which he is retained are illegal as being contrary to public policy, and legal practitioners entering into such agreements are therefore guilty of professional misconduct and render themselves liable to the disciplinary action of the Court.

Per Lal Chand and Chatterji, JJ., contra that the practice of receiving back fee is neither opposed to public policy nor improper as regards a legal practitioner, other than members of the English bar, enrolled under the Legal Practitioners Act, 1879.

Further appeal from the decree of the Divisional Judge of Multan Division, dated 4th June 1904.

This was a reference to a Full Bench made by Chatterji and Kensington, JJ., to determine whether it is legal and proper for a legal practitioner to make his remuneration in a case contingent on the success of the case.

The incidents which caused the consideration by the Court of the question of the propriety of the back fee system in the Punjab were as follows :

On an application having been made to restore the above appeal dismissed in default, it appeared that the counsel retained by the appellant did not appear at the hearing on account of his back fee not having been deposited. Thereupon the question of the legality and propriety of the back fee system as prevailing among the legal practitioners in the province was referred to a Full Bench.

The order of the Division Bench (Chatterji and Kensington, JJ.) referring the question of law to a Full Bench was as follows :—

CHATTERJI, J.—In our opinion if the understanding between Mr. Morrison and his client that the former was to have his back fee deposited with him before he would argue the appeal, is not opposed to public policy and to the traditions of the bar to which Mr. Morrison belongs, the client was clearly in fault in not making the deposit, and there is no sufficient ground for readmitting the appeal. A Full Bench judgment of this Court, *Beechy* v. *Faiz Mahomed* (1) supports Mr. Morrison's view that the understanding is not improper or illegal on which he acted in declining to appear at the previous hearing. But if, as some recent authorities hold—*vide In the matter of a Pleader of the Chief Court of the Punjab* (2)—the opinion of the Full Bench is wrong, Mr. Morrison was not justified in declining to appear, though he may be excused if he was misled by that opinion, and his client would have a fair ground for restoration of his case. *14th May* 1906.

A reference was lately made on this point to a Full Bench which failed, because it transpired subsequently that there was no question of back fee involved in that case. It clearly is involved in the present instance, and we accordingly refer it to a Full Bench.

Upon the reference to the Full Bench the following judgments were delivered :—

CLARK, C. J.—I take it that the question referred to the Full Bench is the general one. *26th Nov.* 1906.

Whether it is legal and proper for a legal practitioner to make his remuneration in a case contingent on the success of the case.

The case has been argued on this general question and it is desirable that an answer should be given to this general question. Mr. Grey and Mr. Sheo Narain have assisted the Court as *amici curiae* and argued the case. Mr. Grey supporting his own conviction on the subject arguing that such conduct was illegal and improper.

Mr. Sheo Narain for the sake rather of assisting the Court, than as supporting his own personal opinion, has argued that such conduct is neither illegal nor improper.

(1) 5 *P. R.*, 1878, *F. B.* (2) 69 *P. R.*, 1904.

The thanks of the Court are due to the able manner in which these gentlemen have argued the case.

I understand that in Lahore it is usual for the back fee (*i. e.*, the fee, payment of which is contingent on success) to be paid to the legal practitioner before the decision of the case, and that he refunds it to the client if the case has not been successful, that outside Lahore the back fee frequently remains with the client or is deposited with a third party. The point, however, is not material to the decision of the question before us.

The question divides itself at once into two branches, its relation to barristers and other legal practitioners, respectively.

As regards barristers the Full Bench ruling *in Grey* v. *Lachman Das* (1) decided that barristers practising in the country continued to be bound by the usages and rules of etiquette which members of the Bar of England have to observe.

It follows as a corrollary of that decision that as it is improper for a barrister in England to be paid fees contingent on success, it is also improper in this country.

As regards other legal practitioners the question may be considered in two aspects :

(1) Whether an agreement to take fees of this kind is illegal as being opposed to public policy.

(2) Whether though the agreement is not illegal, yet it is so undersirable that it should be taken notice of and treated as improper.

It is to be observed that as regards the former aspect, it does not follow that because an agreement cannot be enforced, it must therefore be considered improper.

For instance, though an agreement by a barrister with his client for payment of fees cannot be enforced there is nothing improper in his making such agreement (the terms of the agreement being unobjectionable).

It would be necessary, therefore, for an adequate determination of this reference to decide something more than simply that the agreement was illegal, it would be necessary to determine whether it was so improper that it should be noticed and put a stop to.

This brings me to the second aspect and shows that in either case it will be necessary to determine the question of the propriety of the agreement in addition to its legality.

(1) 51 P. R., 1895.

An agreement legal in itself may be so improper that the controlling authorities may take notice of the conduct of the parties to the agreement. For instance, an officer of Government pleading limitation to a just money claim might obtain the dismissal of the suit against him and yet be punished by Government for having availed himself of a perfectly legal plea. Similarly, there would be nothing anomalous in a legal practitioner succeeding in a suit on an agreement to pay a back fee and yet being held to have been guilty of grossly improper conduct in the discharge of his professional duty.

Having made these preliminary remarks I will now proceed to consider whether an agreement of the kind under consideration is illegal. The point is very fully discussed by Sir M. Plowden in *Beechey* v. *Faiz Muhammad* (1) it turns upon the question whether it is opposed to public policy that a legal practitioner should have a pecuniary interest in the success of the case he conducts. The question is discussed on page 43 and subsequent pages in an elaborate and exhaustive manner, which must command careful consideration from even those who differ from his conclusion, and the conclusion arrived at by him is as follows :—

"The rule then that I am prepared to assent to is merely "a negative rule, namely that an agreement between pleader "and client regarding the remuneration of the former for his "professional services is not void as opposed to public policy, "merely because it contains a stipulation that the pleader is to "be paid an additional sum by the client on condition of his "conducting the case to a successful issue.

"Such an agreement I would hold to be *primâ facie* lawful, "but subject to the qualification, that the bargain is a fair one, "and not such as it would be inequitable to enforce, that is, "(to borrow the words of the Privy Council) not 'extortionate "'and unconscionable :' that it is not of a gambling and "speculative character : that it is not open to any such objection "as would invalidate the agreement if made by a private "person supplying funds to maintain the litigation, that is, "tending to promote unrighteous litigation : and lastly, that the "particular issue or event on which the right to the future "payment is contingent, is not of such a nature that it would "be improper to permit the pleader to have a pecuniary interest "in bringing that event about."

(1) 5, *P. R.*, 1878, *F. B.*

Sir M. Plowden then on page 51 proceeds to consider the authorities on the subject and finds that the authorities support his view as stated above.

I will now consider the authorities bearing on the subject that have been brought to my notice, and first as regards our own Court.

In re Ali Muhammad Mukhtar (1). This was a case in which a mukhtar had engaged to undertake all the expenses up to final appeal connected with a Civil case in consideration of receiving half the net proceeds of the litigation. I consider this quite a different class of agreement from the one under consideration. I will discuss the subject under the next authority quoted.

In the matter of a Pleader of the Chief Court of the Punjab (2). This was the case of a pleader entering into agreement with a client to conduct certain cases for him on condition of receiving a share in the result of the litigation. The litigation being, as I understand, for possession of land.

The pleader admitted that his conduct was improper, his apology was accepted and his conduct ruled to have been higly improper, and the judgments relied upon were *Moung Htoon Oung* (3), *In the matter of an advocate of the Calcutta High Court* (4), and *In re Bhandara* (5) which will be considered later.

I am disposed to think that a condition to receive a share in the result of the litigation is different from a condition to be paid a fee contingent on success.

A share in the result of the litigation, means, in the ordinary meaning of the terms, a share in what is being sued for, if the suit is for land, it would be a share of the land; if for moveable property a share of the moveable property; if for money, as money cannot be ear-marked, it would no doubt be only for a share of the sum decreed, but that is owing to this peculiar characteristic of money.

A fee is something different from and independent of the subject of litigation.

To illustrate the point, a back fee may be made contingent on a suit being dismissed, or on an accused being acquitted,

(1) 111 *P. R.*, 1894. (2) 21 *W. R.*, 297.
(3) 69 *P. R.*, 1904. (4) 4 *Cal.*, *W. N.*, *Civ.*
(5) 8 *Bom.*, *L. R.*, 102.

it could in these cases hardly be a share in the result of litigation.

If there were no difference, then the ruling in *the matter of a Pleader of the Chief Court of the Punjab* (1) goes directly contrary to the Full Bench ruling in *Beechey* v. *Fais Muhamad* (2).

The former agreement is much more akin to "champerty" than the latter.

The latter is for the *wages* for service to be done, and it is none the less *wages* because the fee is made in part, or in whole, contingent on success.

In other undertakings also wages are often made partially or wholly contingent on success, *e. g.*, where they take the form of a share of the profits of the undertaking.

The former is (to put the matter in a somewhat exaggerated way to better illustrate my meaning) an arrangement by which the legal practitioner is to share in the spoils of a venture in which he is made a co-sharer.

I am quite willing to admit that the reasons which forbid the one transaction apply also to the other transaction, but generally in a minor degree, the main difference being that the share of the result of litigation agreed upon is generally larger than a back fee, and is necessarily proportionate to the value of subject of litigation, whereas the back fee may be and often is independent of the value of the subject of litigation—(*e. g.*, where it is contingent on obtaining an acquittal).

The above are the authorities of our Court, the authorities of other Courts are, first, as regards the Calcutta High Court:—

Moung Htoon Oung (3). In this case the advocate had agreed for a share of the result of the litigation. Couch, C. J., said: "But the question to be considered now is not "whether the agreement, which, it is admitted, was made, "is contrary to public policy and therefore void, but whether, "looking at all the circumstances of the case, it can be "said that entering into such an agreement by the Advocate "is a sufficient reason for suspending his license"—he then held that there was no doubt such an agreement was improper, and though there might be rare cases in which such an

(1) 69 *P. R.*, 1904. (2) 5 *P. R.*, 1878, *F. B.*
(3) 21 *W. R.*, 297.

agreement would not be improper, they were so rare that Courts should not allow such agreements. The gist of the ruling I take to be that such an agreement, though not illegal perhaps, was yet improper and should be prohibited.

In the matter of an advocate of the Calcutta High Court (1). This was the case of a Barrister-at-law making an agreement to share in the result of litigation. The barrister-at-law admitted that his conduct had been improper and the only question was one of punishment. There was no question of the legality of such an agreement.

The Judges held that it was improper for an advocate or pleader to stipulate with his client to share in the result of a litigation.

The Bombay decisions are —

Shivram Hari v. *Arjan* (2). This was a suit by a pleader on an agreement contingent on success. The Judges directed the suit to be tried, remarking, apparently for the benefit of the Court that was to try the suit, that they considered the claim high and felt no disposition to encourage agreements which gave pleaders a personal interest in the litigation of their clients.

Parshram Vaman v. *Hiraman Fatu* (3). The decision was similar to above, it was held that suits on such agreements lay, and that the suits should be decided according to their peculiar circumstances.

In re Bhandara (4). The advocate in this case had misconducted himself in other matters, and in punishing him for those matters the learned Chief Justice recorded his opinion as follows :—

"I consider that for an advocate of this Court to "stipulate for or receive a remuneration proportioned to the "results of litigation, or a claim, or otherwise, is highly "reprehensible, and I think it should be clearly understood, "that whether his practice be here or in the *mofussil*, he "will by so acting offend the rules of his profession and "so render himself liable to the disciplinary jurisdiction of this "Court."

(1) 4 *Cal., W. N. Civ.*
(2) *I. L. R., V Bom.*, 258.
(3) *I. L. R., VIII Bom.*, 413.
(4) 3 *Bom., L. R.*, 102 *F. B.*

The only Madras decision quoted is —

Acham Param Nath v. *Ganty* (1); this quotes a circular of the Sadar Adalat of 1853 prohibiting pleaders from making contracts for professional remuneration contingent on the success of the suit and held that a pleader could not enforce such contract.

As regards the Allahabad High Court—

Sir M. Plowden on p. 51 of *Beechey* v. *Faiz Muhamad* (2), refers to two Allahabad authorities as showing that they did not hold that such agreements were illegal.

Before us copies of certificates required to be filed by legal practitioners in that Court have been produced. These show that the legal practitioners must certify that they have not taken and will not take any fee contingent on the success of the case.

There is therefore no authority that such agreements are illegal.

The meaning of "opposed to public policy" in Section 23 of the Contract Act is discussed at p. 110 of Pollock's "Indian Contract Act" and the authorities there quoted show that the tendency is against the extension of the doctrine of "against public policy."

Though authority is wanting, I am disposed to think that the agreements now under discussion are opposed to public policy and therefore void, but it is not necessary to come to a finding on the subject with reference to my finding on the second of my propositions stated above, namely:

"Whether, though the agreement is not illegal, yet it "is so undesirable that it should be taken notice of and "treated as improper."

We start with the fact that the Punjab is, probably, the only place in India where such agreements are declared by authority to be permissible and where the execution of such agreements is common.

They are not permitted in England and we have seen that they are prohibited in Madras and Allahabad, and disapproved of in Calcutta and Bombay. I have found that

(1) *I. L. R., III Mad.*, 188. (2) 5 *P. R.*, 1878, *F. B.*

they are forbidden to barristers and what is forbidden to barristers should *a fortiori* be forbidden to other legal practitioners.

Whether as a matter of fact such agreements have induced legal practitioners to misconduct themselves or not, it cannot be denied that their tendency is to induce them to resort to improper means in order to win their cases, and such influences are especially strong with the worst class of legal practitioners. It seems to me desirable to exalt the standard of the highly honourable body of legal practitioners, and place them above both suspicion and temptation.

The Punjab is progressing rapidly, and the time when special laws and procedures were necessary owing to its backward state has or is departing, and it seems to me that in this matter the time has come when the same view of such agreements should be taken in the Punjab as is taken in other parts of the British dominion. I would, therefore, hold that agreements between legal practitioners and their clients, whereby the payment of the former is contingent on the success of the litigation, are improper, and that legal practitioners entering into such agreements should from henceforth be considered to be guilty of grossly improper conduct in the discharge of their professional duty.

2nd Jany 1907. REID, J.—The question referred to the Full Bench is whether an understanding or agreement between counsel and client that the "back fee" was to be deposited with counsel before appearance in Court by him in support of an appeal is or is not opposed to public policy and to the traditions of the Bar to which counsel, who was enrolled as an advocate of this Court as a member of the English Bar, belongs.

The "back fee" is a fee to be paid to counsel in the event of success, and usually deposited with him on condition that he shall return it to the client in the event of failure in the suit, appeal or proceeding.

The "back fee" practice prevails in this Province, and a Full Bench of this Court held, in *Beechey* v. *Fait Muhammad* (1), that an agreement between a pleader of the Court and his client, regarding the pleader's remuneration for professional services in conducting a legal proceeding for the client in Court, which stipulated for payment to the pleader, in addition to a

(1) 5 *P. R.*, 1878, *F. B.*

sum to be paid in advance, of a further sum conditional upon success, was not void as being opposed to public policy merely by reason of containing such a stipulation. The legality and propriety of the practice was further recognised in *Muhammad Bakhsh* v. *Morton and another* (1), in which it was held that counsel, with whom a "back fee" had been deposited, could be sued as a stake-holder for return of the "back fee" on failure of the suit in which counsel had been retained.

The reference to the Full Bench deals only with the case of counsel but at the hearing the legality and propriety of the "back fee" practice in the case of pleaders was argued with permission and an attempt was made to distinguish between the two cases.

The practice prevails in contentious proceedings only, and it is unnecessary to consider cases in which an *ad valorem* fee is to be paid for professional services in non-contentious proceedings.

The authorities cited at the Bar and in point are —

(1) *Beechey* v. *Faiz Muhammad*, cited above, in which the practice was supported as being in harmony with the ideas of suitors as a body as to what is the most suitable and advantageous kind of agreement to enter into with their pleaders. The following passage from the judgment of their Lordships of the Privy Council in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2), at page 257 of the report was cited :—"Their Lordships think "it may properly be inferred from the decisions above referred "to, and especially those of this tribunal, that a fair agreement "to supply funds to carry on a suit in consideration of having a "share of the property, if recovered, ought not to be regarded as *per se* opposed to public policy." In the case before their Lordships one Mookerjee had been appointed attorney agent and mukhtar by certain McQueens to institute and prosecute the necessary proceedings for the recovery of their property, on condition of repaying himself all advances with interest out of the property recovered and retaining for himself, in consideration of his trouble and risk, one-third of the clear net profits of the litigation. The successful defendants sued Mookerji for costs incurred by them, and the decree dismissing their suit was maintained by their Lordships on the ground that, in the absence of circumstances to convert the prosecution of the McQueen's suit into a wrong, the suit against Mookerji could not be maintained. The judgment did not deal with the question

(1) 194 *P. R*, 1888. (2) *I. L. R., II Cal.*, 233.

of Mookerjee being, and it does not appear from the report that he was, a legal practitioner. The authority is therefore not directly in point and was apparently cited as indicating the "cautious manner" in which "questions of the validity or "invalidity of agreements connected with litigation in their "relation to the requirements of public policy" should be treated. There is obviously a very marked distinction between permitting maintenance by a layman and permitting maintenance by an advocate or pleader who appears in the proceeding. The only authority of a chartered High Court cited in the judgment which in any way supported the conclusion arrived at is *Ranee Umat Koowar* v. *W. Tayler* (1), which did not deal with the validity of the contract between pleader and client for conditional remuneration.

(2). *Muhammad Bakhsh* v. *Morton* (2), above cited, in which it was held that a suit by an unsuccessful client to recover from his counsel a "back fee" deposited with the latter would lie, counsel being a stake-holder and no question of the privilege of counsel arising.

(3). *Grey* v. *Diwan Lachman Das* (3), in which a majority of 3 to 2 Judges held that counsel, a member of the English Bar and an advocate of the Court, could not sue for fees.

No question of "back fee" arose.

(4). *Shircore* v. *Queen-Empress* (4), in which a majority held that there was no difference between an ordinary fee and a back fee in respect of immunity from stamping a receipt for fees, *Muhammad Bakhsh* v. *Morton* (2), was expressly dissented from by Frizelle, J., and myself.

(5). *Sobha Singh* v. *Lorinda Mal* (5), and *Jai Narain* v. *Sultan Muhammad Khan* (6), which followed the rule that when parties competent to contract have entered into a contract, neither should be allowed to avoid it except on a clear finding that the terms thereof contravened a positive rule of law.

(6). *In the matter of a pleader of the Chief Court of the Punjab* (7), in which it was held that the conduct of a pleader of the Court who contracted to conduct certain cases for a client on the condition of receiving a share of the proceeds of the litigation, was grossly improper within the meaning of Section 13 of the Legal Practitioners Act.

(1) 2 *W. R.*, 307.
(2) 194 *P. R.*, 1883.
(3) 51 *P. R.*, 1895, *F. B.*
(4) 15 *P. R.*, *Cr.*, 1897, *F. B.*
(5) 99 *P. R.*, 1901.
(6) 96 *P. R.*, 1902.
(7) 69 *P. R.*, 1904.

(7). *Thakar Dass* v. *Beechey* (1), in which *Muhammad Bakhsh* v. *Morton* (2) cited above was over-ruled, the Full Bench holding that the "back fee" must be treated as part of the fee paid to counsel and not recoverable by suit.

(8). *Ranee Usmat Kaur* v. *Taylor* (3) above cited and found to be not directly in point.

(9). *In the matter of Moung Htoon Oung* (4), in which Couch, C. J., and Louis Jackson, J., said of the practice of an advocate of the Rangoon Recorders Court being paid, according to the result of the litigation, out of the proceeds thereof, "of the im- "propriety of such a practice there can be no doubt. If allow- "ed it may produce various mischiefs, and though there may "possibly be cases in which an advocate, from the circumstances "of the plaintiff, might be allowed to make some arrangement "of this kind, they are so few and so easily confounded with "cases in which he ought not to do anything of the kind, that "it is not fit or proper for the Courts to allow a transaction "to be entered into by advocates practising in them. This "authority was not cited in *Beechey* v. *Fais Muhammad* (5), possibly because it was thought that advocates and pleaders were not governed by the same rules in the matter.

(10). *In the matter of an Advocate of the Calcutta High Court* (6), in which a Full Bench held that it was improper for an advocate or pleader to stipulate with his client to share in the result of litigation. Hill, J., held that the principle in regard to questions of this character by which the conduct of counsel ought to be guided was that any arrangement between barristers or advocates and their clients whereby a conflict is created between a barrister's duty and his interest is unprofessional?

(11). *Rojendra Nath Mullick* v. *Luchhimoni Dassee* (7), in which was cited and followed the rule laid down in *Lowless* v. *Mansfield* (8), that where the relation of attorney and client subsists, in questions of accounts between the parties, the common rule does not prevail, and that a solicitor who holds securities from his client is bound, irrespective of those securities, to prove the debt for which they were given. This authority was cited in support of the proposition that dealings between parties, one of whom is the legal adviser of the other, are governed by special rules.

(1) 49 *P. R.*, 1906, *F. B.*
(2) 194 *P. R.*, 1883.
(3) 2 *W. R.*, 307.
(4) 21 *W R.*, 297.
(5) 5 *P. R.*, 1878, *F. B.*
(6) 4 *Cal., W. N. Civ.*
(7) *I. L. R., XXIX Cal.*, 595.
(8) 1 *Dr. & War.*, 557.

(12). *Achamparambath Cheria Kunhammu* v. *Ganty* (1), in which a Full Bench held that if Ganty was to be regarded as a barrister he was under a disability to contract for his fees; that if he was to be regarded as a pleader he was prohibited by a Circular Order of the Sadar Adalat from enforcing a contract for payment of an additional fee in the event of success; that the decision in *Kennedy* v. *Broun* (2), governed all agreements made by members of the English Bar in that character.

(13). *Shivram Hari* v. *Arjun* (3), in which it was held that an agreement to pay a pleader Rs. 50 in the event of success as the sole remuneration for his professional services was not illegal under Section 7, Act I of 1846, but the Court expressed its disinclination to encourage agreements which gave to pleaders a personal interest in the litigation of their clients.

(14). *Parshram Vaman* v. *Hiraman Fatu* (4), in which the last cited authority was followed. Section 7, Act I of 1846, provides that parties employing pleaders shall be at liberty to settle with them by private agreement the remuneration to be paid for their professional services. In these two Bombay cases Section 23 of the Contract Act was not referred to and the Judges in the first case were opposed to conditional remuneration.

(15). *Sayad Abdul Hak* v. *Gulam Jilani* (5), in which it was held that the rules governing dealings between solicitors and their clients in England should not be applied to dealings between vakils and their clients in the Indian *mofassil*, the vakil being generally engaged for a particular case only and not having that influence over a client which the solicitor might be supposed to have.

(16). *In re N. F. Bhandara* (6), in which it was held that it was highly reprehensible for an advocate of the High Court to stipulate for, or receive, a remuneration proportioned to the results of litigation or a claim, whether in the form of a share in the subject matter, a percentage or otherwise and that an advocate, whether practising in the Presidency town or the *mofassal* would, by so acting, offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of the High Court.

(1) *I. L. R., III Mad.*, 138.
(2) 13 *C. B. (N. S.)*, 677.
(3) *I. L. R., V Bom.*, 358.
(4) *I. L. R., VIII Bom.*, 413.
(5) *I. L. R., XX Bom.*, 677.
(6) 8 *Bom. L. R.*, 102, *F. B.*

(17). *Alston* v. *Pitambar Das* (1), in which it was held that an English or Irish barrister, who, in virtue of his call to the Bar, was enrolled as an advocate of the Allahabad High Court and was thereby authorised to practise as an advocate in the said Court and in the Courts subordinate thereto, was, in respect of fees paid to him by a client for professional services, in exactly the same position as if he were practising in England or Ireland, and that, the fees received by him being mere *honoraria*, he could neither sue for the recovery, nor be sued for the return of such fees.

(18). *Janson* v. *Driefontein Consolidated Mines* (2), at pages 500 and 507, in which it was said that public policy is always an unsafe and treacherous ground for legal decision. Lord Davey added that in the case under consideration it could not be easy to say on which side the balance of convenience would incline.

(19). Cordery's Law Relating to Solicitors, Edition 3, page 273, in which abundant authority is cited for the rule that in contentious business, an agreement to remunerate a solicitor by a share of, or commission on, or sum proportioned to the amount of the property to be recovered is bad.

(20). The following dicta at pages 551 and 554 of the report of *Morris* against *Hunt* (3):—"But it is said that counsel can "maintain no action for their fees: why? because it is under- "stood that their emoluments are not to depend upon the event "of the cause but that their compensation is to be equally the "same whether the event be successful or unsuccessful. They "are to be paid beforehand, because they are not to be left "to the chance, whether they shall ultimately get their "fees or not, and it is for the purpose of promoting the honour "and integrity of the bar, that it is expected all their fees "should be paid at the time when their briefs are delivered. "That is the reason why they are not permitted to maintain "an action. Nothing can be more reasonable than that "counsel should be rendered independent of the event of the case "in order that no temptation may induce them to endeavour "to get a verdict which in their consciences they think they "are not entitled to have counsel should be rendered as in- "dependent as the Judge or the jury who try the cause when "called upon to do their duty."

Section 23 of the Contract Act provides that the consider- ation or object of an agreement is lawful unless.....the

(1) *I. L. R., XXV All.*, 509. (2) *L. R. H. L.* (1902), 500.
(3) 1 *Chit* 544.

Court regards it as immoral or opposed to public policy, and Section 10 provides that all agreements are contracts if they are made.....for a lawful consideration and with a lawful object.

The dicta above cited from the case of *Moung Htoon Oung* (1), are, in my opinion, conclusive answers to the arguments, recorded in *Beechey* v. *Faiz Muhammad* (2), for allowing conditional agreements for remuneration to be made, and there is, in my opinion, a very marked distinction between the stimulus afforded to an advocate or pleader by an honest desire to do his duty to his client and to gain reputation at the Bar and the stimulus afforded by pecuniary gain from the result of the case in which he is retained. I would maintain the tone and status of the Bar and am strongly opposed to lowering that tone and status to suit the prejudices and customs of an ignorant section of the people of this Province.

In my opinion, based on more than thirty years' experience at the Bar and on the Bench in India, the "buck fee" practice is most pernicious and must affect most prejudicially the integrity and moral tone of the Bar.

Pleaders in this Province exercise all the functions of advocate, the main distinctions between the two classes being that pleaders can sue for recovery and can be sued for refund of fees and cannot appear without powers of attorney.

The rules which govern advocates in respect of conditional remuneration are therefore, in my opinion, equally applicable to pleaders and the temptations held out by conditional remuneration affect both classes equally.

The rules to be deduced from the authorities cited are in my opinion:

(1). That advocates enrolled by virtue of being members of the English or Irish Bar are governed by the rules governing members of those Bars.

(2). That the standard of professional conduct demanded from pleaders and advocates, not members of the English or Irish Bar, is as high as that demanded from members of those Bars.

(3). That an agreement between an advocate or pleader and his client for remuneration conditional on the result of the suit, appeal or proceeding is unlawful, by reason of being immoral and

(1) 21 *W. R.*, 297. (2) 5 *P. R.*, 1878, *F. B.*

opposed to public policy, which demands the maintenance of a high standard in the legal profession.

(4). That an advocate or pleader who enters into such an agreement is guilty of unprofessional conduct.

For these reasons my answer to the reference is that the "back fee" practice is unlawful and unprofessional in the case of both advocates and pleaders.

I have had the advantage of reading the judgments of the learned Chief Judge and of my brother Chitty, and have recorded a separate judgment in consequence of the importance to the legal profession and the public of the questions raised, of the fact that the practice under consideration has prevailed in this Province for more than 30 years, and of the great weight to be attached to the opinion of the learned Judge who recorded the leading judgment in *Beechey* v. *Faiz Muhammad*.

CHATTERJI, J.—I have had the advantage of reading the judgments of all my learned brothers who, besides myself, were members of the Full Bench, and I do not think I can add anything to the very exhaustive discussion by them of the subject before the Full Bench. All the Judges, with the exception of Mr. Justice Lal Chand, have held that the agreement for payment of any portion of a legal practitioner's fee on the successful result of the case taken up by him is opposed to public policy and improper, whether he happens to be a barrister or a pleader. They further hold that a legal practitioner who enters into such an agreement is guilty of unprofessional conduct. My brother Lal Chand has written a very able and lengthy judgment combating these views. *6th March* 1907.

It is of little importance which way my opinion is given, for already there is an overwhelming majority against the agreement for back fees. And inasmuch as I cannot reasonably hope to throw any further light on the question after all that has been written by my learned colleagues, I shall content myself with briefly stating my views.

The question before the Full Bench is couched in general terms or rather has been treated and argued as such. The points involved appear to be (1) whether such an agreement is opposed to public policy; (2) whether the entering into any such agreement by a legal practitioner amounts to professional misconduct; and (3) whether the same rule applies to barristers and pleaders, using the latter word to include mukhtars and lower ranks of legal practitioners

constituted under Act XVIII of 1879 in order to avoid circumlocution.

Although the order in which I have enumerated the questions is more logical, it is convenient to take up the second part of the last question first. We have in this Province two main classes of practitioners (1) advocates and (2) pleaders using the word in the comprehensive sense above stated. We have no vakils and attorneys at law properly so called. Persons belonging to these classes if they wish to practise regularly in our Courts have to take up the status of pleaders under the Act. Advocates hitherto enrolled have been, with one exception, exclusively members of the English Bar though members of the Irish and Scotch Bars are also eligible. For all practical purposes the advocates of our Court may be said to consist of English barristers.

According to the traditions of their Bar English barristers are incompetent to contract for their fees, and though the functions discharged by them as advocates of this Court do not in all respects correspond with their functions in the English Courts it has been held that they are nevertheless bound by all the rules that regulate their profession in England. In *Grey* v. *Diwan Lachman Das* this was laid down for this Province by a Full Bench and forms the main ground for its decision that an English barrister though enrolled as an advocate of this Court is incapable of making a contract of suing as an advocate. It appears to be well settled that in England a member of the Bar would not be allowed to enter into any understanding with his client making his fee dependent in any way on result of the case with which he is entrusted: *Morris* v. *Hunt* and other cases cited by my learned colleagues. The rule followed in England has been accepted in India and from the *ratio decidendi* adopted in *Grey* v. *Diwan Lachman Das*, the conclusion is unavoidable that a barrister who is an advocate of this Court would be guilty of improper and unprofessional conduct if he stipulates for "back fees."

It is true that at present the practice is largely followed by them also in this Province but that is due to the fact that payments of "back fees" are customary here and has been declared lawful by a Full Bench of this Court in *Beechey* v. *Faiz Muhammad*. But if the matter is considered in the light of the professional etiquette of the English bar as recognised by

the English Courts which is binding in this country as well the practice must be declared to be improper.

The question remains whether legal practitioners, who are not barristers, can lawfully stipulate for back fees. For them there is no traditional rule or etiquette on the subject. They are creations of the Indian statute law and are competent to contract for their fees. My remarks as I have already said do not refer to vakils and attorneys-at-law for no such status is recognised in this Province. The matter must be decided on first principles and the balance of judicial authority.

I must confess that here I am much impressed by the arguments of my learned brother Lal Chand in his able judgment of dissent. I am able from my own experience of nearly quarter of a century at the Bar to bear out his statements as to the effect of the practice of "back fee" upon the legal profession in general. There has been no such evil worked by it upon the *morals* of legal practitioners and litigants in general as by itself necessitates the reconsideration of the question settled by the Full Bench case of 1878. The practice had its origin not wholly in the distrust of lawyers by litigants in this Province but partly also in the poverty and habits of thrift of the people. It is a great convenience to the poor suitors but gives an undue advantage to the well-to-do ones. On the whole it is a help to the new or struggling practitioner but is to some extent a source of loss to the leading men of the profession.

I am not at all sure that the prospect of a back fee is a living incentive to improper practices on the part of legal practitioners. It may be so in some cases, but in the past there has been no practical exemplification of this tendency. It must not be forgotten that the desire to win a case in order to get other work from the same client or to establish a reputation at the Bar is always a powerful incentive and may also lead and probably has occasionally led to improper conduct. Thus the identity of interest between pleader and client cannot be wholly eliminated but must *ex necessitate* subsist in some respects. On the other hand participation in the subject matter of a suit and merely having a portion of the fee dependent on success in it are distinguishable on tangible and substantial grounds. Mr. Justice Lal Chand therefore very rightly says that the real factor in shaping

the conduct of a legal practitioner in the discharge of the duties of his profession in his personal character.

Mr. Justice Lal Chand is also I think right in his view that in framing Act XVIII of 1879 which introduced many changes from the previous Legal Practitioners Act, XX of 1865, the legislature took note of and acted upon the arguments of Sir Meredyth Plowden in *Beechey* v. *Faiz Muhammad*. I hesitate, however, to subscribe to his interpretation of Section 28 of the Act that by implication it permits the practice of back fees. The section invalidates agreements for fees between legal practitioners and their clients unless they are in writing and have been duly filed in the Court where the work is undertaken, but does it seem to follow from this that an agreement for "back fee" if such an agreement duly filed would necessarily be valid in every case. The section appears to me not to deal with the substance or subject matter of the agreements but merely with the form. It prescribes certain formalities without going through which they cannot be enforced.

I am of opinion that if the taking of back fee is improper it may be a ground for taking disciplinary action under Section 13 of the Act on the part of the High Court.

I think therefore the question whether taking "back fees" is improper and opposed to public policy is not settled by the Act but must be decided on general principles. This decision is unquestionably a matter of difficulty in my opinion, and I cannot but endorse much that has been said in favour of not extinguishing the practice by my brother Lal Chand. I am also not free from doubt whether the proposed abrogation of it by my other learned colleagues does not savour somewhat of a counsel of perfection.

I have already said that the overwhelming preponderance of opinion against the practice makes my own of little importance. The following considerations appear to me to tell in favour of the view taken by the other learned Judges :—

(1). The fixing of a high ethical standard which will not permit a legal practitioner to have any concern with the result of the case in his hands even to the extent of having any part of his fee dependent on it is an advantage in improving the tone of the Bar.

(2). It is obviously inexpedient to have one rule of professional conduct for the highest class of legal

practitioners, *viz.*, the barrister advocates and another for the others.

(3). It appears that the other High Courts have generally condemned the practice. This adds to the weight of the opinion of those Judges who are for abrogating it in this Province. It is obviously an advantage that the same rules of conduct should govern the Bar of all India.

These reasons are doubtless of great force but they hardly suffice for our positively deciding that agreements by pleaders for " back fees ", safeguarded as they are by the law and the considerations set forth in *Beechey* v. *Faiz Muhammad* are wholly insufficient for the protection of litigants and the interests of the public and are therefore absolutely opposed to public policy. I need not quote the authorities on the question of public policy. Some of them are given in the judgment of Mr. Justice Reid and a few in *Jai Narain* v. *Sultan Muhammad Khan* (1). It is the general opinion of eminent Judges and jurists that transactions and dispositions of property ought not in general to be held void at the present time, because in the judgment of the Court it is against the public good that they should be enforced, though the grounds of that judgment may be novel. " The general tendency of modern ideas," says Pollock " is no doubt against the continuance of such a jurisdiction. Principles of Contract, 6th edition, page 298. I am not satisfied that the balance of convenience is entirely on the side of declaring them unlawful and improper. Take a case which might be fairly common, suppose a poor suitor has a good claim and is unjustly kept out of his rights by his opponent. He may now go to a pleader of repute and say " take up my case if it is a good one. " I cannot pay your fee now as I have not got the money, but I " promise to pay it when the case is won ". The pleader would be quite safe according to the Full Bench ruling if he got an agreement written out and filed. But if we hold such an agreement to be opposed to public policy the poor litigant must go unrepresented altogether unless the pleader takes it up for nothing and trusts to the gratefulness of his client to pay him something at his pleasure if the case is won. This will seldom happen. A practice which has been in vogue for at least thirty years and which has not been shown to have worked any tangible evil should not I think be condemned as opposed to public policy on purely theoretical reasoning.

It must not be supposed, however, that I am in favour of the practice. I should on the whole prefer its abolition in spite of

(1) 96 *P. R.*, 1902.

the advantages it sometimes offers to poor litigants and new and struggling practitioners, but I doubt very much whether we can bring about that abolition by holding it to be opposed to public policy.

I therefore, though not without some hesitation, agree with my brother Lal Chand that, with respect to pleaders and legal practitioners enrolled under the Legal Practitioners, Act, 1879, other than members of the English Bar, the agreement is not opposed to public policy and would reply accordingly to the question before the Full Bench.

As regards advocates who are barristers I would reply that such an agreement is improper with reference to the rules, traditions and etiquette of their Bar and is therefore prohibited to them.

30th Nov. 1906. ROBERTSON, J.—The point which we have to consider is, in brief, the "back fee" system now in vogue among legal practitioners and their clients in the Punjab, one which it is possible to countenance. As far as I can judge this reference in the light of the authorities, as they now stand, would have been unnecessary had it not been for the judgment of this Court pronounced by a Full Bench of three Judges in the case of *Beechey* v. *Faiz Muhammad* (1).

The "back fee" system, as it now exists, is a practice in pursuance of which clients when engaging legal practitioners of all classes are accustomed to stipulate that only part of the fee payable for the services of the practitioners shall be payable in any event, another portion being made dependent on the success of the litigation. The usual custom is that the whole of the fees, both ordinary and "back fee" are deposited with the practitioner, who returns "the back fee" often direct to the money-lender (for in a very large number of cases the money necessary for litigation has to be borrowed), in case he does not win his case. Sometimes the "back fee" is only equal in amount to the ordinary fee, but in a very large number of cases it is very largely in excess; sometimes it is said that the "back fee" amounts to as much as from five to ten times the amount of the ordinary fee. This is the "back fee" system as it stands now. In the case reported as *Thakar Das* v. *Beechey* (2), the ordinary fee appears to have been Rs. 50 and the "back fee" Rs. 250.

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(1) 5 *P. R.*, 1878, *F.B.* (2) 49 *P. R.*, 1906.

It has been decided in *Grey* v. *Diwan Lachman Das* (1), that an advocate cannot sue for his fee and in *Thakar Das* v. *Beechey*, it has been laid down that a "back fee" is part and parcel of the ordinary fee, and that a client cannot sue to recover a "back fee" from an advocate with whom he has deposited it.

It therefore appears that as regards barristers-at-law, the position is the same as in England, *vide Ross Alston* v. *Pitambar Das* (2), and the principles laid down in *Morris* v. *Hunt* (3) make it perfectly clear that in their case it is certainly not permissible to stipulate beforehand for a fee which is in any way dependent on the results of the litigation. As Mr. Grey, the President of the Bar Association, who was kind enough to assist the Bench by arguing the question pointed out as regards barristers there can be no question at all that the practice must be entirely condemned. This view is also supported by ample authority.

As regards pleaders the case is possibly somewhat different, and it becomes necessary before considering the question in reference to the authorities as they stand at the present day to examine the decision passed in *Beechey* v. *Faiz Muhammad* (4) and to consider the correctness or otherwise of its reasoning. In that case one Beechey, a pleader, had made an agreement with a client under which he was to receive Rs. 150 down, and Rs. 200 in case of the recovery of certain stolen property which was the subject of litigation.

It was laid down in that ruling that the office of pleader was one created by the legislature and that his rights and duties are to be regulated by the enactment governing pleaders. It was then pointed out that a pleader had full freedom of contract in regard to his agreements with his clients subject only to the provisions of the general law, and that such an agreement could only be held to be void under Section 23 of the Contract Act, if the consideration or object was one of those declared in that section not to be lawful. The question is thus stated on page 42. "Thus the question is reduced to whether "such an agreement is void because its consideration or "object ought in the Court's opinion to be regarded as "opposed to public policy. In other words it is opposed to "public policy that a client should agree with his pleader that "the former shall pay to the latter an additional fee in the

(1) 51 *P. R.*, 1895.
(2) *I. L. R.*, *XXV All.*, 509.
(3) 1 *Ohit.*, 544.
(4) 5 *P. R.*, 1878, *F. B.*

"event of the pleader conducting the client's case by lawful "means to a successful issue lawful in itself.

"If this is opposed to public policy it must be for reasons "connected either with the time for payment, or the fact of "success or the character of the event which is deemed to con- "stitute success."

Now everything which has been written by so learned a Judge as Sir Meredyth Plowden must command our respect, but I find it necessary to point out that in my humble judgment the reason why we must hold that such a contract as that under discussion is illegal and void as contrary to public policy lies a little deeper. To this I will return presently: The judgment there goes on to say that as regards the client the practice can only produce good effects and the origin of the custom is said to have been the distrust of the Punjab litigants of the legal practitioners. Are we to hold that the legal profession have done nothing in the 28 years since 1878 to mitigate this distrust? But there can be no doubt that if this was one reason another was that it made it possible for counsel to get higher fees. A money-lender is always chary of lending money to a person about to litigate without good security, but he is always prepared to deposit a much larger sum than he would otherwise lend with the legal practitioner upon his assurance that it will be returned if the litigation is not brought to a successful issue. After admitting that the question was one in regard to which there was much doubt the conclusion finally come to was "the rule then that I am prepared to "assent to is merely a negative rule, namely that an agreement "between pleader and client regarding the remuneration of the "former for his professional services is not void as opposed "to public policy, merely because it contains a stipulation that "the pleader is to be paid an additional sum by the client "on condition of his conducting the case to a successful issue.

"Such an agreement I would hold to be *primâ facie* "lawful, subject to the qualification that the bargain is a "fair one, and not such as it would be inequitable to enforce, "that is (to borrow the words of the Privy Council) not, "extortionate and unconscionable"; that it is not of a "gambling "or speculative character; that it is not open to any such "objection as would invalidate the agreement if made by a "private person supplying funds to maintain the litigation, "that is tending to promote unrighteous litigation; and, lastly, "that the particular issue or event on which the right to the "future payment is contingent, is not of such a nature that it

"would be improper to permit the pleader to have a pecuniary "interest in bringing that event about.

"I think it would be found after experience of the general "rule, subject to these qualifications, that they are sufficient to "guard against the abuse of a practice which it seems to me "inexpedient to attempt to wholly suppress. If experience "shows they are not, further qualifications can be added such "as occasion may demand."

In the first place it would appear impossible to say that such contracts are not of "a gambling and speculative nature." Surely a contract to receive one-sixth down and five-sixths only on success is a contract of a gambling and speculative nature, and all such contracts are of their very nature "speculative," and would appear to come within the purview of Section 30 of the Contract Act. It appears to me that a good deal of the reasoning of this judgment is fallacious and unsound, and that the conclusions have not been borne out by subsequent experience.

The main reason why in my judgment a contract between a client and a pleader under which the latter's remuneration is made in any way dependent on success must be held to be contrary to public policy, is that, such a contract places a direct temptation before and an incentive to the pleader to act improperly in the conduct of the case. It is notorious that the morality of many suitors in this Province at least permits them to bolster up a true claim with false evidence. Are we to suppose that such clients are usually particularly anxious that the pleader shall bring his case "by lawful means to a successful issue lawful in itself." Surely it is quite obvious that the prospects of securing a remuneration far in excess as the "back fee" often is of the ordinary fee must be a temptation to all legal practitioners, and it is a temptation to which they ought not to be subject. There may be few of whom it can be directly predicated that they will knowingly resort to fraudulent practices to secure the "back fee," but there are many upon whom it must have a subtle influence in the direction of disingenuousness, the *suggestio falsi* and the *suppressio veri*, and there are few upon whom the temptation will not be a burden though many may be able to resist it. For it must be remembered that the "back fee" is a gamble upon the result pure and simple. Under such a contract the exertions of the counsel count for nothing. He may make most strenuous and able efforts for a successful issue, but all this will avail him nothing to

increase his ordinary fee unless his efforts are crowned with success, and there are many cases in which a pleader entering into such a contract must be perfectly aware that he has no right to success. It is not necessary in order to declare a class of contracts contrary to public policy to be able to aver that in all cases such contracts *must* have mischievous results, it is quite sufficient to be obliged to conclude that the contract in question is one which is to all ordinary human beings a direct temptation and incentive to practices which are clearly injurious to the public and detrimental to the administration of justice. And it must never be lost sight of that this is not a question concerning only a small and peculiar class, for it is stated that one in every 30 of the inhabitants of the Punjab is *annually* affected by litigation.

It is clearly, therefore, a matter of pressing public interest to the whole Province.

And I would remark that it appears to me that there is no analogy between the case decided by their Lordships of the Privy Council in regard to champerty and maintenance on which stress is laid in *Beechey* v. *Faiz Muhammad* (1) and the matter now before us. I will now proceed to consider the authorities on the question particularly those of date subsequent to 1878.

Beechey v. *Faiz Muhammad* (1) itself over-ruled a judgment of this Court in *Beechey* v. *Gholam Ghous* (2), in which the view had been taken that such contracts were contrary to public policy.

In the case quoted in *Beechey* v. *Faiz Muhammad* (1), *Ranee Usmut Koowar* v. *Mr. W. Tayler* (3), the defence was never set up that the contract in question was contrary to public policy and the matter was never discussed. It is difficult to see how that case can have any bearing on the matter. The same appears to be the case in regard to the judgment in the case of *Shiv Ram Hari* v. *Arjun and others* (4), and in the case of *Parshram Vaman* v. *Hiravan Fatu and others* (5), a different point only was decided, a remand made and all other points, including presumably the legality of the contract, were referred back to a lower Court. These appear to be the only cases in which any mention occurs of such a contract without strong condemnation of it.

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(1) 5 *P. R.*, 1878. ( ) 2 *W. R.*, 307.
(2) 26 *P. R.*, 1874. (4) *I. L. R.*, *V Bom.*, 258.
(5) *I. L. R.*, *VIII Bom.*, 413.

As regards the English rule for barristers it is clearly laid down in *Morris* v. *Hunt* (1), noticed above, and as regards solicitors in regard to contentious business an agreement to remunerate a solicitor by a share of or commission in or a sum proportioned to the amount of the property is bad. See Cordery's "Law of Solicitors," p. 273, 3rd edition. These rules are embodied in Section 11 of the Solicitors' Remuneration Act of 1870.

In *Achamparambath Cheria Kunhammu* v. *William Sydenham Gants* (2), it was laid down by the Madras High Court that even as regards pleader's contracts for professional remuneration contingent as to the amount on the success or otherwise of the suit could not be enforced, under the circular orders of the Sadar Adalat.

In the case of *In the matter of an advocate of the Calcutta High Court* (3), it was laid down by a Full Bench of five Judges that it was "improper for an advocate or pleader to stipulate "with his client to share in the result of a litigation, and that "in this case a warning and censure would be sufficient, but "it should be distinctly understood that should a case of a "similar nature be brought to the attention of the Court in "future it will be most severely dealt with.

It is hardly necessary to point out that any pleader who takes an additional sum after bringing litigation to a successful issue clearly shares in the result of such litigation where the claim is one to realizable property, and that precisely the same principles apply where the object aimed at is something different.

A Bench of two Judges of the High Court of Calcutta "*In the matter of Moung Htoon Oung* (4), an advocate of the Recorders Court at Rangoon" expressed similar views. In that case decided in 1883 or 1884 it appears that the advocate had contracted with his client to share in the money recovered by litigation, and the Judges remark, *inter alia*, "of the "impropriety of such a practice there can be no doubt. If "allowed it may produce various mischiefs and though there "may possibly be cases in which an advocate from the "circumstances of the plaintiffs might be allowed to make some "arrangement of that kind, they are so few and so easily "confounded with cases in which he ought not to do any thing of "the kind, that it is not fit or proper for the Courts to allow a "transaction of such a nature to be entered into by advocates

(1) 1 *Chit.* 544.
(2) *I. L. R., III Mad.*, 138, *F. B.*
(3) 4 *Calc. W. N., Civ., F. B.*
(4) 21 *W. R.*, 297.

" practising in them." These principles in which I cordially agree apply with equal force to the case of pleaders, and appear to have been lost sight of in the judgment in *Beechey* v. *Fais Muhammad* (1), the concluding paragraph of that judgment expressly extends the views expressed to any practitioner which clearly covers the case of pleaders. Moreover in that judgment there is a clear indication that their Lordships of the Privy Council had expressed a similar view, for it is said, " the " Judicial Committee of the Privy Council have shown by the " notice which they have recently issued the view which the " highest Court for India takes of such transactions."

The next case for consideration is that dealt with by a Full Bench of the Bombay High Court consisting of the Chief Justice Sir Lawrence Jenkins and two puisne Judges. The last paragraph of that ruling puts the case very clearly and emphatically, and I think it cannot be improved upon. The matter dealt with was the conduct of an advocate, *In re N. F. Bhandara*, and the paragraph with which we are concerned runs as follows:—

" The conditions and exegencies of a *mofussil* business may " justify procedure on the part of an advocate which would " receive no countenance in the presidency towns but (to allude " to one matter the papers disclose) I consider that for an " advocate of this Court to stipulate for, or receive a remuneration " proportioned to the results of litigation, or a claim whether " in the form of a share in the subject matter, a percentage, or " otherwise, is highly reprehensible and I think it should be " clearly understood that whatever the practice be here or in " the *mofussil* he will by so acting offend the rules of his profes- " sion and so render himself liable to the disciplinary jurisdiction " of this Court."

The same view was taken by a Division Bench of this Court *in the matter of a pleader of the Chief Court* (2).

The decision in that case fully endorses the view taken by the Bombay High Court *in re Bhandara* who was an advocate of the Court.

It will thus be seen that the practice we are now considering has met with direct condemnation in published rulings of the Calcutta, Madras and Bombay High Courts, and Mr. Grey informed us a statement which agrees with our own information that the practice is unknown in the United Provinces. Some o f these rulings are specifically stated to apply to pleaders.

(1) 5 P. R., 1876, F. B. (2) 69 P. R., 1904.

It appears to me however clear that the same principles must be laid down to govern the conduct of pleaders in this matter as of advocates. It is clear that a solicitor in England is not permitted to enter into such a contract. It is clear that when this Court passed its decision in *Beechey* v. *Fais Muhammad* (1) (1878) the state of the authorities on the point was very different from what it is now. One or two of the judgments quoted which deal specifically with the matter in question are of prior date to 1878, but none of them appear to have been published at that time. The dates of those rulings are approximately as follows *Moung Htoon Oung* (2), the date of the ruling is 1874, but it appears to have been published in 1884. The date of *Achamparambnath Cheria Kunhammu* v. *William Sydenham Gantz* (3) is 1881. The case of *an advocate of the Calcutta High Court* (4) appears to have been decided in February 1900 only. *In re Bhandara* (5) was published in 1901. The present Legal Practitioners' Act was passed in 1879.

It will thus be seen that it might have been possible to take a view in 1878, such as was more or less tentatively put forward then, which it is quite impossible to take in face of subsequent experience and the array of authorities on the other side with which we are now confronted. With the views taken in these authorities I fully concur. Without for a moment making any specific accusations I feel bound to say that my experience of eight years in this Court has led me to deplore the existence of the custom of taking "back fees." The somewhat sanguine expectations expressed by Sir Meredyth Plowden have not been fulfilled, and in view of the very nature inherent in such contracts and of heavy weight of authority against them, I have no hesitation in coming to the conclusion that the system is one which must be declared unlawful as contrary to public policy. I would therefore answer the question put before us in the negative.

KENSINGTON, J.—I do not desire to add anything to the judgments already recorded and therefore merely say that I am entirely in accordance with the views expressed by those of my learned colleagues who have held back fee contracts to be illegal as well as improper for all branches of the legal profession. I agree that the answer to the reference should be in the negative. *3rd Jany.* 1907.

(1) 5 *P. R.*, 1878, *F. B.*
(2) 21 *W. R.*, 297.
(3) *I. L. R.*, *III Mad.*, 138, *F. B.*
(4) 4 *Calc.*, *W. N.*, *Civ.*
(5) 3 *Bom. L. R.*, 102, *F. B.*

It is understood that the Division Bench by which the reference was made will determine the question whether the circumstances justify restoration of the appeal in respect to which the general principle involved has been discussed.

4th Jany. 1907. JOHNSTONE, J.—I have enjoyed the advantage of reading the judgments of several of my learned colleagues on this Bench, and it is unnecessary for me to deal elaborately with the question before us, as I find myself in full accord with Reid, Robertson, Kensington, and Chitty, Judges, whose judgments I have seen. I understand that the learned Chief Judge, whose judgment also I have read, while he is of opinion that the agreements under consideration are opposed to public policy, and therefore void, holds the view that it is unnecessary to decide this definitely, and that it is sufficient to rule that such agreements are improper and the legal practitioners entering into them are guilty of grossly improper conduct from a professional point of view. With all deference I am inclined to think for myself that both findings are called for in this case and that the latter finding virtually involves the former.

I wish specially to adopt the reasoning of my brother Robertson. For much the same reasons as those set forth by him I would hold that a contract based on the "back fee" system is opposed to public policy and so is unlawful and void. In my opinion when a counsel, be he barrister or advocate of the Court or pleader or mukhtar, gets up to address a Court, he should have no inducements to zealous performance of his task other than his desire that justice be done, his solicitude for a client who is trusting him, his desire to preserve his own self-respect and the natural instinct of every good man to do his duty to the best of his ability.

I wish also to say that I agree with my brother Robertson that a "back fee" contract or arrangement is a speculative or gambling transaction; and to my mind this view much strengthens the conclusion that the transaction is an unlawful one. The "back fee" is not special remuneration for peculiar exertions or unusual efforts on behalf of the client: it is special remuneration in the event of success—a very different thing. An advocate may prosecute a case with exceptional zeal and diligence and yet lose both case and "back fee." Equally he may deal with the case in a perfunctory manner and yet gain the extra remuneration.

I have always deplored the prevalence of the "back fee" system, and I am glad this Court has now an opportunity to denounce it.

RATTIGAN, J.—I have had the advantage of reading the opinions of the learned Chief Judge and my brother Robertson, and I find myself so entirely in accord with the views of the latter that I might content myself with simply expressing my concurrence with him. The question involved, however, is one of importance, and we are differing from a previous Full Bench ruling; under the circumstances, and in view of the fact that I, as a Judge, am impelled to condemn a system which as a member of the Bar I in common with my professional brothers, daily practised, I feel it incumbent upon me to explain the grounds upon which I agree with my brother in his conclusions. This explanation is, I think, all the more necessary as Mr. Sheo Narain, in his able address as *amicus curiæ*, made it one of his arguments in support of the propriety of the "back fee" system that it had been practised, without demur, by members, past and present, of the Punjab Bar. The learned pleader very naturally and properly laid stress upon this argument and contended that a practice which had been adopted by such learned counsel as Sir Meredyth Plowden, the late Sir W. H. Rattigan, the late Mr. Spitta and the late Mr. Justice Rivaz as well as by other past and present members of the Bar could not well be stigmatised as either *per se* improper or contrary to the traditions of the profession. This argument has unquestionable force, and I, for one, agree with the learned pleader that it is impossible to characterise as inherently improper or disgraceful a practice which has been followed by all members of the Bar for many years. I refuse to believe that the practice would have been tolerated at all by the profession to which I have the honour to belong, had it been regarded by the members of that profession as inherently disgraceful. But I think I am right in saying that the practice, though tolerated and adopted, has never met with the approval of the Bar as a whole. On the contrary, I have good reason for saying that the more prominent members of the Bar, at all events, have throughout strongly disapproved the system and have practised it against their own inclinations solely because it had been judicially declared by the Full Bench of this Court to be legitimate. In face of this declaration, and the system being one which cannot reasonably be said to be either "morally "disgraceful or open to any obvious moral censure," it would

7th Jany. 1907.

have been alike impertinent and impracticable for individual members of the Bar to condemn it, impertinent, because an individual who attempted to condemn it would have clearly been wanting in respect to this Court which had after full consideration recog s d th› practice as valid and legitimate; impracticable, because under such circumstances even leading members of the Bar would have found it exceedingly difficult to maintain their professional position had they refused to adopt a system which (for reasons to be presently given) finds favour with a large class of the litigant public in this Province and which the rest of the legal profession were at perfect liberty, and without incurring any censure, to practise. I do not think, therefore, that this argument, plausible as it may seem at first sight, has any real force, or that we must assume that members of the Bar who have hitherto adopted the practice, necessarily approve or have approved the same. The real question is whether the system of "back fee" is or is not one open to objection on the ground of public policy, and upon this question we must obviously give our decision quite irrespectively of the fact that the system has been actually in vogue for years past. It may well be that many legal practitioners who personally had strong objections to the system, practised it nevertheless, and as there is nothing *per se* disgraceful in it, they were, I hold, perfectly justified in adopting it. But it does not follow that because persons of unimpeachable character have entered into agreement for contingent remuneration, these agreements are not objectionable as opposed to the policy of the law.

The learned Chief Judge holds that agreements between legal practitioners and their clients whereby the remuneration of the former is made contingent upon success are not illegal, and that it would be difficult to assert that they are contrary to public policy. As, however, the tendency of such agreements is to induce practitioners to resort to improper means in order to win their cases, the learned Chief Judge considers these agreements to be "improper," and proposes that legal practitioners entering into them hereafter should be considered to be guilty of grossly improper conduct in the discharge of their duties. I have no hesitation in agreeing that contracts of this kind are not illegal, but while agreeing with the Chief Judge in the result I regret that I am unable, with every deference, to arrive at that result upon the same grounds. On the contrary, I would myself hold

that the system of back fees is to be reprobated, not because the agreements are in any way "improper" in the ordinary sense of that expression, but because they are distinctly opposed to public policy.

I am fully conscious of the truth of the *dictum* that "public policy is an unruly horse," and I admit that the Courts have "this paramount public policy to consider, that "they should not lightly interfere with the freedom of con- "tract." Nor would I venture save for weighty reasons, to extend the doctrine of public policy beyond the classes of cases already covered by it (Pollock's "Contract Act," p. 110). But the words of Section 23 of the Indian Contract Act are perfectly clear and they must be given effect to by the Court which, if it finds that an agreement upon which it has to adjudicate is one of which the object or consideration should be regarded as opposed to public policy, must hold such consideration or object to be unlawful, whether or not the particular case with which it is dealing comes within the category of cases which have already been held to be covered by the doctrine. As the same learned author remarks, "there is no department of the law in which the "Courts have exercised larger powers of restraining indivi- "dual freedom on ground of general utility, and it is "impossible to provide in terms for this discretion without "laying down that all objects are unlawful which the Court "regards as immoral or opposed to public policy. The "epithet 'immoral' points, in legal usage, to conduct or "purposes which the State, though disapproving them, is "unable, or not advised, to visit with direct punishment. Public "policy points to political, economical or social grounds of "objection outside the common topics of morality, either "to an act being done or to a promise to do it being "enforced. Agreements or other acts may be contrary to "the policy of the law without being morally disgraceful "or exposed to any obvious moral censure." The question before us for determination is not, however, from the point of view of public policy, a novel one. On the contrary, it has been the subject of numerous decisions of the Courts, and in England especially there is ample authority for holding that an agreement by a barrister or a solicitor for remuneration contingent upon success is opposed to the policy of the law. My brother Robertson has referred to several of these decisions, and I shall presently cite some other but before proceeding to that part of the case I think it advisable to discuss the

question in the abstract and to explain the reasons why I venture to hold that agreements of this kind are obnoxious to the doctrine of public policy.

As already remarked, there are numerous decisions to the effect that these agreements are opposed to public policy. There are, on the other hand, decisions of eminent Judges to the contrary. But I think I am justified in saying that in almost every instance where the system of contingent fees for professional services has not been condemned, the Court has been at pains to point out that the system is such that it might easily lead to grave abuses, and that every such agreement between client and pleader requires the special and careful scrutiny of the Court. If this be the case, and if, as the learned Chief Judge remarks, the tendency of such agreements is to induce legal practitioners to resort to improper means in order to win cases, and I fear that it would be impossible to deny that among a certain class of such practitioners these agreements do have this deplorable tendency,—there can, I think, be no question that it is most impolitic to countenance those agreements. In this Province there is, in this particular respect, no essential difference between the case of an advocate, a pleader or a mukhtar, for *quaod* the conduct of the case entrusted to him, each of these members of the legal profession stands practically upon the same footing, and if the agreement for contingent fees when made by an advocate is contrary to public policy, it is, in my opinion, equally so when made by a pleader or a *mukhtar*. I have no hesitation in conceding that the system of "back fees" has not been very largely abused in the past. The legal profession fortunately consists in the main of honourable gentlemen who would disclaim to take advantage of a system which enables them, if they so desire, to abuse their rights and privileges. But while admitting this, I cannot shut my eyes to the fact that the system does lend itself to abuses, and that instances of such abuses have actually occurred, and it is for this reason that I am of opinion that the system should be discouraged.

In this connection I would like to quote a few passages from the judgment in the celebrated case of *Kennedy* v. *Brown* (1) :—"We are aware," say the learned Judges, that

(1) 13 *C. B.* (*N. S.*), 677.

" in the class of advocates, as in every other numerous class, " there will be bad men taking the wages of evil, and " therewith also for the most part the early blight that " awaits upon the servants of evil. We are aware also that " there will be many men of ordinary powers performing " ordinary duties without praise or blame; but the advocate " entitled to permanent success must unite high powers of " intellect with high principles of duty. His faculties and " acquirements are tested by a ceaseless competition proportionate " to the prize to be gained, that is, wealth and power " without, and active exercise for the best gifts of mind " within. He is trusted with interest and privileges and " powers, almost to an unlimited degree. His client must " trust him at times with fortune and character and life. The " law entrusts him with privilege in respect of liberty of " speech which is in practice bounded only by his own sense " of duty, and he may have to speak upon subjects concerning " the deepest interests of social life and the innermost feelings " of the human soul. The law also trusts him with a power " of insisting on answers to the most painful questionings, and " this power again is in practice only controlled by his own " view of the interests of truth. It is of the last importance " that the sense of duty should be in active energy, proportioned " to the magnitude of these interests." It was in consideration of these grounds that the learned Judges held that an advocate should be held to be incapable of contracting for hire, and they added that " if the law were to allow the " advocate to make a contract of hiring and service, it might " be that his mind would be lowered and that his performance " would be guided by the words of his contract rather than " by principles of duty; that words sold and delivered ac- " cording to contract for the purpose of earning hire, would " fail of creating sympathy and persuasion in proportion as " they were suggestive of effrontry and selfishness; and that " the standard of duty throughout the whole class of advocates " might be degraded. It may also well be that if contracts " for him could be made by advocates, an interest in " litigation might be created contrary to the policy of the " law against maintenance; and the rights of attorneys might " be materially sacrificed, and their duties be imperfectly " performed by unscrupulous advocates, and these evils, and " others that may be suggested, would be unredeemed by a " single benefit that we can perceive." As a member of the Bar, I rejoice to think that this high standard of the rights and duties of barristers who are advocates of this

Court has been recognised by the Full Bench in *Grey* v. *Diwan Lachman Das* (1). And if a barrister is for such reasons incapacitated from contracting for the ordinary remuneration for his services, he is, I venture to think, *a fortiori*, debarred from contracting for fees contingent upon his successful conduct of the case entrusted to him. A pleader can, doubtless, under the law of this country, contract for remuneration for professional services. But even in his case, and having regard to the nature of his duties which in this Province so clearly resemble the duties of the advocates are we justified in going beyond the strict letter of the law and giving our sanction to a system which must necessarily give him an extraneous interest in the litigation in which the part which he takes should be merely that of the expert lawyer, whose sole aim and object is to do everything in his power, as an advocate or pleader, to see that his client's case is put with all legitimate force before the Court which has to adjudicate upon the claim of the parties ?

These are general observations, but they are, in my opinion, worthy of consideration when dealing with the question specifically before us, and they should, I think, turn the scale if there be any doubt as to the expediency of recognising agreements for contingent fees. And that there is such doubt is beyond question.

In the leading case of *Beechey* v. *Faiz Muhammad* (2), Plowden, J., remarked : "I am quite willing to admit, after "all has been said, that the advantages and disadvantages "of such a rule are *somewhat evenly balanced*, and that it is "a question of *nicety* whether such agreements should or "should not be declared to be opposed, in the Court's "judgment, to public policy." The learned Judge was, however, "of opinion that the system (of back fees) was calculated "to secure to him" (the client) "from his pleader a degree "of zeal and diligence, of attention and promptitude in conducting his case in excess of that which would otherwise be devoted "to it. . . . . A native client," the learned Judge added, "rarely thoroughly satisfied with any terms "arranged between himself and his pleader unless by those "terms the pleader has a solid interest in success." In other words, the system is to be maintained despite its dubious character because the client cannot, or *thinks* he cannot, expect of his pleader such zeal and promptitude as

(1) 51 P. R., 1895, F. B. (2) 5 P. R., 1878, F. B.

the pleader would devote to the case if he had "a solid interest "in success." And yet, in a later passage of the same judgment, it is admitted that it is "undesirable to recognise as "valid an agreement of this kind when it gives the pleader "a pecuniary interest in success." With all due deference, I confess I am unable to distinguish between "a solid interest "in success" which apparently is unobjectionable, and a "pecuniary interest in success" which it is undesirable to recognise. So far as the "back fee" system is concerned, the solid interest which the pleader (or advocate) has in the success of the case must, *ex hypothisi*, be a pecuniary interest, and it is because I strongly hold to the view that agreements which give a legal practitioner a "solid" or "pecuniary" interest in litigation are fraught with possibilities of abuse, that I am impelled to regard them as opposed to public policy. As the learned Chief Judge well remarks, "they tend to induce legal practitioners to resort "to improper means in order to win their cases; they are, "indeed, the result (so it is said) of a profound and well "founded belief of the client that his case will be more "zealously prosecuted if there is an inducement in "prospect to an extraordinary degree of assiduity in "conducting it." Further, there can be little doubt, I think, that to the practice of accepting remuneration contingent upon success is due a great deal of the purely speculative litigation with which the Courts of this Province are as well acquainted as are the Courts elsewhere in British India. "Gambling in "litigation and what are called in England maintenance and "champerty," remarked Edge, C. J. in *Chunin Kaur* v. *Rup Singh* (1), "are unfortunately only too common in this coun-"try." In the Punjab at the present day the abuses to which Phear, J., referred in *Grose* v. *Amirtamayi Dasi* (2), at p. 12, 13, very largely prevail. "In every Court of Civil "Justice," the learned Judge observed, "throughout Bengal "speculative traffic in law proceedings has assumed the "dimensions and respectability of a regular trade. A large "class in the community fattens and grows rich on the spoils "of needy suitors. Litigation is promoted and maintained "without reference to the wishes or interests of the nominal "parties. As often as not in cases where proprietary interests "are in contest, the names on the records represent puppets "which move at the bidding of persons who are in no way "before the Court. The proceedings are carried on not to

(1) *I. L. R., XI All., 72.* (2) *4 Beng. L. R., O. J. 12.*

"adjust the rights of suitors seeking equity and justice, "but in order that contingencies may be determined according "to which the successful player in a great game of speculation "will draw the stakes. I feel it impossible to exaggerate the "magnitude of the evil . . . . I am afraid that there "are *vakeels* of these Courts who make use of the opportunities "afforded to them by their position of buying up and maintaining "pending suits, and I am sure that there are attorneys whose "regard for the interests of their clients is deadened by "familiarity with dealings of a champertous character."

It is of course settled law in this country (*see Ram Coomar Coondeo* v. *Chundar Canto Mookerjee* (1), at page 257) that agreements of a champertous character are not necessarily void, but, as their Lordships of the Privy Council point out in the case cited, such agreements have to be carefully watched and when they are made for improper objects, as for the purpose of gambling in litigation or of injuring and opposing others by abetting and encouraging unrighteous suits, effect ought not to be given to them. Now it seems to me that agreements between pleader and clients for remuneration contingent upon success partake very largely of champerty. They are not necessarily champertous in all cases, but in a large number, perhaps in the majority, of cases they are so, and whenever they have been judicially recognised as valid, the Courts have almost invariably added the caution that they should be closely scrutinized as they tend to many abuses and are open to many objections. To these cases I shall presently refer but, before doing so, I would add that experience shows that in this Province litigation of entirely unnecessary and harassing nature is not seldom fomented by a class of legal practitioners who are content to accept remuneration for their labours only in the event of their client's success.

Now let me turn to observations from time to time made by learned Judges both in this country and elsewhere with respect to this class of agreements. I think it is no exaggeration to say that in almost every instance where effect has been given to such agreements, it has been conceded that the system of contingent remuneration, though not illegal, is open to abuse, and needs the diligent supervision of the Courts. In the Full Bench case of this Court, *Beechey* v. *Fais Muhammad* (2), it is obvious that the learned Judges

(1) *I. L. R., II Calc.*, 333. (2) *5 P. R.*, 1878, *F. B.*

arrived at their conclusions with hesitation. Plowden J.'s observations have already been referred to by me in this connection, and I would only add that the rule which the learned judge was prepared to assent to was "merely a "negative rule, namely that an agreement between pleader "and client regarding the remuneration of the former for "his professional services is not void as opposed to public "policy, merely because it contains a stipulation that the "pleader is to be paid an additional sum by the client on "condition of his conducting the case to a successful issue." Such an agreement the learned judge holds to be *prima facie* lawful, but he at once points out that it is so subject to the qualifications that it is a fair and equitable one, not extortionate or unconscionable; not of a gambling or speculative character; not open to such objections as would invalidate the agreement if made by a private person advancing funds to maintain litigation; not made for the purpose of promoting unrighteous litigation; and, finally, "that the particular "issue or event on which the right to the future payment "is contingent is not of such a nature that it would be "improper to permit the pleader to have a pecuniary interest "in bringing that event about." With all deference I confess that a rule which has to be hedged in with such qualifications and restrictions appears to me to be one which the Courts, with their necessarily limited powers of supervision over the relationship that exists between pleader and client, should not be called upon to adopt. Smyth, J., in the same case while accepting this "negative rule" as so qualified, added, "I "can readily conceive that when the agreement is of that "class" (*viz.*, an agreement for remuneration contingent on success) "there may be superadded circumstances which "would *often* in particular cases make it void as being "opposed to public policy." "It does not seem to me," "continued the learned Judge, "possible to lay down any "useful general rule as to the class of circumstances which "would have this effect. The question must be decided in each "case on its own peculiar circumstances. But subject to the "qualifications and safeguards which Mr. Justice Plowden has "been careful to specify, I am prepared to concur with him in "the general rule, as far as it goes, which he proposes to "lay down in regard to agreements between pleaders and their "clients for the remuneration of the former for their profes-"sional services. Such agreements should be scrutinized by "the Courts with peculiar care and disallowed without

"hesitation whenever they appear to be unconscionable or "inequitable or opposed to public policy."

In *Nathoo Lal* v. *Badri Parshad* (1), the High Court referring to agreements of the kind now under consideration, remarked: "By such a bargain the pleader acquires a direct interest "to carry on the litigation to the uttermost extent, by every "means and influence in his power, and this renders it the "more incumbent on the Court to watch closely the terms of "such arrangements."

In *Shiv Ram Hari* v. *Arjan* (2), Wastropp, C. J., and Birdwood, J., held that the agreement then in suit (called an *inamchithi*) between a pleader and his client was not illegal, but they added: "Although we cannot designate the remuneration "as extortionate, yet we regard it as high,.....and we feel "no disposition to encourage agreements which give to pleaders "a *personal interest* in the litigation of their clients."

The back fee system as practised in this Province is practically unknown in other parts of this country, but a very similar system prevails in the United States of America, and it is interesting and instructive to see in what light such agreements between clients and attorneys are regarded by the Courts and profession of those States. The Colorado Bar Association adopted a "Code of Legal Ethics" for the guidance of its members, and among the rules laid down in this Code I find that Rule 50 provides that "Contingent fees may be contracted "for; *but they lead to many abuses* and certain compensation is "to be preferred," (*Chicago Legal News, November 10th*, 1906, *page* 110).

An exactly similar rule has been adopted by the Alabama State Bar Association, (*Robbins'* "*American Advocacy*," *Appendix, page* 268). Presumably the various other Bar Associations in the United States have adopted the same rule. But be this as it may, there can be no doubt that in the United States such agreements between client and attorney, though legalised, are subjected to close scrutiny. The learned author above-mentioned deals at some length with this subject, and in para. 187 of his work makes the following observations:—"At "a time when the honour of the profession of the law was more "prominent than its business aspect, the practice of taking con-"tingent fees was frowned upon, and placed the offender in

(1) 1. *N. W. P.*, 1. (2) *I. L. R.*, 5 *Bom.*, 267

"a lower and more dishonourable strata of practitioners. "Gradually, however, the justice and necessity of such contracts "in certain instances have been generally recognised, although "Courts and laymen seem to still view them with suspicion. "The contingent fee is purely a wild growth; it knows neither rules nor limitations. There is neither definiteness "nor certainty about it. 'If you lose, I get nothing; "'if you win, you get nothing', was the well-known definition of "a certain lawyer who was asked by a client to explain "the meaning of the word. While there is some exaggeration "about this definition, it sufficiently expresses the idea that "the attorney's compensation in this class of cases is not based "on any consideration of the real value of the services of the "attorney to his client, but is rather a joint speculation where "one puts in his claim and the other his services, with an "agreement to share in the result at a certain ratio.? We have "no intention at this time to enter into the question of the "validity of agreements for contingent compensation, nor to "discuss the circumstances under which they may be said to "become champertous. It is sufficient to say that the rule "sustained by the great weight of American authority is to "the effect that a contract between the attorney and his client "for a contingent fee is not necessarily invalid. All the law "will do in such cases is to scrutinize the transaction and see "that it is fair, and that no unfair advantage has been taken "either of the necessities or the ignorance of the client."

In *Lynde* v. *Lynde* (*New Jersey Court of Errors and Appeals, Lawyers' Annotated Reports, Vol.* 58, *page* 476) *Pitney, J., observed*:

"The late Chief Justice Brashy, in an opinion holding "that because of the non-adoption in this State of the law "of Champerty and Maintenance, a contract between attor- "ney and client proportionate to the amount of the recovery was "not necessarily void, at the same time said: 'Such contracts "'will be inspected with jealous vigilance by the Courts on "'account of the delicacy of the relationship of the parties to "'them, and the most transparent candor and good faith is "'required on the part of the attorney in these dealings with "'his client.'"

To a similar effect is the judgment of the Arkansas Supreme Court in *Davis* v. *Webber* (*Lawyer's Annotated Reports, Vol.* 45, *at page* 198), where the Court remarked, "Such contracts' "however, should be characterized by the utmost good faith on

"the part of the attorney towards his client, because of the "confidence reposed in him. The Courts will scrutinize such "contracts closely to see that the *abervima fides* has been "preserved."

In *Elmon* v. *Johnson* (*Lawyers' Annotated Reports, Vol.* 21, *at page* 369), Magruder, J., speaking with reference to agreements between attorney and client for contingent fees, said: "No single circumstance has done more to debase the practice "of law in the popular estimation, and even to lower the lofty "standard of professional ethics and self-respect among mem- "bers of the legal profession itself in large portions of our "country than the nature of the transactions, often in the "highest degree champertous, between attorney and client which "are permitted and have received judicial sanction. It some- "times would seem that the fiduciary relation and the oppor- "tunity for undue influence, instead of being the grounds "for invalidating such agreements, are practically regarded "rather as their excuse and justification."

In *Johnson* v. *Van Wayek* (*District of Columbia Court of Appeals, Lawers' Annotated Reports, Vol.* 41, *page* 526), the Court held that "the recognized relations of attorney and "client have resulted in the complete recognition of the legality "of contingent fees." They added, however, that "unnecessary "and speculative litigation, the promotion of inexcusable "strife, the vexation of landholders and the laying of embar- "goes upon the free alienation of their holders are as pernicious "now as they ever were and as needful of redress. Contracts "which tend to promote these evils are as much opposed to the "said public policy as they ever were, and therefore ought "not to beenforced."

The Supreme Court of the United States in *Taylor* v. *Bemiss* (*United States Supreme Court Reports, Lawyer's Edition, Vol.* 23 *at pages* 64, 65) held that a contract by an attorney for prosecuting a claim against the United States is not void, because the amount of the compensation to be given to the attorney is made contingent upon success. The learned Judges added: "This does not, however, remove the suspicion which "naturally attaches to such contracts."

With reference to these extracts I think I am justified in saying that even in those cases where contingent fees have been recognised as valid, the Courts have been at trouble to point out that the practice is one which requires careful scrutiny. No doubt in many of the cases cited the reason given for

such supervision has been that agreements of the kind, being between client and attorney, every care is to be taken to see that they are not of an extortionate and unconscionable character. This is undoubtedly one reason, and a very strong one, why such agreements should be closely scrutinized and discouraged. But it is not, I think, the only reason, and I endorse the views of Magruder, J., (above quoted) that the system of contingent fees tends to "debase the practice of law in popular estimation." And I would go further and say that it has also an obvious tendency to promote speculative and unrighteous litigation and to induce certain members of the legal profession to resort to illegitimate or improper means in order to win their cases and so obtain for themselves remuneration when, if the case were lost, they would receive either no remuneration at all or (in some cases) but a very insignificant fee. It is admitted that the system of "back fees" is not one advantageous to the legal profession generally, and that that profession would prefer to receive certain remuneration. Why then I would ask, should we give our sanction to a practice which admittedly is open to grave abuse and can be justified only on the assumption, highly derogatory to the honour of a most honourable profession, that the pleader will not conduct his client's case with due assiduity unless he has a "solid" or "pecuniary" interest in the success of his client's cause? Surely it is no sufficient justification for a judicial recognition of the practice that the ignorant litigant erroneously supposes that his pleader will not conduct his case properly unless he has himself a personal interest in the result? Further, is it in accord with the interests of the public that judicial sanction should be accorded to agreements which, for one reason or another, are of such a peculiar nature that the Courts must be ever vigilant to closely scrutinize them? Is it not a sufficient condemnation of such agreements that such scrutiny on the part of the Courts is invariably insisted upon?

It is said that these agreements do not *necessarily* partake of the nature of champerty. I quite admit this. But it would at the same time be idle to deny that in very many instances, I might say in the majority of instances, they are in the highest degree champertous. Can it, for example, be seriously contended that if a pleader agrees in view of his client's present inability to pay a larger fee, to conduct a case for the recovery of money or other property for a fee of (say) Rs. 50 to be paid in advance, but stipulates for a further fee of (say) Rs. 500 in the event of his client's success, the pleader has not a direct and very solid

interest in the issue of the proceedings? There are, of course, cases in which no such consideration can arise. For example, a pleader may stipulate for a fee contingent upon the acquittal of his client in respect of a criminal charge. But in almost every case of this kind there is an illegitimate inducement to the pleader to resort to every means, fair or unfair, to secure a successful verdict, and I am at one with the learned Chief Judge in holding that it is not right that any such inducement should be permitted.

Upon principle, then, and quite apart from authority, I would hold that an agreement between pleader and client whereby the former is to be remunerated, either in part or in whole, contingently upon the success of his client in the case, is opposed to public policy. Such agreements are not to the advantage of the Bar; on the contrary, the majority of legal practitioners disapprove them. They are, on the other hand, open to many grave objections and must at all times be carefully scrutinized by the Courts. And, apparently, the sole ground upon which any plausible justification for their non-condemnation can be based is the plea that the ignorant litigant believes that his case will not be conducted with such zeal and such vigour as it would if his pleader had some pecuniary inducement dependent on the result. Personally I regard any such plea as in the highest degree derogatory to the members of the Bar, and I feel sure that the latter, as a body, share my opinion.

I turn now to the authorities in support of the view which upon principle commends itself to my judgment. And here I would repeat that, *quoad* this question, there does not appear to me to be any essential distinction between the case of a barrister, a pleader or a *mukhtar*, and that the only point involved is whether an agreement of the kind under consideration is lawful or otherwise, it being a matter of no moment whether one of the parties to the particular agreement was an advocate, a pleader or a *mukhtar*.

In *Morris* v. *Hunt* (1), it was laid down that "the emolu-"ments of counsel are not to depend upon the event of the "cause but to be equally the same whether the event be suc-"cessful or unsuccessful: they are to be paid before hand, "because they are not to be left to the chance whether they "shall ultimately get their fees or not: it is for the purpose of

(1) 1 *Chit.*, 544.

"promoting the honour and integrity of the Bar that it is "expected that their fees should be paid at the time when "their briefs are delivered."

In England a very similar rule prevails with regard to solicitors' fees, Section 11 of the Attorneys and Solicitors' Act, 1870 (33 and 34 Vict., C. 28) provides that "Nothing in this "Act contained shall be construed to give validity to any pur- "chase by a solicitor of the interest, or any part of the interest, "of his client in any suit, action or other contentious pro- "ceeding to be brought or maintained, or to give validity to "any agreement by which a solicitor retained or employed to "prosecute any suit or action stipulates for payment only in "the event of success in such suit, action or proceeding."

This section came before the Master of the Rolls (Jesset, M. R.) for consideration in *Re Attorneys and Solicitors' Act*, 1870 (1). In that case there was an agreement between clients and solicitors whereby it was agreed that in the event of the solicitors succeeding in recovering certain property for their clients they should receive 10 per cent. on the value of the property. The Master of the Rolls held that the agreement was "pure champerty" as it gave to the Solicitors, in the event of success, what was equivalent to a tenth part of the property to be recovered: (see also *per* Hawkins, J., at p 900.— *Alabaster* v. *Harness* (2).

Tabram v. *Horne* (3), is a curious case, but to some extent in point. It was there held that "it is a good defence to an "action on an attorney's bill that he undertook to perform the "business on the principle of 'No case, no pay.'" The learned reporter adds the following note: "This case is given because "it appears by inference at least to negative the presumption "which had long obtained in the profession that an action by "an attorney for the amount of his bill could not be answered "by proof that he had undertaken his client's case upon the "contract 'No case, no pay'; although it was always understood "that he was in such a case liable to the animadversion and "punishment of the Court."

In *Earle* v. *Hopwood* (4), it was held that "a contract "between attorney and client that the attorney shall advance "money for carrying on a law suit to recover possession "of an estate, and that the client shall, if the "suit be successful, pay the attorney, over and above his

(1) *L. R.*, 1 *Ch. D.*, 573. (3) 6 *L. J., K. B.* (O. S.) 24.
(2) *L. R.*, 1 *Q. B.*, (1895), 889. (4) 30 *L. J., C. P.* (*N. S.*) 217.

"legal costs and charges, a sum according to the benefit "to the client from possession of the estate, is void on the "ground of maintenance."

In delivering the Judgment of the Court, Earle, C. J., remarked: "If the contract had been that the plaintiff was "as attorney in the suit to advance money for the prosecution "of the suit and the defendant was to give him a portion of "the property to be recovered, it would have been a contract "directly in violation of the law of maintenance; the contract "as stated in this declaration is that the defendant was to "pay the plaintiff, over and above all legal charges incurred, a "sum of money according to the interest and benefit to the "defendant from the possession of the property in the event "of the suit being successful and the defendant obtaining "possession; that contract seems to me to fall precisely within "the same principle and to be void upon the same ground. The "only distinction between the two cases is that the plaintiff "here has the personal security of the defendant, but if "the latter is a solvent man and the plaintiff were allowed to "recover in this action, he would in effect obtain a share of "the property by following his judgment to execution," (cf. also *Prince* v. *Beathi* (1).

My brother Robertson has dealt in detail with the authorities in *Achamparambath Cheria Kunhammu* v. *William Sydenhan Ganty* (2), *Moung Htoon Oung* (3), *In the matter of an Advocate of the Calcutta High Court* (4), *In re: Bhandara* (5), and *Beechey* v. *Ghulam Ghaus* (6), and I need not therefore say more regarding them than that they strongly support the view that agreements between clients and pleaders for remuneration contingent upon success are opposed to the policy of the law. Practically these latter cases and the English cases above-mentioned are, with the exception of the Full Bench ruling in *Beechey* v. *Faiz Muhammd* (7), and the American decisions above-mentioned, the only direct authorities upon this question. With the American authorities and the Full Bench ruling I have already dealt and I can only repeat that though the actual decisions were to a contrary effect, the *dicta* of the learned judges who decided these cases seem to me to justify the conclusions at which, both upon principle and the weight of authority, I have arrived.

(1) 32 *L. J., Ch.* (*N. S.*) 734.
(2) *I. L. R., III, Mad.*, 138.
(3) 21 *W. R.*, 297.
(4) 4 *Cal., W. N., Civ.*
(5) 3 *Bom., L. R.*, 102.
(6) 26 *P. R.*, 1874.
(7) 5 *P. R.*, 1878, *F.B.*

In conclusion I would repeat that these agreements are to be condemned not because they are naturally objectionable but because they are such that the probabilities of evils and abuses resulting from their encouragement are very strong. There is, I consider, nothing morally disgraceful in such agreements. On the contrary I can conceive of cases in which a pleader might well feel justified in accepting remuneration on those terms. He would, for example, surely merit no censure if in order to secure justice he agreed to give his professional services to a needy client with a just claim upon condition that if the claim were established and the client thereby come into funds, adequate remuneration was to be awarded to him. But while conceding all this, I am still of opinion that the probabilities of abuses and evils are so great that it is in the interests of the community at large that these agreements should be prohibited absolutely and without reference to circumstances.

I would therefore answer this reference in the negative.

CHITTY, J.—The question before the Full Bench is, I under- 1st *Decr.* 1906.
stand, whether it is legal or proper for a legal practitioner to make his remuneration in any case contingent on the successful result of that case: in other words, can the "back fee system" as prevailing in this Province be regarded as legal or proper by the Courts. The Full Bench ruling of this Court (*Beechey* v. *Faiz Muhammad* (1)) is now after 28 years under review. It was then laid down that an agreement between a pleader and client regarding the remuneration of the former which stipulates for payment to him of a sum down and a further sum conditional upon success is not by reason merely of such stipulation void as being opposed to public policy. That rule was enunciated by Sir M. Plowden subject to certain qualifications which it is not necessary to refer to here.

I have had the advantage of reading the judgments of the Chief Judge and Mr. Justice Robertson in this case. Both agree in deprecating the "back fee" system and characterising it as improper. Robertson, J., has gone further and regards it as unlawful as being opposed to public policy. In this latter opinion I entirely concur, and I do not propose to add much to the exhaustive judgment which he has pronounced. I will, however, shortly state my view

(1) 5 *P. R.*, 1878, *F. B.*

of the question. It has been pointed out that it must be considered (*a*) with regard to barristers-at-law and (*b*) with regard to pleaders. I must confess that in principle I can see no reason for distinguishing in this particular matter those two branches of the profession. It is only in the capacity of advocate for a client that the question of remuneration contingent on success arises, and in this respect both barrister and pleader stand on the same footing. What is right or wrong for the one must be right or wrong for the other. There is, however, a technical distinction which might be drawn. The case of the barrister cannot, strictly speaking, be determined by reference to the law of contract, inasmuch as he is regarded as incapable of contracting in the matter of his fees—*Grey v. Lachman Das* (1). The pleader on the other hand is competent to contract for his remuneration, and to his agreement the provisions of the Contract Act certainly apply. So far as the barrister is concerned there cannot in my opinion be any doubt. For him the practice in vogue is wholly indefensible. It is opposed to the well established "traditions of the Bar, and directly" contravenes the cardinal principles which regulate his relations with his client. This is most clearly demonstrated by the remarks of Bayley and Best, JJ., in the case of *Morris* v. *Hunt* (2), which was cited by Mr. Grey, and it is unnecessary to do more than refer to them. Can then a practice which is not permissible in the case of a barrister be legal and so presumably permissible in the case of a pleader? In other words, can the Court regard it as not opposed "to public policy?" "Public policy" in this connection must be taken to be that policy which regulates the relation of the legal profession on the one hand and the litigating public on the other. Section 23 of the Contract Act provides that the consideration "or object of an agreement is lawful unless" ..... not, *it is* but, "*the Court regards it as*..... opposed to public policy." It is therefore left to the Court to determine in each case whether the object of the agreement is opposed to public policy. No doubt the Courts have of late years been averse to stigmatising as opposed to public policy, and so avoiding agreements which are in themselves in other respects unobjectionable. The term "public policy" must not be used in too comprehensive a manner. But here, it appears to me, we are enunciating no new principle. The Courts on this question have never wavered. So far as counsel in England are concerned, there can (as I have

(1) 51 *P. R.*, 1895. (2) 1 *Chit.* 544.

stated) be no doubt whatever. The Courts, whenever the matter has come before them, have consistently set their face against any such arrangement between a counsel and his client. It is worthy of notice that the Legislature in England, while granting to Solicitors the greatest freedom in contracting with clients for their remuneration has expressly prohibited agreements of the nature now under consideration. Section 11 of the Solicitors Remuneration Act, 1870, provides: "Nothing in this Act contained shall be construed to give "validity to any agreement by which a solicitor retained "or employed to prosecute any suit or action stipulates "for payment only in the event of success in such suit, "action or proceeding." Coming to this country we find that the High Courts have uniformly adopted the same view. The cases have been cited at length by Mr. Justice Robertson and I need not again refer to them in detail. No doubt most of them are cases in which the conduct of advocates was concerned, but the expressions of opinion are not confined to that branch of the profession. Pleaders are more than once included. The only authority that supports the countrary view is the Full Bench Ruling of this Court in *Beechey v. Faiz Muhammad* (1). The conclusion at which Sir M. Plowden arrived in that case was not reached without some doubt. He admitted that the question was one on which there might well be two opinions. So far as the client was concerned he saw nothing contrary to public policy in an agreement making the pleader's remuneration contingent, in whole or in part, upon success. He did however recognise the dangers which would arise if such an agreement were permissible to the pleader. He thought that these dangers might be averted first by the fact that no man can become a pleader who has not produced a certificate of good character, and secondly by the fact that it will not pay a man in the long run to act improperly or be dishonest. I must confess with all respect for the learned Judge that this reasoning does not commend itself to me, nor has the experience of late years altogether justified his expectations if the effect of such agreements is to put temptations in the way of legal practitioners, that itself goes to show that it is contrary to public policy to recognise such agreements. The section of the Solicitors' Remuneration Act to which I have referred was not before the Full Bench in 1878, and the various authorities cited to us are also of subsequent

(1) 5 P. R., 1878, F. B.

dates. Possibly if the learned Judges had the question before them with the same materials for decision as now available, their views might have been different. However that may be, in my opinion that judgment cannot now be supported.

In conclusion I would say that I am unable to draw a distinction between agreements of this nature being improper and their being unlawful. If they are improper, if legal practitioners making them are to be regarded as guilty of professional misconduct, then I think that it follows as a matter of course that the Court must regard such agreements as opposed to public policy, and so by virtue of Section 23 of the Contract Act unlawful. I would, therefore, answer the question before us in the negative.

13th Feb. 1907. LAL CHAND, J.—I am particularly fortunate in having the advantage of the opinions recorded by my learned colleagues but unfortunately labour under a heavy disadvantage of being unable to express my entire and implicit concurrence with their views.

With the exception of the Hon'ble Mr. Justice Chatterji, who has not yet written his note, my learned colleagues have concurred in condemning the practice of back fee on one ground or another.

It is therefore of no real practical use to record a dissentient note particularly when pressed, as I am, by the weight and importance of the concurrent opinions of so many of my learned colleagues. But the question under consideration is of a peculiar and general importance, and possibly it is not undesirable that I should express my views on a matter of which I have had a considerable experience as a member of the Bar, and which I have practised myself for over twenty years. I have therefore decided, though with considerable hesitation and diffidence under the circumstances, to expres at some length my views on the question under reference.

Looking at the question in the abstract, the back fee no doubt is a fee payable contingent on success, but I am not aware, at least so far as appellate practice is concerned, that the back fee is often returned direct to the money lender. So far as I know, and my experience is mostly limited to appellate practice, the money lender is very rarely if at all a party to the payment of the back fee. As regards the amount it may occasionally be disproportionate to the advance

or total amount of fee as was found to be the case in *Thakar Das v. Beechey* (1). But such disproportions are very rare and the usual proportion in a very considerable majority of cases consists of payment in equal half shares. It may further be mentioned that although part payment in advance and part on success forms the ordinary mode of payment of fees in this Province, it is not the exclusive method, and instances occur off and on where the whole fee is paid in advance as what is termed a *bilmukta* fee. Such then is the back fee practice, which we are asked to condemn as immoral, unlawful and illegal. With all due respect for the opinions of my learned colleagues I feel unable to agree that the mode of part payment as back fee has had or has a demoralising influence on the legal practitioners of this Province. I do not mean for a moment that back fee may not occasionally in a few cases act as an incentive for a more zealous or even over-zealous prosecution of the suit or appeal. But I entirely endorse what was stated in argument by Pandit Sheo Narain that a desire to retain back fee no way influences the proper or improper conduct of the case by far the largest majority of the legal practitioners in the Province.

It is a factor ignored almost universally, and, as pointed out in argument, no case has hitherto been discovered where misconduct could be attributed to a desire to retain the back fee. The question of professional misconduct depends entirely in my opinion upon the personal character of the practitioners unaffected by the manner of payment of fees, and this remark applies not only to the legal profession but to every other profession. Some feel inclined to denounce the legal profession itself as being open to a variety of temptations, and a sort of support is rendered to this view by the circumstance that the profession in its origin was intended to be honorary though now it is so only by a misnomer. But I find no ground or reason for holding that the morality of the legal practitioners as a body has been adversely affected or is likely to be so affected by arranging to receive the fee partly in advance and partly on success. The back fee system is not in vogue in other provinces, and yet there is no ground for maintaining that a larger number of instances of misconduct have occurred in this Province than elsewhere. I can safely affirm that to say the least there is absolutely no ground for making an unfavourable comparison of the

(1) 49 P. R., 1906, F. B.

members of the legal profession in this Province with others in the sister Provinces, I therefore find considerable difficulty in agreeing with my learned colleagues that the system of back fee with all its subtle influences has affected or has tended to affect adversely the morals of the legal practitioners in this Province. I am strongly confirmed in this view by the circumstance that several eminent members of the English Bar have for a long time practised the system without feeling or raising any objections against the practice. I am not aware that prior to a few years the system was ever regarded as objectionable by any member of the Bar, and I cannot persuade myself to believe that if it were so regarded at least by the leaders of the Bar they would have allowed the system to prevail or would have adopted it themselves in practice. These gentlemen moreover by their extensive practice were in constant contact with others including practitioners in the *mufassil* and if it were so injurious in its effects as, now it is depicted to be, it is highly improbable that they would have tolerated it to exist or prevail at least without entering a strong protest. The truth seems to be that the practice was not felt to be either derogatory or demoralising, and not being illegal as held in *Beechey* v. *Faiz Muhammad* (1), and now held by the Hon'ble Chief Judge, it was encouraged by example and continued in practice as a method found to be well suited to the comparatively poor circumstances of the Province. By this mode of payment the client pays generally less than the regular fee if he loses and he is only too glad to make up the balance in case he wins his suit or appeal. Is it then opposed to public policy? The term public policy is not defined by the Contract Act, and it appears to me for very good reasons, as it is incapable by its shifty nature of bearing a rigid definition. Public policy would vary in different countries according to its own peculiar conditions and circumstances. What might be true public policy in England need not invariably be so in India. There are no doubt certain high ideals which ought to compose public policy everywhere in a limited sense but every necessary ingredient of public policy need not be uniform everywhere. There is ample justification for this view if I am right in thinking that the circumstances, economic and otherwise of each country, do enter in determining what is or ought to be its public policy for the

(1) 5 *P. R.*, 1878, *F. B.*

purpose of the Contract Law. So far, however, as may be possible, the public policy ought to be fixed, stable and not changeable. The following quotation from the Principles of Contract by Pollock, page 294, fully bears out this view. "The view here put forward that there is really nothing in "the case to warrant the invention of new heads of public policy "seems to be borne out by the following remarks of the Master "of the Rolls:—

"It must not be forgotten that you are not to extend "arbitrarily those rules which say that a given contract "is void as being against public policy because if there is "one thing which more than another public policy requires "it is that men of full age and competent understanding "shall have the utmost liberty of contracting, and that these "contracts when entered into freely and voluntarily shall be held "sacred and shall be enforced by Courts of Justice. Therefore "you have this paramount public policy to consider that "you are not legally to interfere with the freedom of con-"tract."

It is thus clear that very strong and cogent reasons ought to be shown for holding that the back fee system is opposed to public policy, when it was not held to be so by a Full Bench judgment in 1878, and has since prevailed for the last thirty years and before, under circumstances already alluded to. If it has resulted or tended to result in degrading and disgracing the profession and its members who have practised it, it ought to be condemned unhesitatingly as opposed to public policy in order to safeguard the future. But it is hardly sound and reasonable to condemn the system now for the first time on mere *a priori* considerations and hold that it has a tendency to degrade and is therefore objectionable.

The evidence to support the view that the practice has tended to degrade the profession, is altogether wanting in my opinion, and it is remarkable that when the question came up for decision a few years before the practice was supported by an elaborate memorial presented by the Bar Association as a body, including both sections of the Bar. There is absolutely no reason for condemning the system as Champertous. I am in perfect accord with the Hon'ble Chief Judge that stipulation to receive a share in the result of the litigation is different from a stipulation to be paid a fee contingent on success. The authorities therefore where

legal practitioners were held guilty of misconduct for having engaged to receive a share out of the funds of the litigation in lieu of fees are wholly inapplicable. There is no element whatever of wager in the transaction. The system is evidently suited to the pecuniary circumstances of a considerable portion of the suitors. It helps them even if they have to borrow from a money-lender. So far as appellate practice is concerned the deposit is not made until about the last date when the appeal is finally heard. And unfortunately, or fortunately, the period is appreciably long specially in this Court between the times when the appeal is filed and it comes on for a final hearing. If the deposit remains with the money-lender as is stated to be the case no interest is paid on it by the litigant. He pays comparatively a higher fee on success but such payment under such circumstances is never regarded as a loss or a burden. From the litigant's point of view therefore the system is not opposed to public policy in any sense of the term. For the legal practitioners it ensures a higher emolument in certain circumstances and may possibly act as an incentive in certain cases and with certain individuals. But there is no reason for holding that as a whole it tends to demoralise the legal practitioners, or acts as a temptation for unnecessarily prolonging argument, or for having resort to improper or unprofessional practices in the conduct of cases. In my opinion by far the more powerful and effective motive exists in a desire to win a reputation or to prove a point which one sincerely believes forms the true aspect of the case. The system therefore does not appear to me to be opposed to public policy.

As regards the legality of the practice otherwise, my work is rendered much easier by the pronouncement of the Hon'ble Chief Judge that the practice is not illegal for either section of the Bar. I will advert later on to the distinction between the members of the English Bar, enrolled as advocates in this country, and the pleaders whose legal status is the pure creation of the Indian legislature. Taking up at first the case of the latter, who in fact formed the subject matter of the Full Bench decision in *Beechey v. Fais Muhammad* (1), the question to my mind turns in the main upon the provisions of the Legal Practitioners Act. Chapter III of the Act deals specially with pleaders and mukhtars. By Section 6 power is given to the High Courts to frame rules for the qualification and admission of pleaders, and

(1) 5 *P. R.*, 1878, *F. B.*

sections 12 and 13 empower the High Courts to suspend and dismiss pleaders for certain specified reasons. The question of remuneration of pleaders is specially provided for under Chapter VI. Section 27 empowers the High Courts to fix and regulate the fees payable by any party in respect of the fees of his adversary's advocate, pleader, vakeel or mukhtar. But Sections 28 to 30 control exclusively the agreements made by pleaders and mukhtars with their clients respecting the amount and *manner* of payment for the whole or any part of any past or future services, fees, &c., in respect of business done or to be done. It is provided that such agreement shall not be valid unless made in writing and filed in Court and that it shall not be enforced in Court if it is not found to be fair and reasonable. Section 30 excludes any claim beyond the terms of the agreement. It is thus clear that the whole subject relating to the admission and remuneration of pleaders is dealt with exhaustively under the Act. There is no other legal provision relating to the pleaders, and therefore the whole question of their rights, duties and remuneration is to be determined under the Act, which in fact is the source of their legal status. The Contract Act is in effect so far modified that it is absolutely essential that the agreement relating to fees shall be made in writing subject to a further control under Sections 29 and 30 as regards the amount which may be reduced if not fair and reasonable. It was in fact held in *Hasari Lal* v. *Tilok Chand* (1), that a pleader cannot recover fees under an oral agreement. But as regards the *manner* of payment for the whole or part of any past or future fees the parties are apparently left at perfect liberty to contract as they choose. A provision is enacted for reducing the amount if not fair and reasonable but there is none to control the *manner* of payment for the whole or part of any past or future fees except that the agreement shall be in writing. There is no question in the present case that the back fee system is not legal because the agreement is not made in writing. Therefore as regards the manner of payment by back fee the practice is no way opposed to the provisions of the Act. On the other hand, while there is express provision to control the amount and none to regulate the manner, there is obvious reason for inferring that the Legislature did not intend to interfere with the *manner* of payment. This conclusion is strongly supported by the significant fact that the Legal

(1) 136 P. R., 1903.

Practitioners Act was passed soon after the Full Bench decision in 1878 legalising the back fee practice. There exists every reason to presume that the judgment in the Full Bench case was known to the framers of the Act, and I am fully fortified in making this presumption by the equally significant fact that the safeguards proposed by the Full Bench judgment against any misuse of the system are actually embodied in Sections 28 to 30 of the Act. After admitting that the advantages and disadvantages of back fee were equally balanced, and that it is a question of nicety whether such agreement should or should not be declared to be opposed to public policy, Sir Meredyth Plowden remarked as follows :—

"If the law required in this country, as I think it "advantageously might do, that no agreement between pleader "and client for remuneration should be enforceable by action "when it had been reduced into writing, I should have arrived, "with even less hesitation, at the opinion which I now hold. "Further, the rule I am prepared to assent to is merely a "negative rule, namely, that the agreement .....is not void as "opposed to public policy merely because it contains a "stipulation that the pleader is to be paid an additional "sum by the client on condition of his conducting the case "to a successful issue. Such an agreement I would hold to "be *primâ facie* lawful, but subject to the qualification "that the bargain is a fair one and not such "as it would be inequitable to enforce, *i. e.*, not extortionate "and unconscionable, that it is not of a gambling or speculative "character, &c." There were thus two main suggestions proposed as safeguards other than those already provided for in the Contract Act, *viz.*, that the agreement should be in writing, and that it should be fair and reasonable and both these suggestions were embodied in the Legal Practitioners Act in Sections 28 and 29. Section 28 makes it incumbent that the agreement shall be made in writing, and Section 29 requires that the agreement shall not be enforced unless it is proved to be fair and reasonable leaving the manner of payment otherwise uncontrolled. Under the circumstances I am justified I think in presuming that the view propounded in the Full Bench judgment of 1878 as regards back fees was maintained by the Act, otherwise some provision would have been entered to neutralise the authority of the decision and to forbid the practice. It is true that the safe guards embodied in Sections 28 to 30 of the Legal Practitioners Act are not applicable to vakeels.

But this is not very material as the practice sanctioned by the Full Bench judgment is not found to prevail in Provinces under the jurisdiction of the Chartered High Courts. Moreover, it is quite possible to imagine that the Legislature did not think it necessary to interfere with the arrangement as to fees made by advocates and vakeels. There is no danger however on this account so far as our Province is concerned, for a vakeel when enrolled as a pleader of the Chief Court loses his higher status, and is held bound according to the authorities of this Court by the provisions of the Act as a mere pleader of the 1st grade. He is bound to file a written agreement as required by Section 28 of the Legal Practitioners Act, otherwise he cannot recover his fee by suit—*Madan Gopal* v. *Sheo Singh Rai* (1).

Turning to the case law, it is unnecessary for me to refer to judgments quoted and commented upon in *Beechey* v. *Fais Muhammad* (2). The cases where a pleader or advocate agreed to share in the subject matter of litigation in lieu of fees or funds supplied may also be left out for the reasons given by the Hon'ble Chief Judge with whom I so far concur. An agreement to receive a certain portion of the fixed fee in case of success appears to me to be totally different from showing or having an interest in the subject matter of the litigation. This is specially evident when the fee is fixed for conducting a criminal proceeding. Eliminating such cases, very few are left which bear directly on the question at issue.

(1) *Shivram Hari* v. *Arjun* (3) was a case under Act I of 1846. The agreement called *Inam Chitthi* was filed with the *Vakalat nama*. It was held that the *Inam Chitthi* was evidently given as the sole intended remuneration for the professional services of the pleader, but it was not held that it was illegal or unenforceable under the provisions of Act I of 1846. The suit in which the agreement was filed involved a claim for Rs. 310 and the plaintiff had agreed to pay Rs. 50 to his pleader as *inam* on success. It was held to be high though not an extortionate amount and the Judges felt no disposition to encourage agreements which gave to pleaders a personal interest in litigation.

(2) *Parshram Vaman* v. *Hiraman Fatu* (4) is a case in point. In that case the suits were based on oral and written agreements to pay certain rewards in addition to the usual fees, provided the cases were decided in favour of the parties making the agreements. The previous judgments of the Bombay High

(1) 54 *P. R.*, 1881. (3) *I. L. R.*, *V*, *Bom.*, 258.
(2) 5 *P. R.*, 1878, *F. B.* (4) *I. L. R.*, *VIII*, *Bom.*, 413.

Court, including *Shivram Hari* v. *Arjun*, already alluded to, were referred to and it was held that the agreements were not illegal, and the Subordinate Judge was directed to decide the suits according to their particular circumstances. The case was decided under Act I of 1846, which enacted by Section 7 that the parties shall be at liberty to settle with pleaders by private agreements the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the *Vakalat nama*. It is now required by Act XVIII of 1879 that the agreement shall not be valid unless made in writing.

(3) *Achamparambath Oheria Kunhammu* v. *William Sydenham Ganty* (1), was a case of a barrister-at-law who had secured an agreement stipulating for a fee to be paid in addition to his fee as a present in case the suit was decreed for a sum in excess of Rs. 1,000. It was held that as a barrister the defendant was incompetent to make any agreement for his fees. As a pleader though empowered by Act I of 1846 to settle beyond the rule prescribed by the Regulation XIV of 1875 the claim would not be enforceable as inconsistent with a circular order of the Sadar Diwani Adalat issued on 3rd August 1853.

This case was quoted as an authority by the Subordinate Judge in his reference in *Parshram Vaman* v. *Hiraman Fatu* (2), for holding the agreements to be unenforceable. But it was evidently not followed or accepted by the Judges who held that the agreements were enforceable as noted already.

(4) The facts are not given in *Moung Htoon Aung* (3), but it was apparently a case of sharing in the subject matter of the litigation.

(5) *In the matter of an Advocate of the Calcutta High Court* (4) was a case of an advocate and distinctly a case where the advocate agreed to receive part of the compensation to be allowed under the Land Acquisition Act as remuneration for his professional services. In one case the agreement was to receive half the compensation allowed above Rs. 10,000, and in the other to receive one-half of the amount allowed in excess of Rs. 40,000, as an additional fee. The case was decided by a Full Bench of five Judges, and it was observed that it was "improper "for an advocate or pleader to stipulate with his client to share "in the result of the litigation." The advocate admitted that

(1) *I. L. R., III Mad.*, 138.
(2) *I. L. R., VIII Bom.*, 413.
(3) 21 *W. R.*, 277.
(4) 4 *Cal. W. N., Civ.*

his conduct was improper but pleaded ignorance, and the only question for decision was one of punishment. Having regard to the actual facts of the case it appears to me that sharing in the result of the litigation meant in this case sharing in the subject matter of the litigation, and not that it was improper to receive a portion of the fee agreed upon contingent on success in the case.

(6). *In re Bhandara* (1), was a case of gross professional misconduct on the part of an advocate who was charged with forcing his client into an agreement to give him a large fee, Rs. 10,000, by holding out to him a threat of appearing on the other side. He was also charged with showing (after his engagement) the other party to the claim a way to escape payment. The case was tried by a Full Bench of three Judges who held that the accused was guilty of gross professional misconduct, and directed his name to be removed from the rolls of the Court. The following observation occurs at the end of the judgment, and was relied upon in argument in the present case.

"I have not hitherto travelled beyond the limits of the "promulgated charges, but I should not have it thought that "my silence in reference to other matters appearing on the "papers before us indicates approval. The conditions and "exigencies of a Mufassil business may justify procedure on "the part of an advocate which would receive no counte-"nance in the Presidency town but (to allude to one matter "the papers disclose) I consider that for an advocate of "this Court to stipulate for or receive a remuneration "proportioned to the results of the litigation or a claim, "whether in the form of a share in the subject matter, a "percentage or otherwise, is highly reprehensible, &c." It is clear that the observation in the first place is particularly restricted to advocates, and moreover the obvious reference is to cases where a share in the subject matter of the litigation is stipulated for whether by fixing proportion, percentage or otherwise. This decision does not even purport to differ from the view held by the same High Court in *Parshram* v. *Vaman Hiraman Fatu* (2) where agreement by pleaders to receive certain fees contingent on success were held to be legal and enforceable.

(7). There is one Allahabad case (*Nathoo Lal* v. *Badri Parshad* (3) which is quoted by Hon'ble Mr. Justice Rattigan and is

(1) 3, *Bom. L. R.*, 102. (2) *I. L. R., VIII, Bom.*, 413.
(3) 1 *N. W. P.*, 1.

also referred to in *Beechey v. Faiz Muhammad* (1). According to the agreement a fee of Rs. 350 was agreed upon to be paid without any condition, but it was further agreed to pay Rs. 500 more as *shukrana* in case the claim for possession was decreed, a further sum of Rs. 500 was to be paid after the time for appeal had expired and half the amount of mesne profits to be realised. As pointed out by Sir Meredyth Plowden in *Beechey v. Faiz Muhammad* (1), it was not held that the agreement was void and illegal, but that the circumstances of the case might be looked to to see if the claim was equitable. A decree passed for Rs. 980 in pleader's favour by the lower Appellate Court was actually upheld, *i.e.*, for a sum apparently including the contingent fee but excluding probably the half share in the mesne profits. It may be noted in this connection that the second payment of Rs. 500 was contingent on appeal not being preferred, and was reserved for the High Court vakils as fees if an appeal were preferred. I have looked into the copies of certificates required to be filed by the Allahabad High Court which were referred to in argument. These certificates are required for ensuring that the actual amount received by an advocate or vakil be entered in the decree and do not appear to me to have any bearing on the question under consideration. The certificates were not framed to provide against a practice which did not prevail, but in order to secure against a party being made to pay fees higher than has actually been received by the advocate or vakil of his adversary. Disregarding then the cases where a share in the subject matter of the litigation was agreed upon the only Indian authorities bearing on the question of back fee are *Parshram Vaman* v. *Hiraman Fatu* (2), *Nathoo Lal v. Budri Parshad* (3) and the circular of the Sadar Diwani Adalat referred to in *Achamparambath Cheria Kunhammu v. William Sydenham Ganty* (4). The two former held the agreements to be enforceable and not void or illegal, and the last has apparently no legal force and was not accepted as such though referred to as an authority by the subordinate Judge in *Parshram Vaman v. Hiraman Fatu* (2). It is, therefore, not permissible to hold that the practice is opposed to or has been forbidden by the authority of the High Courts in other Provinces.

It was urged in argument that there ought to be no distinction in this respect between a barrister and a pleader, but I am not prepared to assent to this proposition. In the

(1) 5 *P. R.*, 1878, *F. B.* (3) *I, N. W. P.*, 1.
(2) *I. L. R., VIII, Bom.*, 413. (4) *I. L. R., III, Mad.*, 138.

first place the legal status of a pleader is a pure creation of the Indian Legislature, and it would be unsound to apply to him bodily the rules enacted under different circumstances and for a different legal status. There is further no analogy between the position of a barrister and a pleader. The former is utterly incompetent to contract for his fees and receives his fees as honorarium. The latter is positively required to make a written agreement and receive his fee as remuneration for his services. A barrister, therefore, who is incompetent to make any agreement for his fee may be held debarred from making an agreement contingent on success. But the same argument would not apply where the remuneration is fixed by express agreement between the parties, and the agreement is required by law to be in writing. An agreement by a barrister, moreover, is a nonentity in the eye of law. The agreement made by a pleader is subject to the scrutiny of Courts. A back fee unlawfully retained by a barrister cannot be recovered, but a pleader under similar circumstances can be sued for and made to disgorge what he has no right to retain. There is therefore no analogy whatever between their respective legal position.

Under the Legal Practitioners' Act there is a considerable distinction even between the status of a vakil and a pleader of an unchartered High Court such as the Chief Court is. Very few of the provisions of the Act are applicable to the former and yet as observed in *Sayad Abdul Hak* v. *Gulam Jilani* (1), the principles applicable to the relation of a solicitor with a client are scarcely applicable in the case of a vakil. But moreover even in England apparently a solicitor is not debarred from making an agreement for his fee partly contingent on success.

Section 11 of the Solicitors' Remuneration Act, which is quoted in the judgment of my learned colleague the Hon'ble Mr. Justice Chitty, runs as follows :—

"Nothing in this Act contained shall be construed..... "to give validity to any agreement by which a solicitor "retained or employed to prosecute any suit or action "stipulates for payment *only* in the event of success in such "suit, action or proceeding."

It is significant that the section is merely negative in its operation so far as it provides against the validity of a

(1) *I. L. R., XX Bom.*, 677, *p.* 682.

stipulation for payment in the event of success. If the matter were so reprobate as it is represented to be the language would have been mandatory. But, moreover, the provision against the validity of such agreements is restricted to cases of stipulation for payment *only* in the event of success. There is no provision forbidding an agreement for part-payment in the event of success, and apparently such agreement would not be illegal or invalid under the Act.

It appears to me that there is a considerable distinction between cases where the fee is payable only on success and the practice which we are called upon to condemn. The former is of a somewhat speculative nature and may on that account be objectionable. But the same considerations do not apply to a case where a good portion, usually half of the fixed amount, is received beforehand as remuneration for services to be rendered. There is no particular anxiety for securing remuneration for labour to be performed specially where the other half is also received in deposit beforehand. This appears to me to be the main principle underlying *Morris* v. *Hunt* on which great stress was laid in argument. It was a case relating to taxation of costs, and the question raised was that the charge on account of fee for counsel was improper. It was argued that inasmuch as counsel cannot sue the client for fee it should not at all be allowed in the account. The following quotation will speak for itself as to the ground on which this contention was overruled. After referring to other objections, Bayley, J., observed: "But "then the suggestion is that by law no man is liable to pay "for counsel at all, and that therefore the whole of the charge "for counsel is improper. This seems to me to arise entirely "from a mistake in point of law. It is never expected, it has "never been the practice, and in many instances it would be "wrong, that counsels should be gratuitously giving up their "time and talents without receiving any recompense or reward. "It is the recompense and reward which induces men of con- "siderable ability, and certainly of great integrity and with "every qualification which is necessary to adorn the bar, to "exert their talents. It is the emolument in the first instance, "to a certain degree, that induces them to bear the difficulties "of their profession and to wear away their health which a "long attendance at the bar naturally produces, and it is "of advantage to the public that they should receive their "emoluments which produce integrity and independence, and

"I know of nothing more likely to destroy that independence "and integrity than to deprive them of the honourable re- "ward of their labours. But it is said that counsel can maintain "no action for their fees. Why because it is understood that "their emoluments are not to depend upon the event of the "cause but that their compensation is to be equally the same "whether the event be successful or unsuccessful. They are to "be paid beforehand because they are not to be left to the "chance whether they shall ultimately get their fees or not, "and it is for the purpose of promoting the honour and integ- "rity of the bar that it is expected that all their fees should "be paid at the time when their briefs are delivered. That "is the reason why they are not permitted to maintain an "action. It is their duty to take care if they levy fees that "they have them beforehand and therefore the law will not "allow them any remedy if they disregard their duties in that "respect. The same rule applies to a physician who cannot "maintain an action for his fees" . . . "These are the reasons "why the gentlemen of the two professions can maintain "no action for their fees; but is it to be supposed that men "are to waste their lives to qualify themselves for their pro- "fessions without receiving any emolument. That never can "be imagined, and the constant course which has been adopted "shows that it never could be so understood." This judgment evidently in plain and unmistakeable language differs from the theory that fee for counsel is a mere gratuity or honorarium and not a salary or hire for service. It was quoted as such by the Hon'ble Mr. Justice Rivaz in his judgment in the Full Bench case of *Grey* v. *Diwan Lachman Das* (1). But putting the matter briefly and logicy the view enunciated seems to run as follows:— It is absurd even to conceive that counsel would render professional services without receiving recompense or reward. In fact the law insists that they should receive the remuneration in order to encourage men of talents and ability to qualify for the profession and conduct it with integrity and independence.

And in order to ensure payment and not leave it to the "chance whether they shall ultimately get the fees or not," the law requires they should receive it beforehand under threat of a penalty that otherwise it shall not be received at all, no action to sue for it being maintainable. I fail to see how this reasoning is applicable to contingent fees, specially when the

(1) 51 *P. R.*, 1895, *F. B.*

whole is received beforehand by payment or deposit. There was no question then as regards the impropriety or immorality of a fee contingent on success. The question was that a counsel cannot sue for his fee and the clear and unmistakeable reply given was that he cannot sue because it is eminently desirable and necessary that he should receive a fee and receive it beforehand and not be left to the chance of litigation for recovering it. Neither of these laudable aims is defeated by the practice sought to be condemned in this case. The whole fee is received beforehand and part of it, usually half, is agreed to be retained by the pleader or counsel under any circumstance independent of the result of the litigation, so that he be rewarded for his services and may not perform them gratuitously. There is an agreement to return a portion of the fee under certain contingencies but it is *per se* unobjectionable. Anyhow it is not opposed to the *ratio decidendi* of authority quoted and none other is quoted to show that it is so. There are similar observations in the judgment of Best, J., in the same case, but they all refer directly to the same point, and indirectly to a case where the whole fee is rendered contingent on success. Thus: "But it has been said that in- "asmuch as counsel could not recover their fees from the "plaintiff, therefore plaintiff could not recover them from the "defendant. The defendant mistakes the principle upon "which he is called upon to pay these fees. His liability is "founded upon the principle stated by my brother Bayley. "Nothing can be more reasonable than that counsel should be "rendered independent of the event of the cause in order that "no temptation may induce them to endeavour to get a "verdict which in their consciences they think they are not "entitled to have. Counsel should be rendered as independent "as the judge or the jury who try the cause when called upon "to do their duty. Was it ever understood by any man that "gentlemen who are put to the most enormous expense in "rendering themselves competent to appear in a Court of "Justice as advocates are to act for nothing. No man is so "ignorant or so stupid as to suppose that this can be the case. "There is nothing which has so great a tendency to secure "the due administration of justice as having the Courts of "the country frequented by gentlemen so eminently qualified by "their education and principles of honour.....If under such "circumstances there could possibly be a disposition to do "injustice to such men the greatest injury would be done to "the public.....It never entered into in any man's contempla-

"tion as a sound principle that counsel are not to be paid "in the first instance but that payment must depend upon the "event." These passages render it still more clear if there were any room for doubt that the case referred to here is when the whole fee is dependent upon success and counsel are called upon *to act for nothing*. Such practice is if permitted held to be injurious to public interest because it will fail to attract men of ability to appear as advocates in Courts of Justice. There was no occasion to consider and decide the moral effect of part-payment contingent on success. It may possibly be suggested as a possible result of the reasoning in *Morris* v. *Hunt* that the whole fee be rendered payable beforehand in order to secure full recompense to the legal practitioners for their services in Court. This no doubt would be the result if it is ruled that it is unprofessional to contract for part-payment of fees on success. The movement would so far be in the pecuniary interests of the bar and in the direction contemplated by *Morris* v. *Hunt*. For it is not likely that men of talents and ability who join and adorn the bar, will allow their pecuniary interests to suffer in the matter of remuneration for services in Court. There will hardly be any difficulty in devising and settling means and methods for attaining the proper and requisite object and to secure full compensation if the whole fee is to be paid beforehand. As a matter of fact Pandit Sheo Narain asked us in his argument to leave out of consideration altogether the supposed pecuniary loss or gain to the bar as a result of upholding or abolishing the back-fee system. My only apprehension is that the litigant will suffer in the end by the abolition of the practice. As it is both parties are content with the present arrangement. It avoids the two extremes. If a legal practitioner, whether counsel or pleader, performs his duties indifferently and such cases, to put it mildly, are not few, the litigant does not get adequate return for his payment but he loses only one half. On the other hand if a legal practitioner performs his work with zeal and ability and pains he has the satisfaction (of receiving the adequate consideration) for if he loses he still retains one half of the fees as remuneration for services performed and is not dissatisfied. Nor is the litigant dissatisfied if the whole fee is retained on success which is not due to the ability of the legal practitioner engaged. If the last case were a reason for abolishing the back fee, and such cases are not rare, it would equally be a reason for not allowing any fee in such cases and yet if it were done it would directly militate against the

principle so strongly, eloquently and elaborately enunciated in *Morris* v. *Hunt*.

There is thus an absolute dearth of authority for holding that a stipulation for part payment of fee on success specially where such payment is received in deposit beforehand is illegal or unlawful.

As observed in *Beechey* v. *Fois Muhammad* (1), "a very "strong case ought to be made for interfering with a practice "which commends itself to the natives of the country which "is satisfactory and advantageous to them and is not likely "to promote the unnecessary litigation." Whether the practice originated in the litigant's inability to pay the whole fee at once or in his desire to secure proper attention and amount of labour for remuneration paid it has been accepted as a satisfactory arrangement by both parties to the agreement. There is neither cause nor ground for grievance or complaint. If the prospect of securing or retaining back fee has a subtle tendency to demoralise a pleader or an advocate by inclining him to improper practices in the conduct of a case the satisfaction that the whole fee is already secured has an equal demoralising influence in inducing him to give the minimum trouble to his brain, leaving the case to its fate and to the judgment of the Court. If however an earnest ambition to win reputation and good name does operate as an incentive to counteract the last-mentioned influence it would equally act as such to counterpoise the declining tendency of the former. Anyhow a litigant under the circumstances would be perfectly justified on business principles to keep back a portion in order that the desire to secure the same may act as an incentive for rendering proper services. Such attitude on his part may in theory be derogatory to the profession. But in deciding whether the practice is opposed to public policy the interests of both parties ought to be taken into account. Where then is there a good reason for interference on theoretical grounds when the result from the litigant's point of view might be to pay more and get less work. These considerations apply equally to pleaders and advocates. If the latter as barristers are governed by the usages and traditions of the Bar in England and the practice to retain part payment on success, though deposited beforehand, is opposed to such traditions and usages it would be unprofessional on

(1) 51 P. R., 1878.

their part to continue the practice. No authority directly in point was however quoted for the very probable reason that the practice does not prevail there. The practice is opposed to the theory that a barrister is incompetent to contract for his fee. But that does not render it illegal to make such agreement as pointed out by the Hon'ble Chief Judge. As regards consideration of public policy the reasons given already apply equally to an advocate while the provisions of the Legal Practitioners' Act are altogether silent as regards advocates and do not debar them from arranging for part remuneration on success. It is not however clear to my mind that advocates enrolled by this Court are governed by the usages and traditions of the Bar in England. It was so decided by a majority of 3 to 2 in *Grey* v. *Lachman Das* (1), and I am bound by that decision. But if the question were open I would agree with the views expressed by Hon'ble Mr. Justice Rivaz and Sir Charles Roe, and hold that the English rule is not to be considered applicable "in the Punjab where different condi-"tions exist between the various grades of the profession "*inter se* and different relations are recognised between counsel "and client." The same view has I understand been recently held by the Chief Court at Rangoon, and the matter will probably ere long be finally settled by a decision of their Lordships of the Privy Council.

It is unnecessary for me to say anything further on the subject excepting that it would be a matter for surprise that so many eminent members of the English Bar should have readily adopted the practice of part-payment on success unless the truth were that it was recognised that there was nothing pernicious *per se* in the system and that it is well-suited to the circumstances of the province. It was therefore thought unnecessary and undesirable to import and apply bodily all the usages and traditions of the profession as understood elsewhere. This I believe to be the keynote of the decision in *Beechey* v. *Faiz Muhammad* (2), and I adhere to it unreservedly.

In the end I heartily join in the gracious desire expressed by the Hon'ble Chief Judge to exalt the standard of the highly honourable body of legal practitioners. If something could be done to raise their status and place them even on the same footing as vakeels of the Chartered High Courts the change would, I believe, be received as a valuable boon. As it is

(1) 51 *P. R.*, 1895. (2) 5 *P. R.*, 1878.

they are under great disabilities under the Legal Practitioners' Act as an ill-trusted body in matter of range of practice, receiving instructions and remunerations, &c. A vakeel of a Chartered High Court even is reduced to the same level and subjected to similar disabilities by enrolling himself as a pleader of the Chief Court. I hope and earnestly desire that the abolition of the back-fee system may result in improving their standard appreciably.

So far as I can guess the practical result of the abolition would be to raise the standard of advance fees or to fix fees by hearings, a practice easily liable to abuse. For the rest the conduct of the litigation will remain unaffected and will depend as before on the ability and moral strength of the individual actually employed to conduct the case.

No. 62.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

REVISION SIDE.

THE MUNICIPAL COMMITTEE OF DELHI,—(DEFENDANT),—PETITIONER,

Versus

DEVI SAHAI,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 1569 of 1905.

Erection of a new building—Application for, including projections on a street—Ommission of Municipal Committee to pass orders thereon within six weeks—Applicant not entitled to presume tacit sanction provided for in sub-section 5 of section 92 as to projection or encroachment—Punjab Municipal Act, 1891, Sections 92, 95.

Held, that where sanction for the erection of a projection or structure overhanging into or encroaching upon any street which requires a written permission under Section 95 of the Punjab Municipal Act, 1891, is applied for and included in an application for the erection or re-erection of a building provided for in Section 92, and the Municipal Committee fails to pass any order within six weeks after the receipt of a valid notice under sub-section 1 of Section 92, the person interested in such application is not warranted under sub-section 5 of that section to erect such projection and cannot be deemed to have obtained the necessary sanction in respect thereto. The tacit sanction provided by sub-section 5 covers only erections or re-erections of buildings, but does not also cover a projection or structure overhanging into or encroaching upon any street or road.

Aya Ram v. *Queen-Empress* (1), *Ibrahim* v. *Municipal Committee, Lahore* (2), *Damodar Das* v. *Municipal Committee, Delhi* (3), *King-Emperor* v. *Billu Mal* (4), and *Ali Mardan* v. *Municipal Committee, Kohat* (5) referred to.

(1) 9 *P. R.*, 1901, *Cr.* (2) 27 *P. R.*, 1901
(3) 52 *P. R.*, 1900. (4) 27 *P. R.*, 1904, *Cr.*
(5) 45 *P. R.*, 1905.

Petition for revision of the order of W. A. Le Rossignol, Esquire, Additional Divisional Judge, dated 22nd February 1905.

Shadi Lal, for petitioner.

Chuni Lal, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J.—We think that we must set aside the order of the learned Divisional Judge on revision for the following reasons :— *20th Decr.* 1906.

It appears that defendant applied for permission to the Municipal Committee of Delhi to build a house on a certain plan on land which he alleges to be his own. The only reply he got was a notice, dated 4th March 1903, to the effect that the Committee would consider the application. He accordingly proceeded, without waiting further, to build and on 13th May 1905 the Committee issued a notice to him under Section 95 of the Municipal Act calling upon him to remove a "taj" and "katwar" and to clear encroachments off from 38 yards of roadway "zamin rasta" over which his buildings projected.

The plaintiff thereupon brought a suit for an injunction to restrain the Committee from interfering with his house.

The first Court has found on the facts that the plaintiff has enroached upon land of the Committee used as a public passage.

The lower Appellate Court, without coming to any finding on the facts, has held that inasmuch as sanction to build was applied for under Section 92, and no notice of the application was taken by the Committee under Section 92 to forbid the erection of the building, no action can now be taken against the builder under Section 95, and the only remedy of the Municipal Committee is by way of regular suit.

Now Section 92 clearly applies primarily to the erection of buildings upon the private property of the appellant, and a totally different set of considerations apply to sanction in such cases from those which apply to sanction to build in a manner to lead to obstruction to, or to encroach upon, public streets. Section 92 has to be complied with in any case, but a sanction, or an implied sanction from six weeks of inaction, can only affect matters within the purview of Section 92; and implied sanction or sanction by silence under Section 92 can be no answer in respect of buildings of the special kind dealt with udner Section 95, and which cannot be constructed under

Section 95 without the written permission of the Committee. If a man applies for sanction under Section 92 for the construction of a building which includes a projection, as part of a larger building, the building of such projection requiring permission in writing under Section 95 he cannot, we think, shelter himself under sanction by silence under Section 92, against action under Section 95. Under Section 95 certain things can only be done with written permission, the fact that certain other things may be done under tacit sanction under Section 92 cannot extend such tacit sanction to cover acts requiring written sanction under Section 95 merely because the sanction is applied for to do both things at one and the same time. All that tacit sanction under Section 92 can do is to sanction acts not requiring written sanction under Section 95. Several rulings have been quoted, *viz.*, *Ibrahim* v. *Municipal Committee of Lahore* (1), *Aya Ram* v. *Queen-Empress* (2), *Damodar Das* v. *Municipal Committee, Delhi* (3), *King-Emperor* v. *Billu Mal* (4), and *Ali Mardan* v. *Municipal Committee, Kohat* (5), which we have examined, but the only ruling quoted to us which expresses any view at all in conflict with that expressed above is *Aya Ram* v. *Queen-Empress* (2). The question was not fully gone into in that case, and was considered from the point of view of criminal liability only. We are, however, unable to accept the view said to be therein suggested that because application to do acts requiring sanction under Section 95 are included in an application to do acts which do not require such a special form of sanction, that therefore a tacit sanction which covers the latter, also covers the former. Nor can we accept the view that Section 95 does not apply to encroachments and obstructions which are attached to new buildings, but only to those which are added to old ones. We see nothing in the wording of the section to warrant this interpretation of it, and it is obvious that the value of it for the protection of public streets would be largely diminished by any such interpretation. If the building now in question does in fact encroach upon a public street, that encroachment is not covered by any tacit permission to build under Section 92, for written permission is required by Section 95, and that has not been given. An encroachment upon Municipal property *not* being a street or drain, sewer or aqueduct, would not come within the purview of Section 95 (*Ali Mardan* v. *Municipal Committee, Kohat* (5),

(1) 52 *P. R.*, 1900. (3) 27 *P. R.*, 1901.
(2) 9 *P. R.*, 1901, *Cr.* (4) 27 *P. R.*, 1904, *Cr.*
(5) 45 *P. R.*, 1905.

If the building is entirely within the bounds of the plaintiff's own land, then we hold that Section 92 would apply, and that tacit permission would cover the case, but not so if portions of the building are such as to require written sanction under Section 95.

We accordingly accept the appeal, set aside the judgment and decree of the learned Divisional Judge, and remand the case to him for rehearing and disposal according to law, after finding whether as a matter of fact the plaintiff has added to, or placed against or in front of, any building, any projection or structure overhanging, projecting into, or encroaching on any street, or into or on any drain, sewer or aqueduct therein.

If he has not, then Section 92 applies and tacit consent will cover the case. If he has, Section 95 would apply and tacit consent under Section 92 would not cover the case. The remand is under Section 562. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal allowed.

No. 63.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

FARMAN SHAH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1298 of 1905.

Land Acquisition Act, 1894, Sections 11, 12, 23, 24—Award of Collector when to be final—Nature of proceedings before Collector—Competency of owner to question their validity or of Civil Court to determine its correctness—Compensation—Principles on which compensation should be determined—Market value.

Held, following *Ezra* v. *Secretary of State* (1) that proceedings under the Land Acquisition Act, 1894, up to the making of an award are purely administrative and in no way judicial, and that therefore where a specially appointed Collector prepares under this Act a provisional award and refers it under his departmental instructions to the Collector of the District for approval, and the latter having been himself also empowered to make the acquisition, reduces the amount, the final award of the Collector within the meaning of Sections 11 and 12 is the award so reduced, and neither the owner of the property nor the Civil Court is entitled to question this on the ground of irregularity in the proceedings of the said Collectors.

(1) *I. L. R., XXX Calc.*, 86; *I. L. R., XXXII Calc.*, 605.

Held also that in determining the amount of compensation to be awarded for the property acquired under this Act the "market value" in clause I of Section 23 means the value at date of notification which the property would have commanded at that date in the open market had Government never contemplated acquisition. It is not permissible to take into account sp culative increase in prices due to the expectation that government is about to make acquisitions, or even enhanced prices which owners may themselves have paid in excess of "market value" as defined above.

Zulfikar Khan v. *Collector of Mianwali* (1), *Prem Chand Burral* v. *Secretary of State* (2), *Collector of Poona* v. *Kashi Nath* (3), followed. *Parma Nand* v. *Secretary of State* ( ), *Hira Nand* v. *Secretary of State* (5), *Rajindra Nath Banerji* (6), *Nuje Khetsey* (7), referred to.

First appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 12th September 1905.

Pestonji Dadabhai and Daulat Rai, for appellants.

Turner, Government Advocate, for respondent.

The judgment of the Court was delivered by

11*th Feb.* 1907. JOHNSTONE, J.—This case and No. 1297 of 1905 are Land Acquisition cases, the dispute being between Government and the owners as to the amount of compensation to be allowed to the latter under the Act for their lands taken away to form the Civil Station of Cambellpore, Attock District. Case No. 1297 will be separately dealt with on the merits, though from the similarity of the circumstances much that I will write in this judgment will apply directly also to that, and also much will apply *mutatis mutandis*. The figures given in this judgment refer only to the present case. Preliminary to the question of assessment of claims we have to deal with more than one by no means easy point arising out of the procedure of the Revenue Officers who have handled the case In order to give the reasons for my views on these points I must begin by setting forth the history of the whole affair, in so far as the record reveals it.

In March 1903 it was first tentatively decided by the Executive Authorities (a committee assembled on the spot) that the land in suit should be taken up for the new Civil Station.—See Government witness No. 2, Tahsildar of Attock, p. 48, line 10, paper-book. This same Tahsildar was directed to

(1) 90 *P. R.*, 1905.
(2) *I. L. R., II Calc.*, 103.
(3) *I. L. R., X Bom.*, 585.
(4) 44 *P. R.*, 1904.
(5) 31 *P. R.*, 1905.
(6) *I. L. R., XXXII Calc.*, 343.
(7) *I. L. R., XV Bom.*, 279.

make an estimate of values and he did so, reporting on 24th April 1904, p. 47, line 24. Apparently there was no preliminary notification under Section 4 of the Act (I of 1894), but only notification under Section 6, whereof one is printed at page 1 of the book, and is dated 22nd September 1904. In it the *Deputy Commissioner of Attock* is appointed under Section 7 of the Act to take order for the acquisition; and presumably all the other notifications are worded in the same way. It seems that earlier notifications, awarded in the same way, so far as regards the Deputy Commissioner, were published and later on superseded by amended notifications. But earlier than this Lala Ram Nath, Extra Assistant Commissioner, had been appointed "Collector" for the same purpose—see Notification No. 345 of 7th March 1904,—and he had proceeded to hold an enquiry under the Act, which ended, so far as he was concerned, in his writing and signing the document printed at pages 2 to 9 of the paper-book. That document seems to deal only with the land of the village of Kamalpur Sayadan. This document was drawn up in the presence of the proprietors and Babu Nihal Singh, Sub-Overseer, Department Public Works, and Mr. Bagley, Executive Engineer; and in it the Extra Assistant Commissioner assessed the compensation at Rs. 37,011-0-6 in all, or, if part, of Khwas Khan, a proprietor's land was to be made up by a grant of other land, Rs. 36,528-0-6. Some passages in the latter portion of the document are so important that I must transcribe them *verbatim* —

"Although my estimate does not exceed the amount "sanctioned by Government for the land in question, yet it "has far exceeded the estimate reported by the Tahsildar, "and the reason for this is that the Tahsildar did not include "about 30 acres of the area of bazar, nor did he fix any separate compensation therefor. I have included this area in my "estimate.

"I therefore according to paragraph 57 (of Revenue Circular "54) think it proper to send up this award to the Deputy "Commissioner for approval, and for orders as to its announcement.

"In conclusion I beg to submit as follows:—

"1. (Irrelevant for present purpose).

"2. Permission may also be granted for allowing the rates "and the total compensation.

"3. Distinct orders may be passed on the case of Khwas "Khan.

"I have told the proprietors and Babu Nihal Singh that "the award as regards this village will be announced after "it is approved of by the Deputy Commissioner.

"The original file be sent up to the Deputy Commissioner, "Attock."

This bears date 17th May 1904.

The Deputy Commissioner did not approve of the proposed compensation, and took the case into his own hands and finally (page 13, paper-book) on 22nd November 1904, by which time (if not long before it) he had become specially empowered to deal with the matter, pronounced an award in which he set down Rs. 25,071-1-9 as the figure to be paid for the lands in Kamalpur. The owners refused to accept his assessment and on 13th December 1904, to the number of 50, they filed objections asking for a reference to the Civil Court—pages 14 to 16; and on 11th January 1905 two more owners filed objections—page 26. The only detailed reference to the Civil Court that I can find is that of 7th January 1905; the second set of objections were simply sent on with a formal endorsement. Thereafter proceedings began in the Divisional Court, which on 12th September 1905 awarded Rs. 32,105-6-0 in all, being Rs. 7,000 odd over the Collector's figure but some Rs. 5,000 below Lala Pran Nath's estimate. The objectors have appealed to this Court, and on the arguments we have heard it seems to me that the following preliminary questions arise—

(a) Is Lala Pran Nath's writing of 17th May 1904 the award or an award at all?

(b) Were Mr. Bosworth-Smith, Deputy Commissioner's proceedings *ultra vires?*

In my opinion, which coincides with that of the Court below, Lala Pran Nath never made an award at all. The passages quoted *in extenso* above from his writing shew that he did not conceive himself to be setting down on paper what Government intended to pay as compensation to the owners. He merely made a calculation, discovered it was rather high, and determined to take the Deputy Commissioner's opinion. He asked for "permission" to allow his rates and the total compensation proposed; and he also left the matter of Khwas Khan wholly undecided. Therefore, whether Mr. Pestonji is right in contending that an award can be "made—" see Sections 11 and 12 of the Act—without being then and there announced, that is, whether the view is or is not

correct that the making and the announcing of an award are distinct acts, and that the former may precede the latter by a day or many days I need barely decide, inasmuch as the writing of 17th May 1904 is not an "award" at all.

As regards the second question (*b*), the existence of the notifications of which one is printed at page 1 of the book, makes it clear that on 22nd November 1904, when he made and announced his award, the Deputy Commissioner was fully authorized to do so. Whether these notifications superseded the appointment of Lala Pran Nath or not, we need not stop to enquire : they certainly gave power to the Deputy Commissioner. I am disposed to think that, when the Extra Assistant Commissioner sent up the file to the Deputy Commissioner on 17th May 1904, the latter, not then empowered, should simply have recorded his opinion and have returned the papers to the Extra Assistant Commissioner, then the responsible officer, to make his award and announce it, and should not have "transferred" the case to himself, who at the time probably had no powers in the matter at all. Probably again, it would have been better had the Deputy Commissioner, when he became empowered, carried out the procedure laid down in Section 11 of the Act, but I do not think that any of these irregularities, if they are such, need trouble us here. The Deputy Commissioner's award is undoubtedly the award in the case, and we have only to consider the appeal against the decision of the learned Divisional Judge, and to say whether the sums awarded by him are adequate in amount.

Another way of looking at both the above questions is that appellants should not be allowed now to contend that Lala Pran Nath's and not the Deputy Commissioner's "award" is the award in the case, inasmuch as they expressly filed objections to the Deputy Commissioner's award and expressly asked that it be referred to the Divisional Judge. It seems clear that no "objections" have ever been filed to Lala Pran Nath's "award," and no reference in connection with it has ever been asked for or has ever been made to the Divisional Court, and it may even be said that if the objections of December 1904 and January 1905 can be taken as directed against Lala Pran Nath's "award," they would be time-barred under Section 18 of the Act.

We have also heard an argument as to the meaning and intention of paragraphs 57 and 58 of Revenue Circular No. 54; Mr. Pestonji urging that these rules are *ultra vires* of Government. It is not necessary for us, in my opinion, to give any opinion on the point; but I may say that I am inclined to think, on the strength of the Privy Council ruling, to be noticed later, that the criticism is unsound, inasmuch as these proceedings up to the making of an award are purely administrative and in no way judicial.

In support and explanation of the view stated above I would like to refer to a few authorities. In the well-known case *Ezra* v. *Secretary of State* (1), at pages 84 *et seq.*, will be found a discussion of the position and duties and functions of a Collector under Act I of 1894. It is laid down that the Collector "is not a Court"; that until an award is actually made, it is still in the power of Government to withdraw and to give up its intention of acquiring the property; that when an award is once made, "the amount of the compensation fixed by the Collector "is binding on the Government, but not on the persons "interested"; that no inference opposed to these propositions can be drawn from the circumstance that in the act the Collector's award and the Divisional Court's decree are both called "awards"; and that there is nothing illegal either in the "Collector's" consulting (under orders of the Revenue or Executive authorities or otherwise) his superior officer as to rates, &c., or in his fixing the amount of compensation with reference to evidence not taken in the presence of the parties. This would dispose of the argument, noted above, as to the *necessity* for a proceeding exactly on the lines of Section 11 of the Act.

When this same case came up on appeal to the Privy Council (2), their Lordships agreed with the Calcutta High Court that the proceedings up to the Collector's award were not judicial but merely administrative, and also agreed in the inferences drawn by the High Court from this circumstance.

I do not think any further authorities need be noticed in connection with any of the points so far discussed; but I may quote *Amolak Shah* v. *The Collector of Lahore* (3), in which also the position and function under the act of a

(1) *I. L. R.*, *XXX Calc.*, 86. (2) *L. R.*, *XXXII Calc.*, 605.
(3) 115 *P. R.*, 1906.

Collector and of the Civil Courts respectively are discussed under somewhat different circumstances.

In opening his argument on the merits Mr. Pestonji informed us precisely to which items of the Divisional Judge's assessment he objected. It appears, pages 65, 66, paper-book, that he drops all objections regarding *rakkar*, *banjar-jadid*, *banjar-kadim*, and *ghair mumkin* land, as well as regarding trees, houses, wheat crops, stone wall and fakir's hut. This leaves the following items still under dispute, *viz.* :—

Maira land, *lipara*, *lipara* of Khawas Khan, *chahi*, and five wells.

The *maira* land is 80 acres, 1 rood 19 poles in area, and the Divisional Judge has allowed Rs. 80 per acre, or Rs. 10 per *kanal*. This is the same rate as that allowed by the Tahsildar and Collector, and half what Lala Pran Nath would have given. Appellants want Rs 40. The learned Divisional Judge has observed that there are three methods of arriving at the market value of agricultural land in this country, *viz.*, comparison with recent sales of neighbouring lands, capitalization of net profits, and valuation on basis of land revenue. In the case of *maira* land he has examined a number of instances of sales of *maira* land given in the list at pages 20, 23, paper-book, and has rejected them all as tests on various grounds. In dealing with the net-profits test he suggests 20 times net profit as a fair valuation, which means a net profit of 8 annas a *kanal* only, if Rs. 10 is the value per *kanal*. He admits that the Collector allowed Rs. 3 per *kanal* as compensation *for standing crops* on such land; but he does not explain how on such a basis he gets the net profit down to 8 annas. The price, Rs. 3, was probably by no means high, inasmuch as the Collector was not a dealer, anxious to get the grain, but an officer, who, judging by his award in the present case, was not the least likely to pay much more than market value for anything. The learned Divisional Judge's argument that "only a limited amount of standing crops can be sold" to my mind establishes nothing, and is not very intelligible. It is no question of some special kind of crop, like tobacco or melons, for which there is a limited market, but of the ordinary staple crops of the country. Mr. Butler's estimate of net profits per acre, Re. 1-7-0 only, if correctly stated, seems to me absurdly low. I cannot believe it would be worth

any zamindar's while to cultivate land at all with such dismal prospects.

As regards land revenue the Divisional Judge's own remarks show how hopeless a test it is. He first observes that 127 times the land revenue is not an unfair estimate of market value, which would work out to about Rs. 36 an acre or Rs. 4-8-0 per *kanal* only 50 per cent more than what the Collector was willing to give for the standing crop, and a mere fraction of even the lowest rates of sales in recent years. In short I do not at all approve of the learned Divisional Judge's method of dealing with the matter. I would base my estimate on test sales, judiciously selected, and would by no means neglect the figures paid for crops.

The sales in question are Nos. 1, 5, 7, 8, 10, 14, 17, 19, 20 and 29 in the list at pages 20, 23. I am not at all satisfied with the Divisional Judge's reasons for rejecting these precedents. He says Nos. 1 and 8 (Rs. 50 per *kanal*) should be rejected because the areas are so small. He does not seem to have realised that, though Government has taken up 118 acres odd, this area is not the compact property of one man, but is divided minutely into very small holdings, in some of which are many shareholders with shares in some cases going as low as $\frac{1}{24}$. The average size of *holdings* is a little over $2\frac{1}{2}$ acres and the area owned *by each claimant* is something very low indeed. In these circumstances I see no good reason for the view that sales of small areas should be neglected. Next, he objects to No. 7 as a test because it was bought for a graveyard. I cannot see that this is any reason at all for rejecting it as a precedent; but as it is far above what appellants claim, I am content to leave it out. In No. 5 the rate is Rs. 50 a *kanal*. It may be that the purchaser wished to add it to his well-irrigated area, and he might perhaps be ready to pay a litle more than he otherwise would for it, but after all this is mere conjecture, and the rate is the same as in Nos. 1 and 8. No. 10 was sold at an absurdly low figure; but I think it should be borne in mind in assessing value—No. 14 ($3\frac{1}{2}$ *kanals*) sold at Rs. 25 odd, and No. 17 (10 *kanals*) at nearly Rs. 30 a *kanal*—I would take both into the calculation. No. 19, 5 *kanals*, went at Rs. 50 per *kanal*. No reason whatever has been given for neglecting this. None of these are said to be inflated prices due to Government's action. About No. 29 ($2\frac{1}{2}$ *kanals*) there is a mystery. Claimants say it was really Rs. 400 for the equity of redemption, and that the whole bargain cost

Rs. 1,350. Of this there is no adequate proof; but in my opinion there is some ground for supposing that mortgage rights were not sold for this sum of Rs. 400 but only equity of redemption, and as we do not know for certain the amount of the mortgage lien, the safest way is to leave this item out of account. I would utilise Nos. 1, 5, 8, 10, 14, 17, 19, and 20. This last is the average rate given by Colonel Leigh, Collector, in 1899, for land taken for the railway—a very large area. I can see no good reason for neglecting the bargain Colonel Leigh, an officer of great experience, made so long ago as 1899; and in this connection see *Munji Khetsey's case* (1), para. 3 in headnote. Taking all the numbers but the last, and keeping it as a separate test, I find that the average price is Rs. 28-10-6 per *kanal* to Colonel Leigh's Rs. 29-14-3.

Considering the steady increase in the value of land everywhere I see nothing unfair in these circumstances in fixing the fair value of *maira* land at Rs. 30 per *kanal*. In my opinion Lala Pran Nath would probably have come to a conclusion like this had he not made too much of the suggestion that in sale deeds prices had been overstated to defeat pre-emptors. We are assured, and it is not denied, that no pre-emption suit has been brought in the village in these ten years; and the list of claimants shews that none but Sayads own the lands taken up, while the names of purchasers at pages 20—23 are mostly of Sayads. There is thus no reason to discount the sale figures.

The *lipara* land comes next. Lala Pran Nath allowed Rs. 30 per *kanal*, the Collector Rs. 20, and the Divisional Judge Rs. 40. The area to be dealt with is *en bloc*, 14 acres, 3 poles and 19 roods; but here again it must be remembered that it is divided among ten holdings and many owners. The Divisional Judge has again refrained from making use of the evidence of previous sales. I agree with Mr. Turner that the sale to Khawas Khan should not be taken into account. I will give my reasons at length later, but I cannot see why the eight sales of *lipara* land, Nos. 3, 18, 21 to 24, 27 and 31 in the list at pages 20—23, should be wholly ignored. It is stated and not denied that six of these sales, being of small areas, less than a *kanal* each, sold for special reasons at Rs. 100 per *kanal*. But I see no reason why the two larger sales Nos. 3 and 27 (1 *kanal* 10 *marlas* and 3 *kanal* 2 *marlas*) should not be relied upon. The average price per *kanal* on this basis would be Rs. 52 odd per *kanal*. I see no reason whatever for refusing this. We have no safe materials for an estimate but these two sales.

(1) *I. L. R., XV Bom.*, 279.

Leaving out the special case of Khawas Khan for the present we come to the *chahi* land. Lala Pran Nath allowed Rs. 60, the Collector Rs. 80, and the Divisional Judge Rs. 100 per *kanal*. The claim was for Rs. 300, but in this Court the owners hold out only for Rs. 250. The area is 14 acres 33 poles. As no sales have taken place in the village, and only one in Jassian (adjoining) so long ago as 1893, and four in another neighbouring village, called Sarwala, we have not much to go upon. The Divisional Judge, on the basis of produce estimates, mentions the claimants' figure of Rs. 250 per *kanal* only to reject it; and then he takes 127 times the land revenue, the estimate of Mr. Butler of the Settlement Department, and finds Rs. 80 per *kanal* the figure. Putting one thing with another, he fixes Rs. 100 as fair. I am inclined to agree that the Rs. 250 estimate is excessive; and as the thing must be largely guesswork, I would not alter the Divisional Judge's figure, especially as the wells themselves have been separately valued. For them the Divisional Judge has given some Rs. 3,100 in all, and such wells are of no value apart from the land, so that this sum is really an additional compensation for the land treated as *chahi* land.

The claim of Rs. 19,000 for the wells is simply preposterous. Lala Pran Nath and the Divisional Judge, respectively, have allowed the following sums, if we correct a mere slip in the latter's figure for the fifth well :—

	Pran Nath.	Divisional Judge.
	Rs. a. p.	Rs. a. p.
(*a*) Saifali Shahwala ...	1,142 0 0	805 12 0
(*b*) Roshan Shahwala ...	679 0 0	503 0 0
(*c*) Ghanaya Shahwala ...	757 8 0	639 2 0
(*d*) Walayat Shahwala ...	736 0 0	623 12 0
(*e*) Muhammad Shahwala	526 0 0	533 12 0
Total	3,840 8 0	3,105 6 0

On the strength of the evidence of Babu Nihal Singh, Department Public Works Overseer, page 56, line 26, the owners claim Rs. 25 *per foot* of masonry below water. The Divisional Judge has given from Rs. 17-12-0 *per yard* down to Rs. 11-12-0, taking the Tahsildar's estimate. This officer was put in the witness-box, but was never examined on this point, and we have no evidence but Babu Nihal Singh's. In my opinion the Divisional Judge was not justified in taking as evidence the

preliminary report of the Tahsildar. I would allow the Babu's estimate here.

I set down here the increased awards necessary on this way of looking at the matter :—

Wells.	Additional sum allowed by Divisional Judge.	Additional now allowed.	Increase.	Total now allowed for well.
	Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.
(a)	94 8 0	450 0 0	355 8 0	1,161 4 0
(b)	47 0 0	300 0 0	253 0 0	756 0 0
(c)	52 8 0	250 0 0	197 8 0	836 10 0
(d)	35 8 0	150 0 0	114 8 0	738 4 0
(e)	35 4 0	225 0 0	189 12 0	723 8 0

And now we come at last to the *lipara* land of Khawas Khan. This was 14 *kanals* in area. He purchased it on 19th February 1904 from Nawab Shah and Amir Haidar Shah for Rs. 2,500, *i.e.*, at the rate of Rs. 178-9-2 per *kanal*. This was before the earliest notification under Section 6 of the Act, and nearly a year after the assembling of the first Committee at Campbellpore which was to decide whether Government would set up a Civil Station there, and what land (roughly) would be taken up. The contention of Khawas Khan is that the rate at which he was able to purchase—his purchase was apparently *bonâ fide* and for cash down—is the rate at which Government should compensate him, being in accordance with the market value *at date of notification*. Indirectly the same argument is put forward by all the other claimants thus—if the market value of Khawas Khan's plot was really Rs. 178 per *kanal* at date of notification then the market value of all the remaining *lipara* land, and perhaps also of other sorts of land, similarly situated, was also Rs. 178 per *kanal*. These persons all rely upon the first clause of Section 23 of the Act, under which the Court is to take into account the market value of the land at the date of notification under Section 6.

Mr. Turner for Government, relies upon the fifth clause of Section 24, under which the Court is forbidden to take into consideration "any increase in the value of the land acquired "likely to accrue from the use to which it will be put when "acquired"; and on the difficult question thus raised we have heard lengthy and learned arguments.

To begin with, I may note that we have already ruled that ground 14 of the grounds of appeal is inadmissible. In our opinion we cannot take into account prices obtained by Government in December 1905 and in 1906 on sales of portions of the lands acquired. Those sales are not, and cannot be, on the record, and enhanced rates obtained on them are certainly due to the cause mentioned in the fifth clause of Section 24 of the Act. The real point for discussion is this: Had Government immediately upon its making known its intention to acquire these lands published a notification under Section 6 of the Act, then without question the prices to be paid would be the normal market values of the lands at that time, irrespective of enhancement of value, prospective or immediate, due to the intended establishment of a Civil Station and bazar at Campbellpore. But Government delayed the notification more than a year, and the market value of all lands on the spot and near the spot must undoubtedly have risen, if the word "market value" be taken in its dictionary sense and not in a technical sense. Khawas Khan purchased at a rate far above what had obtained in previous years, a price which he would not have paid and which would not have been obtainable but for the intimation in March 1903 of the intentions of Government, and similarly any other persons, in February 1904, could have sold at enhanced rates though perhaps not at so much enhanced a rate as that paid by him. Should all this be taken into account? Should Government have to pay for its delay in issuing the notification? I am inclined to think not.

The learned counsel for the claimants have referred us to Cripps on the Law of Compensation, 4th Edition, pages 107 and 108. This is a work dealing solely with the law as it obtains in England; and no doubt, where Indian Statute law does not afford an adequate test, or where it is obscure, the principles of "Compensation" laid down in such a book might be usefully followed. But in the present case we have two sections of the Indian Act, Nos. 23 and 24, which set down in considerable detail the rules to be followed by the Courts in this country; and for this reason, I think, we need not discuss Mr. Cripp's ideas at all.

The Punjab rulings to which we have been referred are the following:—

Parma Nand v. *Secretary of State* (1), in which, at pages 136, 137, are certain remarks regarding the necessity for seeing

(1) 44 P. R., 1904.

what was "the most advantageous way in which the owner "can dispose of" the property, and also the usefulness of a valuation on net profits of houses.

Hira Nand v. *Secretary of State* (1) : in this case land was taken up near Lahore, and the principle followed was that the owner is entitled to have the price of his land fixed with reference to the "probable use which will give him the best return "and not merely in accordance with its present use or dis- "position."

Zulfikar Khan v. *Collector of Mianwali* (2): here the same principle was laid down, but the proviso, based upon Section 24, clause 5, of the Act, was insisted upon *that the Court must not take into account probable increase in value due to the setting up of the Civil Station of which it was to form a part.* This was a ruling of a single Judge.

This last ruling is exactly in point, and I would follow it. The argument of the claimants is that Government's delay in issuing the notification has allowed actual market value to rise; but to this the reply is that the rise is merely speculative. Government is not bound to complete an acquisition project; and persons dealing in these lands should have studied the Act, and they would have seen what Government would have to pay when it came actually to acquire them.

Again, it is contended that the words of clause 5, Section 24, do not, strictly speaking, apply, because each plot of land must be taken separately. It is argued that, when the Court is dealing with plot A and is trying to ascertain its market value at date of notification (Section 23, first clause), the test is the actual market values (in the dictionary sense) at that date of the surrounding plots B, C, D, &c. But this method of dealing with the matter would, except when only a single plot is taken up, nullify the fifth clause of Section 24 entirely. The correct way is to take the whole of the land together, and to hold here that we must assess each and every plot at the rates that would have obtained if Government had never announced any intention of making a Civil Station or bazar at all.

In regard to the "most advantageous" use of the land as a test of value, here again the circumstances shew that in all probability but for Government's intentions, the land would all have remained agricultural for an indefinite time to come. The principle is a thoroughly sound one, but it does not help

(1) 211 P. R., 1905. (2) 90 P. R., 1905.

the owners here. It was adopted in *Collector of Pona* v. *Kashi Nath* (1) and in *Prem Chand Burrel* v. *Secretary of State* (2) in which ruling I may note here that it is laid down also that the price which an owner may himself have paid for property, if above normal market value, is no test of what Government should be made to pay. I approve of this *dictum*, and it disposes of Khawas Khan's argument based on the very high price which he paid.

In my opinion, then, Section 23, Clause 1, and Section 24, Clause 5, must be read together; and market value in the former section means market value in the dictionary sense, tempered by the caution in the latter section.

Rajindra Nath Banerjee's case (3) does not help claimants. No doubt future utility should be taken into account in estimating market value; but here, apart from the setting up of the Civil station and bazar, no special "future utility" is visible.

In *Numji Khetsey's case* (4), already noticed, no doubt it is said that probable increase in values owing to the spreading of a town should be taken into account in these cases; but this means increase of building from natural causes apart from Government's intentions with regard to the land taken up.

I need not discuss any further authorities. I would have given Khawas Khan, had I tried the case below, compensation at the same rate as other owners, *i.e.*, Rs. 52 per *kanal*, but he has been allowed Rs. 100, and we cannot, in the absence of an appeal by Government, interfere with this.

The net result, then, is as follows: I would accept this appeal and in modification of the decree of the Divisional Judge, I would award to the appellants the following sums for the parcels of land, &c., indicated :—

Kinds of land.	Area.			Rate per acre.	Amount now awarded.		
	A.	R.	P.	Rs.	Rs.	A.	P.
Maira	80	1	19	240	19,288	8	0
Lipara	14	8	19	416	6,185	6	5
Lipara of Khawas Khan ...	1	3	0	800	1,400	0	0
Chahi	14	0	33	800	11,365	0	0
Carried over ...	...	...	...	.....	38,238	14	5

(1) *I. L. R., X Bom.*, 585.
(2) *I. L. R., XXXII Calc.*, 343.
(3) *I. L. R., II Calc.*, 103.
(4) *I. L. R., XV Bom.*, 279.

Kinds of land.	Area. A.	B.	P.	Rate per acre. Rs.	Amount now awarded. Rs.	A.	P.	
Brought forward ...	...	...	...	...	38,238	14	5	
Bakkar	1	0	32	40	48	0	0	
Banjar Jadid	0	0	28	32	5	9	7	
Banjar Kadim	0	2	32	32	22	6	5	
Ghair Mumkin	5	0	35	5	26	1	6	
Trees as per Collector's award	...	...	...	...	152	0	0	
Three trees at tank	...	...	..	...	30	0	0	
Houses	...	...	...	...	440	0	0	
Wheat crops	...	...	..	...	88	8	0	
Stone wall	...	...	...	...	58	0	0	
Well of Saifali Shah	...	...	..	...	1,161	4	0	
Well of Roshanali Shah ...	...	...	...	...	756	0	0	
Well of Ghanaya Shah ...	...	...	..	...	836	10	0	
Well of Wilayat Shah ...	...	..	..	...	738	4	0	
Well of Muhammad Shah ...	...	...	...	...	723	8	0	
Fakir's hut	...	...	...	...	20	0	0	
Extra for 10 kanals *las*, ...	...	...	..	...	50	0	0	As regards this, we heard no argument.
					43,384	1	11	
Add 15 per cent., except on crops and trees					6,467	15	1	
Total ...					49,852	1	0	

The claim made by the appellants in the Divisional Court was absurdly high, and even that made in this Court (Rs. 45,000 odd, additional money) was immensely more than they were entitled to. Therefore, in my opinion, the parties should bear their own costs.

RATTIGAN, J.—I entirely agree and have nothing to add to my brother's exhaustive judgment. The appeal is accepted *pro tanto*, and each party will bear his own costs. 12*th Feby.* 1907.

Appeal allowed.

No. 64.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

REVISION SIDE.

HARYA,—(DEFENDANT),—PETITIONER,

Versus

MUL CHAND,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 1015 of 1904.

Insolvency—Omission to frame schedule—Creditor not debarred from instituting suit—Civil Procedure Code, 1882, *Sections* 351, 352.

Held that where in an insolvency proceedings no schedule had been framed as contemplated by Section 352 of the Code of Civil Procedure a creditor is not, by reason of his debt having been entered in the schedule filed by the insolvent with his application for insolvency, debarred from suing for his debt.

Arunachala v. *Ayyavu* (1) followed.

Penhearow v. *Partab Singh* (2) considered and distinguished.

Petition for revision of the order of Lala Mul Raj, Judge, Small Cause Court, Lahore, dated 7th January 1904.

Jowala Parshad, for respondent.

This was a reference to a Division Bench made by Lal Chand, J., to determine that where in an insolvency proceedings no schedule had been framed as contemplated by Section 352 of the Code of Civil Procedure whether a creditor could recover the amount of his debt by a regular suit.

The order of reference by the learned Judge was as follows :—

18th May 1906. LAL CHAND, J.—The petitioners in this case were sued on a bond for Rs. 53, including interest. Harya, defendant, pleaded that he had already been declared an insolvent in proceedings to which plaintiff was a party and of which he had due notice and that therefore plaintiff could not sue him on the bond. The other defendant Jalal Din pleaded that the amount due under the bond had been repaid by Harya, defendant, who alone had borrowed a further sum of Rs. 25, which was entered in the list attached to the application for insolvency and therefore he could not be sued.

No evidence was produced by either side and the lower Court proceeded to decree the claim as defendants admitted having executed the bond.

The lower Court has entirely ignored the pleas set up by the defendants. There may be some justification for ignoring the plea set up by defendant 2 as he did not produce any evi-

(1) *I. L. R., VII Mad.*, 318. (2) 76 *P. R.*, 1899.

dence to prove that the amount due under the bond had been repaid by Harya, defendant. But there was no ground for not deciding Harya's plea that he could not be sued as he had been declared an insolvent in proceedings to which plaintiff was a party.

This plea is repeated in the application for revision, and it is evidently necessary to consider and decide its validity. The insolvency proceedings show that the plaintiff was entered as a creditor in the list filed with the application for insolvency and that notice was duly served upon him, among other creditors, to show cause against the applicant being declared an insolvent. Plaintiff, however, did not appear, though some other creditors did appear, and ultimately after recording evidence for the applicant Harya the Court declared him an insolvent under Section 351, Civil Procedure Code, and called creditors to register their debts at the next hearing on 22nd December 1900. None of the creditors, however, appeared to prove their debts and the case was accordingly ordered to be filed on 22nd December 1900. The question is whether under such circumstances the plaintiff, whose name is entered in the schedule filed with the application for insolvency, is debarred from suing on his bond.

I am inclined to think he is not.

As I read Section 352, Civil Procedure Code, the declaration made under Section 351 operates as a decree in favour of such creditors only who actually appear to prove their debts after declaration made under Section 351 and whose names as such are then entered in the schedule to be prepared by the Court under Section 352, Civil Procedure Code.

This view, however, does not appear to be quite consistent with the judgment in *Penhearow* v. *Partab Singh* (1). There apparently a schedule prepared before the declaration made under Section 351 was held to be a sufficient compliance with the provisions of Section 352, and plaintiff whose name was entered in that schedule was held as debarred from suing. So far as I can discover there is no provision in the Code for preparing a schedule before declaring insolvent under Section 351, and possibly I surmise that the schedule mentioned in the judgment *Penhearow* v. *Partab Singh* was the list filed with the application for insolvency. If this surmise be correct it would not at all in my opinion comply with the provisions of Section 352, Civil Procedure Code. As already observed the schedule

(1) 76 *P. R.*, 1899.

referred to in Section 352, is a schedule prepared after the declaration under Section 351, and where no such schedule has been prepared owing to non-appearance of the creditors to prove their debts would the declaration under Section 351 operate as a decree in favour of creditors whose names are entered in the schedule attached to the original application for insolvency.

As the judgment in *Panhearow* v. *Partab Singh* (1) is not clear and it is at least doubtful whether it was intended to apply to a case like the present, I refer the case to a Division Bench for decision. Parties to be informed.

The judgment of the Court was delivered by

2nd Feby. 1907. LAL CHAND, J.—The facts of this case are given in full in the referring order and need not be recapitulated. The case appears to be on all fours with *Arunachala* v. *Ayyavu* (2), and we agree with the view taken in that case and hold that the suit is maintainable. Possibly there was some order in *Penhearow* v. *Partab Singh* (1) adopting the list filed under Section 345, Civil Procedure Code, as a schedule under Section 352, Civil Procedure Code. There is none however in the present case, and we are not prepared to hold that a list of debts filed under Section 345, Civil Procedure Code, prior to a declaration under Section 351, Civil Procedure Code, is a schedule as required by Section 352, Civil Procedure Code. It is necessary that the Court should by order determine the persons who have proved themselves to be the insolvents' creditors and their respective debts and then frame a schedule of such persons and debts. In the absence of any such determination by Court the declaration under Section 351, Civil Procedure Code, that the applicant was an insolvent cannot be deemed to be a decree in favour of the respondent for the amount due to him. The suit in consequence is not barred as *res judicata* and is maintainable. We dismiss the petition for revision but without costs, as the suit is due to respondent's own failure to appear and prove his debt in the insolvency proceedings.

Application dismissed.

(1) 76 P. R., 1899. (2) *I. L. R., VII Mad.*, 318.

No. 65.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

SOBHA SINGH,—(PLAINTIFF),—APPELLANT,

Versus

KISHORE CHAND AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 27 of 1907.

Custom—Alienation by male proprietor—Alienation of ancestral estate in order to carry on speculative suits for pre-emption—Legal necessity—Revision—Power of Chief Court to interfere on questions other than in respect of which the application was admitted—Punjab Courts Act, 1884, Section 70 (1) (b) (iii).

Held that advances made to agricultural proprietors on the security of ancestral land to provide them with funds to fight out speculative suits for pre-emption can under no circumstances be regarded as incurred for legal necessity and alienees who make such advances cannot reasonably ask the Courts to regard such alienations as made for necessary purpose.

Held also that under clause (*iii*) of the proviso to Section 70 (1) (*b*) of the Punjab Courts Act, 1884, the Chief Court cannot exercise its revisional powers except in regard to those points in respect of which the application under Section 70 (1) (*b*) has been admitted.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 14th July 1906.

Chuni Lal, for appellant.

Ganpat Rai, for respondents.

The judgment of the Court was delivered by

SHAH DIN, J.—The suit out of which this appeal has arisen was brought by the plaintiff-appellant to contest a mortgage of 530 *kanals* and 15 *marlas* of land effected by his father in favour of the defendants on 5th October 1896 for Rs. 1,000. The consideration for the mortgage consisted of two items of Rs. 430 and Rs. 570, the legal necessity in respect of which, as explained in the deed, was stated to be as follows: (1) Rs. 430 were to be paid into Court in a pre-emption suit in which an *ex-parte* decree had been obtained by the mortgagor on 8th August 1896; and (2) Rs. 570 were required for purposes of another pre-emption case which was then pending. It appears that the sum of Rs. 430 was actually paid into Court by the mortgagor soon after the mortgage, though it was taken back by him on the *ex-parte* decree being set aside. In the other case the suit was dismissed and therefore Rs. 570 were never paid into Court at all. In the present suit the plaintiff alleged that the land was ancestral, and that as the mortgage was not made for consideration and legal

5th March 1907.

necessity, it was void against him and did not affect his rights of succession to the land. The defendants pleaded that the land was self-acquired of the plaintiffs' father, that the mortgage was for consideration and necessity, that the plaintiff had acquiesced in the alienation, and that the suit was barred by limitation. The first Court found that the plaintiff had failed to prove that the land in suit was the ancestral property of his father; that the alienation was made for necessity, and that the plaintiff had acquiesced in the mortgage. It therefore dismissed the plaintiff's suit.

On appeal the learned Divisional Judge, without properly going into the questions of the nature of the property and the plaintiff's alleged acquiescence in the alienation, held that the mortgage was for necessity, and on this ground upheld the decree of the first Court.

The plaintiff applied to this Court for revision under Section 70 (1) (*b*) of the Punjab Courts Act and his revision was admitted by Mr. Justice Chatterji as an appeal in respect of the question whether the necessity for the mortgage as regards the sum of money (Rs. 570) alleged to have been required for the pre-emption suit that was dismissed by the First Court, was or was not established. The plaintiff's application for revision having been admitted in respect of this question alone, we cannot, under clause (*iii*) of the proviso to Section 70 (1) (*b*), treat the question of the necessity as regards the sum of Rs. 430 which has been decided by the Lower Appellate Court in defendants' favour as an open one, and the arguments on both sides were, therefore, limited to the alleged necessity for Rs. 570.

Now as regards this item the learned Divisional Judge has contented himself with remarking that "the defendants had "more than sufficient reasons to believe that the money was "required for the purpose of acquiring land by pre-emption," and has held upon the authority of the decision of this Court in *Uttam Singh* v. *Buta Singh* (Civil Appeal No. 29 of 1902) (1), that "the alienation of ancestral land for such a purpose must be "held to have been for valid necessity." The authority cited, however, is not in point and does not support the broad proposition which the Divisional Judge has laid down in this case. The question of necessity for an alienation has to be determined in each case with reference to its particular facts; and all that was held in the decision above referred to was that the evidence on the record was sufficient to satisfy the Court "that the sale "in suit was effected for the purpose of increasing the estate of "the family of the appellants in Bara Pind and was an act of

(1) 67, P. L. R., 1903.

"good management within the power of the vendors, and was "not assailable by the sons of one vendor." In the present case there is not the remotest suggestion, nor is there any evidence on the record to substantiate any such allegation, if one were made, that the suit for pre-emption was instituted with the sole object of increasing the estate of the family and that the mortgage for Rs. 570 was, all things considered, an act of good management. No doubt there may be cases in which circumstances may justify the temporary alienation of ancestral land by a pre-emptor for the purpose of raising the necessary funds to pay into Court the purchase money; but in all such cases the contemplated benefit to the pre-emptor's estate, such as would support a finding as to the alienation being an act of good management, must be clearly and unequivocally established. The institution of a speculative suit for pre-emption, which, as here, may be unsuccessful and which may have been undertaken simply to satisfy a mischievous craving for litigation can, under no circumstances, be a sufficient justification for alienating ancestral land, and the alienees who advance money to pre-emptors to provide them with sinews of war to fight cases of this description cannot reasonably ask the Courts to regard the alienations made in their favour as for legal necessity.

We think, therefore, that the learned Divisional Judge was not justified in holding that as regards the item of Rs. 570 the mortgage in dispute was effected for valid necessity. This being our view, if the decision of the appeal had turned solely upon the question of necessity for the mortgage, we should have held that the plaintiff was bound by the mortgage to the extent of Rs. 430 only. It is urged, however, for the respondents that the Divisional Judge has not disposed of the other points that arise in the case and which go to the root of the plaintiff's claim, *viz.*, that the property in suit was self-acquired of the mortgagor and that the plaintiff acquiesced in the alienation in question. On both these points the first Court had found in favour of the defendants, and a finding on either of these adverse to the plaintiff by the Lower Appellate Court would have sufficed to dismiss his claim. As the respondents are clearly entitled to a decision on each of these questions, and as the Lower Appellate Court has not disposed of them in its judgment (the finding as to the 165 *kanals* of land being ancestral property does not appear to have been come to after a full consideration of the matter) we set aside the judgment and decree of the Lower Appellate Court and remand the case for decision with reference to the foregoing remarks.

Appeal allowed.

No. 66.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

APPELLATE SIDE.

SOBHA RAM,—(PLAINTIFF),—APPELLANT,

Versus

RAM DAS,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 1329 of 1906.

Arbitration—Award—Receiving evidence from one side in absence of other—Misconduct—Award set aside—Decree on merits—Appeal—Competency of Appellate Court to question the legality of the order setting aside award—Civil Procedure Code, 1882, Section 521.

Where arbitrators held meetings and took the evidence produced by one party in the absence of the other party which was wholly unavoidable and did not give the latter sufficient opportunity to produce his own evidence.

Held, that they were guilty of Judicial misconduct within the meaning of Section 521 of the Civil Procedure Code and that their award was not valid, and was rightly set aside by the Court.

Query—Whether, in a case in which there has been an order of reference to arbitration under Section 508, Civil Procedure Code, and an award has been delivered by the arbitrators but has been set aside by the Court under Section 521, and a decree is passed on the merits, it is open to an appellate Court on an appeal against that decree to consider the question of the legality of the order setting aside the award?

Further appeal from the decree of H. Scott Smith Esquire, Divisional Judge, Rawalpindi Division, dated 11th October 1906.

Beechey, for appellant.

Sukh Dial, for respondent.

The judgment of the Court was delivered by—

6th March 1907. SHAH DIN, J.—The judgment in this appeal will also dispose of the connected appeal No. 1331 of 1906.

The plaintiff Sobha Ram sued his nephew Ram Das for recovery of Rs. 1,000 cash, and for possession of 191 *kanals* 6½ *marlas* of land on the allegations that on 29th May 1894 they divided their joint estate between themselves with the exception of Rs. 1,000 in cash, debts due to the family to the amount of Rs. 1,000, and 100 *bighas* of land, which were set apart for the maintenance of Mussammat Sudhi, grandmother of the plaintiff and mother of the defendant; that the cash was intact on the death of Mussammat Sudhi and came into the possession of the defendant, who also had realised the debts for Rs. 1,000; that Mussammat Sudhi having died, the plaintiff was entitled to half the share of the property in question.

The defendant pleaded, *inter alia*, that Mussammat Sudhi had spent in her life-time the cash and the sums realised on account of debts ; that as these items had been assigned to her as her absolute property she had full control over them ; and that he himself had spent Rs. 1,600 on her funeral ceremonies, half of which the plaintiff was bound to pay before obtaining a decree for half the land.

On 20th February 1906 the parties applied to the Court asking it to refer the matter in dispute to certain arbitrators named by them, and the Court made the order of reference accordingly. On the 22nd March 1906 the arbitrators filed their award in Court. The award being in plaintiff's favour, the defendant applied to have it set aside on the grounds that the arbitrators had taken the plaintiff's evidence in the absence of the defendant, who was prevented from attending on the date fixed for evidence owing to the serious illness of his daughter which resulted in her death, and that the arbitrators had not given the defendant an opportunity to produce his own evidence. The Court allowed this objection and setting aside the award proceeded to decide the suit upon the merits.

It found that the defendant was liable for the Rs. 2,000 cash and debts aforesaid, and that therefore the plaintiff was entitled to Rs. 1,000. After deducting from this sum Rs. 400 due from the plaintiff to defendant, as the former's half share of the funeral expenses incurred by the latter, in connection with Mussammat Sudhi's death, the Court gave the plaintiff a decree for Rs. 600 and 50 *bighas* of land.

On appeal the Divisional Judge held, with reference to the plaintiff's contention that the first Court should have passed a decree in accordance with the arbitrator's award, dated 22nd March 1906, that he could not go behind the order of the Court setting a side the award, *Ganga Prasad* v. *Kura* (1). On the merits of the case he held that the Rs. 2,000 cash and debts were assigned to Mussammat Sudhi as her share out of the family property and not merely for her maintenance ; that it was not shown by the plaintiff that the money was kept intact until her death, and that then, or previously, it came into defendant's possession ; and that though the defendant had performed the funeral ceremonies of the deceased lady, he had failed to prove that the income from her estate

(1) *I. L. R., XXVIII All.*, 408.

was not sufficient to meet the expenses incidental thereto. The decree of the first Court was, therefore, modified to one in favour of the plaintiff for possession of 50 *bighas* of land only.

Both parties have appealed to this Court. In this appeal the first contention raised on behalf of the plaintiff is that the lower Appellate Court had full power to go behind the order of the first Court setting aside the award, that the award was set aside on insufficient grounds as no judicial misconduct on the part of the arbitrators had been made out, and that a decree should have been passed in terms of the award. The authorities on this question seem to be rather conflicting. The plaintiff's contention derives some support from the decisions in *Nanak Chand* v. *Ram Narayan* (1), *Abdul Rahman* v. *Yar Muhammad* (2), and *George Vastian Soury* (3), whilst the defendant's position is fortified by the rulings in *Ganga Prasad* v. *Kura* (4), and *Shyama Charan Pramanik* v. *Prolhad Durwan* (5).

In the view, however, which we take of the case it is unnecessary to come to a decision on the legal point thus raised, as we think, after carefully considering the matter in issue and referring to the record, that the first Court was perfectly justified in setting aside the award of the arbitrators on the ground that the latter had been guilty of judicial misconduct in having taken the plaintiff's evidence in the absence of the defendant which was wholly unavoidable, and should have been condoned, and in having omitted to give the latter sufficient opportunity to produce his own evidence.

On the merits, after hearing argument and perusing such portions of the record as were relied upon by each party in support of his appeal, we entirely concur in the conclusions come to by the learned Divisional Judge in his considered and carefully worded judgment.

We accordingly dismiss this appeal and the appeal No. 1331 of 1906. The parties will bear their own costs throughout.

Appeal dismissed.

(1) *I. L. R., II All.*, 181, *F. B.* (2) *I. L. R., XXII Mad.*, 202.
(3) *I. L. R., III All.*, 636. (4) *I. L. R., XXVIII All.*, 408,
(5) 8 *Cal. W. N.*, 390.

No. 67.

Before Mr. Justice Johnstone.

MANOHAR LAL,—(DEFENDANT),—PETITIONER,

Versus

PARS RAM AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 2087 of 1904.

Custom—Pre-emption—Pre-emption on sale of house property—Mohalla Barwala, Jagadhri—

Held, that the custom of pre-emption in respect of sales of house property by reason of vicinage does prevail in Mohalla Barwala of the town of Jagadhri.

Dhan Devi v. *Kanshi Ram* (1), *Mamon* v. *Ghaunsa* (2), referred to.

Petition for revision of the order of T. J. Kennedy, Esquire, Divisional Judge, Ambala Division, dated 19th April 1904.

Shadi Lal, for petitioner.

Dwarka Das, for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—This was a suit for pre-emption, the sale which constituted the cause of action having been a sale by auction under a decree. *11th March* 1907.

The ground on which the right is based is vicinage, the property being a house in the town of Jagadhri in Muhalla Barwala, and plaintiff owning house property immediately adjoining. The first Court gave Plaintiff a decree, holding that the custom of pre-emption did prevail in the muhalla and that plaintiff, even if he intended after purchase to dispose of the property to outsiders, was entitled to a decree. The Divisional Judge dismissed vendee's appeal, and he comes up here on the revision side.

The only question of any importance for this Court is whether the custom of pre-emption on the score of vicinage prevails in the sub-division or not. The muhalla is quite small, said to contain 15 to 20 houses only. In so small an area it is not to be expected that much litigation has occurred, and I am inclined to agree with petitioner, see ground 2 of petition, that the muhalla is not by itself a sub-division of the town. This brings in the neighbouring bazars and muhallas, and in them there is abundant proof by positive instances of the existence of the custom of pre-emption. Further, neither in the muhalla itself nor in the neighbouring streets has there been a single

(1) 38 *P. R.*, 1906. (2) 99 *P. R.*, 1906.

case in which pre-emption was claimed and the claim met by a decision *against* the existence of the right. In the two cases within the muhalla one was decided in favour of pre-emptor by an award of arbitrator and the other on a compromise. In my opinion in these circumstances the conclusion is clear that the custom does prevail in Muhalla Barwala.

The above remarks show how this case is distinct from cases like *Imam Din* v. *Ghulam Muhammad* (1), in which it was laid down that where *no* instances are forthcoming in a recognised sub-division of a town, instances in other sub-divisions are insufficient to prove a custom in that sub-division, for here there are two instances in the muhalla *plus* others in the neighbouring streets which furthermost likely are in the same "sub-division". In a similar manner I would distinguish *Raman Mal* v. *Bhagat Ram* (2), and I would refer to *Dhan Devi* v. *Kanshi Ram* (3) (Single judge), and *Mamon* v. *Ghaunsa* (4) (Division Bench), as supporting the above-stated manner of looking at the case. The last mentioned case was very like the present one, though of a different town.

As regards the plea that the claim is a *benami* one, I agree entirely with the Courts below. The law is clear: I can find nothing in it which prevents a pre-emptor from enforcing his rights because there is reason to suppose that he does not intend to retain the property in his own hands after he has secured it.

I hold that the custom of pre-emption of houses on the score of vicinage does prevail in Muhalla Barwala, Jagadhri Town, and that plaintiff is entitled to enforce his right under that custom.

Dismissed with costs.

Application dismissed.

No. 68.

Before Mr. Justice Rattigan.

APPELLATE SIDE.

RAM RAKHA,—(PLAINTIFF),—APPELLANT,

Versus

SANT RAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 272 of 1907.

Custom—Pre-emption—Pre-emption on sale of shops—Katra Ramgarhian, Amritsar city.

Found, that the custom of pre-emption in respect of sale of shops by reason of vicinage in Katra Ramgarhian of the city of Amritsar had not been established.

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(1) 86 *P. R.*, 1901. (3) 38 *P. R.*, 1906.
(2) 17 *P. R.*, 1895. (4) 99 *P. R.*, 1906.

Sundar Singh v. *Mehr Singh* (1) referred to.

Further Appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Amritsar Division, dated 7th February 1906.

Ram Bhaj Datta for appellant.

Turner for Respondents.

The Judgment of the learned Judge was as follows :—

9th March 1907. RATTIGAN, J.—The question in this case is really whether the custom of pre-emption in respect of shops exists in the *Katra* Ramgarhian of Amritsar city? Mr. Ram Bhaj Datta for appellant, no doubt, because he saw the difficulty of proving the existence of any such custom, wished to argue that the property sold was not really a shop but an ordinary residential house. I could not, however, see my way to listening to this argument in view of the fact that the said property has both in the first Court, and also in the lower Appellate Court, been treated by all parties as a shop. It is so described in the plaint and in plaintiff's own plan and the issue framed by the first Court on the parties' pleadings was "whether the custom of pre-emption in respect of shops exists in *Katra* Ramgarhian." Apparently until the case came into this Court no one regarded the property as other than a shop, and under these circumstances I do not think it would be just or equitable to allow plaintiff, at this late stage of the proceedings, to completely alter the nature of his case and to argue that the property was in reality only an ordinary dwelling-house. The plaintiff in the lower Courts had the advantage of the services of one of the most experienced members of the Amritsar Bar, and it is idle to contend that in cases when pre-emptive rights in towns are asserted, a plaintiff does not know the difference between a right of pre-emption as regards *shops* and a right of pre-emption as regards ordinary *houses*. For the purposes of this appeal, therefore, I must assume that the property in dispute was a *shop*. The next question is whether plaintiff, upon whom the burden of proof rested, has been able to prove that in the *Katra* Ramgarhian custom recognises a right of pre-emption in respect of the sale of a shop? And here I have no hesitation in agreeing with the Divisional Judge that no such custom (which is of a very exceptional character) has been established. The oral evidence except in so far as it relates to definite instances in which the alleged custom has been set up, is necessarily of no value and practically plaintiff's case rests on the four precedents cited by him. In a very recent case, one of these

(1) 54 P. R., 1907.

four precedents in fact, a learned Judge of this Court held the custom of pre-emption had not been proved to exist in this *Katra* in respect to a sale of a shop (*Sunder Singh* v. *Mehr Singh* (1). In arriving at this conclusion the learned Judge did not ignore the three other so-called precedents now relied upon by plaintiff. On the contrary he dealt with them specifically and held that they did not establish the existence of the alleged custom. I have myself no hesitation in agreeing with this conclusion. In the case of *Sant Singh* v. *Arur Singh*, which was decided by a Munsif, there was no enquiry into custom, no issue upon the point, and practically no finding thereon. In the 2nd case, *Taj Singh* v. *Gujar Singh*, the munsif, after a very summary trial, decided in favour of the existence of the custom upon the oral evidence of three or four witnesses. In the third case, *Mussammat Ram Kaur v. Mul Singh*, the dispute between the parties was compromised. I cannot regard these three instances as sufficient proof of the existence of the custom, especially in the face of this Court's decision in the *fourth* case, *Sundur Singh* v. *Mehr Singh*. I might also observe that this suit was instituted on the 10th may 1905. Under the Punjab Pre-emption Act (II of 1905), which came into force the very next day (i.e., on the 11th May 1905) "no right of pre-emption" exists in respect of the sale of a shop (see 13 (2)). I allude to this fact merely *en passant* for of course if plaintiff could have proved in this case that the custom did exist in respect of the sale of a shop he would have been entitled to succeed as the suit was instituted one day before the said Act came into force. I hold, however, that the plaintiff has failed to prove the existence of any such custom, and I accordingly dismiss this appeal with costs. In describing this as an appeal I presume that the application for rivision was admitted as such under section 70 (*i*) (*b*) of the Punjab Courts Act.

Appeal dismissed.

No. 69.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

APPELLATE SIDE.

MUHAMMAD DIN,—(DEFENDANT),—APPELLANT,

Versus

JAWAHIR AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 516 of 1906.

Custom—Adoption—Adoption of daughter's son—Sekhu Jats of Tahsil Daska, Sialkot District—Burden of proof.

Found, in a suit the parties to which were Sekhu Jats of the Daska Tahsil of the Sialkot District, that no custom was proved recognising the

(1). 54 P. R., 1907.

adoption of a daughter's son in presence of near collaterals, such as a cousin or cousin's sons, the burden of proof being upon those setting up such adoption.

Ganpat v. *Nanak Singh* (1), and *Nanak* v. *Nandu* (2) referred to.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 8th June 1905.

Gokal Chand for appellant.

Shahab-ud-din for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—One Wadhaya, a Sekhu Jat of Mauzah Chak Khina in the Daska Tahsil of the Sialkot District, adopted his daughter's son in February 1904, and executed a registered deed of adoption in his favour. The plaintiffs, who are very near relations, that is, the first cousins and sons of first cousins, of Wadhaya, brought the suit out of which this appeal has arisen for a declaration that the adoption in question was invalid by custom. Both the lower Courts have found, after a consideration of the relevant clauses of the *Riwaj-i-ams* of 1855 and 1893 and upon an examination of the instances relied upon by the parties that the defendants, upon whom the *onus* lay, have failed to prove that the adoption was valid by custom. They have consequently decreed the claim. *15th March* 1907.

The adopted son appeals to this Court; and the question for decision in this appeal is whether, among Sekhu Jats of Tahsil Daska, custom empowers a sonless proprietor to adopt his daughter's son. The *onus* of proving the validity of the alleged adoption lies admittedly on the appellant, and we have to see whether, upon the evidence adduced by him, he has succeeded in discharging the *onus*. After giving our best consideration to the argument of the appellant's counsel and referring to the record, we think that he has not done so.

The answer to question 19 in the old *Riwaj-i-am* of 1865 is to the effect that in the absence of sons a brother's son, and in his absence, a daughter's or a sister's son can be adopted. No instances are given in support of this entry. The *Riwaj-i-am* of 1893 is opposed to this, as all the tribes of the Daska Tahsil (in which the parties to this case reside) state therein that it is only in *default of collaterals* that a daughter's son can be adopted (see Customary Law of the Sialkot District, page 22—answer to question 71). There being thus a Conflict between the two

(1) 81 *P. R.*, 1900. (2) 29 *P. R.*, 1904.

Riwaj-i-am, the appellant cannot rely upon the entry in the earlier *Riwaj-i-am* as serving to shift the *onus* of proof on to the plaintiffs.

The oral evidence in the case is of no value. The Office Kanungo, who was appointed a local commissioner to make an enquiry into the question of custom on the spot, mentions in his report two old instances culled from the Settlement pedigrees of the villages concerned, namely, (1) in *Mauzah* Sahuwala, in which one Sher Muhammad gifted his property to his daughter's son, Jalal, and (2) in *Mauzah* Bhopanwala, in which Dulla, a Chima Jat, adopted his sister's son, Ditta. The judicial decisions relied upon by the appellant are as follows :—

(1) *Fakir* v. *Ram Ditta*, decided on 29th July 1888. This is of no value, as the suit was held to be barred by limitation and there was no decision on the question of custom involved.

(2) *Sher Singh* v. *Dassan*, decided in 1871. In this case the nephews of the donor contested a gift of 3rd of his property to a daughter's son, who had also been adopted. The suit was dismissed and there was no appeal. The parties were Jima Jats of the Sialkot *tahsil* and the question of the validity of the adoption does not seem to have been properly considered.

(3) *Chanda* v. *Karam Dad*, decided by the Divisional Judge, Sialkot, on 25th January 1895. The parties were Chima Jats of *tahsil* Daska. The alienation in dispute was made by one Buta, who executed a registered will in favour of his sister's son who was also his son-in-law, and had apparently been adopted by him. The plaintiffs were nephews of Buta. The Divisional Judge held that the defendant had been living with Buta as his *khanadamad*, and that his adoption was valid by custom.

(4) *Mula* v. *Arura*, decided by the Divisional Judge, Sialkot, on 17th April 1895. The parties were Bajwa Jats of *tahsil* Sialkot, and the question for decision was whether the adoption of a sister's son was valid by custom.

The Divisional Judge upheld the adoption, but his decision was reversed on appeal by this Court, on the ground that no adoption had in fact taken place.

(5) *Muhammad Bakhsh* v. *Ditta*, decided in 1880. The parties were Sandhu Jats of *tahsil* Sialkot. The case was one of gift and not of adoption. The judgment, of which a copy is placed on the file, does not fully state the facts of the case nor

does it properly discuss the question of custom involved. The plaintiffs rely upon the following precedents :—

(1) *Ishar* v. *Devia*, decided on 1st June 1904. The parties were Jats resident in *tahsil* Daska. The Court held that the adoption of a daughter's son was invalid by custom in the presence of nephews.

(2) *Nanda* v. *Nanak*, decided on 31st May 1909. The parties were Jats of *tahsil* Sialkot. The adoption of a sister's son was held invalid in the presence of a nephew.

(3) *Hari Singh* v. *Hira Singh*, decided on 2nd January 1877. The parties were Jats of *tahsil* Daska. The adoption of a daughter's son was held invalid in the presence of a nephew.

(4) *Hira* v. *Ditta*, decided on 20th April 1904. Parties were Jats of *tahsil* Sialkot. The adoption of a sister's son was held invalid in the presence of collaterals, of the adoptive father.

Coming now to the published decisions of this Court, we find that *Ganpat* v. *Nanak Singh* (1) and *Nanak* v. *Nandu* (2) support the plaintiff's contention. In *Ganpat* v. *Nanak Singh* it was held, after considering the entries in the *Riwaj-i-ams* of 1865 and 1893 bearing upon the question of custom, that among Kalwan Jats of the Sialkot District the adoption of a daughter's son was invalid by custom. In *Nanak* v. *Nandu* it was held that among Ghumman Jats of the Sialkot District the adoption of a sister's son is invalid in the presence of a cousin.

On the other hand, the appellant's counsel is unable to cite a single decision of this Court in favour of the validity of the adoption set up in this case.

On the whole, then, after a careful consideration of the evidence and the materials before us, we cannot but hold that the appellant, upon whom the *onus* lay of proving affirmatively that his adoption was valid by custom has failed to discharge that *onus*.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

(1) 81 *P. R.*, 1900. (2) 29 *P. R.*, 1904.

No. 70.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

HAR GOPAL,—(PLAINTIFF),—APPELLANT,

Versus

APPELLATE SIDE.

BHAGWAN SAHAI AND OTHERS,- (DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 268 of 1906.

Mortgage—Conditional sale—Agreement by instalments or in default the mortgage would become a sale—Applicability of Regulation XVII of 1806 *to such agreements—Regulation XVII of* 1806*—Stipulated period.*

Held, that a deed of mortgage whereby money was borrowed on the security of landed property upon a stipulation that the sum borrowed would bere paid by annual instalments and in case of default as to any instalment the mortgage would become a sale for the balance due at the time of default could not be treated as a mortgage by conditional sale subject to the provisions of Regulation XVII of 1806 and is not liable to the conditions and incidents applicable under the Regulation to such sales.

Bagh Sing v. *Basawa Singh* (1) followed.

Held also, that the term "stipulated period" in Section 8 of the Regulation means the full term on the expiry of which the mortgage money is payable notwithstanding that under its terms the mortgagee might, on a default being made, be entitled to foreclose at an earlier period.

Kishori Mohan Roy v. *Ganga Bahu Debi* (2) followed.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Delhi Division, dated 13th January 1906.

Harris for Appellant.

Morrison for Respondents.

The judgment of the Court was delivered by—

15th March 1907. JOHNSTONE, J.—This is a case of a peculiar kind. The suit is one for possession by way of foreclosure. The deed was executed by one Nainu on 26th September 1890 and by it the land was mortgaged for Rs. 150. Nainu promised to pay each year Rs. 30 of the principal and the interest for the year and agreed (in the deed) that on default the land should be deemed sold for the balance due at time of default. Nothing was paid. Mortgagee caused notice to be served on Nainu (so he says) on 5th July 1892 under the Regulation, and his case is that on the expiry of the year of grace (5th July 1893) he became owner of the property. Nevertheless he did nothing to enforce his alleged rights until 5th July 1905, on which day, one day before

(1) 50 *P. R.*, 1906. (2) *I. L. R., XXIII, Cal.*, 228, *P. C.*

the expiry of 12 years, he filed the present suit, Nainu having by then been dead 7 or 8 years. Defendants, Nainus' heirs, pleaded limitation want of consideration for the mortgage, absence of prior demand as required by the Regulation, and non-service of, and irregularities in, the notices. The first Court found the suit within time, the notice duly served, prior demand made, the notice quite regular, and consideration proved, and gave plaintiff his decree.

The learned Divisional Judge found that there was no time bar, but declined to accept the evidence of service of notice. He therefore accepted the appeal of the defendants and dismissed the suit; and now plaintiff appeals.

In our opinion probably the better view is that the notice has not been proved to have been served. This is not one of those cases in which allowance can be made on the score of lapse of time, for defects in the evidence of a party. Here plaintiff himself, in a way that cannot fail to throw great doubt upon the *bonâ fides* of his case, has waited for years after the death of the original mortgagor before bringing his suit. The heirs were certainly all minors at the time and two of them are minors even now; and in such circumstances very good evidence indeed is required to prove such a point as service of the notice. The attesting witnesses of the fact of service are alive but have not been called, and plaintiff relies only upon the process-server and a stranger, named Kalu, whose evidence is nearly worthless. Such a witness as he can be procured at any time by such a man as plaintiff.

This is sufficient for the disposal of the case; but, even if we take it for the sake of argument that the notice was duly served and was regular, that prior demand was really made, and that full consideration passed, there is to our mind a fatal obstacle to the suit. In the first place, it is more than doubtful whether the Regulation covers the case at all. If it does not, then plaintiff's cause of action accrued not on expiry of one year after service of notice, but when default occurred, *i. e.*, in 1891; and clearly the suit would be time barred. Again, if the Regulation does apply, then Plaintiff should not have had notice issued until after expiry of the "stipulated period" mentioned in the Regulation. In our opinion this phrase means stipulated period for *redemption*, which, if there is such a period at all, must be at least 5 years after execution of deed, for according to agreement mortgagor was not obliged to pay the last instalment of the debt, and so to redeem, until 5 years had elapsed. Looked at

in this way it must be held that the notice was premature and so useless, and the result would be that plaintiff has not yet acquired under the Regulation a good title to ownership of the land.

A few remarks about these two alternatives will be useful. In our opinion *Bagh Singh and others* v. *Basawa Singh and others* (1), is sufficient authority for the proposition that the Regulation does not apply to such *bai-bil-wafa* as the present one. There no stipulated period for redemption was to be found in the contract, but there was a condition that, if mortgagor failed for 6 years to pay interest, the land would be considered sold for the balance of principal and interest. It was ruled that the Regulation did not apply. The case was thus very similar to the present, and we propose to follow it. The consequence, as already stated, is that the suit is time barred.

The authority for the alternative proposition will be found in *Kishori Mohan Roy* v. *Ganga Bahu Debi* (2).

If 5 years is to be taken as the term for redemption, then the petition in the present case for issue of foreclosure notice was premature and the proceedings under it useless. Their Lordships pointed out that in such cases the right of the mortgagee to petition under section 8 of the Regulation does not arise until the period stipulated *for redemption* has expired.

We therefore dismiss this appeal with costs.

Appeal dismissed.

N.1.

Before Mr. Justice Rattigan.

APPELLATE SIDE.

FATEH ALI AND OTHERS,—(DEFENDANTS),—APPELLANTS

Versus

NIZAM DIN,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 935 of 1906.

Striking out names of parties—Power of Court to strike out the name of a co-defendant after the first hearing—Civil Procedure Code, 1882, Section 32.

Held, that it is not open to a Court under Section 32 of the Civil Procedure Code, 1882, to strike out in any case the name of a co-defendant after the first hearing of the suit.

Damodar Das v. *Gokal Chand* (3), followed; *Mussammat Bibi Hukam Kaur* v. *Sardar Asa Singh* (4), referred to.

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(1) 50 P. R., 1906. (2) *I. L. R., VII, All., 72, F. B.*
(3) *I. L. R., XXIII, Cal., 328, P. C.* (4) 1 P. R., 1900.

Miscellaneous further appeal from the order of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 27th June 1906.

Jalal Din for Appellants.

Devi Dial for Respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—In a previous suit between the present plaintiffs and the present defendants it was held by the Revenue authorities that the former were not entitled to occupancy rights, and the latter were granted a decree for possession. Plaintiffs then sued in the Civil Court for a declaration that they were sole occupancy tenants of this land and that defendants Nos. 1—5 had no right whatever thereto. The persons impleaded as defendants Nos. 6 and 7 were admittedly the proprietors of the land. *13th March* 1907.

Defendants pleaded (*inter alia*) that the suit was barred under section 13, Civil Procedure Code, by reason of the decree given to them by the Revenue authorities and a preliminary issue on this point was struck on the 28th March 1906.

On the 30th March the Court finding that the dispute was really only one between plaintiffs and defendants Nos. 1—5 returned the plaint for amendment with a view to the names of defendants Nos. 6 and 7 being struck out.

The plaint was amended accordingly, and the Court proceeded to decide the preliminary issue. On the 31st May the Court held that the suit was barred under section 13, Civil Procedure Code, and dismissed plaintiffs' suit with costs. This decision was reversed by the Divisional Judge on the ground that the present suit related to title and concerned persons both of whom claimed to be entitled to occupancy rights, and that as such it was one which the Revenue Courts had no jurisdiction to entertain. The learned judge accordingly remanded the case under section 562, Civil Procedure Code.

Defendants Nos. 1—5 have appealed to this Court and on their behalf it is contended—

(*a*) that the suit as originally brought was clearly one falling under section 77 (3) (*d*) of Act XVI of 1887 as the proprietors were parties to the suit ;

(*b*) that under section 53 the first Court had no power to return the plaint for amendment after the first hearing, *Damodar Das* v. *Gokal Chand*, (1) and

(1) *I. L. R., VII All., 79, F. B.*

that consequently the real and only plaint still before the Court is the one originally filed on the 16th January 1906.

An appeal of course lay under section 588 (*b*), Civil Procedure Code, from the order of the first Court returning the plaint for amendment and admittedly no such appeal was lodged. It is contended, however, that the defendants can take this objection at this stage as the whole case is now before me for determination as regards the merits of the Divisional Judge's order (*Maha Ram* v. *Ram Mahar* (1), *Savitri* v. *Ramji* (2)). Upon the *amended plaint*, the claim is, I think, clearly one cognizable by a Civil Court, for upon that plaint the dispute is between two parties, each asserting themselves to be occupancy tenants; the proprietors of the land no longer appearing on the record as parties. On the other hand, the claim as laid in the *original plaint* falls equally clearly, in my opinion, under section 77 (3) (*d*) of the Punjab Tenancy Act, as the suit was then by a person alleging himself to be entitled to occupancy rights as against the defendants of whom, at that time, some at all events were admittedly the landlords. Upon the ruling of the Full Bench *Maha Ram* v. *Ram Mahar* (1), the present objection can and should be considered in this appeal and the question accordingly is whether the Court of first instance was competent to allow the plaint to be returned for amendment after the first hearing. The decision of the Allahabad Full Bench in *Damodar Das* v. *Gokal Chand* (3) is unquestionably a direct authority to the contrary, and though in some cases a plaint has been returned for amendment even on appeal (*e. g.*, in *Mussammat Bibi Hukam Kaur* v. *Sardar Asa Singh*) (2), the power of the Court to allow such amendment was not considered. In the present case, morever, the plaint was returned for the purpose of striking out the names of certain defendants who had (in the opinion of the Court) been improperly joined as defendants, and even if the plaint could in other respects have been amended either by the plaintiffs or by the Court itself at any time before judgment the names of these parties could not have been struck out even by the Court after the first hearing (section 32, first para., Civil Procedure Code). In my opinion therefore the Court of first instance was incompetent to return the plaint for amendment in this particular after the first hearing, and I must accordingly hold that the only plaint before the Court is the one originally filed. This being the cases the suit is clearly one

(1) 1 *P. R.*, 1903, *F. B.*,
(2) *I. L. R.*, *XIV*, *Bom.*, 232.
(3) *I. L. R.*, *VII*, *All.*, 79 *F. B.*
(4) 1 *P. R.*, 1900.

falling under Section, 77 (3) (*d*) of Act XVI of 1887 and as such cognizable solely by a Revenue Court. Under these circumstances I must accept the appeal and reversing the order of the Divisional Judge restore the decree of the first Court dismissing the plaintiffs' suit. Plaintiffs must pay the appellant's costs throughout.

Appeal allowed.

No. 72.

Before Mr. Justice Rattigan.

GURDITTA,—(DEFENDANT),—APPELLANT,

Versus

JAI SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 814 of 1905.

Custom—Inheritance—Right of sister's son to succeed in preference to the Jagirdar ala malik—*Thakar Rajputs in Dada Siba* jagir, *Kangra District.*

In a case the parties to which were Thakar Rajputs of the Dada Siba *Jagir* in the Kangra District, *held* that the defendant had failed to establish a custom whereby a sister's son inherited his maternal uncle's ancestral property in preference to the *jagirdar ala malik.*

Surjan v. *Lalu* (1) referred to.

***Further appeal** from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 7th April* 1905.

Sohan Lal for appellant

Sukh Dial for respondent.

The judgment of the learned judge was as follows :—

RATTIGAN, J.—A return has now been made to my order of the 17th November 1906 which should be read as part of this judgment. Upon the evidence given on the remand proceedings the Munsif is of opinion that a sister's son is entitled by custom prevailing among Thakar Rajputs in Dada Siba *jagir*, Kangra District, to inherit his maternal uncle's property in preference to the *jagirdar ala malik*. The Divisional Judge, on the contrary, holds that no such custom has been proved, and after hearing the learned pleaders for the parties I agree with him. There may, no doubt, be cases in the Punjab where, in the absence of collaterals, a sister's son or grandson is regarded as an heir. But this is apparently not the case in the

20th March 1906.

(1) 175 *P. R.*, 1888.

Kangra District, for in that district even a daughter's son is looked upon as a total stranger so far as succession to ancestral landed property is concerned (see "Tribal Law," page 140). According to the *wajib-ul-arz* the *ala malik* is entitled to succeed if the deceased proprietor has left him surviving no persons whom custom regards as heirs, and to a like effect is the decision of this Court in *Surjan* v. *Lalu* (1). The question then in this case is whether by the custom of the parties a sister's grandson is regarded as an heir in the absence of agnatics? The general rule undoubtedly is that custom does not regard a sister or her issue in the line of heirs—(para. 24 of the Digest of Customary Law). There may be exceptional cases but the *onus* of proving that a sister's issue comes within the category of heirs rests upon the persons so alleging. In the present case as the Divisional Judge points out there is really no evidence in support of this allegation, and the oral evidence adduced by appellants on the remand is unsupported by any documentary proof and is of no value. Had the alleged instances really occurred it would have been easy to corroborate the oral evidence by entries in the mutation registers.

I am accordingly of opinion that no ground has been shown why I should reverse the original finding of the Divisional Judge who is an officer of great experience in this district, and I therefore reject this appeal with costs.

Appeal dismissed.

No. 73.

Before Mr. Justice Reid.

AIWAZ AND ANOTHER,—(PLAINTIFFS),—PETITIONERS,

Versus

REVISION SIDE.

SIMLA-KALKA RAILWAY COMPANY,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 1880 of 1905.

Railways Act, 1890, *Section* 75 (1)—*Passenger's luggage booked by luggage van—Liability of a Railway Company as carrier of articles of special value—*

Held, that a Railway Company is not liable for the loss of a box containing gold and silver ornaments and Government Currency Notes of the Value of over Rupees 100 which had been entrusted to it for conveyance in the luggage van by a passenger who had not made the declaration prescribed by section 75 (1) of the Indian Railways Act, 1890.

(1) 175 *P. R.*, 1888.

The terms parcel or package in section 75 (1) included a passengers luggage.

Muhammad Abdul Ghaffor v. *Secretary of State* (1), referred to.

Petition for revision of the order of Lieutenant-Colonel R. E. S. Taylor, Judge, Cantonment Small Cause Court, Ambala, dated 12th August 1905.

K. C. Chatterji for Petitioners.

Morrison for Respondent.

The judgment of the learned Judge was as follows :—

REID, J.—This application raises the question whether a Railway passenger whose box, containing clothes, gold and silver ornaments of the value of Rs. 20 or 30, and Government Currency Notes of the value of Rs. 190 has been entrusted to the Railway Company's servants for conveyance in the luggage van and has been lost or stolen, can recover the value of the box or of any part of its contents from the Company without having made the declaration prescribed by section 75 (1) of the Indian Railways Act, IX of 1890. *10th Nov.* 1906.

The first contention for the applicant was that " any parcel or package " in section 75 (1), does not include passenger's " luggage " dealt with by section 74 of the Act. This contention has no force. The object of the rule contained in section 74 is obviously to make the Company liable only for property entrusted to it and not for property which a passenger chooses to keep in his own custody, whether in his compartment or elsewhere, and " luggage " consists of " parcels and packages."

The next contention was that section 72 of the Act makes the Company liable as a bailee under the Indian Contract Act.

The presence in the section of the words " subject to the other provisions of this Act " adequately meets this contention which has no force.

The next contention was that Currency Notes are not included in the second schedule to the Act.

Clause (*b*) of the schedule, in my opinion, covers them. They are promises to pay, made by a person on behalf of the Government of India, although they are not included in the difinition of Promissary Note in section 4 of the Negotiable Instruments Act for the purposes of that Act.

(1) 56 *P. R.*, 1897.

They are, moreover, securities for the payment of money, even though they may not be bank notes. This contention has no force. The last contention is that the Company were liable for the whole value of the non-scheduled of the contents of the box, and of Currency Notes up to Rs. 100.

Muhammad Abdul Ghaffoor v. *Secretary of State for India* (1) is directly against this contention, and section 75 (1) provides for freedom from responsibility, for the "loss, destruction or deterioration of the parcel or package" not merely for freedom from responsibility for the loss of the contents of such parcel or package.

The applicant is not, in my opinion, entitled to recover from the Company in respect of the box or of any part of its contents not having complied with the provisions of Section 75 (1) of the Act.

The application is dismissed with costs.

Application dismissed.

No. 74

Before Mr. Justice Reid.

MOHKAM DIN AND OTHERS,—(PLAINTIFFS),—
PETITIONERS,

REVISION SIDE.

Versus

MANSABDAR AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Revision No. 1920 of 1906.

Jurisdiction of Civil Court—Suit for removal of watercourse constructed with the sanction of a Canal Officer—Northern India Canal and Drainage Act, 1873, Sections 21, 22, 24, 25.

Held that a Civil Court has no jurisdiction to restrain a party, to whom permission has been granted under the Northern India Canal and Drainage Act, 1873, to construct a watercourse through the land of another, from such construction.

Kadir Bakhsh v. *Bhagat Ram* (2), *Mehtab Singh* v. *Hakim* (3), *Bhambu Ram* v. *Chhatta Mal* (4), *Lakh Ram* v. *Secretary of State for India* (5) and *Kishore Mohan Roy Chowdhry* v. *Chunder Nath Pal* (6) referred to.

Petition for revision of the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 17th July 1906.

Ram Lal, for petitioners.

Sheo Narain, for respondents.

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(1) 56 *P. R.*, 1897.
(2) 71 *P. R.*, 1888.
(3) 114 *P. R.*, 1888.
(4) 144 *P. R.*, 1894.
(5) 46 *P. R.*, 1897.
(6) *I. L. R.*, *XIV Calc.*, 648.

The judgment of the learned Judge was as follows :—

19th Jan. 1907.

REID, J.—The question for consideration is whether a Civil Court has jurisdiction to decree a perpetual injunction restraining a party, to whom permission has been granted under the Canal Act, VIII of 1873, to construct a water channel through the land of another, from constructing that channel.

Kadir Bakhsh v. *Bhagat Ram* (1), *Mehtab Singh* v. *Hakim* (2), *Bhambu Ram* v. *Chhatta Mal* (3), and *Lakh Ram* v. *Secretary of State for India* (4), are authority for holding that a Civil Court has no jurisdiction provided that the procedure prescribed by the Act has been complied with.

The procedure adopted was not attacked in the plaint and no irregularity has been pointed out at the hearing.

The plaint alleged that the proposed water channel would injure the plaintiffs' cultivation, and the question of compensation is left by the Act to the Collector. It has not been alleged that the assessment of compensation was inadequate and the plaint does not contain any allegation which could not have been urged in the proceedings of the Canal Officer or Collector. The fact that the proposed water channel was to run through the plaintiff-petitioners' land does not in my opinion affect the question. The jurisdiction is the same whether the plaintiff asserts a right to cut a channel through the land of another, or to prevent another from cutting a channel through his land.

The rule laid down in *Kishore Mohan Roy Chowdhry* v. *Chunder Nath Pal* (5) is general and specifically excepts cases from which the jurisdiction of the Civil Court is ousted. For these reasons I dismiss the application with costs.

Application dismissed.

No. 75.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

SHAHAB-UD-DIN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,
Versus
SOHAN LAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 357 of 1905.

Will—Bequest to trustees with a direction that it should be used for charitable purposes—Uncertainty of the objects—Bequest void.

Held that a bequest of property by a Muhammadan testator for such charitable objects as the trustees should think proper or for some such

(1) 71 P. R., 1888. (3) 144 P. R., 1894.
(2) 114 P. R., 1888. (4) 46 P. R., 1897.
(5) I. L. R., XIV Calc., 648.

purpose as that the testator should obtain eternal bliss therefrom does not create a trust as the subject matter is not clearly or definitely indicated and the trust is therefore void by reason of uncertainty of its object.

Bai Bopi v. *Jamnadas Hathisang* (1) *Runchordas Vandravandas* v. *Parvatibai* (2), *Smith* v. *Massey* (3), *In re Jaunan's Estate* (4), *Parbatti Bibee* v. *Ram Barun Upodhya* (5), and *Marice* v. *The Bishop of Durham* (6), referred to.

First appeal from the decree of Captain B. D. Fitzpatrick, District Judge, Rawalpindi, dated 3rd January 1905.

Ishwar Das, for appellants.

Pestonji Dada Bhai and Fazal Husain, for respondents.

The judgment of the Court was delivered by

19*th Decr.* 1906. ROBERTSON, J.—One Ghulam Ali made a will, dated 17th June 1901, which is printed at page 4 of the paper book as follows :—

1.—My property is as follows :—

(*a*) Deposit in the shop of Devi Sahai Sohan Lal, Bankers, Rawalpindi, Rs. 10,000.

(*b*) 50 Shares in Commercial Bank, Rawalpindi, valued at Rs. 5,000, and two houses, *pucca*, built at Shahjahanpur, together with share of land in Hisam-ud-din's possession, worth Rs. 2,000.

2. I have divided the above amount in this way: that after defraying my funeral expenses in a reasonable manner, Rs. 2,000 should be given to each of my wives, that is Mussammat Maryam Jan and Mussammat Sahara. I have accordingly written to Devi Sahai Sohan Lal for making the required entries.

3. Whereas according to Muhammadan Law, I am entitled to will a third of my property, I give Rs. 500 to my brother's son, Shams-ud-din, on account of his services, and for the remaining Rs. 4,500 the following respectable Muhammadans shall be my executors.

1.—Khan Bahadur Allah Bakhsh.

2.—Maulvi Nazir Ahmad.

3.—Maulvi Alaf Din.

4.—Babu Abdul Ghani.

5.—Sheikh Fazal Ilahi.

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(1) *I. L. R., XXII Bom.*, 774.
(2) *I. L. R., XXIII Bom.*, 725.
(3) *I. L. R., XXX Bom.*, 500.
(4) *L. R., VIII Ch., Dn.* 587.
(5) *I. L. R., XXXI Calc.*, 895.
(6) 9 *Ves* 399; 10 *Ves.* 522.

These trustees shall expend the money for such charitable objects as they think proper or they shall give it to whomsoever I direct or use it in such a way after my death that I may obtain eternal bliss.

4.—*Re* Ornaments.

5.—The Rs. 1,000, balance of Rs. 10,000 above, with Sohan Lal. * * * I give in equal shares to my three brothers, Shahab-ud-din, Hisam-ud-din and Amir Ali.

The execution of the will by Ghulam Ali while in full possession of his senses is clearly proved and is now admitted.

The defendants in this case are (1) Devi Sahai Sohan Lal, the bankers, (2) the executors trustees named in clause (3) of the will, and (3) the two widows; the bankers having, in accordance with written instructions from Ghulam Ali, written on 17th June 1901, paid over the money to the beneficiaries, the widows and executors in accordance with the terms of their instructions, which correspond to the terms of the will.

The present claimants are three brothers of the deceased Ghulam Ali. They urge that the will is invalid as opposed to Muhammadan Law, and that under any circumstances it is invalid as regards clause (3), the bequest of Rs. 4,500 for charitable purposes; that clause being, it is alleged, too vague for execution.

It is admitted that the will is bad as regards those portions which make bequests to sharers. Consequently if the widows have received more than they are entitled to under Muhammadan Law, *i.e.*, ⅛ each, of this estate, decree for the balance must be passed against them.

As regards the bankers Devi Sahai Sohan Lal, we think it is quite clear that no action can be sustained against them. They acted simply on the written instructions of their client, dated 17th June 1901, duly signed and filed as Exhibit A. That letter is clearly genuine and constitutes a complete answer as regards the bankers, and the appeal is at once dismissed with costs as far as they are concerned.

The real question of difficulty is as regards the "charitable" bequest of Rs. 4,500.

Clause (3) runs—"Whereas according to Muhammadan "Law I am entitled to will a third of my property, I give Rs. 500 "to my brother's son, Shams-ud-din, on account of his services

"and for the remaining Rs. 4,500, the following respectable "Muhammadans shall be my executors

* * * * * *

"These trustees (amins) shall expend the money for such "charitable purposes as they think proper, or they shall give "it to whomsoever I direct or use it in such a way after my "death that I may obtain eternal bliss." The bequest of 500 is not contested.

Now it cannot be contested that the Muhammadan Law permits a very wide scope to a testator as regards the ⅓rd of his property which he may dispose of by will. His power of disposition for expenditure on charitable or religious purposes is subject to very slight restriction.

But here we have a direction to 5 executors whose business it is to realize and distribute the estate to the various claimants and beneficiaries with the least possible delay to dispose of a large sum upon objects which are described in the vaguest way. The words in vernacular are:—"Yih amin is "rupaiye ko mussaraf khair men jis tarah woh munasib "tassawar karenge ya jisko main dilaun ya mere bad aise kam "men jis se mujh ko sawab-i-daim ho kharch karenge. These "trustees (amins) shall expend the money for such charitable "objects as they think proper or they shall give it to whomso-"ever I direct or use it in such a way after my death that I "may obtain eternal bliss."

Now a definite bequest in those terms, or even a clear creation of a trust in those terms, would not be invalid up to the prescribed limit according to Muhammadan Law. The money is to be expended on "charitable objects." Such charitable objects to be selected by five respectable persons specially named for that purpose. No authority was quoted to us to the effect that a bequest, or a trust for charitable "purposes" when a certain person is, or persons are, named to select the charitable objects is in itself necessarily bad under Muhammadan Law. What is contended is that under general principles applying to all testators alike such a provision in a will directing executors to dispose of money on such charitable objects as they may select is bad for indefiniteness and that in such a case it must be held that the money so disposed of must be held not to have been disposed of at all by the will. In this case although in the second part of the sentence the word "amin" is used it is clear that the five persons named are appointed as executors of the will in regard to this Rs. 4,500, and that it is as executors that they are to carry out the charitable provisions.

Some of the authorities, *viz.*, Amir Ali's Muhammadan Law, Volume 1, page 482, *Bai Bapi* v. *Jamnadas Hathisang* (1), *Runchordas Vandravandas* v. *Parvatibai* (2), *Smith* v. *Massey* (3), *In re Jarman's Estate* (4) and *Parbathi Bibee* v. *Ram Barun Upodhya* (5), quoted to us on either side were in point, some were not for various reasons. As regards the English authorities, *Morice* v. *The Bishop of Durham* (6), is not exactly in point. There a trust had been created "to dispose of the ultimate residue on such "objects of benevolence and liberality as the Bishop of Durham "shall most approve," and this was held to be bad as not being a charitable trust pure and simple, and as not being capable of proper supervision for various reasons more or less peculiar to the English Law. The principles laid down *in re Jarman's Estate Leavers* v. *Clayton* (7), however, are of more general application. One William Jarman had made the following provision in his will: "I direct that my executors shall apply "to any charitable or benevolent purpose they may agree upon, "and at any time, the residue of my personal property which "by law may be applied to charitable purposes."

The executors accordingly gave the money to the General Hospital, Nothingam.

The next of kin claimed the residuary estate on the ground that it was "undisposed of". In delivering judgment Vice-Chancellor Hall said: "I must hold that in this case the "direction has reference to a gift or trust which the Court "cannot execute. It could not execute it at the date of the death "of the testator nor if the executors had not thought fit to "exercise the discretion which was vested in them. The observa-"tions in the cases show that the test is this, that the Court is "not to wait and see whether the executors will appoint to "charitable objects or not, but to look at the will as at the "date of the death of the testator and at once say whether the "gift is definite, or indefinite, and if the latter, that it is "inoperative That is the case here and I hold that the gift "of the residue fails."

In that case the residue had been actually allotted to a clearly charitable object; in the case before us it is admitted that no part of the money has as yet been devoted to any charitable object. In *Runchordas Vandravandas and others* v. *Parvatibai and others* (2), a bequest of the residue of the estate for "dharm" by a Hindu was held to be void for uncer-

(1) *I. L. R., XXII Bom.*, 774
(2) *I. L. R., XXIII Bom.*, 725.
(3) *I. L. R., XXX Bom.*, 500.
(4) *L. R.*, 8, *Ch. Dn.* 587.
(5) *I. L. R., XXXI Calc.*, 895.
(6) 9 *Ves.*, 399; 10 *Ves.*, 522.
(7) *L. R.*, 8 *Ch. Dn.*, 584.

tainty, *Marice* v. *The Bishop of Durham*, being followed. In this case the words in vernacular are :—" Yih amin is rupaiye ko " mussaraf khair men jis tarah woh munasib tassawar karenge, " yah jisko main dilaun ya mere bad aise kam me jis se mujh ko " sawab-i-daim ho kharch karenge."

We are of opinion, following the principles laid down by the House of Lords, and followed by their Lordships of the Privy Council, that this provision of the will must be held to be inoperative and void on account of uncertainty, and that the Rs. 4,500 disposed of thereby must be held to be undisposed of and to be the property of the heirs.

The appeal will therefore be so far accepted as against the executors as to decree Rs. 4,200 to the plaintiffs. The Rs. 300 expended on funeral obsequies must of course be allowed. As the executors apparently acted in perfect good faith they will not be liable for costs.

Appeal allowed.

No. 76.

Before Mr. Justice Johnstone.

REVISION SIDE.

SAIDA AND OTHERS,—(PLAINTIFFS),—PETITIONERS,

Versus

ISMAIL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Revision No. 354 of 1905.

Occupancy rights—Succession to—An associate of a sonless adopted son has no right in preference to a male collateral relative—Punjab Tenancy Act, 1887, Section 59.

In a dispute as to the succession to occupancy rights between the brothers of an adopted son who were formally associated by the latter with him in the tenancy and the collateral heirs of the adoptive father descended from the original holder of the land, it appeared that by virtue of the custom of the tribe applicable as regards succession to proprietary rights the plaintiffs alone were entitled to succeed.

Held, that the mere formal association by the adopted son who died sonless gives no right of succession under Section 59 of the Punjab Tenancy Act, 1887, to the brother of the adopted son in presence of the near male agnates of the deceased's adoptive father, and that therefore the latter alone were entitled to succeed to the land inherited from the adopting father.

Nihala v. *Ishar Singh* (1), *Karam Din* v. *Sharaf Din* (2), *Puran Chand* v. *Mahadeo and others* (3), *Hari Chand* v. *Dhesa* (4), and *Mehru* v. *Mutsaddi* (5) referred to.

Petition for revision of the order of T. J. Kennedy, Esquire, Divisional Judge, Ambala Division, dated 19th October 1904.

Muhammad Shafi, for petitioners.

Fazl-i-Ilahi, for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—This petition has been admitted on the point of law raised. As the questions of fact are clear and hardly disputed, this means admitted as regards the whole dispute. The learned Divisional Judge, agreeing with the first Court in his final conclusion, dismissed the plaintiffs' appeal with costs. *28th March* 1906.

There is no doubt that the occupancy rights in suit were held by Nur, father of plaintiff Saida and father's father of plaintiff Alia. Nur had a third son, Pira, who adopted one Abdul Rahim as far back as September 1878 and made a gift of his occupancy rights to him. Pira died not long afterwards. Abdul Rahim formally associated the defendants with himself in the tenancy as far back as 1882, and they had been holding along with him as far back as 1880. On these facts the first Court held that plaintiffs have no subsisting right to succeed to the tenancy in preference to defendants upon the recent death of Mussammat Jiwani, widow of Abdul Rahim, who succeeded to her husband when he died in February 1892.

The learned Divisional Judge treated the association of defendants with himself by Abdul Rahim as a *gift*, and held that only the landlord could object to such a gift, and it must be presumed that he has not objected. He relied upon *Nihala* v. *Ishar Singh* (6). Defendants are Abdul Rahim's brothers and nephews, and Divisional Judge says they succeed to him by survivorship.

Before me a certified copy has been put in of the judgment of this Court in Civil Appeal No. 936 of 1905, decided on 28th June 1906. That was a suit between the landlords and these very defendants for the land, and the final decision was that the landlords had by lapse of time and acquiescence lost their right to object to what happened in 1880-82.

(1) 68 *P. R.*, 1894.
(2) 89 *P. R.*, 1896, *F. B.*
(3) 89 *P. R.*, 1900.
(4) 12 *P. R.*, 1904.
(5) 109 *P. R.*, 1894.
(6) 68 *P. R.*, 1894.

The way I look at the case is this. Plaintiffs cannot and do not now impugn the gift to Abdul Rahim or his adoption : those acts are now safe from attack owing to lapse of time. Thus, Abdul Rahim undoubtedly became occupancy tenant ; and naturally, under Section 59 (1) (*b*), Punjab Tenancy Act, his widow succeeded him. But they say that they can impugn the association of defendants in the tenancy under customary law and they assert that here there is no time bar against them inasmuch as they could not sue for *possession* until the death of the widow and at the same time were not bound to sue for a declaration. It is quite clear that apart from the act of Abdul Rahim of 1880-82 defendants could have no rights whatever as they do not come under clause (*c*) of sub-section (1) of the aforesaid Section 59. Plaintiffs also contend that they and not defendants are the *heirs* of Abdul Rahim. In my opinion these contentions are sound and in accordance with the authorities.

Taking the last contention first I would refer to such rulings as *Karam Din* v. *Sharaf Din* (1), *Puran Chand* v. *Mahadeo and others* (2) and *Hari Chand* v. *Dhera* (3). From these rulings I gather that, while in cases of contest between a landlord and others regarding succession to or alienation of a tenancy, Section 53 and Section 59, "Punjab Tenancy Act," 1887, must be regarded, on the other hand, in cases of conflict between occupancy tenants and those who would be their natural heirs under custom or between persons claiming succession to an occupancy tenancy, the holder of which has died, and alienees of the occupancy rights, the same rule of custom should presumably be followed as regulate alienation of and succession to land held in ownership. I would also refer to *Mohen* v. *Mutsaddi* (4) under which, where *A* is joint occupancy tenant with *B* and *C* is *A's* natural heir according to the custom of the tribe of *A*, and *A* dies, *B* does not succeed in preference to *C* by survivorship, but *C* succeeds in preference to *B* by virtue of custom. Upon these authorities the contention of plaintiffs that they, and not defendants, are the heirs to Abdul Rahim is clearly sound.

For the other contention of plaintiffs no authorities are needed at this time of day. I can find no article of the Limitation Act, 1877, Schedule II, which bars their claim to possession of the tenancy in despite of the happening of 1880-82. Plaintiffs' right is to succeed to Abdul Rahim on the death of himself and his widow. If he is treated as an adopted son

(1) 89 *P. R.*, 1898, *F. B.* (3) 12 *P. R.*, 1904.
(2) 69 *P. R.*, 1900. (4) 109 *P. R.*, 1894.

then under custom and Section 59 (2), Tenancy Act, his heirs, he being sonless, are his adoptive father's nearest male agnates if descended from the original holder of the land; and if he is treated as a donee then equally under custom the gift, upon failure of his male line, reverts to the heirs of the donor.

The Divisional Judge's mistake was that he failed to see the qualifications of Section 53 and Section 59, "Tenancy Act," explained in the rulings of 1894, 1898, 1900 and 1904 quoted above.

For these reasons I would find for plaintiffs, and, accepting the petition and reversing the finding and decree of the learned Divisional Judge, I would direct that plaintiffs' claim be decreed in full with costs throughout.

Application allowed.

No. 77.

Before Mr. Justice Lal Chand.

BARU MAL AND ANOTHER,—(PLAINTIFFS),—PETITIONERS,

Versus

MUNIR KHAN AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

} REVISION SIDE

Civil Revision No. 102 of 1904.

Attachment of immovable property before judgment—Compensation for erroneous attachment—Civil Procedure Code, 1882, Section 491—Applicability to Small Cause Courts.

Held, that a Court of Small Causes has no jurisdiction to award compensation under Section 491, Civil Procedure Code, for an erroneous attachment before judgment of immovable property as it is excepted by the second schedule to the Code from attachment by such a Court.

Petition for revision of the order of Lieutenant-Colonel C. J. Roberts, Judge, Cantonment Small Cause Court, Sialkot, dated 8th October 1903.

Sukh Dial, for petitioners.

Kamal-ud-din, for respondents.

The judgment of the learned Judge was as follows:—

LAL CHAND, J.—The only point for decision in this case is whether the order allowing compensation under Section 491, Civil Procedure Code, is a valid order. The suit was tried by a Small Cause Court which under Schedule 2 of the Civil Procedure Code had no power to order attachment of immovable property before judgment. It is therefore not a case of compensation for improper attachment provided for by Section 491,

3rd Nov. 1906.

but for an attachment which the Court had no jurisdiction or power to order. By Schedule 2 of the Civil Procedure Code, Chapter XXXIV, relating to arrest and attachment before judgment is extended to the Provincial Courts of Small Causes except as regards immovable property. The exception in my opinion prohibits the Small Cause Court not only from ordering attachment of immovable property but also from determining the question of compensation in case an attachment is ordered by mistake. It would otherwise be anomalous to hold that the Court had no jurisdiction to order attachment of immovable property but could award compensation for such attachment if made erroneously. The lower Court therefore had no power to allow compensation under Section 491, Civil Procedure Code, and its order so far was *ultra vires*. I accept the application for revision and set aside the order awarding compensation under Section 491, Civil Procedure Code, but without costs.

Application allowed.

No. 78.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

APPELLATE SIDE.

DALIP SINGH,—(PLAINTIFF),—APPELLANT,

Versus

ISHAR SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 300 of 1906.

Religious institution—Mahant—*Suit relating to appointment and removal of*—*Right to sue without obtaining sanction*—*Civil Procedure Code*, 1882, *Section* 539.

Held, that a suit for the removal of the incumbent *mahant* of a *dharamsala* who has misbehaved as *mahant* and misused the funds of the institution and for the appointment of the plaintiff in his place falls within the scope of Section 539 of the Code of Civil Procedure and is not maintainable without obtaining previous sanction of the Collector to the institution of such suit.

First appeal from the decree of D. J. Boyd, Esquire, District Judge, Hoshiarpur, dated 22nd December 1905.

Sohan Lal, for appellant.

Browne, for respondents.

The judgment of the Court was delivered by

13*th March* 1906. LAL CHAND, J.—This is a pauper appeal in a pauper suit dismissed by the Lower Court as unmaintainable without previous

sanction obtained under Section 539, Civil Procedure Code. The suit relates to a *dharmsala*, and was instituted by plaintiff-appellant for possession of its office and property by removing defendant 1, who was admitted to have succeeded as *mahant*, but was alleged to have forfeited his right to retain the office and the property owing to misconduct and misuse of endowment property. There was no allegation that the *dharmsala* in suit or the property attached thereto was private property. The plaintiff alleged that the parties, including defendant 2, were *chélas* of the previous incumbent; that on his death, in June 1901, defendant 1 was appointed as his successor and has held the office and property as a *mahant*, but as he has misbehaved since his appointment, plaintiff be appointed as a *mahant* in his place and be placed in possession of the *dharmsala* and of the property attached thereto. The suit as instituted clearly falls within the terms of Section 539, Civil Procedure Code. There is no reason for doubting that the *dharmsala* with its appurtenant property constitutes a trust for public, charitable and religious purposes. The plaintiff alleges that the defendant 1 has committed a breach of such trust by misbehaviour as *mahant* and misusing in debauchery the trust property. He asks for removal of the defendant and for his own appointment as a *mahant* who is a mere trustee of endowed property, *Ramanathan Chetti* v. *Murugappa Chetti* (1). The view taken by the Lower Court is therefore evidently correct. The pleader for appellant referred to and relied upon *Bawa Sukhram Das* v. *Barham Puri* (2), *Sewa Singh* v. *Budh Singh* (3), and *Mussammat Monijan Bibee* v. *Khadem Hossein* (4), to support his contention that previous consent under Section 539, Civil Procedure Code, was not requisite in the case. But these were not cases of any alleged breach of trust or of removal of a trustee. *Sukhram Das* v. *Barham Puri* (2) was a suit by a person claiming as the lawful *mahant* for possession of the property of the shrine from a person who was alleged to have dispossessed him of the property. *Sewa Singh* v. *Budh Singh* (3) was a suit by worshippers of a *dharmsala* to set aside certain alienations effected by the *mahant*, but there was no prayer to remove him and to appoint a new trustee in his place. *Monijan Bibee* v. *Khadem Hossein* (4) was a case of a dispute between rival parties, each claiming to exercise rights as *matwallis* over *wakf* property. Not a single authority was quoted where Section 539 was held inapplicable to a suit for removal of the incumbent *mahant*, and appointment of another person in his place on an allegation of a breach of

(1) *I. L. R.*, *XXIX Mad.*, 283, *P. C.*
(2) 122 *P. R.*, 1890.
(3) 66 *P. R.*, 1892.
(4) 9 *Calc.*, *W. N.*, 151.

trust. The view we take is further supported by *Sajedur Raja* v. *Baidyanath Deb* (1), *Sajedur Raja* v. *Gour Mohun Das* (2), and *Sayad Hussein Mian* v. *Collector of Kaira* (3) quoted in the judgment of the Lower Court. It was attempted for appellant to distinguish these cases by pointing out that the plaintiff in the piresent suit has asserted his own personal right to be appointed as a *mahant*. But the distinction relied upon appears to us to be altogether immaterial. The relief asked for by plaintiff is defendant's removal as a *mahant* by reason of an alleged breach of trust on his part, and it is evidently immaterial for applying Section 539 that the person asked to be appointed in defendant's place on removal be plaintiff himself, or another fit person. The gist of the suit is to secure a proper administration of trust properties, and the alleged cause of action is a breach of trust by the incumbent *mahant*. Even, ni order to secure his own appointment, it is necessary for plaintiff to sue for removal of defendant on an allegation of breach of trust, and he cannot obviously do so without obtaining consent of the Advocate-General as required by Section 539. Section 539, Civil Procedure Code, is therefore clearly applicable and the suit instituted without such consent is palpably unmaintainable. We, therefore, agree with the Lower Court and dismiss the appeal with costs. It may be pointed out that the Lower Court having dismissed plaintiff's suit ought to have passed an order under Section 412, Civil Procedure Code, directing the plaintiff to pay the Court-fees which would have been paid by the plaintiff, if he had not been permitted to sue as a pauper. We feel incompetent to correct the omission on appeal filed by plaintiff, but under Sections 592—412 we order the plaintiff-appellant to pay the Court-fees which would have been paid by him if he had not been permitted to appeal as a pauper.

Appeal dismissed.

No. 79.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

APPELLATE SIDE.

UMRA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

MUHAMMAD HAYAT AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1046 of 1906.

Husband and wife—Legitimacy of children—Presumption as to legitimacy of child born after marriage—Evidence Act, 1872, Section 112.

Held, that on the birth of a child during marriage the presumption of legitimacy is conclusive, no matter how soon the birth occurs after the marriage.

(1) *I. L. R., XX Calc.*, 397. (2) *I. L. R., XXIV Calc.*, 418.
(3) *I. L. R., XXI Bom.*, 49.

Further appeal from the decree of Qazi Muhammad Aslam, O.M.G., Divisional Judge, Ferozepore Division, dated 5th July 1906.

Gouldsbury, for appellants.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—It is unnecessary to recapitulate the facts in this case which are given in full in the judgments of the Lower Courts. The two points argued in appeal were that Suban was not married to Halim and that Muhammad Hayat, respondent, is not his legitimate son. As regards marriage, the fact was admitted for plaintiffs in the Lower Appellate Court, though denied in the grounds of appeal filed in that Court. It was, moreover, admitted by Shamira, one of the collaterals in the mutation proceedings, which were effected in favour of the respondent Muhammad Hayat in 1900-1901 shortly after death of Halim. Plaintiffs-appellants then took no objection that Suban was not the married wife of Halim, or that Muhammad Hayat was not his legitimate son. Muhammad Hayat was not only permitted to succeed to Halim's whole property (300 *ghumaos* in area) but also allowed to be appointed as a Lambardar in Halim's place under the *sarbarahi* of Shamira, one of the collaterals. The marriage is further supported by oral evidence, which has been credited by the Lower Courts and the omission to produce the *Nikah Khawan* was explained as due to his illness, which is not improbable. The negative evidence produced by plaintiffs against marriage is of no value. Considering their dilatory conduct in instituting the present claim, six years after succession had opened, coupled with their omission to raise any objection at the mutations, we have no hesitation in accepting the concurrent finding of the Lower Courts that Suban was married to Halim. As regards legitimacy it was not denied that Muhammad Hayat is Suban's son. We entirely discredit the evidence produced by plaintiffs to show that he was born before marriage and was brought to Halim's house by Suban. The evidence is opposed to the entry in the village birth register, which shows his birth on 22nd November 1899 in the village of Halim. According to Suban's statement in the mutation proceedings and in the present suit, she was married to Halim in the month of *phagan* preceding the birth of defendant 1, but even

11*th March* 1907.

assuming, as suggested for the plaintiffs, that the marriage took place on the 1st of *Baisakh*, *i.e.*, about 7½ months before birth, the time which elapsed between marriage and birth is altogether immaterial for determining legitimacy. As pointed out in Amir Ali's Law of Evidence, at page 671, under Section 112 of the Evidence Act, "So far as "concerns descent from particular parents, a child born "during wedlock is presumed according to English Law to "be the legitimate issue of such parents, *no matter how soon* "*the birth be after marriage.* When a man marries a woman "whom he knows to be with child, he may be considered "as acknowledging by a most solemn act that the child is "his. The present section following English Law adopts "the period of birth as distinguished from conception as "the turning point of legitimacy. It is a peculiarity of "that law that it does not concern itself with the conception, "but considers a child legitimate who is *born of parents* "*married* before the time of his birth, though they were "unmarried when he was begotten." There is, therefore, a conclusive presumption under Section 112, Evidence Act, that Muhammad Hayat, who was born during the continuance of a valid marriage between his mother and Halim, is Halim's legitimate son, irrespective of the question whether he was born six, seven or eight months after such marriage. We accordingly uphold the findings of the Lower Courts that Muhammad Hayat, respondent, is the legitimate son of Halim, and dismiss the appeal with costs.

Appeal dismissed.

No. 80.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

KIRPA RAM,—(Plaintiff),—PETITIONER,

Versus

Revision Side.

KHUSHALI MAL AND OTHERS,—(Defendants),—RESPONDENTS.

Civil Revision No. 1958 of 1906.

Custom—Pre-emption—Pre-emption in respect to sale of shops in villages—Punjab Pre-emption Act, 1905, Sections 12, 13 (2).

Held, that sub-section 2 of Section 13 of the Punjab Pre-emption Act, 1905, is inapplicable to shops in villages. The custom of pre-emption exists

in respect to such shops subject to the provisions of Section 12 of that Act.

Petition for revision of the order of Lala Karm Chand, District Judge, Gujranwala, dated 7th April 1906.

Roshan Lal, for petitioner.

Dharm Das, for respondents.

The judgment of the Court was delivered by

CHATTERJI, J.—This is a suit for pre-emption of a shop in a village which has been thrown out on the preliminary ground that such suits in respect of shops are barred under sub-section (2), Section 13 of the Punjab Pre-emption Act. *18th March* 1907.

In our opinion this construction is erroneous. In the first place the provision against pre-emption of shops has been inserted in a sub-clause of Section 13 which deals exclusively with pre-emption in regard to urban immovable property. Ordinarily the presumption would be that the provision was limited by the scope of the section unless indeed the language was distinctly to the contrary purport in which case it would of course have its full effect. But in such a case the drafting would be open to condemnation as unscientific. A rule of the above description if it was intended to have general operation would have been inserted in a section by itself and not made a subordinate clause of one dealing exclusively with urban immovable property. It is to be noted that the scheme of the Act divides immovable property which is the subject of pre-emption into two grand divisions, *viz.*, village land and immovable property, and (2) urban immovable property, and separately provides rules for claims in respect of each. This is also an essential point to be borne in mind in construing the Act and in judging the significance of the prohibition against pre-emption of shops, etc., being enacted in a sub-Section of a section relating to urban property.

Again, Section 12 provides for pre-emption of land and village immovable property and the latter expression has been defined in Section 3 (2) to mean immovable property within the limits of a village other than agricultural land. This comprehensive definition would include shops in a village and Sections 13 and 12 and in fact the whole Act should according to a cardinal rule of interpretation be construed together.

The only tangible objection to the above interpretation is that *dharmsalas*, mosques, etc., would under it be subject to pre-emption. But buildings of this kind are *res extra commercium* as Mr. Shadi Lal points out in his Commentary on Section

13, and one can hardly conceive of pre-emption being brought in respect of them. None has been brought in the past. If however a special provision was needed for them it would have been made in Section 12, or sub section (2) of Section 13 might have been made an independent section and worded so as to make it of general application.

This, however, does not affect the question before us. We must construe the Act as a whole, and each section with reference to its subject matter, unless the language or context is plainly otherwise, and we have no difficulty in arriving at the conclusion that sub-section (2) of Section 13 does not apply to shops in villages and that the plaintiffs' claim is not barred thereby.

We accept the application and, reversing the decrees of the Lower Courts, remand the case to the Court of first instance to decide it on the merits.

Court fee on the petition is refunded. Other costs to abide the result.

Application allowed.

No. 81.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

ACHHAR SINGH AND OTHERS,—(Plaintiffs),—APPELLANTS,

Versus

MEHTAB SINGH AND ANOTHER,—(Defendants),—RESPONDENTS.

Appellate Side

Civil Appeal No. 142 of 1907.

Custom—Adoption—Adoption of daughter's son—Hindu Nandan Jats of Dasuha tahsil, *Hoshiarpur District—Burden of proof*—Riwaj-i-am.

Found, in a case the parties to which were Jats of the Nandan *got* of Dasuha *tahsil* in the Hoshiarpur District, that plaintiffs upon whom, in the special circumstances of the case, the *onus* rested had failed to prove that the adoption of a daughter's son was invalid by custom.

Ralla v. *Budha* (1), *Natha Singh* v. *Sujan Singh* (2), referred to.
Ghullu v. *Mohabat* (3) distinguished.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 26th October 1905.

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(1) 50 *P. R.*, 1893, *F. B.* (2) 34 *P. R.*, 1899.
(3) 92 *P. R.*, 1894.

Bodhraj Sawhny, for appellants.

Sohan Lal, for respondents.

The judgment of the Court was delivered by

JOHNSTONE, J.—In this case the plaintiffs, reversioners of Mahtab Singh, Jat, of the Dasuha *tahsil* of Hoshiarpur, who is defendant 1 in the case, contest the adoption by defendant 1 of defendant 2, daughter's son of defendant 1, and ask that it be declared that the adoption shall not affect their rights. The *factum* and validity of the adoption having been put in issue, the first Court decided that the adoption certainly took place, and that it is valid by custom. The learned Divisional Judge, in a brief judgment, took the same view and dismissed the appeal, without summoning the defendants. Plaintiffs come up on the revision side under clause (*b*) of Section 70 (1), Punjab Courts Act, and their petition has been admitted as an appeal in regard to the question of the validity of the adoption only. After hearing the learned counsel for the appellants, we have arrived at the conclusion that the decision of the Courts below is sound. *19th March* 1907.

The *Riwaj-i-am* is as regards Jats in the district generally altogether against the plaintiffs, and it must be borne in mind that where it favours females, a special value attaches to such a document, framed as it always is according to the stated views of males only. It is true that no instance in this *gôt* (Nandan) is forthcoming one way or the other; and from this Mr. Sawhny argues that, inasmuch as the general presumption for the Jats of the Province as a whole is against the validity of such adoptions, *Ralla* v. *Budha* (1), and inasmuch as in this *gôt* there is no rebuttal of this presumption, the decision should be in favour of plaintiffs. Ordinarily there might be some force in an argument of this kind, but here special circumstances supervene to render it of no effect. Besides the *Riwaj-i-am*, which is for all the Jats of the District, we have the circumstance that in many *gôts* (*e.g.*, *Natha Singh* v. *Sujan Singh* (2), and Civil Appeal No. 1296 of 1905) of Jats of the District and even in this very *tahsil* of *Dasuha*, it has been found, and is undoubted, that the adoption of a daughter's son in the presence of near collaterals is valid. The ruling of Ludhiana District quoted before us, *Gullu* v. *Mohabat* (3), is a case of

(1) 50 *P. R.*, 1893, *F. B.* (2) 34 *P. R.*, 1899.
(3) 92 *P. R.*, 1894.

a sister's son and so useless. In our opinion it is very unlikely that this small *gôt* should have a separate custom of its own, mixed up as it admittedly is in residence with other *gôts* and inhabiting a tract in which among Jats such adoptions are valid. In the circumstances we hold that, notwithstanding the general rule for the Province as a whole, the burden of proof that this adoption is invalid lies on the plaintiffs; and, as no instances are forthcoming one way or the other, the inevitable conclusion is that plaintiffs have failed to discharge the *onus* thus laid upon them.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

No. 82.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

REFERENCE SIDE.

GUR BAKHSH,—PLAINTIFF,

Versus

KHAIRATI—DEFENDANT.

Civil Reference No. 52 of 1906.

Attachment—Fodder, liability of, to attachment in execution of decree—Civil Procedure Code, 1882, *Section* 266 (*n*)—*Punjab Land Revenue Act*, 1887, *Section* 70.

Held, that fodder required for the owner's cattle is exempt under clause (*n*) of Section 266 of the Civil Procedure Code, read with Section 70 of the Punjab Land Revenue Act, 1887, from attachment in execution of a decree against an agriculturist.

A Civil Court can only attach so much as will leave in the opinion of the Collector of the District a sufficiency for the owner's cattle.

Wasil v. *Muhammad Din* (1) superseded.

Case referred by Munshi Barkat Ali Khan, Munsif, 1st Class, Dasuya, District Hoshiarpur, on 4th June 1906.

The opinion of the Court was delivered by

18th March 1907. JOHNSTONE, J.—This is a civil reference by the Small Cause Court of Dasuya, District Hoshiarpur. In an execution proceeding the decree-holder got *bhusa* belonging to the judgment-debtor attached, and the question for decision was whether, and by what procedure, it is attachable. In *Wasil* v. *Muhammad Din* (1) a Division Bench of this Court held that *under Section* 266 (*b*), *Civil Procedure Code*, there is no prohibition whatever against the attachment of all or any of the *bhusa*

(1) 93 *P. R.*, 1904.

belonging to an agriculturist. This is no doubt a correct interpretation of that clause, but the Judge, Small Cause Court, properly points out that Section 266 (*n*) tells a different tale. Under it we have to look at Section 70, Land Revenue Act, 1887, and Volume I, Chief Court Rules and Orders, Part C, Rule 5, Note (4); and it becomes clear that, as regards fodder for cattle belonging to an agriculturist judgment-debtor, the Civil Court can attach only so much as will leave, in the opinion of the Collector of the District, a sufficiency for the owner's cattle. It seems to us that the procedure indicated here is cumbrous and unsatisfactory, but we cannot help that.

We rule, then, that in such cases the Civil Courts must only attach so much as the Collector, to whom a reference must be made, may judge to be right according to the rules of his department.

By this ruling we supersede the Division Bench ruling quoted above; but it is so clear that the Judges who sat on that Bench overlooked clause (*n*) of Section 266 of the Civil Procedure Code, that we do not think a reference to a Full Bench is called for.

No. 83.

Before Mr. Justice Chatterji, C.I.E, and Mr. Justice Johnstone.

KHAN ZAMAN,—(DEFENDANT),—APPELLANT,

Versus

FATTEH SHER,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1263 of 1906.

Pre-emption—Sale of share of joint agricultural land to a co-sharer—Suit by another co-sharer of the Khata—*Punjab Pre-emption Act, 1905, Section* 14.

Held, that under the provisions of the Punjab Pre-emption Act, 1905, a co-sharer in joint undivided agricultural land has no right of pre-emption in respect to a sale of a share of such land made to any of the several co-sharers in the estate.

Section 14 deals with several pre-emptors claiming in respect of the same property but does not provide for the case of a pre-emptor claiming against a vendee who has equal rights with him.

Further appeal from the decree of Misr Jawala Sahai, District Judge, Mianwali, dated 22nd March 1906.

Gokal Chand, for appellant.

Beni Parshad, for respondent.

The order of reference was as follows :—

17*th Jan.* 1907. Rattigan, J.—The question involved in this case is of importance and should be decided by a Division Bench. It relates to the proper construction of Section 14 of the Punjab Pre-emption Act, 1905, but here there are not two rival pre-emptors with equal rights. The dispute is between a *pre-emptor* and a *vendee*, both of whom are co-sharers in the *khata*.

The judgment of the Division Bench was delivered by

22*nd March* 1907. Chatterji, J.—The material facts of this case are that a joint *khata* of 27 *kanals* 12 *marlas* of land at Shabbaz Khel was held by four brothers, Fatteh Khan, plaintiff, Nur Khan, defendant 2, vendor, Khan Zaman, defendant 1, vendee, and Jahan Khan, who is no party to the proceeding. Some five years before suit Nur Khan transferred his one-fourth share to Khan Zaman and this suit was filed by the plaintiff for pre-emption of half the land.

Various pleas were raised by the vendee which need not all be noticed here. The only important ones are that the suit cannot be brought for pre-emption of half the property sold, that partition had taken place and that the claim was barred by time.

The first Court decided all the issues in plaintiff's favour and gave him a decree for one-third of the property sold. On appeal the District Judge, who had the powers of a Divisional Judge, enhanced the decree to a half share.

In the District Judge's Court it was objected by defendant vendee that plaintiff had no prior claim to pre-emption. The same ground is again raised in Revision under Section 70 (1) (*b*) which being a novel one, under the new Pre-emption Act, has been referred to a Division Bench by the learned Judge by whom the application was first heard. This is the sole point argued before us and requiring decision.

Although the sale took place long before the passing of the Pre-emption Act, the suit was filed after it came into force. Under clause (3) of Section 2 of the Act therefore the claim must be decided in accordance with the provisions of the Act and not otherwise. The suit has been filed within one year of the date of commencement of the Act and is therefore within time under Section 28 of the Act, the limitation being that provided in Article 120 of the Indian Limitation Act and the sale

being an oral one of a share in joint property. In fact the question of limitation is not before us.

The first Court gave a decree for one-third of the land on the ground that the three brothers other than the seller are entitled to proportionate shares. The District Judge enhanced the decree to a half share "according to general principles of equity," as the "first of the 4 brothers' forbearance should be equally divided between the vendee and the pre-emptor. The first Court's decree was obviously based on Section 14 of the Pre-emption Act.

Section 14, however, deals with several pre-emptors claiming in respect of the same property and does not provide for the case of a pre-emptor, claiming against a vendee who has equal rights with him. Nor can a principle which would be of use in deciding the present case be deduced from it. Clause (*a*) is the only clause which deals with claims by co-sharers and provides for their dividing the property pre-empted in proportion to the shares they already hold in the property. The Courts below have evidently decided the claim under this clause. But the language of this clause is clearly inapplicable to a case in which the dispute is between two persons who would have been equally entitled had they both claimed pre-emption, and would have come under clause (*a*), but one of whom happens to be the vendee and is sued by the other. No rule for deciding such a claim is provided by this or any other clause of Section 14 or is deducible from them. There is no other section to which resort can be had for the solution of the question. Clause (*e*) does not in terms apply, as this is not a claim by several pre-emptors but only by one. Section 12 of the Act, which defines the rights of the different grades of claimants for pre-emption of village property, declares that in the case of sale of a share in joint land the right belongs to co-sharers jointly in the first instance and then to them severally. This means we think that unless a joint claim is made each co-sharer is entitled to claim pre-emption for himself. If the purchaser is a stranger, such a co-sharer in the absence of a claim by all the co-sharers jointly, can claim and acquire the whole property by pre-emption. There is no provision from which it can be inferred that where the claimant has been able to make a several claim, the acquisition would be for the benefit of other co-sharers.

Is there a different rule if the purchaser happens to be one of the co-sharers? Clearly he does not stand in a different

position to that he would hold if he claimed pre-emption singly. All the co-sharers being on an equal footing, on what ground can pre-emption be claimed by one co-sharer against another, when that other acquires a share of the joint property by private purchase? Under the provisions of Section 12 his right to buy may be postponed to the right of joint purchase by all the co-sharers, but when such a right is not put forward, there is no reason why he should surrender the whole or any portion of his purchase to another co-sharer, who has exactly the same rights as himself.

The present is not a claim by the co-sharers of the *khata* jointly. Whether excluding the seller and the purchaser, the other two brothers, *viz.*, plaintiff and Jahan Khan, might have sued for pre-emption for the benefit of themselves, reserving a third share for the defendant purchaser is a question we need not decide. This possibly is the only way a joint claim by them which would have been superior to that of the purchaser's right could have been brought, though we do not commit ourselves to this view. But the present claim is merely a claim for pre-emption of half a share in the property sold. Such a claim is not contemplated or provided for in the Act. The right of pre-emption attaches to the entire bargain to which the right applies, and no change has been made in this respect by the Punjab Pre-emption Act. The claim, whether joint or several, must be for the entire property to which the right attaches.

The right of pre-emption is the right to acquire property in preference to other persons, see Section 4 of the Act. The plaintiff singly has no superior right to that of the defendant vendee, and the decree giving plaintiff a half share in the purchase is open to the same objection that the decree given in *Ahmad Din* v. *Mussammat Hasso* (1) was. It gives plaintiff a right to share in the benefits of the purchase made by the plaintiff and not to be substituted for him in the purchase as all pre-emption must mean, or, in other words, it is a decree for co-emption, not pre-emption. The reasoning of the Full Bench judgment in *Ahmad* v. *Ghulam Muhammad* (2), therefore fully applies to it. It is not necessary to report that reasoning here. The present Act has made no provision for co-emption.

It is clear then that the Punjab Pre-emption Act contains no provision for the decision of a claim of the present nature. It must therefore be decided on general principles.

(1) 54 *P. R.*, 1882. (2) 94 *P. R.*, 1904, *F. B.*

We hold that plaintiff had no priority over the defendant vendee, and that he is not entitled to claim pre-emption by himself against the vendee of the whole or any part of the property sold. His claim must therefore fail.

We accept the appeal and dismiss the plaintiff's claim with costs in all the Courts.

Appeal allowed.

No. 84.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

BHAGAT RAM AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

PARAS RAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 1298 of 1906.

Arbitration—Application to file a private award—Award effecting portion of immovable property—Registration Act, 1877, Section 17, clauses (b) (i)—Court not competent to remit private award when defective and indefinite—Civil Procedure Code, 1882, Sections 520, 525, 526—Court-fee—Court-fee on appeal from an order rejecting an application to file an award in Court—Court Fees Act, 1870, Schedule I, Articles 1, 17.

Held, that the Court-fee payable upon the memorandum of appeal against an order rejecting an application under Section 525 to file an award is Rs. 10 under the sixth clause of Article 17 and not an *ad valorem* fee in accordance with Article 1 of the Court-fees Act, 1870.

Hari Mohan Singh v. *Kali Prosad Chaliha* (1), *Dharm Das* v. *Ajudia Pershad* (2), distinguished.

Firdaus Khan v. *Dare Khan* (3) dissented from.

Lurkhur Chaube v. *Ram Bhajan Chaube* (4) followed

Held, also, that when an award made without the intervention of the Court is on the face of it defective, determines matters not referred to arbitration, and is so indefinite as to be incapable of execution the Court has no power under Sections 525 and 526 to amend it or to remit it for reconsideration but must refuse to file and enforce it.

Mustafa Khan v. *Phulja Bibi* (5) and *Miran Bakhsh v. Rahim Bakhsh* (6) referred to.

Semble: for the purposes of Section 525 of the Code of Civil Procedure an award of arbitrators privately appointed by the parties even if it effects partition of joint immovable property of over Rs. 100 in value and is signed by the parties to signify their acceptance of the same does not require registration and can be filed and made a rule of Court.

(1) *I. L. R., XXXIII Calc.*, 11.
(2) 70 *P. R.*, 1881.
(3) 109 *P. L. R.*, 1902.
(4) *All. W. N.* (1903), 214.
(5) *I. L. R., XXVII All.*, 526.
(6) 18 *P. R.*, 1892.

Miscellaneous first appeal from the decree of Pandit Joti Parshad, District Judge, Jhang, dated 30th August 1906.

Nanak Chand and Sukh Dial, for appellants.

Harikishen Singh and Bahadur Chand, for respondents.

The judgment of the Court was delivered by

19*th March* 1907. SHAH DIN, J.—This is an appeal from an order rejecting an application under Section 525, Civil Procedure Code, to file an award of arbitrators privately appointed by the parties. The memorandum of appeal bears a Court-fee stamp of Rs. 10. The pleader for Paras Ram, respondent, urged as a preliminary objection to the hearing of the appeal that the order appealed against being a decree, the memorandum of appeal must bear an *ad valorem* stamp under Article 1 of Schedule I of the Court-fees Act, calculated on Rs. 20,000, which is stated to be the amount or value of the subject matter in dispute. The authorities which were relied upon in support of this objection are *Hari Mohan Singh* v. *Kali Prosad Chaliha* (1) and an unpublished decision of this Court, *Firdaus Khan* v. *Dare Khan* (2) (Civil Appeal No. 990 of 1897, decided on 26th November 1901 by Anderson and Harris, JJ.). The appellants' pleader, on the other hand, cited the following decisions in support of his position.

Lurkhur Chaube v. *Ram Bhajan Chaube* (3) and *Nand Lal* v. *A. Atkinson* (Civil Appeal No. 989 of 1903, decided on 8th April 1905 by Chatterji and Kensington, JJ.).

Now the decision in *Hari Mohan Singh* v. *Kali Prosad Chaliha* (1), does not appear to us to be applicable to a case like the present. There the appeal was not from an order rejecting an application under Section 525, Civil Procedure Code, as in this case, but from an order passed under Section 526 directing the award to be filed in Court, and the decree passed in accordance with the award was "in terms to the effect that the plaintiff is to recover the sum of Rs. 3,248 and odd as awarded by the arbitrators." In that case, therefore, the amount or value of the subject matter in dispute in appeal was the sum of Rs. 3,248 and the memorandum of appeal was held to be governed by Article I of Schedule

(1) *I. L. R. XXXIII Calc.*, 11. (2) 109 *P. L. R.*, 1902.
(3) *All W. N.* (1903), 214.

I of the Court-fees Act. The ruling of this Court in *Firdaus Khan* v. *Dare Khan* no doubt supports the respondents' contention, but it will be observed that the learned Judges who decided that case followed *Dharm Das* v. *Ajudhia Perhsad* (1), which is analogous to the Calcutta case cited above, and is not, therefore, directly in point. The following passage in the judgment in *Dharm Das* v. *Ajudhia Pershad* (1) embodies the *ratio decidendi* :—

"We find that the award of the arbitrators filed by the order of the first Court, and in terms of which that Court passed judgment and decree has awarded to the plaintiffs-respondents, the applicants in the first Court, property shown in the decree to be of the value of Rs. 1,45,200, and the object of the appeals preferred by the appellant is to have this decree set aside. This much property then at least was in dispute on the appeal to the Commissioner and in dispute in this Court, even if it cannot be said that the whole property which forms the subject matter of the award is in dispute, a point which we do not decide. * * * * In the Commissioner's Court and in this Court Rs. 1,665 should have been paid in addition to Rs. 10 and under Section 12, clause 2 of the Court-fees Act, that amount must now be required from the appellant in that Court and the same sum in this Court * * * * before the appeal can proceed." It will thus be perceived that the ground upon which this Court in the last cited case held that Article I of Schedule I of the Court-fees Act governed the memorandum of appeal before it and that it was chargeable with an *ad valorem* Court-fee, was that the amount or value of the subject matter in dispute in appeal was the value of the property, *viz.*, Rs. 1,45,200 which the decree of the first Court passed in terms of the award of the arbitrators had awarded to the plaintiffs-respondents, and that the relief sought in the appeal was to have that decree reversed. That decision, therefore, like the Calcutta decision above referred to, does not seem to be applicable to a case like the present, in which the application to file the award under Section 525, Civil Procedure Code, has been rejected, and consequently no decree has been passed in terms of the award at all. The relief sought in the appeal before us is not the reversal of a decree awarding specific property of a definite money value to the respondents, but simply an adjudication upon

(1) 70 *P. R.*, 1881.

the appellants' right to have the award of arbitrators filed in Court under the provisions of Chapter XXXVII of the Code of Civil Procedure. The subject matter in dispute in this appeal, therefore, is one which it is impossible to estimate at a money value, and hence clause VI of Artile 17 of the second schedule to the Court-fees Act would seem to apply to this memorandum of appeal.

Another consideration which, in our opinion, very much weighs against the contention of the pleader for the respondent is this: Suppose this appeal is dismissed and the application under Section 525, Civil Procedure Code, to file the award stands rejected, it would be open to the present appellants to bring a regular suit to enforce the award. The plaint in such a suit, if one were brought, would bear an *ad valorem* stamp, and the appeal arising out of that suit would have to be similarly stamped. If this be so, can it be reasonably contended that it was within the contemplation of the legislature that an appeal from an order rejecting an application under Section 525, Civil Procedure Code, which was clearly intended to provide a simple, cheap, and expeditious process for making a private award, a rule of Court, should be treated, in regard to the question of the Court-fee leviable thereon, on precisely the same footing as an appeal arising out of a regular suit brought under the ordinary provisions of the law to enforce such an award? According to this contention the party who seeks to enforce an award made out of Court in the first instance by availing himself of the summary remedy provided in Chapter XXXVII of the Civil Procedure Code, and failing therein, by a regular suit, will have to pay on his memorandum of appeal an *ad valorem* Court-fee twice over. This, surely, could not have been intended by the legislature, especially when we find that an application under Section 525, Civil Procedure Code, though it must be numbered and registered as a suit and is for all practical purposes treated as a plaint, is only liable to a Court-fee stamp of Rs. 8 as an application and not to an *ad valorem* stamp as a plaint in a regular suit.

In *Nand Lal* v. *Atkinson* (C. A. No. 989 of 1903), this Court has decided that an appeal from an order refusing to file an agreement to refer to arbitration upon an application made under Section 523, Civil Procedure Code, is sufficiently stamped, if it bears a Court-fee of Rs. 10. This decision, though not directly applicable to the present case, is in

point, in so far as it lays down that the order appealed from is a "decree," but that the appeal is not liable to an *ad valorem* Court-fee, simply because it is an appeal from a decree and not from an order. The ruling of the Allahabad High Court in *Lurkhur Chaube* v. *Ram Bhajan Chaube* is a direct authority in support of the appellants' position.

Upon a careful consideration of the authorities, then, we hold that the appellants' memorandum of appeal, which bears a Court-fee of Rs. 10 is sufficiently stamped, and we overrule the respondents' preliminary objection accordingly.

On the merits of the appeal the questions for determination: are (1) whether the award of arbitrators, dated the 15th of November 1905, requires registration, and not being registered is inadmissible under Section 49 of the Registration Act; and (2) whether the award in question is open to objection on any of the grounds mentioned or referred to in Section 520 or Section 521, Civil Procedure Code, and cannot therefore be ordered to be filed? As regards the first question, the contention for the respondent was that the award which has effected a division of joint family property, having been signed by the parties to signify their acceptance of the award, must be treated as an instrument of partition, and its registration was compulsory under Section 17, Indian Registration Act. In the view which we take of the merits of this case, it is unnecessary to discuss and decide the point of law thus raised, though we may note that the present inclination of our opinion is that the award in question was not compulsorily registrable under Section 17, nor was it inadmissible under Section 49 of the Act, both because awards of all descriptions are exempted from registration under clause (2) of Section 17, and because in making an application under Section 525, Civil Procedure Code, the present appellants did not seek to enforce their title to immoveable property and tender the award as evidence of that title (as might be the case if a regular suit were brought to enforce an award), but merely asked the Court to file the award, which was at the time in possession of the arbitrators, and to make it a rule of Court.

As regards the second question, we are of opinion, after hearing arguments on both sides and referring to the record, that the award is defective and unenforceable, and should not

be ordered to be filed. The grounds urged in support of the conclusion come to by the Court below and which have, we consider, been made out upon materials before us, are —

(*a*) that the arbitrators did not effect a complete partition of the joint family property held by the four brothers who are parties to this appeal ;

(*b*) that the arbitrators exceeded their powers in deciding matters not referred to them; and

(*c*) that the award is so indefinite as to be incapable of execution.

As regards (*a*), the agreement, dated 15th November 1905, recites that there is a dispute among the brothers, parties to the agreement, in regard to the partition of the property, moveable and immoveable, which their father, Chaudhri Jagta Ram, has made over to them and which they hold jointly ; that Jagta Ram has set apart a portion of his estate for his own use and enjoyment ; and that they refer the matter of the partition of the joint property with the exception of the property left in the hands of Jagta Ram (which is set out in detail in the agreement) to two arbitrators who are named in the agreement. Provision is also made for reference to an umpire (Lala Sobha Ram) in case of a disagreement between the arbitrators. The whole joint property in possession of the brothers was to be divided into four equal shares by lots.

The arbitrators made the award on the same day on which the agreement was executed, and it appears from the evidence of the arbitrators and the statements of the brothers upon the record that the arbitrators did not take the trouble to ascertain the details of the property, moveable and immoveable, in the possession of each brother, but contented themselves with taking from the parties four incomplete lists of the joint property which they had prepared beforehand and casting lots on the basis of these lists without equalizing the parties' respective shares in accordance with a definite principle of valuation. Admittedly all cash and jewellery in possession of the parties were excluded from the award, and no attempt at all was made to find out their amount or value by sending for and examining the parties ' books, which the arbitrators state the parties declined to produce. A comparison of the three lists on the record with the details of the property as given in the award also discloses discrepancies which, though not very material, at least show that the award was not the

result of mature deliberation and a full enquiry as to the details and amount of the property which the arbitrators were asked to divide. We are therefore, constrained to hold that the award was defective on the ground that it failed to make a complete partition of the joint property which the arbitrators were appointed to divide.

As regards (*b*) a reference to the award shows that the arbitrators exceeded their powers in giving a decision in respect of at least two matters which were not referred to them by the agreement. In the first place, the award, after referring in detail to the property which under the agreement was left in the hands of the father, and which was expressly excluded from the cognizance of the arbitrators (who were appointed only to partition joint property held by the brothers) decides that the father "shall have free power of disposition with regard to this property uncontrolled by the sons, no matter whether the transfer be made to one of the sons in consideration of services rendered by him or to a stranger." In the second place, the award declares that certain residential houses in possession of the brothers separately shall remain the joint property of the parties for the present, that they shall be divided among them within six months, but that if not so divided within the said period each brother shall be entitled to recover from such of the others as may be liable, the value of the improvements, if any, which he may be found to have effected in respect of the house or houses in his possession. We are clearly of opinion that in deciding these two matters in the way they did, the arbitrators exceeded their powers, which were expressly limited by the agreement under which they had been appointed to the partition of the joint estate of the parties, and that this being so, the award in question must be held to be one which is incapable of being filed. For it is not seriously denied that in these proceedings, which have been initiated by an application under Section 525, Civil Procedure Code, to file an award, the Court has no power to amend the award or to remit it for reconsideration, but must either affirm it in its entirety or wholly reject it. (See *Mustafa Khan* v. *Phulja Bibi* (1) and *Miran Bakhsh* v. *Rahim Bakhsh* (2)).

(1) *I. L. R.*, 27 *All.*, 526. (2) 18 *P. R.*, 1909.

With regard to the last point (*c*), it needs only to read the award to see that the partition of the joint property of the parties has been effected therein in such an ill-defined manner that if the award were ordered to be filed and a decree passed in terms of the award, the identification of the property, which has been allotted to each brother as his share, would be attended with manifold difficulties, and we are, therefore, constrained to hold that the award is so indefinite as to be incapable of execution.

For the foregoing reasons we maintain the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

No. 85.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

APPELLATE SIDE.

SOHNA,—(DEFENDANT),—APPELLANT,

Versus.

SUNDAR SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 645 of 1904.

Custom—Adoption—Adoption of daughter's son—Dhillon Jats of Mauza Jawinda Khurd, Tahsil Tarn Taran, Amritsar District.

Found, in a suit the parties to which were Dhillon Jats of Mauza Jawinda Khurd in the Tarn Taran Tahsil of the Amritsar District that the validity of the adoption of a daughter's son had been established by the party setting up the adoption.

Ralla v. *Budha* (1), *Jiwan* v. *Hakam Khan* (2), *Wasawa Singh* v. *Arur Singh* (3), and *Buta Singh* v. *Ram Singh* (4) referred to.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 20th May 1904.

Harris, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

8th Feb. 1907. SHAH DIN, J.—The facts of this case are as follows: One Jiwan Singh, a sonless Dhillon Jat of Mauza Jawinda Khurd, Tahsil Tarn Taran, in the Amritsar District, adopted his daughter's son, defendant in this case, and executed a deed of adoption in his favour on the 14th January 1901. The plaintiffs who are collaterals of Jiwan Singh in the fourth degree, brought the present suit for a declaration that the

(1) 50 *P. R.*, 1893, *F. B.* (3) 33 *P. R.*, 1900.
(2) 140 *P. R.*, 1894. (4) 86 *P. R.*, 1907.

alleged adoption of the defendant did not in fact take place and that if it did take place it was invalid by custom. The defendant pleaded that he had been adopted by Jiwan Singh with the observance of the requisite ceremonies accompanied by the execution and registration of a deed of adoption, and that under the custom applicable to the parties his adoption was perfectly valid. The first Court framed two issues on these pleadings, one relating to the *factum* of the adoption and the other to its validity, and having found in favour of the defendant on both the issues, it dismissed the plaintiff's suit. On appeal the learned Divisional Judge concurred with the first Court's finding as regards the *factum* of adoption, but differed from it as to the validity of it, holding, after a discussion of the *Riwaj-i-am* upon which the first Court had relied and a few judicial decisions bearing upon the question, that among Dhillon Jats of the Tarn Taran Tahsil a sonless proprietor could not adopt a daughter's son. The plaintiffs' suit was accordingly decreed.

The defendant appeals to this Court. As both the Courts have found that the adoption in dispute did as a fact take place, and the correctness of this concurrent finding is not challenged by the learned pleader for the respondents, the sole question for decision in this appeal is whether the defendant upon whom, according to the Full Bench ruling of this Court in *Kalla* v. *Budha* (1) the onus of proof lay, has established that his adoption is valid by custom. After hearing arguments and referring to the *Riwaj-i-am* and the judical precedents bearing on the point, we think that the question must be answered in the affirmative. The clauses of the *Riwaj-i-am* of 1865 which are relevant to the present enquiry are as follows:—

Section IV:

Power of a sonless Dhillon Jat to adopt and the rights of the adopted son. *Answer to Q.* 13 (*clause* 1). In our tribe the custom of adoption prevails. A woman cannot adopt, but a male sonless proprietor can in his lifetime adopt a boy up to the age of 15. A written instrument is essential to such adoption as well as the observance of ceremonies such as are performed at the birth of a son. The brotherhood should also assemble. *Answer to Q* 14 (*clause* 2). It will be competent to a male sonless proprietor to adopt the son of any person in his own or some other

(1) 50 P. R. 1898, F. B.

village, from among all the *Gots* of the *Jat tribe* except the Bal *Got*, it being immaterial whether the adopted person is the son of a collateral near or remote, or of a daughter, or of a sister. The proprietors of Ajnala, Raya, and Amritsar *parganas* made an exception to this general rule and stated that only near collaterals could be eligible for adoption and not every member of the whole *qaum*, and that the issue of a daughter or sister would not be so eligible.

The lower appellate Court remarks that " the *Riwaj-i-am* " of the Amritsar District carries but little weight as an " expression of real custom "; but we find that in *Jiwan* v. *Hakam Khan* (1), the *Riwaj-i-am* of the Tarn Taran Tahsil was held to be a reliable and correct record of custom, and that in *Wasawa Singh* v. *Arur Singh* (2), (p. 120), the *Riwaj-i-am* of the Amritsar Tahsil was considered of some value in regard to the question of the validity of adoption of daughter's son among *gil* jats of that Tahsil.

The answer to *Q. XIV* in the English abstract of customary law of Amritsar prepared in 1893, does not afford us much guidance here; it simply notes that in many cases the adoption of a daughter's son in the absence of near collaterals was stated to be customary.

In support of the *Riwaj-i-am* of 1865, the lower appellate Court notes two instances: (1) in village Lopoke, where Jai Singh adopted his sister's son, and (2) in village Khara, where Kharak Singh adopted a foundling. But it does not consider these instances of much value on the ground that there is nothing to show whether there were any collaterals of the adoptive father or whether these adoptions were disputed or acquiesced in. Besides the *Riwaj-i-am* in question, the defendant relied in the Courts below on two judicial decisions in support of his case, *viz.*, (1) a judgment of Agha Kalb-Ahid Khan, dated 14th June 1879, and (2) a judgment of Colonel Riddle, dated 24th December 1885, both of which decide that the adoption of a daughter's son among Dhillon Jats of the Tarn Taran Tahsil is valid by custom. These decisions the lower appellate Court has refused to follow mainly on the ground that in recent years the Courts have set aside gifts made to daughters' sons by Dhillon Jats of this Tahsil, The cases upon which

(1) 140 *P. R.* 1894. (2) 83 *P. R.*, 1900.

the lower appellate Court relies in this connection are as follows:—

(1). In Civil Appeal No. 159 of 1899 the Divisional Judge of Amritsar held that among Dhillon Jats of Tarn Taran Tahsil custom did not empower a gift to a daughter's son in presence of nephews.

(2). In Civil Appeal No. 968 of 1899 the Chief Court held that no custom allowing a gift to a daughter's son of a Dhillon Jat was established.

(3). In Civil Appeal No. 193 of 1901, the Divisional Judge of Amritsar held that a gift among Dhillon Jats of Tarn Taran Tahsil to a daughter's son was invalid when not assented to by the brotherhood.

(4). In Civil Appeal No. 53, decided on 28th January 1903, the Sub-Judge of Amritsar held that a gift to a daughter's son (among Dhillon Jats) was invalid as the collaterals had not assented to it.

Now, it will be noticed, in the first place, that all these decisions related to gifts made to daughters' sons and are not, therefore, applicable to the question of adoption which is under consideration in this case. In the second place, the provisions of the *Riwaj-i-am* as to the power of gift are not in all particulars identical with those relating to the power of adoption as set out above, nor can it be said, without examining the facts of each case, how far its particular features as disclosed by the material upon the record contributed to the decision in that case of the question of custom before the Court.

For the determination of the question that arises in this appeal we have before us no less than three unpublished decisions of this Court which are directly in point and in two of which it has been definitely held that the adoption by a sonless Dhillon Jat of the Tarn Taran Tahsil of a daughter's son is valid by custom. In the first of these decisions (Civil Appeal No. 960 of 1895, decided on 24th December 1897) a Division Bench of this Court held, after citing the *Riwaj-i-am* of 1865 with approval, that among Dhillon Jats of Tarn Taran Tahsil a sister's son could validly be adopted. If the adoption of a sister's son is valid among these Jats, *a fortiori* that of a daughter's son would be so, and it is noteworthy that the learned Judges in the above case laid stress upon the plaintiff's own admission, which was in accordance with the custom "prevalent among the tribes that "a sonless Dhillon Jat could

"adopt a daughter's son of 5 years of age in the presence of the "brotherhood."

In the other two decisions, *viz.*, Civil Revision No. 2196 of 1904, decided by Mr. Justice Harry, on 9th July 1906, and *Buta Singh* v. *Ram Singh* (1), decided by one of us (Mr. Justice Robertson) on 21st January 1907, it was held that by custom a sonless Dhillon Jat of Tarn Taran Tahsil had power to adpot his daughter's son. We consider that these decisions conclude the question before us, and following these we hold that the custom of adoption as embodied in the *Riwaj-i-am* of 1865 prevails among Dhillon Jats of Tahsil Tarn Taran and that the adoption of the defendant in this case is perfectly valid under the said custom.

The appeal is accordingly accepted and the plaintiff's suit is dismissed with costs.

Appeal allowed.

No. 86.

Before Mr. Justice Robertson.

APPELLATE SIDE

BUTA SINGH AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

RAM SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 1028 of 1906.

Custom—Adoption of daughter's son—Dhillon Jats of Tahsil Tarn Taran, Amritsar District.

Found, that the adoption of a daughter's son is valid by custom among Dhillon Jats of the Tarn Taran Tahsil.

Ralla v. *Budha* (2) referred to.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 18th August 1906.

Gurcharn Singh, for appellants.

Hukam Chand and Melu Ram, for respondents.

The judgment of the learned Judge was as follows:—

21*st Jan.* 1907. ROBERTSON, J.—In this case the plaintiffs, who are collaterals in about the 3rd degree from the adopter, sue to set aside the adoption of one Chetu by Buta,—Chetu is the son of Buta's daughter. Buta is alive, and himself sets up the adoption. Of the *factum* of the adoption there can therefore be no doubt, the only question is as to its validity. Both Courts find that adoption occurred in 1901 at any rate if not before.

The witnesses produced give several instances of such adoptions, and the entry in the *Riwaj-i-am* of 1865 distinctly

(1) 86 *P. R.*, 1907. (2) 50 *P. R.*, 1893, *F. B.*,

authorizes them. No instances are actually given in the *Riwaj-i-am* but its value is increased by the fact that the question was clearly carefully considered and different answers were given by different sections of the community, and this *Riwaj-i-am* has been followed by this Court in a case to be noticed later. The answer to Question XIV in the English abstract of Customary Law of Amritsar prepared in 1893 does not give us much assistance. It notes that in many cases the adoption of daughters' sons in the absence of near collaterals was stated to be customary.

As to the statement of Bura in a case in 1883 it is quite clear that he did not mean to say that no custom of adoption existed, but merely that no custom *as set up* of adoption by a widow existed. Under no circumstances would the statement have amounted to estoppel. Even if the first Court had not incorrectly interpreted it, it would merely have amounted to an admission. The first Court says further: "It is admitted that "prior to 1865 there was a custom regarding such adoption.' If this be so it is quite clear that the burden of proof which initially lay on the defendant to prove the validity of the adoption (*Ralla* v. *Budha* (1)) was shifted to the plaintiff, upon whom the burden of proving a change in the custom lay heavily. The admission shows that the *Riwaj-i-am* entry was correct. There are at least three instances of the adoption of a daughter's son given by the witnesses. But in addition to this there are two clear decisions of this Court which appear to me to conclude the matter, one by a Division Bench and one by a Single Bench, in respect of these very Dhillon Jats of Amritsar District. In *Kharak Singh* v. *Indar Singh*, Civil Appeal No. 960 of 1895, it is clearly laid down by a Division Bench of this Court that the adoption of a daughter's son was valid by custom. The same view was taken by a Single Judge in Civil Revision No. 2196 of 1904. Neither of these two judgments was discussed by either of the lower Courts. The latter is a case of Dhillon Jats of Tarn Taran Tahsil as is the case in No. 960 of 1895 also.

Under these circumstances I am constrained to hold that the adoption by Buta of Chetu the son of his daughter was valid, and in accordance with the custom of the Dhillon Jats. The appeal is accordingly accepted and the suit dismissed with costs throughout.

Appeal allowed.

(1) 50 P R., 1898, F. B.,

No. 87.

Before Mr. Justice Chatterji, C. I. E., and
Mr. Justice Johnstone.

APPELLATE SIDE.

ATTAR SINGH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

SANT SINGH AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 997 of 1906.

Custom—Adoption—Adoption of sister's son—Kalals of Butari, tahsil Ludhiana—

Found, that among Kalals otherwise called Ahluwalias or Nebs of Mauza Butari in the Ludhiana tahsil the adoption by a sonless proprietor of a sister's son is valid by custom.

C. A., 371 of 1902, and Kirpi v. Solekh Singh (1), *distinguished.*

Attar Singh v. Guran Ditta (2), *Khasan Singh v. Maddi* (3), *Uttam Singh v. Jhanda Singh* (4), *Ralla v. Budha* (5), *Atar Singh v. Prem Singh* (6), *referred to.*

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Ambala Division, dated 30th July 1906.

Muhammad Shafi for Appellants.

Ishwar Das and Gobind Das for Respondents.

The judgment of the Court was delivered by—

16*th April* 1907. JOHNSTONE, J.—The parties to this case are *Kalals* (otherwise called Ahluwalias or *Nebs*) of Mauza Butari, Tahsil and District Ludhiana. The question at issue is the validity of the adoption by defendant 1, a sonless landowner, of defendant 2, his sister's son. Voluminous evidence was recorded by the first Court, whose judgment is a careful and elaborate one. The finding was in favour of the adoption and the suit was dismissed with costs.

The learned Divisional Judge, considering himself bound to follow the view taken in Civil Appeal 371 of 1902 of this Court, a case of the *Kalals* of Kalalhatti in the Umballa District, reversed the decision, found the adoption invalid, and gave plaintiffs a decree, against which defendants now appeal.

Apart from the ruling quoted above, the Divisional Judge's own ideas seem to have been in favour of the defendants; and I think it will clear the ground if I record at once my opinion

(1) 67 *P. R.*, 1904.
(2) 50 *P. R.*, 1879.
(3) 122 *P. R.*, 1893.
(4) 21 *P. R.*, 1896.
(5) 50 *P. R.*, 1893, *F. B.*
(6) 12 *P. R.*, 1906.

that that ruling is easily and perfectly distinguishable, and by itself forms no sufficient ground for decreeing this claim. It will appear at once, upon a perusal of the following sentences, how mistaken is the Divisional Judge's remark that the circumstances of the Kalalhatti case and of the present case "are very similar." Put briefly, the *ratio decidendi* there was that Kalalhatti being a compact village entirely founded and owned by *Kalals*, who settled there many generations ago and live mainly by agriculture, the probability is that the inhabitants, in connection with the preservation intact of the aquatic group and of the original village community, have adopted the customs of the ordinary Punjabi agriculturist; and that a different presumption arises where *Kalals* or similar people settle in small numbers in a village mainly held by other tribes. In the present case these *Kalals*, 4 families in all, own only 3 ploughs of land out of 11¼ in the "miscellaneous" *Patti*, there being 6 other *Pattis* of *Jats*; they have not been in the village for more than some 4 generations; they do not themselves cultivate, but are mostly in Government service or in professional occupations; they intermarry with urban *Kalals*, whose customs are admittedly (see plaintiffs' own witnesses) different from those of the *Jats*; *Karewa* is apparently not allowed among them as it is among *Jats*; and it is contended with great force that, these things being so, the Kalalhatti ruling far from being in favour of plaintiffs, is really against them. These statements of facts are clearly warranted by the record. Mr. Muhammad Shafi for the defendants urges that even among real agriculturists adoption of daughters' and sisters' sons should be declared admissible as a matter of initial presumption, but here we have against us the ruling *Ralla* v. *Budha* (1), which has been generally followed these 14 years, though doubts may have been suggested regarding it. I do not think the present occasion opportune for the reopening of that question.

The initial presumption, then, in my opinion is as regards these *Kalals* that they do not follow agricultural custom, and for the reasons given in Civil Appeal 371 of 1902 aforesaid, I hold also that they do not follow Hindu Law. I may note, however, that the *Kalals* being not of the "twice born" classes of Hindus, even under Hindu Law there would be no prohibition against the adoption of a daughter's or sister's son. It remains to see what is the custom which the evidence on the record shews they actually do follow.

But first I would like to make a few remarks regarding the meaning of the word "agriculturist" and also to the status

(1) 50 P. R., 1893, F. B.

and occupations of *Kalals* as found in this Province. The learned Divisional Judge seems to me to confound ownership of land with agriculture as an occupation. The distinction is a very clear one, and was brought out forcibly in *Atar Singh* v. *Prem Singh* (1), in which case certain *Khatris*, who had held land for no less than 200 years, were taken as non-agriculturists and as a tribe regarding whom no presumption arose that they had adopted agricultural custom. It seems to me clear on the facts given above that the *Kalals* of Bhutari are not agriculturists properly so called. Again the same idea as that which formed the basis of my judgment in Civil Appeal 371 of 1902 comes out in the two *Bedi* cases, both of Hoshiarpur District, *Khazan Singh* v. *Maddi* (2), and *Uttam Singh* v. *Jhanda Singh* (3). In the former case it was found that the *Bedis* formed a compact village living on agriculture, in the latter they were a small section of a village community, mainly composed of other tribes. In the latter Hindu Law was applied, in the former agricultural custom.

These *Kalals* came, or say they came from Ahlu, District Lahore, and are to be found in many parts of the province. They have taken to a variety of occupations, of which agriculture is probably not the most prominent. Their religious and social status was low, but has improved somewhat in recent generations partly from the circumstance that the Kapurthala family belongs to the tribe. On the high authority of the census officers of 1881, and 1891 (Messrs Ibbetson and Maclagan) they should be classed as a whole as "Miscellaneous artisans", and so Mr. Gordan Walker, Settlement Officer of Ludhiana in the eighties, also classes them, though he thinks perhaps *for that district* they *might* be called agriculturists. Notwithstanding petitions to Government the *Kalals* of Ludhiana have not been included in the list of agricultural tribes of the district for the purposes of the Land Alienation Act. In Kalalhatti, District Umballa, as already noted, and in Patti Kalalan, a compact village of *Kalals* adjoining Umballa City, *Mussammat Kirpi* v. *Solekh Singh* (4), they have been declared to have adopted agricultural custom; but equally in Jandiala, District Amritsar, the reverse has been found to be the case,—*Attar Singh* v. *Guran Ditta* (5)—upon a careful enquiry into actual practice.

Considering all this and also the circumstance that, according to the evidence, the *Kalals* of Butahri have relations rather

(1) 12 *P. R.*, 1906. (2) 21 *P. R.*, 1896.
(3) 122 *P. R.*, 1893. (4) 67 *P. R.*, 1904.
(5) 50 *P. R.*, 1879.

with Amritsar and Lahore than with Umballa, I am inclined to hold that the *onus* in the present case, at this stage of the discussion is on plaintiff. But, however this may be, I will consider first the evidence produced or relied upon by defendants.

Defendants have put in a list of adoptions in the tribe, some 30 in number, and this has been exhaustively criticised by Lala Ishwar Das. Divisional Judge discusses about half in detail and says the rest are vague. It would be tedious to go through this list *seriatum*. I will content myself with noticing those which seem to me to be unmistakably in favour of defendants and with making a few remarks about the others. No. 3 is no doubt of the town of Khanna, but the case was undoubtedly one of nomination of an heir and the property was 300 *bighas* of land. The heir selected was a daughter's son's son. Rao Singh of Kalal Majra (No. 6) orally adopted Hira Singh, a daughter's son, and there is a nephew of the adopter, an influential man who became Lambardar *vice* Rao Singh; Hira Singh keeping all deceased's property. No. 16 is the case of one Ram Kishen (Munsif) of Alawalpur, who adopted a daughter's son, his property was in land and was of substantial value. Nos. 1, 2, 4, 10, 11, 12, 15, 17, 19, 22 are objected to by plaintiffs on the grounds that the properties were small and the cases of towns. This is to some extent true. It is also true that in some cases the property was houses or shops. I think Mr. Shafi is right when he protests against the discrimination adopted between town *Kalals* on the one hand and rural *Kalals* not forming compact village communities on the other; also between house and landed property. Adoption is the appointment of an heir to the whole of the adopter's property. If the tribe anywhere recognises adoption of daughters' sons or sisters' sons, the adopted one will of course take everything on the adopter's death—land, houses and moveables. In No. 4 it is said that there were no reversioners, but this is incorrect. I lay no stress on the remaining instances, Nos. 5, 7, etc., as in some of them there is some possible doubt as to whether they involve real adoptions at all, and in others special reasons exist why reversioner should not have sued. I should also note that plaintiffs' own witnesses have been forced to admit some 13 of defendants' instance.

Plaintiff's evidence to rebut all this is weak. His witnesses are numerous, but their value may be gauged by the fact that many of them roundly assert that adoption is not *at all* allowed among the tribe. Further, some of them first deny the truth of certain of defendants' instances and then have to admit

that the adopted ones are in possession and enjoyment of the adopters' estates. They are able to cite not a single instance of Ludhiana, Amritsar or Lahore in which the adoption of a daughter's or sister's son has been set aside.

For all these reasons it seems to me abundantly clear that the adoption in the present case is valid, and that the decree of the Divisional Judge should be set aside and the suit dismissed with costs.

Appeal allowed.

No. 88.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

APPELLATE SIDE.

NIGAHIA AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

SANDAL KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 409 of 1906.

Custom—Alienation—Gift by sonless proprietor to daughter—Rajputs of mauza Kharal Kalan and Kharal Khurd in the Jullundur and Hoshiarpur Districts.

Held, that defendants on whom the *onus* lay had failed to establish a custom by which among Rajputs of Bhatti *got* of *mausa* Kharal Kalan and Kharal Khurd in the Jullundur and Hoshiarpur Districts a sonless proprietor was competent to gift his ancestral estate to a daughter in the presence of collaterals of the fifth and third degrees respectively.

Imam-ud-din v. *Wazir Khan* (1), *Suchet Singh* v. *Banka* (2), *Sultan Bakhsh* v. *Mussammat Mahian* (3) *Mussammat Lakhan* v. *Rahmat Khan*, (4), *Amir Khan* v. *Sardara* (5), and *Umar Khan* v. *Samand Khan* (6), referred to.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Jullundur Division, dated 4th April 1905.

Harris, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by

30*th March* 1907. SHAH DIN, J.—In this appeal and in C. A. No. 1095 of 1906 the same question of custom is involved. They were therefore heard together and will be disposed of by one judgment. In this appeal the parties are Rajputs of Bhatti *got* of *mausa* Kharal Kalan in the *tahsil* of Jullundur, while in the

(1) 14 *P. R.*, 1890.
(2) 90 *P. R.*, 1891.
(3) 46 *P. R.*, 1894.
(4) 101 *P. R.*, 1895.
(5) 110 *P. R.*, 1894.
(6) 145 *P. R.*, 1894.

connected appeal (C. A. No. 1095), they are Rajputs of *mauza* Kharal Khurd in the *tahsil* of Dasuya in the Hoshiarpur District. Both the villages, Kharal Khurd and Kharal Kalan, are inhabited by Rajputs, mostly of the same *got*, and it is admitted that they are governed by the same rules of custom. In this appeal the dispute has arisen out of one Nigahia having made a gift of his ancestral land in favour of his daughter, Mussammat Jhando, on 17th January 1904, the validity of which gift is contested by Nigahia's collaterals who meet him in the fifth degree from the common ancestor. In the connected appeal the gift in dispute was made by one Gulab Khan to his daughter, Mussammat Imam Bibi, and the plaintiffs who have sued to have the alienation set aside are Gulab Khan's collaterals in the third degree. The question for decision, therefore, in both the appeals is whether among Rajputs of Kharal Kalan and Kharal Khurd in the Jullundur and Hoshiarpur Districts, respectively, a sonless proprietor is competent by custom to make a gift of ancestral land to his daughter in the presence of collaterals of the fifth and third degrees.

It is not disputed that the initial burden of proof lies upon the donees, the daughters, in both the cases, and we have therefore to see whether they have succeeded upon the materials before us in discharging that *onus*. The Courts below have found in each case that the *onus* has not been discharged and have decreed the plaintiffs' claim.

The *Riwaj-i-ams* of *tahsil* Jullundur and *tahsil* Dasuya practically throw no light upon the point under consideration, and the *Wajib-ul-arz* of either village is equally silent upon it. The decision of the question of custom, therefore, turns wholly upon the instances which have been adduced by the parties and further sifted by the local commissioner appointed during the trial of the suit out of which the present appeal has arisen, the oral evidence produced in either case being admittedly of little value. The Court of first instance has, in this case, examined in sufficient detail the instances aforesaid, and at the arguments before us have been limited to a discussion of those instances, we have to see how far they bear upon the question at issue between the parties.

There are altogether seventeen instances, of which Nos. 1 to 8 relate to *mauza* Kharal Kalan (Nos. 1 to 4 being deposed to by witnesses examined in Court and Nos. 5 to

8 being brought to light at the local enquiry). Nos. 9 to 12 and No. 17 relate to *mauza* Kharal Khurd, Nos. 13 to 15 relate to Rostgo (which is inhabited mainly by Naru Rajputs) and No. 16 relates to *mauza* Zahura.

The detail is as follows :—

(1). One Kesar gifted, on 9th June 1902, 46 *kanals* 1 *marla* of land (out of 62 *kanals* and $11\frac{3}{4}$ *marlas*) to his daughter without consent of collaterals. No suit has yet been brought. The alienation is very recent and no conclusion can be based upon it.

(2). One Fatteh made a verbal gift of 4 *kanals* 1 *marla* out of 30 *ghumaos* (about $\frac{1}{8}$th of the estate) to his daughter on 15th April 1888, a son of the donor is alive. No suit brought. The gift was of a very small area and the son appears to have been a consenting party.

(3). Allah Ditta, son of Fatteh (in instance No. 2) gifted on 9th November 1894 $\frac{1}{6}$th share of 234 *kanals* 10 *marlas* to his sister. No suit brought by collaterals.

(4). This instance is not at all clear.

(5). One Toba made a verbal gift to his sister's sons of about $\frac{1}{8}$th of his estate on 15th June 1887 in presence of his son. No suit brought.

(6). One Ghausa died in 1866, leaving him surviving two brothers, Kada and Baja, and two daughters Mussammats Chando and Bhari. The daughters took possession of Ghausa's estate with the consent of Kada. In 1875 the sons of Baja sued the daughters for possession of their uncle's land, with the result that after two remands for local enquiry the Additional Commissioner of Jullundur held on 15th July 1876 that by custom applicable to the parties' tribe the daughters were excluded from inheritance by the nephews of the deceased proprietor, and the suit of the latter was accordingly decreed. In the course of the enquiry in that case, the plaintiffs seem to have admitted that if their uncle Ghausa had gifted his land to his daughters, they (the plaintiffs) would have had no claim to it. It is this admission of the plaintiffs as to the validity of a gift to a daughter which is relied upon by the donee in this case, but obviously a stray admission in an old case which did not touch the merits of the actual dispute between the parties can hardly furnish a good basis for a claim as of right under circumstances attending the present alienation.

(7). One Jiwan gifted his land to his daughter, Mussammat Lado, before the present settlement with the consent of collaterals. After the death of the donee, the collaterals succeeded. Not applicable.

(8). Gift to a sister (date unknown) of about $\frac{1}{50}$th of estate in presence of the donor's children. This instance is of no value.

(9). Before settlement one Gulab Khan made a gift of his land to a daughter and a daughter's son, who had also been, it appears, adopted by the donor. The cousins and cousin's sons of Gulab Khan sued the donees to set aside the gift. The first Court dismissed the suit and the appeal was dismissed by the Additional Commissioner of Jullundur on 12th December 1883. The *onus* was laid upon the plaintiffs to show that the gift was invalid and the decision was based upon some instances (the nature and circumstances of which were not set out in the judgment, a copy of which is on the record) in which gifts to daughters were said to have been maintained among Rajputs of the Jullundur and Hoshiarpur Districts. It was also found that the daughter's son had been adopted by the donor.

(10). This instance is the subject of dispute in C. A. No. 1095 of 1906.

(11). This instance is said to relate to the succession of two daughters to their father's land, but no particulars are given and it took place before settlement. The patwari states that a suit was brought, but there is no copy of a decision on the file.

(12). One Mandi willed away his property five or six months before the present suit to his daughters. No further particulars.

(13). A gift to a daughter's son 30 years ago. A suit was brought, which ended in a compromise, the donee getting only $\frac{1}{8}$th of the land gifted.

(14). This was a gift of $\frac{1}{3}$rd of the donor's estate to a sister's son before the present settlement in the presence of minor sons. Not of much value.

(15). A verbal gift made about a month before the suit to a sister's son of about $\frac{1}{3}$th of the donor's land in presence of a minor son.

(16). This is a case of adoption and hence inapplicable to this case.

(17). A gift to a sister's son was set aside on suit brought by collaterals.

A careful analysis of the above instances serves to show —

(1) that in some instances the alienations were of too recent a date to be of much practical value as instances of custom as they may, and in all probability will be questioned and became the subject of judicial investigation;

(2) that in others the amounts of the land alienated were too small to arouse any effective opposition on the part of collaterals;

(3) that in others again the alienations were made either with the consent of collaterals or in the presence of minor heirs who could not object;

(4) that in no single instance in which an alienation was questioned in Court was there a thorough enquiry into the power of a sonless proprietor among the parties' tribe to make a gift to his daughters upon lines approved by the recent decisions of this Court.

It follows, therefore, that in our opinion the donee in the present case, upon whom the *onus* lay, has failed to prove that in the presence of the plaintiffs, who are not shown to be remote collaterals of the donor, the gift in dispute is valid by custom.

Of the published decisions of this Court which have been cited before us in argument none is directly in point. We may, however, note that the following judgments quoted by the learned pleader for the respondents appear to have a bearing upon the question under consideration:

In *Imam-ud-din* v. *Wasir Khan* (1), it was held that among Muhammadan Bhatti Rajputs of the Gurdaspur District, a sonless proprietor was not competent by custom to sell his ancestral land to his son-in-law with the consent of his collaterals, except for necessity.

In *Sucket Singh* v. *Banka* (2) it was held that there was no custom among Hindu Bhatti Rajputs of the Dasuya *tahsil*, Hoshiarpur District, permitting a proprietor to bequeath ancestral property to near relations in the presence of other near relations The provisions of the *Riwaj-i-am* bearing upon the question of alienation are fully discussed in this decision.

(1) 14 *P. R.*, 1890. (2) 90 *P. R.*, 1891.

Sultan Bakhsh v. *Mussammat Mahian* (1), and *Mussammat Lakhan* v. *Rahmat Khan* (2) relate to Ghorewala Rajputs of the Hoshiarpur and the Jullundur Districts, respectively, and lay down that a gift by a sonless proprietor to a daughter is invalid by custom in the presence of collaterals. In the latter decision the collaterals were of the fifth degree.

Amir Khan v. *Sardara* (3) is an important decision relating to Naru Rajputs of the Hoshiarpur District, in which a large number of authorities bearing upon the question of custom applicable to *Narus* are discussed. The rule laid down is that among Naru Rajputs a gift by a sonless proprietor to a sister's son who is also a collateral is invalid in presence of other collaterals.

In *Umar Khan* v. *Samand Khan* (4) it was held that a sonless proprietor among Naru Rajputs of the Jullundur District has not an unrestricted power of alienation of ancestral property in presence of collaterals.

The weight of the above decisions, so far as they may be said to be relevant to the present enquiry, is in favour of the plaintiffs-respondents' position, and as the appellants' counsel has been unable to cite to us a single ruling of equal relevancy, we cannot but hold upon the materials before us that the donee has failed to prove that the gift in dispute is valid by custom.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

No. 89.

Before Mr. Justice Reid.

BHAGAT RAM,—(DEFENDANT),—APPELLANT,

Versus

GANDA SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 772 of 1906.

Arbitration—Award—Delivery of, within the period allowed by the Court—Civil Procedure Code, 1882, *Sections* 508, 521.

Held, that an award made and signed within the period fixed by the Court even when filed in Court after the expiry of that period is valid

(1) 46 P. R., 1894.
(2) 101 P. R., 1895.
(3) 110 P. R., 1894.
(4) 145 P. R., 1894.

under Sections 508 and 521 of the Code of Civil Procedure.

The expression "delivery" in Section 508 means "making" and not "filing in Court."

Umersey Premji v. *Shamji Kanji* (1)., *Arungam Chetti* v. *Arunachalam Chetti* (2), and *Sita Ram* v. *Bhawani Din Ram* (3) followed.

Chuhar Mal v. *Hari Ram* (4) and *Raja Har Narain Singh* v. *Chaudhrani Bhagwant Kuar* (5) distinguished.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Amritsar Division, dated 6th April 1906.

Roshan Lal, for appellant.

At the first hearing of this appeal the judgment of the Court was delivered as follows by

2nd Jany. 1907. REID, J.—The question for decision is whether an award written and signed before the date fixed by the Court under Section 508 of the Code of Civil Procedure for delivery but not filed in Court until after that date was "made within the "period allowed by the Court" within the meaning of Section 521 of the Code.

The Lower Appellate Court has relied on *Umersey Premji* v. *Shamji Kanji* (1) as authority for holding that the award was made within time, but this ruling is opposed to the judgment in *Chuhar Mal* v. *Hari Ram* (4), of which their Lordships of the Privy Council, "entirely approved" in *Raja Har Narain Singh* v. *Chaudhrani Bhagwant Kuar* (5).

The final judgment of the Court was delivered as follows by

21st May 1907. REID. J.—My order of the 2nd January 1907 will be read with this.

The question raised has been considered by a Division Bench of the Madras High Court in *Arumugam Chetti* v. *Arunachalam Chetti* (2), and by a Single Bench in *Sita Ram* v. *Bhawani Din Ram* (3). In each case the ruling of their Lordships of the Privy Council, previously cited, was considered. And in the Allahabad case a mass of authority was considered. In both cases it was held that an award made within the period fixed, but not filed in Court before the expiry of that period, was valid and in the Madras case it was specifically held that "delivery" in Section 508 of the Code of Civil Procedure meant "making," and did not mean "filing in Court." It is true that in the Allahabad case the award had been made over to a peon of the Court within

(1) *I. L. R., XIII Bom.*, 119. (3) *I. L. R., XXVI All.*, 105.
(2) *I. L. R., XXII Mad.*, 22. (4) *I. L. R., VIII All.*, 548.
(5) *I. L. R., XIII, All.*, 300 P. C.

the period fixed, the Court being closed, but Burkitt, J., who decided the case, held that this delivery to the peon would be a sufficient compliance with the order that the award should be submitted, if there were any doubt in the matter. How far delivery to peon, after Court hours, would amount to filing in Court need not be decided now. Burkitt, J., stated that the gist of the cases cited seemed to him to be that the date to be looked at is the date on which the arbitrators made the award, and not the date on which the award may have reached the Court. The point was not dealt with in *Chuhar Mal* and *Raja Har Narain Singh's* cases. I concur in this view of the law, and in the finding of the Lower Appellate Court that the award was made within the period fixed by the Court.

The appeal fails and is dismissed.

Appeal dismissed.

No. 90.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

MUHAMMAD DIN,—(PLAINTIFF),—APPELLANT,

Versus

SHAH DIN AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 298 of 1907.

Custom—Pre-emption—Pre-emption of existence of right in respect to area converted into building sites—Killa *Gujar Singh*—*Suburbs of Lahore*—*Punjab Laws Act*, 1872, *Sections* 10, 11, 12.

A certain area of land was originally comprised within the village of *Killa* Gujar Singh, a suburb of Lahore city, and had been in years past agricultural land. For some time past, however, it had been used as a site for building purposes and had been gradually absorped within the limits of Lahore city.

Held, under these circumstances that the land must be regarded as land situate in a town and that there was therefore no presumption that the custom of pre-emption existed in respect of a sale of such land.

Found upon the evidence that the plaintiff had failed to prove that the custom of pre-emption existed in respect of a sale of such land.

Kishan Dial v. *Ali Bakhsh* (1), and *Karam Ilahi* v. *Bahna Mal* (2) cited.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Lahore Division, dated 8th November 1906.

Grey and Moti Lal, for appellant.

Shadi Lal, for respondents.

(1) 87 *P. R.*, 1890. (2) 21 *P. R.*, 1900.

The judgment of the Court was delivered by

17th May 1907. RATTIGAN, J. -The facts are sufficiently clear from the judgments of the Courts below. Plaintiff is suing to pre-empt certain land which is stated to be situate within the limits of what is known as the *Goal Mandi* of *Killa* Gujar Singh. Admittedly at the time of the sale, in respect of which the present claim is preferred, the land in suit was not "agricultural land" as that term is defined in the Punjab Tenancy Act of 1887. On the contrary, it is alleged by defendants, and not denied by plaintiff, that it is the site of buildings some 200 in number. The lower Courts have dismissed the claim on the grounds (1) that *Killa* Gujar Singh is not a village and does not contain a village community, and that, therefore, no pre-emption arises in favour of the existence of a custom of pre-emption; and (2) that plaintiff has failed to prove that he is by custom entitled to pre-empt the property.

Plaintiff has preferred a further appeal to this Court, and we have heard lengthy arguments as to whether or not *Killa* Gujar Singh is a village and contains "a village community", within the meaning and for the purposes of Section 10 of the Punjab Laws Act, 1872. In this connection we may note that both sides rely on the definition of "village community" given by their Lordships of the Privy Council in the case reported as *Rahim-ud-din* v. *Rawal* (1).

It seems to us, however, quite unnecessary to enter into a decision upon this extremely *vexata questio*. We may assume that to a considerable extent the quarter known as *Killa* Gujar Singh, even to this day, constitutes a village and contains a village community.

There is within its boundaries a fairly large area of agricultural land which is assessed to land revenue, and there are also the ordinary village *abadi*, the ordinary village proprietary body, the ordinary village officers, a record-of-rights, etc. It may, therefore, be that *Killa* Gujar Singh, in part at all events, retains its former character as a village community. It may be so, but upon this point we are not called upon to give any definite opinion as we decide this case purely on its own facts. Upon these facts we are satisfied that the present land in suit does not in reality now form part of the old village of *Killa* Gujar Singh.

During the last 17 or 18 years it has been gradually built upon, and there are now some 200 buildings standing upon it.

(1) 66 P. R., 1903, P. C.

It seems to us that the area in question has been absorbed within the limits of Lahore city which has been spreading very extensively in this direction, and this extension has been particularly noticeable of recent years. While therefore it is quite possible that *Killa* Gujar Singh still in part retains its former character of a village, we cannot but conclude from the evidence that the *area now in dispute* has for some time past become part and parcel of Lahore city. In this respect the present case resembles that reported as *Kishan Dial* v. *Ali Bakhsh* (1), (*cf.* also *Karam Ilahi v. Bahna Mal* (2)).

Upon this view of the case, we must hold that no presumption arises in favour of plaintiff's claim, and that it is for him to prove that in this sub-division of Lahore city or that in Lahore city generally the custom of pre-emption does exist. This he has clearly failed to establish. A few instances have been given by him of the custom, but all these instances relate to agricultural land within the old village of *Killa* Gujar Singh. On the other hand, the Lists A, B and C filed by the patwaris show that there have been a very large number of sales of house property within the area in dispute and in its vicinity, and that no claims for pre-emptive rights were preferred in any single case.

We must accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 91.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

NUR MUHAMMAD,—(PLAINTIFF),—APPELLANT,

Versus

AIMNA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1241 of 1906.

Minor—Settlement on behalf of a Muhammadan minor by his brothers—Competency of minor to repudiate through a next friend such settlement without restoring other party to position he occupied at time of arrangement—Maintainability of suit.

Held, that no suit can be maintained on behalf of a minor to set aside a settlement which has been made on his behalf by his brothers during his minority and had been acted upon by the other party thereto, even on the ground that under Muhammadan Law the brothers had no power to contract on behalf of their minor brother, without first restoring that party to the position which he occupied at the time the settlement was made.

(1) 87 P. R., 1890. (2) 21 P. R., 1900.

Further appeal from the decree of Major B. O. Ross, Divisional Judge, Jullundur Division, dated 21st August 1903.

Sohan Lal and Browne, for appellant.

Vishnu Singh, for respondents.

The judgment of the Court was delivered by

8th April 1907. CHATTERJI, J.—The material facts are given in the judgments of the Lower Courts. The plaintiff and his brothers are the next reversioners of Buta, deceased, the original owner of the disputed land. After Buta's death, the property left by him was recorded in the names of his two widows, and on the death of Mussammat Umri, one of them, in the sole name of the other, Mussammat Aimna. In 1894 the plaintiff's brothers, on his behalf as well as for themselves, came to an arrangement with Mussammat Aimna, by which she surrendered her life estate to them and to one Fauja, the sister's son of her husband, in the proportion of one-third and two-thirds, and Fauja took upon himself to pay Buta's debts amounting to Rs. 300 and to maintain Mussammat Aimna. This was recorded in the revenue papers and is said to be the result of a village *panchayat*. Plaintiffs and their brothers are in the enjoyment of their one-third share of land, but as the plaintiff was and still is a minor, his brother-in-law, as his next friend, has brought the present suit for a declaration that the widow's alienation of two-thirds of Buta's land in favour of Fauja is bad and does not bind him. He repudiates the right of his brothers to enter into the compromise with Fauja and Mussammat Aimna, but does not in his plaint offer to return the benefit he got under it, nor seek to set aside the entire alienation by the widow.

The Lower Courts have dismissed the claim on the ground that the arrangement was on the whole a beneficial one for the minor, and that his brothers acted in good faith and with authority. The plaintiff appeals through his next friend and insists that whether the arrangement is beneficial or not, his brothers had no authority under Muhammadan Law to do any such act as regards his immovable property. He refers to *Rahim Bakhsh* v. *Ghulami* (1), a case among the Gujars of Hoshiarpur District, like the parties, in which the Muhammadan Law was followed, it being found on inquiry that there was no custom to the contrary.

(1) 65 *P. R.*, 1893.

We are of opinion that there is force in the contention under Muhammadan Law, and there was no sifting inquiry into custom. But in our opinion the suit as laid ought not to be entertained. The plaintiff is a minor and seeks to repudiate the act of his brothers, who had the right to be, and who actually were, his guardians. He is unable to exercise his own independent judgment as to the merits of the compromise. He certainly cannot avoid it and retain the benefits he received under it. He must return the land he got and pay his proportionate share of Buta's debts. The offer to pay the debt and the surrender of the land are conditions precedent to his bringing the suit. As he did not do these his suit should not be allowed to proceed. His hand, moreover, ought not be allowed to be forced by an irresponsible person like his present next friend. The principle is a well known one of equity. We think, therefore, the suit should be dismissed on the above ground alone, leaving plaintiff liberty to sue if he is so advised when he attains majority and is able to judge for himself.

We accordingly modify the decree of the Lower Courts by dismissing the suit on the above terms. Parties to pay their own costs in this Court.

Appeal dismissed.

No. 92.

Before Mr. Justice Shah Din.

GIRDHARI LAL,—PETITIONER,

Versus

BHAGO,—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 2481 of 1906.

Sale in execution of decree—Effect of sale when not set aside either under Section 310 *A or* 311—*Competency of executing Court to allow time to judgment-debtor to raise amount of decree after such sale—Civil Procedure Code,* 1882, *Sections* 305, 310*A* 311—*Revision—Error of law—Disregard of imperative rules—Material irregularity—Punjab Courts Act,* 1884, *Section* 70 *A.*

Held, that where immovable property has once been sold in execution of a money decree the executing Court has no authority to allow time to the judgment-debtor to enable him to raise the amount of the decree by a private transfer of the property or otherwise as

provided by Section 315 of the Code of Civil Procedure; and, if such a sale is not set aside either under Section 310 A or 311 of the Code, the Court has no option but to confirm the sale as provided by Section 312.

Held, also, that a complete misapprehension of the powers of an executing Court and the disregard of the imperative rules of procedure resulting for instance in setting aside a sale in execution of a money decree where no objection to the sale had been raised under Section 311, is a material irregularity within the meaning of clause (*a*) of Section 70 (1) of the Punjab Courts Act, 1884.

Petition for revision of the order of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 10th July 1906.

Turner and Rup Lal, for petitioner.

Shadi Lal and Ralia Ram, for respondent.

The judgment of the learned Judge was as follows:—

6th April 1907. SHAH DIN, J.—After hearing the learned counsel on both sides and referring to the record, I am of opinion that the Lower Appellate Court has acted with material irregularity in the exercise of its jurisdiction in this case, and its order cannot, therefore, be allowed to stand. It appears from the file of the execution proceedings that the execution sale took place on 4th November 1905 in favour of the petitioners, and that no application was made by the judgment-debtors to have the sale set aside either under Section 310 A, Civil Procedure Code, on making the necessary deposit required to be made under that section, or under Section 311 on the ground of a material irregularity in publishing or conducting the sale. That being so, the executing Court was bound under the imperative provisions of Section 312, Civil Procedure Code, to pass an order confirming the sale after the expiry of the period of limitation prescribed for applications under the aforesaid sections of the Code, see *Khetter Nath Biswas* v. *Faiz-ud-din Ali* (1), at page 684, and *Umesh Chandra Das* v. *Shib Narain Mandal* (2), at page 1013. One of the judgment-debtors, Mussammat Bhago, however, filed an application on the 27th of November 1905, purporting to do so under Section 305, Civil Procedure Code, asking for time to enable her to raise the amount of the decree by mortgage of the property sold by auction, and the Court granted the application without issuing notice to or obtaining the consent of the auction purchasers, and allowed the applicant time till the 5th of January 1906 to effect the mortgage and deposit the amount in Court. It is clear

(1) *I. L. R., XXIV Calc.*, 682. (2) *I. L. R., XXXI Calc.*, 1011.

that the auction sale having taken place before the last mentioned application was filed by the said judgment-debtor, Section 305, Civil Procedure Code, had absolutely no bearing upon the case, and the executing Court had no power to grant the application under that section. This is not seriously disputed by the learned counsel for the respondent. Further, it would appear that although the said application purported to have been made under Section 305, the order of the Court was not passed under its provisions, for otherwise in pursuance of the second paragraph of that section the Court would have granted a certificate to the applicant authorizing her to make the proposed mortgage, and no such certificate seems to have been granted at all. It is just possible that the Court was under the impression that the judgment-debtor's application was one made under Section 310 A, but in that case the deposit contemplated in that section should have been directed to be made along with the application, which obviously was not done.

Under these circumstances, the order of the Court granting time to the judgment-debtor till the 5th of January 1906 to pay the amount of the decree into Court was unquestionably *ultra vires*, and the said Court was justified, upon application being made by the auction purchasers on the 8th December 1905 and after giving the judgment-debtors sufficient opportunity to show cause against its being granted, in correcting the glaring error of procedure which it had committed and in confirming the sale as required, under Section 312, Civil Procedure Code.

Apparently all objections to the sale which the judgment-debtors could have raised under Section 311 were waived, and it cannot be urged that they have been seriously prejudiced by reason of a wrong order under Section 305 having been passed.

Be that, however, as it may, it is manifest that the order of the first Court under consideration was strictly in accordance with the provisions of the Code of Civil Procedure, and the Lower Appellate Court has, in upsetting that order, acted, it seems to me, upon a complete misapprehension of the powers of an executing Court and wholly disregarded the imperative rules of law which regulates the matter under consideration. Such action on the part of the Lower Appellate Court is tantamount, in my opinion, to its having acted in the exercise of its jurisdiction with material irregularity and fully warrants the interference by this Court on the revision side under clause (*a*) of Section 70 of the Punjab Courts Act.

I accordingly accept the revision and setting aside the order of the Lower Appellate Court restore that of the Court of first instance. Under the circumstances I leave the parties to bear their own costs throughout.

Application allowed.

No. 93.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

BICHHA LAL,—(PLAINTIFF),—APPELLANT,

Versus

APPELLATE SIDE.

GUMANI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1360 of 1906.

Mortgage—Conditional sale—Reference by Civil Court under sub-section 3 of Section 9 of Punjab Alienation of Land Act, 1900—Refusal of Deputy Commissioner to take action after the non-acceptance of his proposal by the mortgagor—Procedure for mortgagee—Regulation XVII of 1806 - Punjab Alienation of Land Act, 1900.

A mortgage made before the commencement of the Punjab Alienation of Land Act by an agriculturist of his land in which there was a condition intended to operate by way of conditional sale and still current was brought by the District Judge, who was moved to issue a notice of foreclosure under Regulation XVII of 1806 after the Act had come into force, to the notice of the Deputy Commissioner. The mortgagee accepted the new mortgage as proposed by the Deputy Commissioner in lieu of the original one but the mortgagor refused. The Deputy Commissioner thereupon decided that nothing further could be done and returned the reference to the District Judge. Notice of foreclosure was then issued and after the expiration of the year of grace the mortgagee instituted a suit for possession as owner.

Held, that in these circumstances the foreclosure proceedings under Regulation XVII of 1806 were not barred by the provisions of the Punjab Alienation of Land Act, and that it was not necessary for the Civil Court upon the institution of the suit for possession to refer the matter again to the Deputy Commissioner under sub-section 3 of Section 9 as the mortgage had then ceased to exist and the mortgagee had become *ipso facto* owner of the property by purchase.

The interpretation of the provisions of the Punjab Alienation of Land Act applicable to the subject discussed by Johnstone J.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated 2nd October 1906.

Shadi Lal, for appellant.

Gurcharan Singh, for respondents.

The judgment of the Court was delivered by

JOHNSTONE, J.—The facts that must be stated for the purpose of the decision of this appeal are these. On 15th February 1897 the four brothers, Gumani and others, mortgaged the land in suit to plaintiff for Rs. 1,000, of which Rs. 300 was kept by plaintiff for payment to Diwan Singh, previous mortgagee of this land, with some 8 bighas more. Interest was to be charged at Rs. 1-8 per cent. per mensem, the sum kept for Diwan Singh to carry interest only after payment to him. Mortgagors agreed that if the total sum due, principal and interest, was not paid off on the expiry of five years from date of deed, the land should be deemed sold to plaintiff. *24th April* 1907.

Before the five years' term expired, the Punjab Alienation of Land Act (XIII of 1900) came into force; and so, when on 3rd November 1903, the term being up, plaintiff applied to the District Judge for issue of notice of foreclosure under Regulation XVII of 1806, that officer referred the matter to the Collector under Section 9 (2) of the said Act. On 6th January 1904 three of the mortgagors appeared, Ram Chand being absent. Those three said the land should be made over to mortgagee for as many years as the Collector might think right. The Collector recorded an order that Ram Chand must appear and added a note that a mortgage for 20 years would meet the case and fixed 19th January. On 18th January the aforesaid three mortgagors appeared and put in a petition to the effect that they could not consent to a mortgage for more than seven years. On this the Collector on the following day decided that nothing further could be done and so returned the papers to the District Judge. The notice for foreclosure then issued, and the year of grace having expired, plaintiff brought this suit for possession as owner, without impleading Diwan Singh, previous mortgagee.

Defendants expressed willingness that the land be made over to plaintiff in mortgage for 20 years; but plaintiff now holds out for the ownership of the land.

The first Court looked at Financial Commissioner's Circular Letter No. 3482 of 6th June 1903 and held that it could not again refer the matter to the Collector, who had, in accordance with paragraphs 4 to 6 of that Circular Letter, considered himself *functus officio*. It then went on to find that the notice of foreclosure was regular and complete, that there was no need to serve any notice on Diwan Singh, and that plaintiff must have a decree for possession as owner on payment of Rs. 365

to Diwan Singh, *i.e*, Rs. 300 principal and Rs. 65 interest.

The learned Additional Divisional Judge only dealt with the question arising under Section 9, Punjab Alienation of Land Act. He held that plaintiff is not entitled to foreclose; that "the object of Section 9 of the Act was to prevent the "enforcement of conditional sale clauses where such had not "become absolute by notice and expiry of the year of grace "before the Act came into force"; that, if the mortgagee elects before the Collector for a mortgage under Section 6 of the Act, all that remains is for the mortgagee to sue for possession as mortgagee and for the Civil Court to decree possession for the term and sum fixed by the Collector; that if the mortgagee refuses to make election before the Collector and sues in Civil Court, the suit should "abate"; and that, inasmuch as in the present case mortgagee did consent to a mortgage under Section 6 for 20 years and the defendants are *now* willing to agree to this, the Civil Court should decree possession as mortgagee for 20 years. The Divisional Judge therefore accepted the appeal and gave plaintiff the decree indicated.

Plaintiff appeals, urging—

(*a*) that the Divisional Judge had no jurisdiction to pass such a decree as the above;

(*b*) that the Collector's powers were exhausted on 19th January 1904 and the Civil Court was bound to give possession as owner to plaintiff by way of foreclosure;

(*c*) that in any case interest should have been awarded on the outstanding debt from date of defendants' refusal before Collector.

The learned Divisional Judge has in my opinion misunderstood the proceedings of the Collector and the meaning of the relevant sections of the Act, and has gone beyond his powers in giving a decree for possession as mortgagee for 20 years. Regarding this last point there is no difference between the parties, defendants admitting that the Civil Court had no power to fix a term of years for automatic liquidation of the debt.

Certain parts of the Alienation of Land Act, 1900, must be set out here in order that my view of the case may be made clear.

Section 2 (4). "The expression 'permanent alienation' "includes sales, exchanges gifts and wills, but does not include "any gift for a religious or charitable purpose whether made "*inter vivos* or by will."

Section 3 (1). "A person who desires to make a permanent "alienation of his land shall be at liberty to make such "alienation where—

(*a*) * * * *

(*b*) * * * *

(*c*) * * *

provided that * * * .

(2). "Except in the cases provided for in sub-section (1), a "permanent alienation of land shall not take effect as such unless "and until sanction is given thereto by a Deputy Commissioner."

* * * * * * *

Section 9 (1). "If a member of an agricultural tribe makes "a mortgage of his land in any manner or form not permitted by "or under this Act, the Deputy Commissioner shall have authority "to revise and alter the terms of the mortgage so as to bring it "into accordance with such form of mortgage permitted by or "under this Act as the mortgagee appears to him to be equitably "entitled to claim.

(2). "If a member of an agricultural tribe has before the "commencement of this Act made a mortgage of his land in which "there is a condition intended to operate by way of conditional "sale, the Deputy Commissioner shall be empowered at any time "during the currency of the mortgage to put the mortgagee to his "election whether he will agree to the said condition being struck "out, or to accept in lieu of the said mortgage a mortgage which "may at the mortgagee's option be either in form (*a*) or in form "(*b*) as permitted by Section 6, and which shall be made for such "period not exceeding the period permitted by the said section "and for such sum of money as the Deputy Commissioner "considers to be reasonable.

(3). "If proceedings for the enforcement of a condition "intended to operate by way of conditional sale are instituted or "are pending at the commencement of this Act in any Civil Court, "or if a suit is instituted in any Civil Court on a mortgage to "which sub-section (1) or sub-section (2) applies, the Court "shall refer the case to the Deputy Commissioner with a view to "the exercise of the power conferred by the sub-section applying "thereto."

Section 6 (1). "If a member of an agricultural tribe mort-
"gages his land and the mortgagee is not a member of the same
"tribe, or of a tribe in the same group, the mortgage shall be
"made in one of the following forms :

(*a*) "In the form of a usufructuary mortgage by which
"the mortgagor delivers possession of the land
"to the mortgagee and authorizes him to
"retain such possession and to receive the rents and
"profits of the land in lieu of interest and towards
"payment of the principal, on condition that after
"the expiry of the term agreed on or (if no term is
"agreed on, or if the term agreed on exceeds twenty
"years) after the expiry of twenty years, the land
"shall be re-delivered to the mortgagor; or

(*b*) "in the form of a mortgage without possession, subject
"to the condition that if the mortgagor fails to pay
"principal and interest according to his contract,
"the mortgagee may apply to the Deputy Com-
"missioner to place him in possession for such term,
"not exceeding twenty years, as the Deputy Com-
"missioner may consider to be equitable, the mort-
"gage to be treated as a usufructuary mortgage for
"the term of the mortgagee's possession and for such
"sum as may be due to the mortgagee on account of the
"balance of principal due and of interest due not
"exceeding the amount claimable as simple interest
"at such rate and for such period as the Deputy
"Commissioner thinks reasonable."

Section 14. "Any permanent alienation which under
"Section 3 is not to take effect as such until the sanction of the
"Deputy Commissioner has been given thereto shall, until such
"sanction is given or if such sanction has been refused, take
"effect as a usufructuary mortgage in form (*a*) permitted by
"Section 6 for such term not exceeding twenty years and on
"such conditions as the Deputy Commissioner considers to be
"reasonable."

Section 10. "In any mortgage of land made after the
"commencement of this Act any condition which is intended to
"operate by way of conditional sale shall be null and void."

Upon a consideration of these provisions of law one principle that emerges is that conditions of sale are only absolutely and necessarily null and void by the operation of the

new law if occurring in *mortgages made after commencement of the Act*. If, therefore, the condition of sale in the present case is null and void or is unenforceable, it must be by virtue of some section other than Section 10. Section (3) refers to cases of *permanent alienations* which persons *desire to make*, and it applies, of course, to transactions entered into after the Act comes into force. In the present case the alienor made a mortgage (a temporary alienation, not a permanent one, *cf.* Section 2 (4)) *before* the Act came into force; and in my opinion it would be a straining of language to hold that when upon the expiry of the period for redemption (that is here, after the Act came into force), the alienor found himself unable to raise the money and pay his debt, he *desired to make* a permanent alienation. Therefore, in my opinion, Section 3 has no application to the present case. Whatever he *desired* to do he did before the Act came into force; and so even if it be taken, by using violence to the wording of the mortgage deed, that when he executed the deed, he *desired to make* a permanent alienation, that was done by him before the Act came into force and thus equally Section 3 does not apply.

Turning to Section 14 I find that its opening words shew it to be wholly inapplicable to the present case. It applies only where Section 3 applies; and thus I am driven to the conclusion that Section 9 is the only refuge for the mortgagors against loss of their land, if indeed any refuge remains at all. Sub-section (1) of Section 9 has obviously no bearing on the case, and so we have to see what is the effect of sub-sections (2) and (3). Under the former sub-section the Deputy Commissioner is "empowered" to offer certain alternatives to the mortgagee. In the present case he did so and the mortgagee accepted the second alternative, the term fixed being twenty years. Mortgagors refused to execute the proposed new mortgage; and so the Deputy Commissioner, following the Financial Commissioner's Circular Letter aforesaid, announced that he must refrain from further action. It is urged on behalf of the defendants mortgagors that the Deputy Commissioner should have insisted upon the proposed mortgage, though it is not explained how the new deed was to be executed *per invitum*. It seems to me that this view is unsound. If the Deputy Commissioner has an option in regard to the original offer of alternatives—that is, if he can, even when the matter first comes to his notice, decline to intervene,—he can surely drop the whole thing and refuse intervention when, after questioning the parties, he finds difficulties arise. The Financial Commissioner's instructions authorize

him to drop the whole thing and, in my opinion, whether it is correct or not, to say that he *must* drop it, he certainly *may* do so if he thinks fit; and it seems to me that the necessary consequence of his action was that the ordinary law took its course, seeing that under no other section of the Act, as we have seen, is the completion of the foreclosure barred.

It is further argued that, when this suit was filed, the Civil Court should have again referred the matter to the Deputy Commissioner under sub-section (3) of Section 9. But that sub-section can only be used, when either sub-section (1) or (2) applies; and here neither applies—(1) obviously, and (2) because of the words in it "during the currency of the mortgage." It is settled law, that upon the expiry of the year of grace allowed by Regulation XVII of 1806 the mortgagee becomes *ipso facto* owner of the property by purchase even though he may still have to sue for possession. It follows that this suit was not instituted "during the currency of the mortgage", and therefore the Deputy Commissioner had no power, after suit was instituted, to put the mortgagee to his election under sub-section (2).

Our attention has been drawn to C. R. 1426 of 1905 of this Court, and in it I find authority for another way of looking at the present case, which is equally fatal to defendants' contentions. It was ruled there *inter alia* that, when the Deputy Commissioner, acting under Section 9 (2) of the Act, declines to interfere, he thereby *sanctions* the permanent alienation. I need not enlarge upon this. It seems to me the *dictum* is peculiarly appropriate to a case like the present, where the reference by the District Judge to the Deputy Commissioner in a very special way brought to the notice of the latter that if he did not intervene, the proprietary right in the land would shortly pass to the non-agriculturist mortgagee. It is no forced interpretation of the Deputy Commissioner's action in the present case to hold that by implication he said—Let it so pass.

For these reasons I would accept the appeal, set aside the decree of the Lower Appellate Court and remand the case to that Court for re-trial of the appeal on the remaining questions arising, including the question of the effect upon plaintiff's claim of his not having paid off Diwan Singh, prior mortgagee.

24th April 1907. CHATTERJI, J.—I concur generally in the foregoing judgment.

Appeal allowed.

No. 94.

Before Sir William Clark, Kt., Chief Judge.

RAM CHAND AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

THAKAR DAS AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 816 of 1906.

Custom—Adoption—Adoption of wife's brother's son—Hindu Law or custom—Brahmans of mauza *Dialpur,* tahsil *Kasur, Lahore District—*Locus standi *of the reversioners of the eighth degree to contest such adoption—Burden of proof.*

Held, that in matters of adoption Brahmans of *mauza* Dialpur, *tahsil* Kasur, in the Lahore District, who are full proprietors with share of *shamilat* in the village, and had settled with the founder, had for eight generations cultivated land, and had closely associated themselves with the Jat proprietors of the village, were governed by the general rules of agricultural custom and not by Hindu Law, and that the defendants had failed to discharge the burden which, under the circumstances, lay upon them of proving that the adoption of a wife's brother's son was valid by custom, or that the collaterals of the eighth degree were not entitled to contest such an adoption.

Moti Ram v. *Sant Ram* (1), *Khazan Singh* v. *Relu* (2), *Natha Singh* v. *Mohan Singh* (3), *Kartar Singh* v. *Mathar Singh* (4), *Girdhari Lal* v. *Dullu Mal* (5), and *Nur Muhammad* v. *Alimullah* (6), referred to.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Lahore Division, dated 11th December 1905.

Sukh Dial, for appellants.

Tirath Ram, for respondents.

The judgment of the learned Chief Judge was as follows :—

CLARK, C. J.—This was a suit between Brahmans of Dialpur, *tahsil* Kasur, Lahore District, to set aside an adoption of a wife's brother's son by a sonless proprietor. *22nd March* 1907.

This Brahman family settled in the village some 200 years ago with the founder, 100 *bighas* having been given as *sankalp* by the Jat founder to the common ancestor of the parties, Lakhmi Das. The adopter, Thakar Das, represents half the family and owns some 50 *bighas*, and plaintiffs are some of the other half of the family, and own their share of the other 50 *bighas*.

(1) 103 *P. R.*, 1902.
(2) 35 *P. R.*, 1906.
(3) 93 *P. R.*, 1906.
(4) 94 *P. R.*, 1898.
(5) 3 *P. R.*, 1901.
(6) 75 *P. R.*, 1892.

Thakar Das was in the eighth degree from the common ancestor, counting both Thakar Das and the common ancestor. The land owned by Thakar Das was certainly ancestral property with reference to plaintiffs.

The first question for decision is whether the parties follow custom or Hindu Law.

Plaintiffs put forward custom and defendants Hindu Law.

Defendants rely upon *Moti Ram* v. *Sant Ram* (1), a case of Brahmans of Manhala, said to be only a few miles from Dialpur. The Brahmans there held land, but were not full proprietors, had no share of the *shamilat* and depended largely for their support on contributions from their *jajmans*, and had not settled with the founders; they were held to follow Hindu Law.

In this case the parties cultivate land, and plaintiffs also keep a shop and receive *virt*, but they are full proprietors in the village with share of *shamilat* and were settled with the founder. They were also parties to the *wajib-ul-arz* and agreed to the same conditions as the Jats as to the alienation of lands, and as to the non-succession of daughters.

The adoption is really the appointment of an heir and similar to the alienation of land, and I hold that in matters of adoption the parties follow custom and not Hindu Law.

The next question is whether plaintiffs being in the eighth degree from the adopter can challenge the adoption. Following *Khazan Singh* v. *Relu* (2), I hold that it was for defendants to prove that they cannot challenge the alienation, and they have failed to do this.

Natha Singh v. *Mohan Singh* (3) is quoted against this view, but that judgment was based on the special facts of that case and does not go counter to the general principle laid down in Khazan Singh's case.

The next question then is whether the adoption of a wife's brother's son is invalid by custom of Jats (and consequently Brahmans) of this village.

Here also the question of *onus* has been argued at length.

For defendants *Kartar Singh* v. *Mathar Singh* (4) is relied upon. This was a case of Sikh Khatris of Rawalpindi. The

(1) 103 *P. R.*, 1902. (3) 93 *P. R.*, 1906.
(2) 35 *P. R.*, 1906. (4) 94 *P. R.*, 1898.

parties did not belong to an agricultural community, and as according to the personal law of the parties, Hindu Law, the adoption of a wife's brother's son was valid, it was held that the *onus* of proving its invalidity by custom lay upon the challenger of the adoption. Also *Girdhari Lal* v. *Dalla Mal* (1). This was a case of Dhawan Khatris of Ferozepore, the adopted child was a wife's sister's son. It was held that presumably the parties followed custom, but not the custom of agricultural tribes, and that this custom was not shown to differ in essential particulars from Hindu Law and the factum, and the validity of the adoption was held proved.

This case is distinguished from both these cases by the fact that the Brahmans in this case, as I have shown above, have closely associated themselves with the Jat proprietors of the village in which they live and in some matters at least have adopted their customs.

An adoption of this kind is so unusual and so at variance with the agnatic rule of inheritance that I think the *onus* of proving its validity lay on defendants (*vide Nur Muhammad* v. *Alimullah* (2)) and they have failed to discharge it.

I therefore accept the appeal and set aside the orders of both Courts and decree declaring that the adoption of Atma Ram by Thakar Das is null and void as against plaintiffs' reversionary rights with costs throughout.

Appeal allowed.

No. 95.

Before Mr. Justice Robertson and Mr. Justice Kensington.

RAJ SARUP,—(PLAINTIFF),—PETITIONER,

Versus

HARDAWARI,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 84 of 1905.

Kudhi kamini—*Suit for the recovery of—Village cess—Jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, 1877, Section 77 (3) (j).*

Held, that *kudhi kamini* is a "village cess" within the meaning of Section 77 (3) (*j*) of the Punjab Tenancy Act, and a suit therefore for its recovery is cognizable by the Revenue and not by the Civil Courts.

Fasal v. *Samandar Khan* (3), *Gowhra* v. *Ali Gauhar* (4), and *Shahya* v. *Karm Khan* (5) followed.

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(1) 3 *P. R.*, 1901. (3) 49 *P. R.*, 1891.
(2) 75 *P. R.*, 1893. (4) 11 *P. R.*, 1890, *Rev.*
(5) 95 *P. R.*, 1907, *Note.*

Petition for revision of the order of Lala Ude Ram, Munsif, Rohtak, dated 19th November 1904.

Lakshmi Narain, for petitioner.

The judgment of the Court was delivered by

5th April 1907. KENSINGTON, J.—In the case a suit for recovery of certain *kudki kamini* dues has been decided by a Small Cause Court. The question before us is whether such suit would lie in a Civil or a Revenue Court.

We take the term *kudhi kamini* to mean a hearth cess and to be the equivalent of the door cess or *haqq-buha* of districts in the Western Punjab. See paragraph 94 of Mr. Douie's Settlement Manual for the Punjab.

Following the decision given in *Fazal* v. *Samandar Khan* (1) and in *Gowhra* v. *Ali Gauhar* (2) and an unpublished judgment of this Court, dated 8th March 1905, on Civil Reference No. 11 of 1904 (3), we hold that *kudhi kamini* is a village cess within the meaning of Section 77 (3) (*j*) of the Punjab Tenancy Act, and that a suit for recovery of the dues is excluded from the jurisdiction of the Civil Courts.

We are unable to rectify the error by registering the decree of the Lower Court as a Revenue Court decree under Section 100 of the Tenancy Act, as the suit has been dealt with by an officer exercising Small Cause Court powers. We must, therefore, accept the application for revision, set aside the proceedings of the Lower Court on the ground that the Court had no jurisdiction, and direct that the plaint be returned to the plaintiff for presentation in the Revenue Court of an Assistant Collector of the 1st grade.

No order as to costs in this Court. The plaintiffs-petitioners are responsible for their own mistake and the defendant respondent has incurred none.

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(1) 49 *P. R.*, 1891. (2) 11 *P. R.*, 1890, *Rev.*
(3) Published as note to this case.

Note.—The following is the unpublished case referred to in the above judgment.

Before Mr. Justice Robertson and Mr. Justice Kensington.

SHAHYA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

KARM KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} REFERENCE SIDE.

Civil Reference No. 11 of 1904.

Case referred by Major O. P. Egerton, Deputy Commissioner, Rawalpindi.

Nanak Chand, for appellants.

The judgment of the Chief Court was delivered by

KENSINGTON, J.—The term haq buha, which forms the subject matter of the suit before us, is explained in paragraph 143 of the Rawalpindi Final Settlement Report of 1887. *8th March* 1905.

It has been held both by this Court (*Fazal* v. *Samandar Khan* (1)), and by the Financial Commissioner (*Gowhra* v. *Ali Gauhar* (2)), that customary dues of this nature, levied by the proprietary body of a village from non-proprietary residents, fall within the definition of village cess contained in clause (12) of Section 4 of the Tenancy Act. Suits for recovery of these dues are therefore cognizable by the Revenue Courts under Section 77 (3) (*j*) of the Act.

It follows that under the ruling in *Bahadur Khan* v. *Sardar* (3), with which we agree, the present suit has been correctly instituted in a Revenue Court, though brought for a declaration in regard to the dues under Section 45 of the Land Revenue Act. We do not think that there is any serious conflict between the ruling last quoted and that contained in *Raja Nur Khan* v. *Mussammat Darab Khatun* (4), which dealt with a different matter and was strictly confined to the case then before the Court. It does not follow that because a Civil Court can entertain a declaratory suit in regard to title as entered in the record of rights, it will, therefore, have jurisdiction in declaratory suits of a different nature, covering matters specifically referred to in Section 77 of the Tenancy Act.

Our reply to the reference is that the Revenue Courts in this case have jurisdiction and that the appeal should be heard by the Collector. We make no order as to costs.

(1) 49 *P. R.*, 1891. (3) 89 *P. R.*, 1895.
(2) 11 *P. R.*, 1890, *Rev.* (4) 25 *P. R.*, 1889.

No. 96.

Before Mr. Justice Rattigan and Mr. Justice Chitty.

FAIZ BAKHSH AND OTHERS,—(Plaintiffs),—APPELLANTS,

Appellate Side.

Versus

JAHAN SHAH AND OTHERS,- (Defendants),—RESPONDENTS.

Civil Appeal No. 1094 of 1905.

Custom—Alienation—Gift by a childless proprietor of his entire estate to two of his grand-nephews in presence of other nephews and grand-nephews—Mair Rajputs of Chakwal tahsil *of the Jhelum District.*

Found that amongst Mair Rajputs of the Chakwal *tahsil* of the Jhelum District, a gift by a childless proprietor of his entire estate in favour of two of his grand-nephews in the presence of other nephews and grand-nephews is valid by custom.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jhelum Division, dated 14th August 1905.

Ganpat Rai, for appellants.

Nanak Chand, for respondents.

The judgment of the Court was delivered by

29*th May* 1906. Rattigan, J.—The parties are Mair Rajputs of the Chakwal *tahsil*, Jhelum District, and the question involved is whether a childless proprietor is competent to transfer by gift the whole of his estate in favour of two of his grand-nephews in the presence of other nephews and grandnephews ? The case reported as *Niaz Ali* v. *Ahmad Din* (1) is directly in point, and it was there held (after a remand for full inquiry) that a gift by will in favour of one nephew was valid by the custom of Mair Rajputs of this very *tahsil*. We see no reason to doubt the correctness of this decision which was referred to with approval in *Sher Jang* v. *Ghulam-Mohi-ud-din* (2), and upon its authority (reading it with the ruling of the Full Bench in *Mussammat Bano* v. *Fateh Khan* (3)), we hold that the gift to Jahan Shah and Karm Shah was valid and the plaintiffs' suit was, therefore, rightly dismissed. Mr. Ganpat Rai urged that an opportunity should be given to plaintiffs to produce further evidence in support of their case, but we do not think that any good and sufficient reason has been given for further protracting this litigation. The parties had ample

(1) 109 P. R., 1882. (2) 22 P. R., 1904.
(3) 48 P. R., 1903, F. B.

opportunity of producing evidence in connection with the third issue, and if plaintiffs' evidence upon the question of custom is weak, its weakness is presumably due to the fact that custom is against them. That this presumption is justifiable is apparent not only from the finding in *Niaz Ali* v. *Ahmad Din* (1), but also from the fact that 5 out of 8 reversioners have not joined plaintiffs in this suit.

We dismiss the appeal with costs.

Appeal dismissed.

No. 97.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

JIWANI,—(PLAINTIFF),—PETITIONER,

Versus

BHAGEL SINGH,—(DEFENDANT),—RESPONDENT.

REVISION SIDE.

Civil Revision No. 2183 of 1904.

Revision—Dismissal of application for default—Power of Court to restore such application—Sufficient cause—Civil Procedure Code, 1882, Sections 103, 647.

Held, that Section 103 of the Code of Civil Procedure applies by virtue of the provisions of Section 647 to an application for revision dismissed for the default of the petitioner, and that the non-appearance of the counsel on behalf of a *parda-nashin* lady owing to an unusual combination of circumstances is a sufficient cause for setting aside the default.

Court of Wards v. *Fatteh Singh* (1) dissented from.

Umar Din v. *Ala Bakhsh* (2), *Coates* v. *Kashi Ram* (3), *Keshori Mohan Seth* v. *Gul Muhammad Shah* (4), and *Rura Mal* v. *Kuria* (5) referred to and distinguished.

Application for re-admission of the application for revision dismissed in default by the Chief Court on 15th May 1906.

Ishwar Das, for petitioner.

Dhanpat Rai, for respondent.

The judgment of the Court so far as is material for the purposes of this report was delivered by

JOHNSTONE, J.—On 15th May 1906 a Judge of this Court dismissed this revision petition for default. On 12th *2nd April* 1907.

(1) 109 *P. R.*, 1882.
(2) 75 *P. R.*, 1881.
(3) 54 *P. R.*, 1901, *F. B.*
(4) 76 *P. R.*, 1903.
(5) *I. L. R.*, *XV Calc.*, 177.
(6) 62 *P. R.*, 1894.

June the petitioner applied for restoration of the petition to the file and, in the alternative, for admission of the application as a fresh revision petition. This application has been referred to a Division Bench, and we have heard arguments.

The first question is whether an application for restoration can be entertained at all, and in connection therewith we have been referred to the following authorities: *Court of Wards* v. *Fatteh Singh* (1), *Umar Din* v. *Ala Bakhsh* (2), *Coates* v. *Kashi Ram* (3), *Keshori Mohan Seth* v. *Gul Mohamed Shaha* (4) and *Rura Mal* v. *Kuria* (5). We have also read Section 102, Section 556, and Section 647 of the Civil Procedure Code.

Mr. Dhanpat Rai relies mainly on the Punjab rulings in *Court of Wards* v. *Fatteh Singh* (1) and *Umar Din* v. *Ala Bakhsh* (2). The first is in terms directly in favour; but the decision on the point there is stated in a single sentence without discussion, and the Bench allowed the petition to be taken as a second petition on the merits. At that time the stamp on a revision petition and the stamp on an application for restoration to file were the same, and therefore the question was one of little practical importance, and so we see that the ruling is by no means a valuable authority. In Umar Din's case the immediate point for decision was different and the case of Court of Wards was merely incidentally cited with approval, again without any formal discussion of the point now before us and without any formal reiteration of the *dictum* upon which Mr. Dhanpat Rai relies.

Th ruling *Rura Mal* v. *Kuria* dealt with a matter of execution. An objection petition under Section 278, Civil Procedure Code, had been dismissed for default, and it was held that no petition for its restoration to the file was admissible, Section 647, Civil Procedure Code, being taken as not extending to execution proceedings. We do not think this any guide here. In connection with execution of decrees, the code contains a long and elaborate chapter of procedure, and it may be right to say that all possibilities in connection with execution can be found there.

We do not think that the Punjab ruling *in Coates* v. *Kashi Ram* or the Calcutta ruling in *Keshori Mohan Seth* help respondent much. In the latter the learned Bench decided the matter of *transfer* of execution proceedings from one Court to another

(1) 75 *P. R.*, 1881. (2) 76 *P. R.*, 1903
(3) 54 *P. R.*, 1901, *F. B.* (4) *I. L. R.*, *XV Calc.*, 177.
(5) 62 *P. R.*, 1894.

as a pure matter of Bengal *practice* and not as a matter of *law*. Clearly the *dictum* there is no guide to us here. In the Punjab ruling it was laid down that in execution proceedings an applicant cannot avail himself of Section 103, Civil Procedure Code, and thereby get an objection restored which has been dismissed for default: that in absence of prosecution of an objection to attachment, the Court should dismiss in default, that if an objection has been disposed of on the merits, a fresh objection by the same objector cannot be entertained, the objector's remedy being, if any exists, by way of review; and that this Court will not interfere on the revision side if a convenient remedy other than revision exists.

Our view is that, though Section 647, Civil Procedure Code, may not extend to execution proceedings, there is no clear authority that it does not extend to revision proceedings. The *dictum* in *Court of Wards* v. *Fatteh Singh* is probably unsound, and is, as we have shewn, of little value as an authority. Taking the words of Section 647 * in their plain meaning, we are unable to see why they should not apply to revision proceedings.

But apart from this there is another way of looking at the matter, even if Section 647 be ignored. Under Section 621, Civil Procedure Code, this Court in revising can pass virtually any order it thinks fit, and it can certainly (and probably should, see *Coates* v. *Kashi Rum* quoted above) dismiss for default in the case of failure to prosecute. The powers, then, in such cases, are something like the powers of an Appellate Court—less than those powers in that some matters that can be taken up in appeal cannot be taken up in revision, but quite equal to these powers in dealing with the case within the sometimes restricted limits. Among other things, as we have already stated, the revising Court can dismiss for default, though this is not plainly stated in any Section; and in our opinion the power to dismiss for default, in proceedings which in their nature so much approximate to appellate proceedings, naturally connotes the power to restore after default, when the default is satisfactorily explained. If a petitioner has been prevented, by some cause beyond his control, from prosecuting a revision petition under the Punjab Courts Act, he is in no way to blame. It is usually no use to him that the law allows him to present a fresh revision petition, for the time-bar comes in. Even if no time-bar supervenes, he has to pay another *ad valorem* duty, though he has been in no way to blame, and we cannot think that the Legislature intended in these ways to penalise innocent defaults.

* *Section 647, Civil Procedure Code.*
The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction other than suits and appeals.
Explanation.
This section does not apply to applications for the execution of decrees, which are proceedings in suits.

In our opinion, then, a petition for restoration is competent, and we admit the petition now before us and overrule the respondent's objection.

The next question is whether there was in fact sufficient cause for the default. Here the important facts are that the petitioner is a lady, who, according to the customs of the country can hardly be expected to appear in person in Court, and that she engaged *two* counsel to represent her. Owing to an unusual combination of circumstances neither could appear, and we think it would be harsh and pedantic to rule that the default cannot be condoned in the case of a lady, who rather went out of her way to ensure an appearance being put in for her. We hold that there was sufficient excuse for default and we restore the revision petition.

Note.—The rest of the judgment is not material to the report.

Full Bench.

No. 98.

Before Sir William Clark, Kt., Chief Judge, Mr. Justice Chatterji, and Mr. Justice Robertson.

APPELLATE SIDE.

ABDULLA,—(PLAINTIFF),—APPELLANT,

Versus

ALLAH DAD AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1131 of 1904.

Custom—Alienation—Alienation of occupancy rights—Right of reversioner to restrain such alienation—Burden of proof—Punjab Tenancy Act, 1887, Section 59.

Held, by the Full Bench that, where, in a suit by a collateral of an occupancy tenant to obtain a declaration that a certain alienation by an occupancy tenant of his occupancy rights would not bind his reversionary interests, it is proved, that the plaintiff was entitled to succeed to occupancy rights on the death of the alienor and that had the subject matter in question been a proprietary right instead of a right of occupancy he could have maintained the suit, the *onus* of proving a special custom that the plaintiff was not competent to maintain his suit will lie on the person asserting the existence of such a custom.

Karam Din v. *Sharaf Din* (1), *Faiz Baksh* v. *Ditta* (2), and *Hari Chand* v. *Dhera* (3), referred to.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Rawalpindi Division, dated 23rd March 1904.

Roshan Lal, for appellant.

Bodh Raj, for respondents.

(1) 89 *P. R.*, 1898, *F. B.* (2) 115 *P. R.*, 1901.
(3) 12 *P. R.*, 1904.

This was a reference to a Full Bench made by Rattigan and Lal Chand, JJ., to determine, whether in a suit brought by a collateral of an occupancy tenant for obtaining a declaration that an alienation of occupancy rights by the occupancy tenant would not bind his reversionary interests, the *onus* is on plaintiff to prove that by custom he is competent to contest such alienation or whether it is for the defence to prove that by custom the plaintiff has no such right.

At the first hearing the point of law involved was referred to a Division Bench by the following order of the learned Judge in Chambers :—

LAL CHAND, J.—The Divisional Judge has held in this case relying on *Faiz Bakhsh* v. *Ditta* (1), that the *onus* lay on plaintiff to prove that by custom he is entitled to question the validity of the alienation of occupancy rights made by his father. At contrary view was taken in *Hari Chand* v. *Dhera* (2), but withou any reference to *Faiz Bakhsh* v. *Ditta* (1), or to the reasoning adopted in that judgment. I therefore refer this case to a Division Bench with a view to further reference to Full Bench if under the circumstances it be considered necessary and desirable. *1st May* 1906.

An early date should be given.

The order of the Division Bench (Rattigan and Lal Chand, JJ.) referring the question of law to a Full Bench was as follows :—

RATTIGAN, J.—The question in this case is whether the *onus* was on plaintiff to prove that he had by custom the right to contest the alienation of occupancy rights made by his father, or whether it was on defendants to prove that by custom plaintiff had no such right. *7th July* 1906.

The decisions of this Court upon the point are conflicting, (see *Faiz Bakhsh* v. *Ditta* (1) and *Hari Chand* v. *Dhera* (2) and we accordingly refer the question to a Full Bench for determination.

The judgment of the learned Judges constituting the Full Bench was delivered by

ROBERTSON, J.—This case has been referred to a Full Bench in consequence of an apparent conflict between the decisions in *29th Novr.* 1906.

(1) 115 *P. R.*, 1901. (2) 12 *P. R.*, 1904.

Faiz Bakhsh and others v. *Ditta and others* (1), and in *Hari Chand and others* v. *Dhera and others* (2). There is, however, it appears to us, no substantial disagreement. It was laid down in *Karam Din* v. *Sharaf Din* (3), that in considering whether collaterals had the right to restrain an alienation of an occupancy right, evidence that such a restriction could be applied were the subject matter a proprietary right instead of a right of occupancy would be relevant.

In Faiz Bakhsh's case it was pointed out that occupancy rights are acquired in such a multitude of different ways, and are enjoyed by such a variety of classes that it could not be said correctly *ab initio* that the collaterals of an occupancy right-holder must be presumed to have a right to restrain an alienation of such a holding.

In Hari Chand's case it was laid down as follows :—

"In our opinion, therefore, if plaintiffs have shown that by "the custom the parties follow, proprietary rights cannot be "gifted, the *onus* lies on defendants to show that by custom "occupancy rights can be gifted."

Briefly the conclusions which we draw from *Karam Din* v. *Sharaf Din* (3), *Faiz Bakhsh* v. *Ditta* (1), and *Hari Chand* v. *Dhera* (2), are :—

When a collateral seeks to restrain an alienation of any occupancy right by an occupancy tenant, proof that such a power of restriction exists in respect of proprietary rights would be relevant.

When such a suit is brought, the initial *onus* lies on the plaintiff, but when he has proved first, that he is entitled to succeed to occupancy right on the death of the occupancy tenant; and, second that had the subject matter in question been a proprietary right instead of a right of occupancy he could have maintained the suit, the *onus* will be shifted and it will be upon the person, who asserts that no such custom obtains as to occupancy rights to prove that contention.

With these remarks, we remand the appeal for decision by the Division Bench.

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(1) 115 *P. R.*, 1901. (2) 12 *P. R.*, 1904.
(3) 89 *P. R.*, 1898, *F. B.*

No. 99.

Before Mr. Justice Robertson and Mr. Justice Chevis.

RADHO,—(PLAINTIFF),—APPELLANT,

Versus

HARNAMAN,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 1096 of 1906.

Custom—Inheritance—Aroras of Amritsar City—Succession of brother in preference to a daughter—Hindu Law—Burden of proof.

Held, that the defendant upon whom the onus lay had failed to establish that in matters of succession the Aroras of Amritsar city were governed by custom and not by Hindu Law, or that collaterals were entitled to succeed to the exclusion of a daughter.

Lacho Bai v. *Asa Nand* (1), *Mokanda* v. *Balli Singh* (2), *Pitambar* v. *Ganesha Ram* (3), *Nihal Chand* v. *Premi Bai* (4), *Anant Ram* v. *Hukman Mal* (5) referred to.

The burden of proof that high caste Hindus, residents of cities like Amritsar, follow a particular custom in derogation of their personal law lie heavily on the person making such an allegation.

Rama Nand v. *Surgiani* (6), *Maharaj Narain* v. *Banoji* (7), *Daya Ram* v. *Sohel Singh* (8), *Chandika Bakhsh* v. *Muna Kunwar* (9), *Muhammad Husain* v. *Sultan Ali* (10), and *Har Narain* v. *Deoki* (11) cited.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 5th April 1906.

Turner, for appellant.

Roshan Lal, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J.—The parties to this suit are Aroras of the Amritsar City. The plaintiff is the daughter of one Nathu Mal, Arora, and claims to succeed to his property after the death of his widow. The defendant is a half brother of Nathu Mal, who is in possession of Nathu Mal's property. It is a curious fact that Nathu Mal also had two brothers of the full blood, and two brothers of the half blood, but only one, Harnaman, of the half brothers is a party to this suit. The position of the two full brothers and the remaining half brother Sant Ram has been in no way explained. 31*st May* 1907

(1) 144 *P. R.*, 1882.
(2) 85 *P. R.*, 1884.
(3) 148 *P. R.*, 1890.
(4) 148 *P. R.*, 1890, *Note.*
(5) 62 *P. R.*, 1902.
(6) *I. L. R., XVI All.*, 221.
(7) 34 *P. R.*, 1907.
(8) 110 P. *R.*, 1906.
(9) *I. L. R., XXIV All.*, 273.
(10) 24 *P. R.*, 1893.
(11) 54 *P. R.*, 1903.

The Aroras claim to be, and are admittedly, high caste Hindus. Probably it would be a safe description to say that they are high caste without being very high caste. But it is fully admitted, nay, claimed by both parties that the Aroras are governed by Hindu Law. Such being the case it is quite clear that if no evidence were offered by either party, the claim must be decreed at once, as under Hindu Law the family not being joint a daughter excludes her father's brother. The defendants, however, set up a custom in entire opposition to Hindu Law and alleged the existence of a custom among the Aroras of the Amritsar City whereby daughters are excluded from succession. Now it is quite clear that the *onus* of proving the existence of this custom lay heavily on the person or the defendant who asserts its existence (*Rama Nand* v. *Surgiani* (1), *Maharaj Narain* v. *Banoji* (2), at page 147) and what we have to see is simply whether or not the custom set up has been proved to obtain among the Aroras, high caste Hindus, in an ancient city like Amritsar, in direct contravention of the personal law of the parties.

It has been sought to establish the custom by reference to published rulings of this Court referring to Aroras of other parts of country, and by oral evidence.

It cannot be accepted as an axiom that the Aroras of Amritsar are bound by custom found to obtain in other parts of the country, but rulings of this Court on the question of the custom obtaining among Aroras in other parts may be usefully examined and may in some cases be relevant. We will first consider the rulings before proceeding to deal with the oral evidence.

The first case quoted is that of *Mussammat Lacho Bai and others* v. *Asa Nand and others* (3). This was a suit by certain collaterals, Aroras of Multan, to contest an alienation by a widow. One of the contentions was that the plaintiff had no *locus standi* in presence of a daughter and daughter's son. The case does not help us at all, both sides alleged that they were governed by custom and no mention was made of Hindu Law, and all that was decided was that the position of the plaintiff justified them in maintaining a declaratory suit. The Judges were careful to say: "It seems enough to decide that the "plaintiff is not proved not to be the next reversioner, without "attempting to decide finally whether daughters' sons are by "custom excluded from the succession." They were also care-

(1) *I. L. R., XVI All.*, 221. (2) 34 *P. R.*, 1907.
(3) 144 *P. R.*, 1882.

ful to point out that the presence of a daughter, who takes only on a life tenure, even if entitled to succeed, would have been no bar to the plaintiff's suit (see pages 425, 426). The next case is that of *Mokanda* v. *Balli Singh* (1). In that case the parties were Aroras living in Amritsar, but stated to be of Multan origin. This case also is of little use to us. The parties represented themselves as being bound by the custom of the Multan Aroras. Neither side appear to have alleged that they were bound by Hindu Law, and the *onus* of proving that a daughter's son could succeed was thrown on the daughter's son, it being accepted that there was a general custom to the contrary. This judgment therefore is of little assistance to us. We next come to the case of *Pitambar and Mussammat Ganeshi Bai* v. *Ganesha Ram* (2). The parties to that suit were Aroras of the Dera Ismail Khan District. In that case it was held that by custom nephews excluded daughters from inheritance. Hindu Law was left on one side, and the effect of *Lacho Bai* v. *Asa Nand* (3), was somewhat misquoted. But attached to that ruling at page 477 of the *Punjab Record* of 1890, is an exceedingly careful and well reasoned Judgment No. 1422 of 1887 (*Nihal Chand* v. *Premi Bai* (4), in which it was held that there being no custom proved to the exclusion of daughters, daughters were entitled to succeed, a method of viewing the question which we venture to consider the correct one. In *Anant Ram* v. *Hukman Mal* (5), this principle was followed. The parties to that case were Aroras of Kasur town, and the *onus* of proving that brothers excluded daughters was correctly thrown upon the plaintiffs, the brothers, who asserted it. No doubt the case of *Nihal Chand* v. *Premi Bai* (4) just alluded to was misunderstood to be in favour of the alleged custom whereas it is in fact against it, but the final result was that a Division Bench found that among Aroras of Kasur daughters are excluded from succession by nephews. This case is of value to the defendants, no doubt, as Kasur is in the next district to Amritsar. It of course proceeded upon the evidence adduced in that case and there appear to have been six instances quoted in support of the custom set up.

It will be seen that of two decisions in which the investigation was approached in the manner which it should be according to the principles of *Daya Ram* v. *Sohel Singh* (6), *Nihal Chand* v. *Premi Bai* (4), was in favour of the succession of daughters, the other *Anant Ram* v. *Hukman Mal* (5), was against their claim.

(1) 85 *P. R.*, 1884.
(2) 148 *P. R.*, 1890.
(3) 144 *P. R.*, 1882.
(4) 148 *P. R.*, 1890, *Note.*
(5) 62 *P. R.*, 1902.
(6) 110 *P. R.*, 1906, *F. B.*

The other rulings are of much less value, as it was either assumed that custom of some kind must obtain, or, as in *Lacho Bai* v. *Asa Nand* (1), this point was not really decided. On the other hand Mr. Turner quoted *Mulo* v. *Phulo Missar* (2), *Ami Chand* v. *Ghasita Mal* (3), and *Lakhmi Das* v. *Kishen Chand* (4), out of numerous rulings referring to high caste Hindus to show that among such high caste Hindus of cities daughters succeed in preference to collaterals, as of course they would among any really high caste Hindus under Hindu Law. Both parties to this suit are Aroras and claim to be high caste Hindus under Hindu Law in general, otherwise it might possibly be said that they are not really of sufficiently high caste to follow Hindu Law in the matter of daughters' succession. We now come to the direct evidence put forward by the defendant in support of the custom put forward by him. He has produced a number of Arora witnesses to say that among Aroras of Amritsar collaterals exclude daughters, but many of these say also that in matters of inheritance the Aroras are bound by Hindu Law of inheritance. Of all the instances given by them only three at most are in favour of daughters' exclusion by collaterals. In all the other cases there were members of a joint Hindu family who took by survivorship.

We will proceed to examine these three instances.

In the case cited by Jaswant Singh, D. W. 10, a daughter does appear to have been excluded from succession by collaterals.

In a case quoted by Hazara Singh, a little girl aged 10 only was excluded by collaterals. The case quoted by Kalu Singh, D. W. 21, is the strongest in defendant's favour. He says that his own wife was deprived of her father's property by the collaterals, and that it was given up on demand without a suit.

This concludes all the evidence in favour of the exclusion of daughters by collaterals. No judicial decision among Aroras of Amritsar were put forward. It was, however, contended that no evidence had been given for the defence to which it is replied that the *onus* lay on the defendant and he clearly failed to discharge it, so that it was unnecessary to call any evidence. No doubt this is true, but cases in which daughters had succeeded in the ordinary course under Hindu Law would have been in point.

Four cases were alluded to by Mr. Turner. In one relating to a claim for a succession certificate Miscellaneous Appeal

(1) 144 *P. R.*, 1882. (3) 143 *P. R.*, 1882.
(2) 108 *P. R.*, 1888. (4) 9 *P. R.*, 1884.

Civil No. 51 of 1890, Divisional Judge, Amritsar, no final decision was come to, but a certificate was granted to the daughter, and as nothing has been shown to the contrary, she probably got the property eventually.

In another case Civil Appeal No. 587 of 1895, Divisional Judge, Amritsar, it was held not to be proved that a daughter does not succeed to self-acquired property among Aroras of Amritsar. Copies of the judgments in these cases were tendered in this Court for the first time. It may therefore be said that there is no evidence by way of local judicial decision upon the record. Mr. Turner mentioned a more recent case in Amritsar in which the District Judge had held that no custom excluding daughters had been established, but of this we can take notice.

The position therefore stands thus, the parties are, as both sides assert, high caste Hindus. That being so, and they being residents of a large city, it clearly lies heavily upon the party asserting the existence of a custom which contravenes their personal law to prove it. Has the defendant succeeded in doing so?

In considering the points we wish to bear in mind certain observations in previous rulings connected with proof of custom.

In Chandika Bakhsh v. *Muna Kunwar and others* (1), their lordships of the Privy Council remark :—

"The result is that in support of the alleged custom four "instances at most can be adduced, and those of a comparatively "modern date, and that there is no other evidence. It is obvious "that a family custom in derogation of the ordinary law cannot "be supported on so slender a foundation."

The observations in *Muhammad Hussain* v. *Sultan Ali* (2) at page 209 are too long to quote but are much in point in regard to the question before us.

(1) *In Har Narain and others* v. *Mussammat Deoki and others*, (3), learned Judges (Roe and Frizelle) say: "There is no doubt "a general tendency of the stronger to override the weak, and "many instances may occur of the males of a family depriving "females of right to which the latter are legally entitled. Such "instances may be followed so generally as to establish a custom "even though the origin of the custom was usurpation, but the "Courts are bound to carefully watch over the rights of the

(1) *I. L. R., XXIV All.*, 273. (2) 54 *P. R.*, 1903.
(3) 24 *P. R.*, 1893.

"weaker party and to refuse to hold that they have ceased to "exist unless a custom against them is most clearly established."

With these views we entirely concur and we should wish to have them weighed and followed by all Courts in this Province.

Applying the principles indicated above can it be held that the defendant has proved the custom set up by him in derogation of the Hindu Law which is the personal law of the parties? We do not think it can.

We accordingly accept the appeal and remand the case for decision on the remaining points under Section 562, Civil Procedure Code. Stamp on appeal and cross-objections to be refunded. Costs to be costs in the cause.

Appeal allowed.

No. 100.

Before Mr. Justice Robertson and Mr. Justice Kensington.

APPELLATE SIDE.

MUL RAJ,—(PLAINTIFF),—APPELLANT,

Versus

LADHA MAL,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 1105 of 1906.

Arbitration—Award—Order refusing to file private award—Appealability of the order—Civil Procedure Code, 1882, *Section* 526.

Held, that an appeal lies from an order under Section 526 of the Code of Civil Procedure, refusing to file an award made between the parties without the intervention of a Court.

Further appeal from the decree of Shaikh Asghar Ali, Additional Divisional Judge, Sialkot Division, dated 13th July 1906.

Ishwar Das, for appellant.

Sheo Narain, for respondent.

The judgment of the Court was delivered by

6th May 1907. ROBERTSON, J.—The question before us is whether or not an appeal lies from an order under Section 526, Civil Procedure Code, refusing to file an award of arbitrators made out of Court.

The learned Divisional Judge, following the Allahabad ruling in *Katik Ram* v. *Babu Lal* (1), has decided that no appeal lies. As pointed out, however, by a Division Bench of this Court in Civil

(1) *I. L. R., XXVI All.*, 205.

Appeal No. 862 of 1906 the contrary view has been taken in by at least two other High Courts, *i.e.*, by Madras in *Ponnusami Mudali* v. *Mandi Sundara Mudali* (1), and *Thiruvengadathiengar* v. *Vaidinatha Ayyar* (2), and by Calcutta in *Muhammad Wahid-ud-din* v. *Hakiman* (3), and *Janokey Nath Guha* v. *Brojo Lal Guha* (4), and by this Court in *Jhangi Ram* v. *Budho Bai* (5). The ruling last quoted has been followed in various unpublished judgments (see Civil Appeal No. 989 of 1903, decided 8th April 1905 and No. 1298 of 1906 decided 19th March 1907, and is supported by the remarks of their Lordships of the Privy Council on page 99 of *Ghulam Jilani* v. *Muhammad Hussain* (6). The point has also not been touched in the recent Full Bench decision of this Court in *Basheshar Lal* v. *Natha Singh* (7) dealing with the right of appeal where an order to file an award has been given under Section 526, Civil Procedure Code. As far as this Court is concerned therefore we are unable to follow the Allahabad rulings in *Katik Ram* v. *Babu Lal* and *Basant Lal* v. *Kunji Lal*, and we hold that in this case an appeal does lie. The appeal is accepted and the case remanded to the Court of the learned Divisional Judge under Section 562, Civil Procedure Code, for decision upon the merits. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal allowed.

No. 101.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

MAHMUD,—(PLAINTIFF),—APPELLANT,

Versus

NUR AHMAD AND ANOTHER,—(DEFENDANTS),—RESPONDENTS. } APPELLATE SIDE

Civil Appeal No. 66 of 1907.

Custom—Pre-emption—Sale of agricultural land to an agriculturist—Suit by a member of the alienors' tribe—Superior right—Punjab Pre-emption Act, 1905, Section 11.

Held, that by virtue of Section 11 of the Punjab Pre-emption Act, 1905, a member of the alienors' tribe has a preferential right of pre-emption in respect to a sale of agricultural land by a member of an agriculturist to that of a vendee who was an agriculturist within the meaning of Section 2 of the Punjab Land Alienation Act, 1900.

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(1) *I. L. R., XXVII Mad.*, 255.
(2) *I. L. R., XXIX Mad.*, 303.
(3) *I. L. R., XXV Calc.*, 757.
(4) *I. L. R., XXXIII Calc.*, 757.
(5) 84 *P. R.*, 1901, *F. B.*
(6) 25 *P. R.*, 1902, *P. C.*
(7) *P. R.*, 1907, *F. B.*

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 9th November 1906.

Fazal Ilahi, for appellant.

Gurcharan Singh, for respondents.

The judgment of the Court was delivered by

29th March 1907. LAL CHAND, J.—This was a claim for pre-emption instituted on 1st February 1906, under the Punjab Pre-emption Act, No. II of 1905. The property sought to be pre-empted is agricultural land, situate in *mauza* Dhandoli, *tahsil* Kharian, District Gujrat. The plaintiff-appellant is a Gujar and a member of an agricultural tribe as notified for the Gujrat District under the Punjab Alienation of Land Act and so is the vendor. The vendee is a Kashmiri by caste and is found to be an agriculturist within Section 2 of the Punjab Alienation of Land Act. The sale was effected on 14th September 1905 and registered on the 23rd idem, but, before registration, the vendee had secured a certificate on 20th September from the Collector showing that he was an agriculturist. It was contended before us in reply to appeal that the vendee was a Rajput, as he was described in the sale deed as a Bhatti Kashmiri. But this contention is obviously futile in the face of the description contained in the certificate as well as in the vendee's own application for obtaining the certificate. The description given in the sale deed evidently means a sub-caste of Kashmiris and not of Rajputs.

The claim for pre-emption was founded in the plaint mainly on an allegation that the plaintiff was a collateral of the vendor and that was the principal issue fixed in the case. The first Court held it proved that the plaintiff was a collateral of the vendor and decreed the suit on payment of Rs. 414, which the Court held to be the fair market value of the property subject to a deduction of Rs. 209 payable to a prior mortgagee.

On appeal the Divisional Judge held that the alleged relationship between the plaintiff and the vendor was not proved by any satisfactory evidence, and he therefore dismissed the suit as "the parties being agriculturists and residents "of the same village had equal power of purchase of the land."

The suit for purposes of jurisdiction was valued in the Lower Courts at Rs. 140-10-0 being thirty times the Govern-

ment revenue assessed on the land. A further appeal was thus inadmissible, the jurisdiction value of the suit being below Rs. 250. But it was contended for appellant on the authority of *Ghulam Ghaus* v. *Nabi Bakhsh* (1) that the decree directly involved a claim to property exceeding Rs. 250 in value, *i.e.*, the price claimed and allowed, and therefore a further appeal was admissible in the case. For respondent, *Nanha* v. *Kure* (2) was relied upon to contend that the suit for pre-emption having been dismissed by the Lower Appellate Court, its decree did not directly involve a claim or question relating to property of the value of over Rs. 250, and therefore the principle laid down in the Full Bench Judgment in *Ghulam Ghaus* v. *Nabi Bakhsh* was inapplicable. It is unnecessary to decide in this case on the merits of either contention, as we hold that the question of law argued in appeal, *viz.*, that the plaintiff-appellant had a superior right of pre-emption under the provisions of the Punjab Pre-emption Act is by itself sufficient to induce the application to be treated as an appeal, even under Section 70 (*b*) IV of the Punjab Courts Act. The contention put forward for the appellant then briefly was that inasmuch as both the vendor and the plaintiff-claimant for pre-emption were members of an agricultural tribe, the plaintiff-appellant was entitled to pre-emption under Section 11 of the Punjab Pre-emption Act against the vendee, who was an agriculturist but not a member of an agricultural tribe This contention was not clearly entered in the grounds of appeal, but it raised a question of law which went to the very root of the dispute. We therefore gave leave to the appellant to urge the contention, and on request by the counsel for the respondent gave him further time under Section 542, Civil Procedure Code, for contesting the case on that ground.

After hearing arguments on either side and examining in detail the provisions of the Punjab Pre-emption Act, we are of opinion that the contention raised for the appellant is sound and is bound to prevail. The right of pre-emption is defined by Section 4 of the Act to "mean "the right of a person to acquire agricultural land. ..... "... .. in preference to other persons." By Section 5 it is enacted that "a right of pre-emption shall exist in respect "of agricultural land and village immoveable property, but "every such right shall be subject to all the provisions and "limitations hereinafter in this Act contained." Section 11

(1) 24 *P. R.*, 1903, *F.B.* (2) 3 *P. R.*, 1896.

prescribes that " no person other than a member of an " agricultural tribe shall have a right of pre-emption in " respect of agricultural land ", provided that if the vendor is not a member of an agricultural tribe, the right of pre-emption may be exercised also by a member of the same tribe as the vendor under certain conditions embodied in the proviso. Section 12 ordains the order in which the right of pre-emption in respect of agricultural land shall vest subject to the provisions of Section 11, and Section 14 provides for an exercise of the right where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption. The procedure for giving notice where agricultural land proposed to be sold is subject to a right of pre-emption is laid down in Section 16, and Section 18 empowers any person entitled to a right of a pre-emption to bring a suit to enforce that right when the sale has been completed. Finally, after directing under Section 20 that in every suit for pre-emption in respect of agricultural land the Court shall of its own motion enquire into and decide certain prescribed issues whether the facts involved therein be admitted or not, it is enacted under Section 21 that if in the case of a sale of agricultural land the Court finds that the plaintiff is not a member of an agricultural tribe and is not entitled to claim pre-emption under the proviso to Section 11 of the Act, the Court shall dismiss the suit. It is clear on the face of these provisions that a right of pre-emption in respect of agricultural land is prescribed by the Act to exist absolutely and is declared to be vested primarily in members of agricultural tribes. It is conceded in favour of persons other than such members contingent only on conditions laid down in the proviso to Section 11, and the very first of these conditions is that " if the vendor is not a member of an agricultural tribe." As against a vendor, who is a member of an agricultural tribe, any person other than a member of an agricultural tribe has absolutely no right of pre-emption, be he an agriculturist or not. The whole scheme of the Act as laid down in the various sections already referred to palpably aims at limiting the right of pre-emption in favour of a member of an agricultural tribe when the vendor is a member of an agricultural tribe. It was contended by the counsel for the respondent that a sale in favour of an agriculturist does not contravene the provisions of the Punjab Alienation of Land Act, that the right of pre-emption in favour

of an owner in the village was an ancient right, that such right was not abrogated by the Act and he relied upon Section 12, clause (*a*) of the Act in order to support his contention. But the whole argument is founded on a fallacy and is not in the least supported by the provisions of the Act under consideration. It is true that the Punjab Alienation of Land Act justified a sale in favour of an agriculturist by a member of an agricultural tribe, and the sale therefore in the present case by a Gujar vendor to a Kashmiri vendee, who is an agriculturist, is legal and valid. But a right of pre-emption is primarily and essentially a right of priority to buy, and such right, under such circumstances, is conferred by law on a member of the agricultural tribe only and not upon a mere agriculturist. A right of pre-emption is a legal right such as need not be exercised at all. If therefore no suit to enforce the right were instituted, the vendee would be competent to retain his sale. But if a member of the agricultural tribe elects to exercise his prior right to buy, the law says he shall be entitled to exercise it. It is an entire fallacy to say that a right of pre-emption was vested of old in an owner of the village, and therefore the plaintiff is not entitled to assert the right as against such owner. The provisions of the Act are in the first place exhaustive and make no such exception as is contended for. But, moreover, the old custom doubtless preferred an owner of a village to a stranger, who did not occupy land in the village. This is amply borne out by the provisions embodied in the early settlement records. But there is no warrant for the assertion that as between owners in the village the old custom did not prefer a member of the same tribe to a person who was not. Whether it was or was not the case may possibly be a debatable question, but it has now been finally set at rest by the provisions of the Punjab Pre-emption Act. Section 12, clause (*d*), relied upon in argument does not in any manner support the respondent's contention. The word *pre-emption* is not used in the clause, but the context itself is expressly rendered subject to the provision of Section 11 which, as observed already distinctly, provides that "No "person other than a member of an agricultural tribe shall have "a right of pre-emption in respect of agricultural land and "decidedly not when the vendee is a member of an agricultural "tribe."

It was finally suggested by the counsel for the respondent that the point raised being a novel one and of widespread interest, the case be referred to a Full Bench for decision. But

we do not see sufficient grounds for adopting the course suggested for our acceptance. The question argued is doubtless novel as it would be, the Act itself under which it is raised being a recent provision, and it no doubt involves a point of general interest. But the matter appears to us to be apparent on a plain reading of the Sections and obviously admits of no reasonable doubt in its solution or decision. We therefore decline to make the suggested reference and hold that the plaintiff is entitled to a right of pre-emption in this case against the vendee, who is an agriculturist, but is not a member of an agricultural tribe. There were two further contentions raised by the vendee in his grounds of appeal in the Lower Appellate Court, *viz.*, that plaintiff had lost his right of pre-emption by acquiescence in the bargain of sale, and that the appellant was in any case entitled to receive the full amount entered in the sale deed, *viz.*, Rs. 600, as it was fixed *bonâ fide*, and, moreover, represented the fair market value of the property sold. As regards acquiescence we are satisfied that no legal acquiescence is proved on the record so as to stop plaintiff from asserting his right of pre-emption. As regards the price to be paid, the counsel for the parties agreed to leave the matter in our hands in order to avoid further delay and expenditure, which would be caused if the case were now remanded to the Lower Appellate Court. After considering the matter, we are of opinion that Rs. 500 is the fair market value of the property sold and fix it accordingly. We accept the appeal, reverse the decree of the Lower Appellate Court, and in modification of the decree passed by the first Court grant a decree to plaintiff for pre-emption of the land in suit on payment of Rs. 500, subject to a deduction of Rs. 209, payable to the prior mortgagee, and a further deduction of such amount as he has already deposited in Court in pursuance of the decree passed by the first Court. The plaintiff shall, subject to deduction as aforesaid, pay the remaining balance into Court on or before 15th May next, but on default in such payment his suit shall stand dismissed with costs. As plaintiff has failed on the principal ground entered in his plaint and has succeeded on a ground which does not appear to have been expressby urged in the Lower Courts, we direct the parties to bear their own costs throughout.

Appeal allowed.

No. 102.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

BURA MAL AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus
NARAIN DAS AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 758 of 1906.

Custom—Inheritance—Bunjahi Khatris of Rawalpindi—Right of collaterals to succeed in preference to daughter's sons and grandsons—Hindu Law—Adverse possession—Possession of a widow in lieu of maintenance—Limitation Act, 1877, Schedule II, Article 144.

Held, that the defendant upon whom the *onus* lay had failed to establish that in matters of inheritance the Bunjahi Khatris of Rawalpindi City were governed by custom and not by Hindu Law, or that collaterals were entitled to succeed to the exclusion of daughter's sons and grandsons of the deceased sonless proprietor.

Held, also, that the mere fact that a widow of a predeceased son entitled to maintenance from the estate of her father-in-law had been in possession of the latter's estate for a long time would not in the absence of an assertion of any rival rights or pretension to adverse possession by her, raise the ordinary presumption that she had been in possession adversely to the real heir: especially where there was evidence that she had been in possession with the consent of the distant reversioners in lieu of maintenance.

First appeal from the decree of W. de M. Malan, Esquire, District Judge, Rawalpindi, dated 16th May 1906.

Dwarka Das, Ishwar Das and Sewa Ram Singh, for appellants.

Pestonji Dadabhai, M. S. Bhagat and Gobind Das, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—At page 4 of the paper book is a pedigree table, which, for the purposes of this appeal, can conveniently be abridged thus— *29th April* 1907.

WASAKHI.

Tirath Singh.		Four other sons.
		Defendants 1 to 11.
Mussammat Sundro (married to Kahn Singh).	Mussammat Bishn Devi (married Bodhraj).	Sant Ram (married Mussammat Sukhi and died).
Plaintiffs 2 to 8 (sons and sons' sons).	Bakhshi Bura Mal, plaintiff 1.	Mussammat Bhani.
		Defendants 17 and 18.

The property in suit, houses and shops in Rawalpindi City, were owned by Tirath Singh, a Bunjahi Khatri, who died about 1869. At that time Sant Ram, his son, was already dead. His widow Sukhi then held the property—in what capacity is one of the chief issues in the case. She died in 1903, whereupon defendants took possession and between that time and date of suit recovered rents which plaintiffs estimated roughly at Rs. 250. Plaintiffs sue for the property and mesne profits, as daughter's sons and grandsons, under Hindu Law. Defendants 1 to 11 assert the right of collaterals to succeed in preference to daughter's sons under the custom of the tribe, and also plead acquiescence and limitation as running from date of Tirath Singh's death and also on the score of adverse possession by defendants 1 to 11 from that date. They further claim reimbursement of expenses on funeral ceremonies of Tirath Singh and on the buildings. The position of defendants 17 and 18 is peculiar. Their case is that though they are not in possession and have not yet brought a suit, they are better heirs than plaintiffs or than defendants 1 to 11, as being daughter's sons of Sant Ram, son of Tirath Singh, or as being heirs to Mussammat Sukhi, who, they contend, did by long adverse possession acquire an absolute title.

The Court below found against the plaintiffs on the score of limitation as well as of acquiescence, and also held that a special custom had been proved favouring collaterals as compared with daughter's sons.

The decision as to limitation was based on the finding that defendants 1 to 11 had "virtually" adverse possession against plaintiffs from the date of Tirath Singh's death, though their actual possession was not found. These findings were sufficient for the decision of the case, and therefore no finding was definitely arrived at regarding the pleas of defendants 17 and 18.

Plaintiffs have now appealed here and we have heard lengthy and elaborate arguments. The first eight grounds of appeal relate to the matter of limitation, the ninth ground denounces the asserted special custom in preference of collaterals, the tenth combats the lower Court's view that Tirath Singh and his brothers held the family property jointly, the eleventh denies acquiescence and the last repeats the claim of rent. There is not a word about defendants 17 and 18, and it is not asked that the issue (9) between them and plaintiffs be decided.

To clear the ground I will deal first briefly with the eleventh ground. It seems to me absurd to assert that, if time was not running against plaintiffs in Mussammat Sukhi's life-time, the mere fact that plaintiffs took no steps till after her death can possibly prove acquiescence in defendants 1 to 11's claim to succeed after her. On the other hand, if time did run against plaintiffs from Tirath Singh's death, or even from 1874, when defendants 1 to 11 sued Mussammat Sukhi to restrain her from alienating the property, then the suit is abundantly barred by time and no question of acquiescence arises. In 1874 Mussammat Sukhi had made no alienations in fact, and the suit was for an injunction against her making any. This prayer was refused, but the Court declared that the then plaintiffs were to succeed after Mussammat Sukhi's death. Such a suit was entirely optional. Present plaintiffs, who were not parties, were not bound to take any notice of it or to rush into Court unless they pleased. I would find in favour of plaintiffs on this point.

Turning next to the tenth ground I remark that defendants 1 to 11 benefit by the Lower Court's decision on the point, inasmuch as, if Tirath Singh and his brothers constituted a joint Hindu family and the property in suit was part of the joint estate, those defendants would take by survivorship. No other view is possible than that the brothers were separate, two of the defendants, Narain Das and Hari Ram, when, examined as witnesses for plaintiffs, admit this to have been the case, as also do two of defendant's witnesses Ganesha and Chaudhri Ganga Ram. There is not a particle of evidence to the contrary, and I would therefore overrule the Lower Court's finding on the point.

We come next to the question of limitation. I think it may be taken as clear without lengthy discussion (*a*) that after the death of Tirath Singh, Mussammat Sukhi and not defendants 1 to 11 had actual possession, (*b*) that the lady was not entitled to possession as of right, but was certainly entitled to maintenance from the estate of her father-in-law. As regards (*a*) I need only note that defendants 1 to 11 virtually admit that she collected and enjoyed the rents, and that her possession is admitted by more than one of their own witnesses, *e. g.*, Ganga Ram (No. 3), Tara Chand (No. 5), Ganesha (No. 6), who says she was malik, Sawan Mal, (No. 7), Sahib Mal (No. 8) and others. Again, the value

of the suit of 1874 shows she was then admittedly in possession. There is no real dispute as to the correctness of proposition (*b*); the law is quite clear, and of course such Khatris as these are presumed to follow Hindu Law of the Mitakshara School.

I will next take up, in connection with the question of time-bar, the pretension of the plaintiffs to take advantage of Article 141, Schedule II, Limitation Act, 1877, by persuading the Court, to recognise that Mussammat Sundro, their mother and grandmother, was alive until 1895, that they had no claim during her life-time and that they have sued within 12 years of her death and so within time. This contention was never put forward during the recording of the pleadings nor was any evidence tendered regarding it until after plaintiffs formally closed their case on 4th April 1906. On that day 27th April was fixed for filing of written arguments, and it was in their written arguments then put in that the Court first heard of the new contention. On 16th May when it came to write its judgment, it noticed, for the first time, that in support of the contention an extract from a death register had been put on the file, whereupon the Court, in my opinion quite rightly, refused to consider the contention or to allow the extract to remain on the file. The reasons why the court could hardly have acted otherwise are fairly obvious. Defendants do not admit the genuineness of the extract or that it refers to this same Mussammat Sundro, and therefore clearly the assertion of the death of the lady in 1895 could not be deemed proved without regular enquiry into defendants' objections to the extract, and plaintiffs had no right whatever, legal or moral, to a further enquiry at that stage of the case. I would hold, therefore, that plaintiffs cannot be allowed to plead Article 141, and that, even if they are allowed as a matter of form to plead it, they have certainly not proved the death of Mussammat Sundro in 1895.

The next point is the nature of Mussammat Sukhi's possession. I have already recorded my opinion that she held not as of right, but in lieu of maintenance, that is, she was neither heiress entitled to a full estate nor even a widow entitled to hold for life. In the proceedings of 1874, rightly considered she never asserted her own heirship, nor did she arrogate to herself the position of a trespasser. This fully distinguishes the present case from *Ram Narain* v. *Maharaj Narain* (1) relied upon by Mr. Pestonji. In that case the widow expressly repudiated the *soi-disant* adopted son and held

(1) 3 *P. R.*, 1904.

against him. The property, at least in those early days, yielded not more than enough for her reasonable maintenance, and, in my opinion, we cannot fairly say that she held adversely to the next heirs whoever they might be when she herself did not clearly take up this attitude. The contention of defendants 1 to 11 that the proceedings of 1874 shew that, though she held by arrangement with them, she held adversely to plaintiffs, does not commend itself to me. My view is that when in 1874 she took up the position of holding for life in lieu of maintenance, she held this position not only in reference to defendants 1 to 11 but in reference to all persons who might be found to be the real heirs of Tirath Singh, *cf. Muhammad Din* v. *Fatteh Muhammad* (1). Plaintiffs content with this arrangement of the matter could safely await her death. I am unable to assent to Mr. Pestonji's proposition, based on *Sonasundara Mudali* v. *Kulanda iveul Pillai* (2) that the decree of 1874 makes the question of the heirship of defendants 1 to 11 *res judicata* against plaintiffs.

Another way of looking at the matter is this. Hindus in the Punjab, though they may follow their personal law, do not always follow in every particular the doctrines of the Mitakshara. Without deserting Hindu Law a tribe may introduce particular modifications, *Sohan Singh* v. *Diwan Chand* (3); and it is just possible that this tribe may have adopted a variation under which the widow of a pre-deceased son takes the same widow's estate which she would have taken had her husband survived his father. If this is what has happened, no argument is required to support the proposition that time only began to run against plaintiffs when Mussammat Sukhi died.

The suit, then, is not time-barred. Adverse possession has not been held [illegible] before suit, nor has plaintiffs' right (if any) been extinguished under Section 28, Limitation Act.

The question of custom in this case may be stated thus: In this tribe do near collaterals exclude daughters and daughters' sons? According to Hindu Law the answer would be in the negative, and the burden of proof has been rightly laid upon the defendants 1 to 11. Among Punjab agriculturists generally the *onus* would be on the daughter's sons; but I can find on the record no proof that these non-landholding Khatris have adopted

(1) 24 *P. R.*, 1906. (2) *I. L. R.*, *XXVIII Mad.*, 457.
(3) 178 *P. L. R.*, 1905.

agricultural custom as a whole. No doubt here and there Bedi Khatris, who are said to be a section of the Bunjahis, have become agriculturists and follow Jat custom; but there is no ground for holding that the Bunjahi Khatris of Rawalpindi City have gone that way. Therefore we have to see whether a special custom in favour of collaterals as against daughter's son has been established.

The District Judge has not discussed the instances in detail. Indeed, in reference to practically all the issues in the case he has referred generally to the written arguments put in by the parties, has suggested that they be read as part of his judgment, and has stated his conclusions merely. Such a judgment is of little or no assistance to an appellate Court, and hardly seems to me to be such a judgment as the Code contemplates.

Defendants' instances are some 22 in number. The first case is that of Megh Raj's property, mentioned by Bura Mal, plaintiff, as witness for defendants. This case is not in point, inasmuch as Megh Raj left a son as well as a daughter, the son died and was succeeded by his mother, and after that the collaterals came in. The instance is one of collaterals *v.* sister—see evidence of Hari Chand, plaintiff's witness 11, and judgment of Commissioner, Rawalpindi, of 18th June 1883. The second case is that of Sham Singh's property. Bhag Singh, witness 4 for defendants, represents it as a case of collaterals against daughters; but their witness No. 16 and also plaintiffs' witnes No. 14 shew that Sham Singh's son survived him and took the estate. The third case that of Budh Singh's property, mentioned by Tara Chand, witness 5 for defendants, is open to precisely the same criticism. All these three instances may be safely ignored, as also the fourth case, Makhan Singh's on much the same ground. Mr. Pestonji informs us that he does not rely upon them. The 5th instance (Ratna's) is criticised as a case of succession by survivorship in a joint family of brothers to the share of a deceased sonless brother who left a daughter, see evidence of Sahib Mal, witness 8 for defendants. There is a conflict of evidence here. Sahib Mal in examination-in-chief said separation took place before Ratna's death. In cross-examination he said the separation occurred two or three years after Ratna's death. Then 14 days later defendants called Ganga Ram (witness 9), brother of Ratna, who said he and Ratna lived separately and was sole owner of his house. Only one brother succeeded. I do not consider this a very good instance: there was no contest, and further Sahib Mal's contradiction is

unsatisfactory. The next case is Lal Chand's. Sahib Mal says the family was joint; but Radhu Mal, witness 14, called at a later date, says the opposite. The case is doubtful. The 7th instance, Duni Chand's, is not a good one. The property was a share in a joint house, owned by him and his brother. The next case (Mangal Singh's property) is in favour of defendants. There was a suit and judgment of a Court dated 8th February 1889. A widow gifted to her daughters and the collateral (Tahl Singh, brother) of her husband sued and got the property. The *onus* may nominally have been wrongly laid, but the decision proceeded upon positive evidence on the record. In case No. 19 (Jowala Sahai's) the daughters were not parties to the litigation between the collaterals and the widow; and further the daughters can still sue. In Raj Kaur's case Sukh Ram, witness 10, the collaterals have turned out even the widow. As she is still alive, daughters need not sue till after her death. Further, cases of forcible seizure are not good instances of custom —*Maula Bakhsh* v. *Muhammad Bakhsh* (1), (at p. 210). The cross-examination of Gurdas Mal, witness 13 for defendants, shews that in Duni Chand's case (No. 11) the daughters starting for their husbands' homes made a voluntary renunciation. The same witness mentions the two Ram Chand's cases [12 (*a*) and (*b*)] and the Ganesha case (13). In all three Ram Chand was the contesting collateral and he succeeded against daughter's sons. In the third case he succeeded only partially upon an arbitration, as part of the property had been *willed* to the daughter's sons. Case No. * 14 (Raja Ram's) is still open to contest, and the next case (No. 15, Jawala Singh's) is not clear. Witness 20, Rup Chand, who succeeded, says the property was joint and collaterals got it, while the cash in Jowala Singh's separate business went to the daughter. The instance is rather against defendants. The next two instances (16 and 17) are of Gurdaspur and admittedly not in point; and No. 18 (Suba Mal's) spoken of by Ditta Mal, witness 23, is doubtful in connection with the alleged and denied separation between Suba Mal and his brother, witness' father.

* Witness Narain Das No. 15.

Besides these cases defendants rely upon certain judgments. Kalu Shah and others in 1875 got a decree in a case of alienation by their collateral's widow, the daughter's rights being pleaded against them in vain. The daughter was not a party but Hari Chand, the daughter's husband, admits that the collaterals succeeded when the widow died. In 1886 Nihal Chand, a collateral of last holder of a house and 5 *kanals* of land, sued the daughter and got decree for the land only, the house having been rebuilt by the daughter. The land was very insignificant

(1) 54 *P. R.*, 1906.

in area. Ratan Singh's case against his brother's widow, decided in December 1866 by Assistant Commissioner, Rawalpindi, does not help much. It was decided not upon instances but upon a *dictum* in the Punjab Civil Code, and the decision was also *ex parte* against the daughter.

The net result of this analysis is that we have in defendants' favour at most Mangal Singh's case (No. 8), Ram Chand's 3 cases (Nos. 12 (*a*), 12 (*b*) and 13), Kalu Shah's case of 1875, and perhaps Nihal Chand's case of 1886. This is a very slender basis upon which to hold that these Khatris, high class town Hindus, follow a special custom at variance with Hindu Law especially as in Rawalpindi District we have at least two rulings in which Hindu Law was applied notwithstanding the *Rewaj-i-am, viz., Sohna Shah* v. *Dipa Shah* (1) (Bhabras of Rawalpindi) and *Kartar Singh* v. *Mathar Singh* (2) (Khatris of Mauza Sukho); and even without more I would hold that the onus on defendants 1 to 11 had not been discharged. But even if this were in doubt, examination of plaintiffs' precedents would at once turn the scale in their favour. There are a large number of cases of gifts and wills in favour of daughters, which are not strictly in point but which shew the desire of these Khatris when sonless to be succeeded by daughters. Leaving these out, we have—

* Witness 18, for defendant, Ishar Singh.

Chaudhri Ram Singh's case *, he was a Kohli Khatri of Gujar Khan, and his daughters excluded his collaterals.

† Witness 20, Rup Chand.

Budha Singh's case †, of Saidpur, near Rawalpindi : one daughter succeeded.

‡ Witness 23, Ditta Mal.

Sant Ram's case ‡ : daughter succeeded, was unmarried. Gurdas Ram's case § : daughter and her son and husband excluded five or six collaterals.

§ Witness 1, for plaintiff, Jiwan Singh

Sobha Ram of Bewar's case § : daughter's son's took, but details scanty. Three more cases by same witness with scanty details, but not contradicted or cross-examined as to details.

‖ Witness 2, Jodh Singh.

Sobha Singh's case ‖ : one daughter who has sons excluded collaterals.

¶ Witness 8, Gopal Das.

Musadda Singh's case ¶ : daughter's son succeeded : no cross-examination.

** Witness 12, Rup Chand.

Hira's case ** : daughter inherited : Gujral Khatri : no cross-examination.

†† Witness 13, Jagat Singh.

Nand Singh's case †† : daughter's son excluded collaterals.

Besides these instances plaintiffs relied upon certain judgments, namely—

(1) 15 *P. R.*, 1902. (2) 94 *P. R.*, 1898.

Judgment of Divisional Judge, Rawalpindi, of 4th August 1892, in *Mussammat Makhni* v. *Sant Ram*, decided in favour of a daughter against a collateral, under Hindu Law, a Khatri case.

Two judgments in Brahmin cases of Rawalpindi of 1873 and 1903: these we may disregard.

Judgment of Mr. Delmerick, Extra Assistant Commissioner, 10th April 1867, in *Hukm Singh* v. *Nihal Singh*, Khatris of Saidpur: award in favour of daughter's son; and one or two other less valuable cases.

My conclusion is that plaintiffs' rights are superior to those of the defendants 1 to 11, and I turn to the matter of the interest of defendants 17 and 18 in the case. The Court below, as we have seen, has not adjudicated with regard to them, and a decision in their favour would not give them the property but would simply result in the dismissal of plaintiffs' suit. It seems to me most convenient to leave them out of account in this suit, a course which will not prevent their suing for the property themselves.

Plaintiffs claim also mesne profits, *i. e.*, rent, while defendants 1 to 11 set off against the plaintiffs' claims sums spent by them on the funeral expenses of Tirath Singh and Mussammat Sukhi (Rs. 2,500) and on repairs, etc., to the buildings (Rs. 500). The Court below has found that the evidence on their counter-claim produced by defendants 1 to 11 is inconclusive, and it has come to no finding on the matter of rent. In my opinion it is so improbable that defendants 1 to 11 rather than Mussammat Sukhi paid up at Tirath Singh's funeral, and the matter is so old a one, that we cannot safely hold that defendants spent anything out of their own pockets. As regards repairs it is also extremely unlikely that defendants would not call upon Mussammat Sukhi to pay up especially as the property had increased so enormously in rental value, and there is no proof of any expenditure worth mentioning after her death. Defendants 1 to 11 assert that they spent a considerable sum on a new *pukka* building; but I cannot hold this proved.

Plaintiffs asked for Rs. 250 rent, or so much more as may have been collected. I do not think they can be tied down to the figure 250. They have proved *primâ facie* the collection by defendants 1 to 11 of Rs. 440-1-3, and defendants, who should have produced accounts, have offered no rebuttal. Making the usual allowance for cost of collection and for maintenance of buildings, I would give plaintiffs a decree for possession of the

property (*ex parte* against absent defendants) and for Rs. 400 cash against defendants 1 to 11 (upon their making up the Court fee to the proper figure), with costs in full against defendants 1 to 11 in both Courts.

29th April 1907. CHATTERJI, J.—I concur. A decree will be drawn up, accepting the appeal in terms of my learned colleague's judgment.

Appeal allowed.

No. 103.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

MUHAMMAD UMAR AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

APPELLATE SIDE. *Versus.*

ABDUL KARIM AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 49 of 1907.

Custom—Alienation—Power of widow to make a son-in-law khanadamad *or to gift to daughter and her husband—Arains of Naraingarh, Umballa District—Ancestral and acquired property*—Locus standi *of reversioner in presence of daughter.*

Found, that among Arains of Naraingarh in the Umballa District no special custom has been proved whereby a widow in possession of her deceased husband's estate for life is competent, in the presence of the first cousins of her late husband, to make a son-in-law a *khanadamad* or to gift her husband's property to him or to her daughter.

In matters of alienation a widow in possession of self-acquired immoveable property of her husband is subject to the same restrictions as if the property were ancestral; and the existence of a daughter does not preclude a near reversioner such as a first cousin from contesting an alienation effected by such a widow.

Jiwi v. *Gahiya* (1), *Roda* v. *Harnam* (2), *Gulab* v. *Ishar Kour* (3), *Chiragh Din* v. *Mamman* (4) and *Sant Sigh* v. *Jowala Singh* (5), referred to.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Umballa Division, dated 20th November 1906.

Muhammad Shafi, for appellants.

Dwarka Das, for respondents.

The judgment of the Court was delivered by—

22nd April 1907. JOHNSTONE, J.—Plaintiffs are the nearest male collaterals of one Ali Muhammad deceased, whose property is in suit. On

(1) 98 *P. R.*, 1891. (3) 63 *P. R.*, 1895.
(2) 18 *P. R.*, 1895. (4) 28 *P. R.*, 1893.
(5) 58 *P. R*, 1899.

5th July 1904, some 3 years and 10 months after the death of Ali Muhammad, his widow Mussammat Senan, defendant 1, executed in favour of her son-in-law Muhammad Umar, defendant 2, two deeds of gift—one of the whole of deceased's self-acquired immoveable property, and the other of one-fourth of his ancestral property. The suit is for a declaration that these deeds shall not, after donor's death, affect the rights of the plaintiffs.

Defendants contended that the gifts were valid by custom, inasmuch as they were made in compliance with the oral will of the deceased Ali Muhammad and in favour of a *khanadamad*.

Issues were settled and evidence taken and the first Court, after a lengthy discussion, held—

(*a*) that the deceased did make an oral will;

(*b*) that that will was valid;

(*c*) that defendant 2 is *khanadamad* of defendant 1; and

(*d*) that an Arain widow in possession of her husband's land can give it to a son-in-law in presence of near collaterals to the extent noted below, namely,—

(*i*) acquired property—the whole.

(*ii*) ancestral—one-fourth.

The learned Divisional Judge took a different line. He utterly disbelieved the story of the will, and he found that Arain widows cannot alienate immoveable property by way of gift. He considered the assertion of *khanadamadi* a mere concoction, got up like the story of the will by the witness Kalu, Lambardar, an enemy of plaintiffs.

Defendants have filed this further appeal and we have heard arguments. I will consider first the question of the oral will. The witnesses who testify to it are Kalu, Lambardar, Hakim Ali, Ali Bakhsh and Ilahi Bakhsh. The first three say they were sent for at the time, the fourth says he went casually about his own business to deceased's house. To my mind none of them is a plainly disinterested witness, and the first, third and fourth are plainly unfriendly to the plaintiffs. This throws some doubt upon their evidence; and it is contended with force by Mr. Dwarka Das that the absence of a writing is suspicious. It is admitted that deceased could at least write his name, and it is said that Kalu can read and write, and no registration of a will is required. Mr. Shafi urges that, inasmuch as the *Riwaj-i-am* of Naraingarh *tahsil* allows wills, both written and oral, deceased and his friends knew that no writing was necessary; but even so, I think that in these days when land is valuable and

reversioners are tenacious of their rights, a man would hardly, in the presence of near reversioners, trust the interests of his daughter to the chances of oral testimony being believed. Further, I do not think that the argument of the first Court based on the peculiar nature of the disease of which Ali Muhammad died is worth much.

But there is much more still against the *factum* of the will, first, there is the long delay in acting upon it. The District Judge's attempted explanation of this, with Mr. Shafi's improvements upon it, is to my mind quite insufficient. The idea is that defendant 2 was only son of his father Usaf Ali and that it took time to persuade the latter to let the former be a *khanadamad*. But in February 1904 Usaf Ali became by virtue of a power-of-attorney agent for defendant 1, who even then described herself as owner of Ali Muhammad's estate, making no mention of defendant 2 and his status and rights. Again, when Ali Muhammad's death was reported on same day (18th September 1900) to the Patwari no mention of the alleged oral will was made, and mutation was effected in favour of defendant 1 as his heiress. In fact, the oral will and the *khanadamadi* of defendant 2 were apparently never heard of until July 1904, when in order to bolster up the gifts they were mentioned in the deeds. I would hold then that the oral will is not proved.

The next question is the right of the reversioners to contest the alienation of non-ancestral property by a widow. I take this question apart from all considerations of who the alienee may be, because Mr. Shafi insists that in the case of non-ancestral property the "agnatic theory" and its consequence, the right of collaterals to control the disposition of property by the holder for the time being, have no application. I am unable to fall in with his view of the matter. He relies upon the passage occurring at page 183 in *Haidar Khan* v. *Jahan Khan* (1), beginning "It is self-evident," and he argues that, because the "agnatic theory" does not apply, plaintiffs have no *locus standi* at all where non-ancestral property is concerned. But in my opinion he overlooks the essential distinction between a male proprietor under customary law and the widow of a male proprietor. Leaving out of account for the moment the rights of daughters, the male collaterals of Ali Muhammad upon his death became at once the owners of all his estate, ancestral or otherwise, though their estate was postponed and the property would not fall into possession until the widow's death; while in the case of a male holder his heirs have no vested estate until he dies. The reversioner can under customary law contest alienations by a male proprietor of ancestral estate only:

(1) 50 *P. R.*, 1902.

that law gives him a sort of interest in such estate in the hands even of a male proprietor, but not in non-ancestral estate. The distinction, then, is clear. Plaintiffs can sue in regard to the non-ancestral property in suit as well as the ancestral, because they are (leaving out of account for the moment the rights of daughters) already the owners of all Ali Muhammad's property, and so of course they have the right to interview if any attemp t is made by the holder for life to waste it or make away with it.

But Mr. Shafi says that the actual custom of the Naraingarh Arains allows widows to make gifts even of ancestral estate to daughters and sons-in-law. I cannot find in the *Riwaj-i-am* of the *tahsils* or of the other *tahsils* of the District of Umbalia, or in any *Wajib-ul-arz*—several of 1853 are on the record—any warrant for this. In them I find indications that *male proprietors* have here and there certain powers of disposition, but there is not a word as to widows. And, in my opinion, the instances relied upon by the counsel do not prove his point. They are seven in number as detailed by the District Judge. The last was a gift to a *pichlag*. It was contested and *set aside*, it being agreed by way of compromise that upon death of widow half should go to the *pichlag* and half to collaterals. In No. 6 the mutation entry expressly says no *jaddis* exist. In No. 5 we have no documentary proof, and the witness first stated that the reversioners sued and got possession, and then contradicting himself said they failed and bought the land. Anyhow, the reversioners have the land. No. 4 is entirely based on the hearsay evidence of one witness; and the same remark applies to No. 2. No. 1 is an alienation of recent date and may still be contested, and so it appears that No. 3 is the only instance worth anything at all. To me it is quite clear that the crediting of unusual and extensive powers to agriculturist widows is hardly warranted on data such as the above; *cf. Jivi* v. *Gahiya* (1), *Roda* v. *Harnam*(2), *Gulab* v. *Ishar kour* (3), *Chiragh Din* v. *Mamman* (4) and *Sant Singh* v. *Jwala Singh* (5), and the instances of gifts by males to daughters and Chief Court rulings in favour of such gifts are wholly irrelevant.

It follows from this that the widow could alienate in presence of plaintiffs only to some one having a better right to inherit than the plaintiffs, or to some one else only if there was

(1) 98 (3) 63 P. R., 1895.
(2) 18 (4) 28 P. R., 1893.
(5) 58 P. R. 1899.

in existence some one whose existence bars plaintiffs. In the present case this can only be if--

(1) Defendant 2 is a real *khanadamad*, and a *khanadamad* inherits to the exclusion of near collaterals, or

(2) The daughter (his wife) is a better heir than plaintiffs, and her existence bars plaintiffs ; or

(3) Defendant 2, by virtue of being her husband, has the same rights that she would have, the gifts being taken as made to her.

The first of these alternatives is easily disposed of. I agree with the learned Divisional Judge that the *khanadamadi* of defendant 2 heard of for the first time in July 1904, is a fiction. There is no proof but something like disproof of its existence before the date of the deeds. There was no authority from the husband to create it; and though among Arains as a whole daughters are no doubt a favoured class, I know of no warrant for the contention that an Arain widow, either in Naraingarh or anywhere else, can make a son-in-law *khanadamad* in the sense that he thereby becomes as it were a son.

As regards points (2) and (3), the rulings in *Mussammat Begam* v. *Nur Bibi* (1) and *Sher Muhammad* v. *Phula* (2), have been quoted as shewing that, when a widow surrenders the estate to the next heir, remoter heirs have no *locus standi* to contest her act. But defendant is not the next heir and the rulings hardly apply, and the only remaining point really is whether the the existence of the daughter bars plaintiffs' suit, which is a suit for a declaration, not specifically against the daughter that *the gifts to defendant* 2 shall, not affect plaintiffs' rights after death of the donor widow.

Plaintiffs are collaterals in the third degree of Ali Muhammad, *i.e.*, first cousins. The daughter is not a party to this suit, and so no finding as to her and plaintiffs' relative rights of inheritance can possibly bind her. But the question is not only whether, apart from the gifts, she would succeed to the gifted property on death of her mother in preference to plaintiffs, but also whether she would succeed, as a son would succeed in such a capacity as to bar plaintiffs from suing now. It seems to me clear that she would succeed to the ordinary estate of a female under customary law though perhaps if she had male issue the property would devolve upon that male issue upon her death. As a matter of fact I understand she has no male issue, so that between plaintiffs and the property *at the worst* there are only two females, the widow and the daughter, and the existence of

(1) 45 *P. R.*, 1892. (2) 9 *P. R.*, 1899.

neither prevents plaintiffs from suing for the declaration prayed for here.

Taking this view of the matter I need not attempt to decide whether among these Arains, on the death of a sonless widow holding ancestral estate of her husband, her daughter or her husband's first cousins would take the property. I need only decide that the gifts to defendant 2 are invalid in presence of plaintiffs and that the existence of the daughter does not bar the suit. The matter of the relative claims of plaintiffs and the the daughter to possession on death of the widow can most conveniently be left for disposal then, if plaintiffs and the daughter disagree on the point.

I would dismiss the appeal with costs.

Appeal dismissed.

No. 104.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

IMAM DIN,—(PLAINTIFF),—APPELLANT,

Versus

MULLA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 1218 of 1906.

Custom—Alienation—Gift by daughter's son of ancestral maternal estate inherited by his mother from her father under a gift—Jats of Mathothial gôt *of* mauza *Kulchpur*, tahsil *Kharian, Gujrat District.*

Found, that among Jats of the Mathothial *gôt* of *mauza* Kulchpur, *tahsil* Kharian, in the Gujrat District, a daughter's son who had succeeded to the property which had been gifted to his mother by her father is competent by custom to gift the said property to his daughter.

Muhammad v. *Hayat Bibi* (1) and *Samman* v. *Ala Bakhsh* (2), referred to.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 3rd May 1906.

Ram Bhaj Datta, for appellant.

Beechey, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case the pedigree table given by the first Court differs in one point from that given by the learned Divisional Judge, and the real truth of the

18th April 1907.

(1) 109 *P. R.*, 1891. (2) 106 *P. R.*, 1901.

matter is not quite clear. In the former table Khana is shown as having one son, Bakhsh, in the latter as having two sons, Hasht, called original donor, and Bakhsh, father of Mussammat Ahmad Bano, donee. Further, in at least one Revenue record Hasht is spoken of as father of the lady. For our purposes, however, the matter is not important. We may take it that the first departure from the ordinary rule of succession among these Jats of the Mathothial *gôt* was the gift to Mussammat Ahmad Bano of ancestral estate by her father. She was married to a man of the Khatrial *gôt*. When she died, her son Mulla, defendant 1, succeeded, and he in turn being sonless gifted the property to his daughters, defendants 2 and 3. Plaintiff related to Bakhsh in the fourth degree—though they are in the seventh generation from the common ancestor—sues to contest this gift as *ultra vires*.

The first Court finds that plaintiff "meets" in the 6th degree, which is wrong; that in this *gôt* relatives so distant are not heirs, though perhaps relations in the fourth or fifth degree might be; that a gift to a daughter followed by possession is valid; and that defendants 2 and 3 are "resident" married daughters of defendant 1 and so have the rights of *khanadamads*.

The suit being on these findings dismissed, plaintiff appealed to the Divisional Court, which held that Mussammat Ahmad Bano, when the gift was made to her, held with the same rights as a *khanadamad*, that defendant 1 succeeded her as full owner, and his powers of dealing with the property were the same as those of any other sonless proprietor; that by custom he could gift it to his daughters "by associating "them with himself in his house and specially in his old age"; that this power is clear from the circumstance that he alienated other portions of the land without protest by plaintiff; and that the suit was rightly dismissed.

This petition by plaintiff has been admitted under Section 70 (1) (*b*), Punjab Courts Act, and we have heard arguments regarding the status and powers of defendant 1, and also regarding the nature of the connection between him and his two daughters. The latter point I will take up now, and having decided it, I will then state the further points that have to be adjudicated upon.

Defendant's case is that the daughters are "resident" daughters, their husbands holding the position of *khanadamads*. Plaintiff's contention is that they are ordinary married daughters and that the case must be decided on the basis of the power

of such a man as defendant 1, himself a daughter's son, whose mother acquired the property by gift from her father, to make a gift to a daughter. In my opinion defendant 2, *quondam*, wife of Nek Alam, deceased, and present wife of Jivan, is a "resident" daughter, whereas defendant 3 is not. Defendant 2's first and second husbands are both natives of Saila, District Jhelum, while the property is in Kulchpur, District Gujrat, where the family resides. Nek Alam seems never to have lived at Kulchpur. His name never appears in the Revenue records of Kulchpur and his children were born at Saila, where he owned and cultivated land. Muhammad, the husband of defendant 3, has also lived continuously at Saila and held land there; and it can safely be said that neither of these men was a *khanadamad* of defendant 1. But the case of Jivan, assuming that *khanadamadi* is recognised, is different Though he has held no land in Kulchpur, his five children by defendant 2 have been born there in defendant 1's house, and the evidence shows that he has resided in that house for some years. Thus, though defendant 2's *doli* did, in the first instance, leave her father's house, and though it is not certain that upon her second marriage she began at once to reside with her father, I am inclined to think, if *khanadamadi* is to be recognised, that her husband has the status of a *khanadamad* and she of a "resident" daughter: *cf. Muhammad* v. *Hayat Bibi* (1) and *Samman* v. *Ala Bakhsh* (2).

The remaining questions are

(1) Has defendant 1 the same powers, in the matter of dealing with ancestral estate, as an ordinary sonless proprietor of the Mathothial *gôt*, or are his powers specially restricted from the circumstance that he inherited the property from his mother who had received it by gift from her father?

(2) Can a sonless proprietor in that *gôt* make a gift of ancestral estate in the presence of near collaterals to a daughter (*a*) who is a "resident" daughter, (*b*) who is not a "resident" daughter?

I am aware of no clear authority regarding the first question applicable to any agricultural tribe in the Province. Gifts to a daughter, where allowed, are, among Punjabi agriculturists, intended for the benefit of a daughter and her male issue. Mussammat Ahmad Bano had a son, defendant 1, who has no sons. In the absence of a gift by him to a

(1) 109 *P. R.*, 1891. (2) 106 *P. R.*, 1901.

daughter, the property would undoubtedly go to plaintiffs at his death. But, taking it for the sake of argument that one or both sections of question (2) are answered in the affirmative, can he make a valid gift to either or both daughters? I much doubt whether he would be permitted to adopt a son not a *yakjaddi* of Mussammat Ahmad Bano's father, but he can undoubtedly alienate for "necessity" exactly as an ordinary sonless proprietor can, and I am on the whole inclined to rule that he can make a daughter a "resident" daughter and her husband a *khanadamad* and can gift to her, if an ordinary sonless proprietor of the tribe can. I am led to this conclusion by a consideration of the view, expressed in more than one published judgment, that where a daughter is recognised as heiress of a sonless man to the exclusion of his collaterals or as a fit donee of ancestral estate, she is virtually looked upon as a son. I do not mean by this that she has exactly the status of a male proprietor, but that, she having passed on the estate to a son, that son is treated as if he had inherited through males.

In the peculiar circumstances of the present case the answer to question (2) is, by no means, easy. There are two contradictory sets of considerations, one set in favour of plaintiff and the other set in favour of defendants. The parties are Jats and pure agriculturists, and I think there can be no doubt on the authorities that the general presumption for the Province as a whole is against the validity of adoption by an agriculturist of a daughter's son and against gifts to daughters and their sons in presence of near collaterals. The institution of *khanadamadi* also cannot be said to be prevalent in the Province as a whole. Next, in this *gôt* we have only one instance of these things, namely, the case of Mussammat Ahmad Bano herself, "resident" daughter of Bakhsh or Hasht and donee of his ancestral estate. The reason of this is said to be that this *gôt* has a custom of its own, declared specifically in 1868 at Settlement in the *shajra nasab*, where we find it recorded that the *gôt* does not allow gifts to daughters, and that the instance of Mussammat Ahmad Bano should not be treated as a precedent. Again in the *Wajib-ul-arz* of 1857 of this village it is said that a father may give a portion of his estate as dowry to a daughter, apparently even in presence of sons, and nothing specific is said regarding gifts to daughters in presence of collaterals only. Further, while the *Riwaj-i-am* of 1868, which seems to have been little, if at all, altered in 1892 at Settlement, in questions 10 and 13 recognises *khanadamadi* and gifts to "resident" daughters, certain tribes of Jats are

mentioned, but neither the tribe of Bakhsh nor the tribe of defendant 1. Thus, we have in favour of plaintiff: (1) general presumption for Province; (2) absence in this *gôt* of instances the other way; (3) the denunciation in the *shajra nasab* of 1868 of gifts even to "resident" daughters.

These considerations are, by no means, slight. But when I turn to the indications in favour of defendants, I find them more cogent. In the Gujrat District generally it is well known that daughters are looked upon with favour among the dominant tribes of Gujars and at least the larger sections of Jats such as the Varaich *gôt*. Bakhsh's ancestors have been settled in Gujrat for at least 200 years (seven generations), and the *gôt* is said to be a comparatively small one. *Khanadamadi* is a very convenient institution, and both it and the practice of gifts to "resident" daughters and their husbands are extremely common in the district, and, on the whole, I arrive at the conclusion, though not without hesitation, that this *gôt* should not be held to follow customs different from the powerful sections of Jats inhabiting the district. I am confirmed in this view by the circumstance that defendant 1 has, without objection, sold two plots of land, no doubt small in area, to individual reversioners, while Mussammat Ahmad Bano gifted 25 *kanals* 2 *marlas* to her cousin Chaugatta. These things, so far as they go, are hardly compatible with a consistent attitude adverse to the powers of daughters and to the status of daughters' sons as ordinary proprietors. I may also note that in 1892, when for compilation of the volume of "Customary Law" 58 clans of Jats were questioned, no mention is made of the dissent of the Mathothial *gôt* from the general rule given in answers 10 and 13.

I would, therefore, dismiss plaintiff's appeal, but without costs.

Appeal dismissed.

No. 105.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

BHAGIRATH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

NATH MAL,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 683 of 1906.

Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Validity of notice of foreclosure—Objection taken for first time on appeal.

In a suit for possession of immovable property under a deed of conditional sale said to have been foreclosed under Regulation XVII of 1806 the

defendants practically admitted the validity of the notice issued under the Regulation, their main contention being that no demand previous to the issue of the notice had been made. The Court having found this point against the defence decreed the claim. On appeal the mortgagors challenged the validity of the notice on the grounds, amongst others, that neither *khasra* and *khewat* numbers nor the principal and interest were specified in it, and that it did not bear the proper official signature of the Judge inasmuch as his official designation was in print instead of being in the Judge's own hand.

Held, that it is not essential to the validity of a notice that it should contain the *khasra* and *khewat* numbers or the precise amount due on account of principal and interest (especially where a gross amount due is stated in addition to the expression "or the balance due") or the official designation of the Judge in his own hand-writing under his signature when it already existed in print at the place required.

Held, per Johnstone, J. (Rattigan, J., doubting as to this) that in the above circumstances an appellant should not be permitted to plead the aforesaid defects in the notice for the first time in appeal.

Lachmi v. *Tota* (1) and *Madho Persad* v. *Gajudhar* (2) referred to.

The judgment of the Court was delivered by

21*st Jany.* 1907. JOHNSTONE, J.—This is a first appeal against the judgment of the District Judge of Hissar. The suit is based on a *bai-bil-wafa*, dated 22nd November 1895. Plaintiff claims to have become full owner, by virtue of the deed and of the action taken by him under Regulation XVII of 1806, on 8th May 1902. He brought his suit in January 1906. Upon the pleadings issues were drawn; and the Court below has held as follows :—

(*a*) The full mortgage-money was paid to the mortgagors-defendants.

(*b*) Defendants may have deposited Rs. 500 of the loan with mortgagee, but this does not invalidate the mortgage, inasmuch as it does not amount as defendants contend to a failure of part of the consideration.

(*c*) Demand by mortgagee before issue of notice is proved.

(*d*) The parties being Brahmins, the Land Alienation Act does not apply to the case.

These findings covered all the pleas of the defendants in the Court below. They admitted receipt of the foreclosure notice and did not say a word about any irregularity or defect in it.

Defendants mortgagors have appealed against the decree passed by the Court below on the basis of the above findings. They began by again pleading the Punjab Alienation of Land

(1) 16 *P. R.*, 1888. (2) *I. L. R.*, XI *Calc.*, 111 *P. C.*

Act, but their learned pleader expressly renounced the plea before us as unsustainable.

They then (ground 3 of appeal) contended that the notice under the Regulation of 1806 was defective because—

(*i*) area of land and *khasra* and *khewat* numbers are entered neither in the notice nor in the application for its issue;

(*ii*) the notice states that Rs. 7,876 should be paid;

(*iii*) amounts of principal and interest are not specified in the notice;

(*iv*) the signature of the District Judge on the notice is not his proper official signature, the words "District Judge" being *printed* in vernacular below the signature instead of being in the Judge's own hand.

Next they again deny that demand was made; and contend that the interest is of a penal nature. [The latter part of this was not pressed].

Lastly they again raise the objection that Rs. 500 of the mortgage money was never paid to them.

All this is in the memorandum of appeal. In addition they urge orally that Section 8 of the aforesaid Regulation requires that the notice should make reference to Section 7 or it is invalid, and this notice never mentions Section 7. And further they assert that the copies of notices actually received by them differ from the notice on the file and are incorrect in certain particulars.

The first objection taken by the plaintiffs' counsel to all this is that all pleas regarding defects in the notice and in its service should be taken to be waived in the Court below, where receipt of notice was admitted without any comment except that demand was not made before issue of notice.

There is no doubt that in the interests of the class for whose protection Regulation XVII of 1806 was passed, the ordinary rules of pleading have been by high authority somewhat departed from. Section 146, Civil Procedure Code, sets forth the circumstances in which issues arise—"when a material proposition of "fact or law is affirmed by the one party and denied by the "other." In ordinary circumstances a Civil Court's duty is to enquire into and decide the issues that arise in a case before it. If a defendant does not raise the plea that something done by plaintiff was irregular, ordinarily the Court would not itself raise the point. In an ordinary way the only exceptions are in regard to such matters as limitation or want of jurisdiction. In the latter case the Court takes notice of the matter, even though not

pleaded, because if the jurisdiction is barred, the Court has no power to deal with the suit at all; and an unpleaded question of limitation is taken notice of on somewhat similar grounds. But here plaintiff stated that he had duly served his notice and had thereby gained an absolute title; and in reply defendants retorted. "We have received your notice; but our objection is "that before notice you made no demand as required by law." I am very doubtful whether any rule of pleading or of equity after this warrants a defendant's pleading for the first time in the Appellate Court that the notice itself contains defects, if the notice is on the face of it complete.

Two rulings have been quoted by Lala Ishwar Das, for appellants, in support of the contention that such matters can be raised for the first time in appeal, *viz.*, *Lachmi* v. *Tota* (1) and *Madho Persad* v. *Gajudhar* (2). In the former it was held that this Court could and should take up in foreclosure cases the question of demand prior to notices even if it had not been mentioned below. The principle laid down was that the provisions of the Regulation are not merely directory but imperative. "It would appear, therefore," the learned Judges remarked, "incumbent upon the mortgagee, who seeks to enforce a forfeiture "under the Regulation, to prove affirmatively that each and all "of the prescribed conditions have been fulfilled..... His "plaint should distinctly state not only that the year of grace "had expired but that the procedure prescribed by law, both "preparatory to and in connection with the notice of foreclosure, "had been duly observed."

In Madho Persad's case the mortgagor had in the first Court rested his case solely on the absence of consideration of the mortgage and had admitted receipt of notice of foreclosure, no issue as to validity of notice being drawn. On appeal to the Judicial Commissioner of Oudh the matter of invalidity of the foreclosure proceedings was taken up and the Court ordered enquiry and found that the foreclosure was ineffectual owing to irregularities. Their Lordships in further appeal declined to condemn this procedure of the Judicial Commissioner and used words, regarding the nature of the provisions of the Regulation which were evidently borrowed by the Judges of this Court who decided *Lachmi* v. *Tota*, aforesaid.

Now in the present case the plaint asserted that on such a day notice of foreclosure, for a period of one year, was caused to be issued by the Court of the District Judge; that the said notice was *duly served* on 7th May 1902; that the file of the case

(1) 16 *P. R.*, 1888 (2) *I. L. R.*, *XI Calc.*, 111 *P. C.*

was duly consigned to the Record Room *on completion*. It also asserted that demands had been made before issue of notice and had not been attended to. In my opinion these assertions cover all a plaintiff is called upon to make in his plaint. He need not, for instance, wade through all the rulings of authority on defects in notices and assert :—"The notice was signed in full by "the District Judge and not merely initialled"; "the signature of "the District Judge was followed by his official designation"; and so on. In my opinion each case of this kind should be treated equitably on its own facts. There are of course cases in which even an Appellate Court should itself most carefully scrutinise the notice and the proceedings connected with it. The Privy Council ruling discussed above only goes the length of saying (*a*) that where a Lower Appellate Court has ordered a further enquiry into pleas of irregularity of notice not put forward in the first Court, the Judicial Committee will not condemn and reverse the action of the Lower Appellate Court; and (*b*) that the provisions of the Regulation are imperative and not merely directory. Let us see, then, what the Regulation really prescribes in set terms. Section 8 lays it down that the mortgagee desirous of foreclosing must—

(*a*) make demand;

(*b*) apply to the District Court in writing.

That the Court should then—

(*c*) serve the mortgagor with a copy of the application;

(*d*) At some time notify to him by *parwana* under its seal and official signature that, if he shall not redeem the property mortgaged "in the manner provided by the "foregoing section" within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become absolute.

If it appeared to an Appellate Court that the mortgagor was totally ignorant of the law and had no legal advice in the first Court and that there were obvious errors in the notice, I think it would be its duty to take the matter up, even *sua motu*, and certainly upon objection raised in appeal; but here mortgagors evidently had legal help, for they noticed the requirement of prior demand (*a*) above and pleaded its absence. It seems to me in such a case a little doubtful whether they should be allowed to come up to an Appellate Court with a number of technical objections to the notice which they had not put forward in the first Court, the notice being on the face of it substantially complete and not misleading.

I am aware that the tendency of the Courts which have followed the Privy Council ruling quoted above, has been to take a view rather different from the above, and, therefore, I will take up the objections to the notice now urged, one by one, notwithstanding my personal view as to the manner in which such cases should be dealt with.

Mortgagors deny prior demand, but, in my opinion, the evidence on the record fully proves that demand was duly made. It is admitted that written notice of demand reached at least two mortgagors; and I see no reason to doubt the veracity of the three witnesses who testify to the oral demand of Mangsar, Sambat 1958, and the second oral demand of a later date; these demands being made of all three mortgagors together.

As to absence of mention of *khasra* and *khewat* numbers, I am unable to see anything in Section 8 to make such mention necessary. As to the figure Rs. 7,876 being misleading, I find the notice runs thus: "You are hereby informed that if within "a year from date on which you receive this notice you fail to "pay or tender to the minor mortgagee or his legal representa- "tive the sum of Rs. 7,876 lent to you under the deed, or the "balance due, together with the interest which may be due on "that sum, or to deposit the said sum in Court within the time "above specified, the mortgage will be finally foreclosed, "&c., &c."

Now the principal sum stated in the deed amounts to Rs. 4,200 and with interest the total due was Rs. 7,876. The wording of the notice is thus not happy, but I am unable to see that it is really misleading. In the first place, the deed provides for compound interest, so that at the end of a year the total accumulation is, as it were, principal. Again, it was not necessary to state the amount precisely at all; and, in my opinion, this consideration, together with the fact of the addition of the words "or the balance due" prevents the infelicitous diction from being actually misleading.

As regards the signature on the notice the objection is that the District Judge has written his name "Bhai Aya Singh" but has not *himself* written the words "District Judge," these words being in print below the signature. In my opinion this is an adequate "official signature."

Next, as regards the objection that the notice does not say that the property shall be redeemed in the "manner provided "for by the foregoing section," my opinion is that these words

need not appear in the notice. They would be useless to a mortgagor who did not have a copy of the regulation by him ; and when we find that the notice repeats all the essential portions of section 7, I would hold that this part of section 8 has been fully and most satisfactorily complied with. In the present case this is undoubtedly what has happened, as the above quotation from the notice shows.

Lastly it is said now, for the first time, that the notices actually served do not agree with the District Judge's office copy of the notice, which is the only notice on the record, and are defective. I can only say as to this that this Court should refuse to look at documents which were not presented to the lower Court, unless some good reason for the non-presentation is made out. No such reason is made out here.

The notice then was quite regular, and it remains only to discuss the plea that out of the consideration a sum of Rs. 500 did not pass. The lower Court has, to my mind, fully disposed of this objection: the sum named did pass, and was then deposited with the mortgagee.

For these reasons I would dismiss the appeal with costs.

RATTIGAN, J.—Upon the fact of this present case I agree entirely with my brother's conclusions. The demand was, I think, undoubtedly made, and I do not consider the notice issued to be defective in any material respect. On the contrary, I am of opinion that the notices if they erred at all, erred in giving the mortgagors more information than was legally necessary. Certainly they were in no sense misleading. *23rd Jany.* 1907.

The mortgagors studiously refrained from producing the original notices in the Court below, and in consequence the plaintiff was obliged to rely on office copies. Presumably the latter are correct, but if they are not the mortgagors cannot at this stage of the case ask the Court to allow them to produce the originals in evidence. They can give no explanation of the non-production of these originals at an earlier stage, and it would be very unfair to the plaintiff to receive further evidence upon this point now.

I also agree that full consideration passed, and that there is no proof that plaintiff's father was after registration paid back the sum of Rs. 500. I see no reason to doubt the correctness of the lower Court's finding as regards this item.

As upon the facts I held that the defendants' objection must fail, I do not feel called upon to express any opinion as to whether in cases such as this the mortgagor is entitled on appeal

to raise, for the first time, objections to the validity of a notice issued under the Regulation, he having in the first Court practically admitted the validity of such notice. As at present advised I am inclined to agree with my brother upon this point, but I would prefer to reserve any definite decision thereon until the question has actually to be determined.

The appeal is dismissed with costs.

No. 106.

Before Mr. Justice Johnstone.

REVISION SIDE.

RAUSHAN,—(DEFENDANT),—PETITIONER,

Versus

MAKHAN,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 372 of 1905.

Pre emption—Assignment of property by vendee—Suit by pre-emptor against vendee alone subsequent to the said assignment—Parties—Pre-emptor bound to implead transferee or to institute fresh suit against him—Limitation for such action—Limitation Act, 1877, Schedule II, Article 10.

Held, that where the subject matter of a pre-emption suit has been assigned by the original vendee before the pre-emptor had instituted his suit, the latter is not entitled to recover the property from the transferee on the strength of a decree he obtains against the vendee alone. In order to obtain the property from the transferee he is bound either to implead the latter as a party to his original pre-emption suit or to institute a fresh suit within the period of limitation prescribed in Article 10 of the Second Schedule of the Limitation Act, 1877.

Nabi Bakhsh v. *Fakir Muhammad* (1), *Bogha Singh* v. *Gurmukh Singh* (2), and *Hakim Singh* v. *Indar* (3) referred to.

Petition for revision of the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 24th November 1904.

Roshan Lal and Gopal Chand, for petitioner.

Ganpat Rai, for respondent.

The judgment of the learned Judge was as follows :—

30th Octr. 1906. JOHNSTONE, J.—In this case, one Makhan sued Wahid, vendee, and his vendor, for pre-emption of a certain area of land. The sale took place on 30th January 1900, and the suit was instituted on 28th January 1901. Before this, one Dulo had sued the same persons for pre-emption on 19th January 1901, and obtained a

(1) 25 *P. R.*, 1903. (2) 93 *P. R.*, 1902.
(3) 46 *P. R.*, 1902.

decree on 28th June 1901, which he never executed. Makhan got his decree on 8th April 1902. Before any suit, on 9th May 1900, mutation of a part of the land had been sanctioned in favour of Dasaundhi and Raushan on the basis of an exchange with the vendee, notice of which had been given to the patwari on 14th April 1900, the usual proclamation following. Similarly, notice had been given to the patwari of the transfer by way of exchange of a further portion of the land to Gahna by vendee on 13th December 1900, and mutation was sanctioned four days later. Further, on 13th November 1901, in the course of Makhan's pre-emption suit the exchanges were clearly mentioned; but plaintiff did not have the transferers impleaded.

Having secured his decree, plaintiff Makhan proceeded to execution and, of course, easily got possession of so much of the land as remained in the hands of the vendees; but possession of the land in the hands of the aforesaid transferers was refused by the holders under circumstances stated at length by the Divisional Judge. On this plaintiff brought this separate suit against vendee and transferers, and the first Court framing the following issues :—

I. Was the plaintiff's application for execution against the transferers rejected and so this suit is barred?

II. Can the plaintiff object to the exchanges, seeing they were made before institution of his pre-emption suit?

III. Does Section 13, Civil Procedure Code, bar this suit as regards the vendee?

IV. To what relief is plaintiff entitled?

Held, that Section 13, Civil Procedure Code, barred this suit as against defendant 1 (vendee); that the exchanges were invalid as being made before expiry of the period for pre-emption; that thus the transferers are mere trespassers; and that plaintiff must have a decree for the land against them.

The transferers appealed to the Divisional Court, which held —(1) that a separate suit and not an appeal against the order refusing possession by execution was the proper course inasmuch as there had been no obstruction or resistance and so Section 331, Civil Procedure Code, had no application; (2) that the present suit is not one for pre-emption, inasmuch as the plaintiff has already got his decree for pre-emption and, having paid the price fixed by the Court, stands already in the shoes of the vendee, the proprietary right vesting in him as from date of sale; (3) that therefore all transfers made after sale are invalid against plaintiff and the transferers are mere trespassers.

The Divisional Judge having thus dismissed the appeal, the transferers came up here on the revision side under Section 70 (1) (*b*), Punjab Courts Act. For them Mr. Roshan Lal contents himself with urging that plaintiff is entitled, as regards this land, to sue only by way of pre-emption ; that the previous suit in no way affects his clients who were not parties ; that, taken as a pre-emption suit, the present suit is out of time ; and he relies upon the remarks in *Nabi Bakhsh* v. *Fakir Muhammad* (1), at page 81, 2nd paragraph.

Mr. Ganpat Rai for plaintiff contends (1) that the exchanges were " collusive ", though he does not say they were fictitious ; (2) that the title of the vendee at time of the exchanges was a " defective " title, and so the transfers effected in favour of appellants are voidable at the instance of the plaintiff, *Bogha Singh* v. *Gurmukh Singh* (2), page 419, and *Hakim Singh* v. *Indar* (3), page 165 ; (3) that transferers are thus mere trespassers ; (4) that the second transfer in Nabi Bakhsh's case was by way of sale, not of exchanges, and so that ruling is inapplicable, and so forth.

After considering the arguments and the authorities, I have no doubt that Nabi Bakhsh's case is fully in point. I hold that plaintiff has, even as against the *transferers*, no suit except by way of pre-emption. Had they been impleaded in the previous suit, they could certainly have set up any defences the vendee might have set up, and plaintiff cannot by keeping them out of that suit deprive them of the right to make these defences. What title is it that the transferers took upon their exchanges ? They took the same title as the vendee had—see page 420, middle of *Bogha Singh* v. *Gurmukh Singh* (2), already quoted—which included the right to resist the pre-emptor's claim on all or any appropriate grounds. Plaintiff must, even as against the transferers, prove (or get them to admit) his suit to be within time under Article 10, Schedule II, Limitation Act, 1877 ; must prove that his right of pre-emption is superior to that of the vendee ; and so forth. Clearly then any suit against the transferers by plaintiff must amount to a pre-emption suit. The suit is therefore time-barred.

This shows that the transferers are not mere trespassers any more than the vendee was and that the transfers are not voidable or void at the mere option of plaintiff, apart from

(1) 25 *P. R.*, 1903. (2) 93 *P. R.*, 1902, *F. B.*
(3) 46 *P. R.*, 1902.

proof *as against the transferers*, that the plaintiff's right of pre-emption is superior to that of the vendee and is enforceable against him; and also that the case of Nabi Bakhsh (1903) is not distinguishable as the plaintiff seeks to distinguish it. The assertion that the exchanges were "collusive" is beside the mark. It makes no difference in the case eve if we assume the transfers were effected to defeat pre-emption and, further, there is no evidence of "collusion."

The fact is that plaintiff had ample opportunity to implead the transferers before the suit was barred against them, but he was badly advised and now has lost his rights.

I allow the petition and, setting aside the findings and decree of the Courts below, I dismiss plaintiff's suit with costs throughout.

Application allowed.

No. 107.

Before Mr. Justice Johnstone.

NIHARKU,—(PLAINTIFF),—PETITIONER,

Versus

MADHO AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 444 of 1904.

Partnership—Assignment of his share by a partner—Liability of assignee on admission for debts owing by the firm—Contract Act, 1872, Sections 140, 251.

Held, that the assignee of a share in a partnership concern when admitted into partnership by the other partners is liable for the debts owing by the firm as originally composed, notwithstanding the fact that the creditor may not have accepted the assignment or absolved the assignor from liability.

Petition for revision of the order of Major P. S. M. Burlton, Judge, Small Cause Court, Simla, dated 30th November 1903.

Sukh Dial and Harris, for petitioner.

Gouldsbury, for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In this case plaintiff sued defendants 1, 2 and 3 for Rs. 199-10-0 on the ground that he had paid, on behalf of the firm to which defendants belonged, Rs. 192 for them to the Patiala State, he being surety for the firm in connection with a certain contract, and the firm, in the person of defendant 1,

30th Octr. 1906.

having expressly engaged in writing to recoup him for this payment. A variety of pleas were put in ; but, for the purposes of this revision, it is enough to state that the Small Cause Court dismissed the claim as against defendants 2 and 3 and decreed it as against defendant, and that now the question for decision really is has plaintiff a cause of action against defendants 2 and 3 ?

The firm consisted at first of defendant 1 and Jagadhar, and plaintiff became surety in the firm's contract with the Patiala Durbar. Then Jagadhar sold his interest to defendants 2 and 3, the latter being a minor at the time. Defendant 3 accepted the situation when he came of age on 7th November 1902 and remained a partner. On 10th April 1903 plaintiff made two payments to the Patiala people on account of the aforesaid contract, *viz.*, of Rs. 105 and Rs. 87, respectively. On 21st April 1903 defendant, professing to act for the firm of defendants 1, 2 and 3, executed a deed promising to repay with interest this amount of Rs 192 and also any further sums plaintiff might pay in the same way. The Court below has held, on these facts, that Section 140, Indian Contract Act, applies, and that plaintiff has a cause of action only against defendant and Jagadhar.

Plaintiff comes up on the revision side and contends that the law has been wrongly applied ; that immediately defendants 2 and 3 became partners—or at least immediately after defendant 3 came of age and ratified the introduction of himself into the partnership defendants 2 and 3 became liable for all that Jagadhar would have been liable for, including the re-imbursement to plaintiff of sums paid by him under his security bond, and that the deed of 21st April 1903 bound all three defendants.

In reply Mr. Gouldsbury suggests collusion between defendant 1 and plaintiff as to execution of the deed of 21st April 1903; denies defendant 1's power to bind defendants 2 and 3 by it ; points out that this deed was not one of the *conditions* of the entry of defendants 2 and 3 into the firm, as it was executed long after that entry, and that Section 251, Contract Act, has no application because the execution of the deed was not a thing " necessary for or usually done ' in carrying on the business ' of such a partnership ". He also relied on *Harrison* v. *Delhi and London Bank* (1), the bearing of which on the present case I am unable to see.

My view of the case is that if at the time of the execution of the deed of 21st April 1903 defendants 2 and 3 were not liable

(1) *I. L. R., IV All.*, p. 437.

to repay to plaintiff the sum of Rs. 192 aforesaid, or any other sums payable by him under his security bond, then the execution of the deed would not come under Section 251, Contract Act, for that deed was executed, so far as I can see, without actual consultation with defendants 2 and 3 and without their express consent, and it was not in the case put an act necessary for or usually done in carrying on the business of such a contract. It is not open to a partner in a firm, who is himself alone under a certain liability to an outsider, to engage on behalf of the whole firm that all its members shall be subject to that liability, unless he obtains authority from his partners so to engage. Therefore we must go back a little and see whether defendants 2 and 3 were liable independently of the deed. If they were, then defendant 1 had power to execute the deed as we have it.

I have little doubt of defendants 2 and 3's liability. After 7th November 1902, if not earlier, they were undoubtedly partners, and I can see no reason why they should not be held liable exactly as Jagadhar would have been liable. The Court below has misunderstood Section 140, Indian Contract Act. It is true that the Patiala Durbar refused to recognise defendants 2 and 3 as contracting with it and continued to look to defendant 1 and Jagadhar for fulfilment of the contract. But it is not right to say that therefore the Patiala Durbar "had rights" only against defendant 1 and Jagadhar. It undoubtedly had rights against defendants 2 and 3 also, though it elected not to enforce them and not to absolve Jagadhar. Hence it was wrong to hold on the strength of the section quoted—see margin—that the surety (plaintiff) is invested with rights only against the two original members of the firm and not also against defendants 2 and 3.

Section 140. Where a guaranteed debt was become due . . . the surety upon payment . . . of all that he the principal debtor is liable for is invested with all the rights which the creditor had against the principal debtor.

I allow the petition and give plaintiff his decree against all 3 defendants, with costs against all 3 defendants in the first Court and in this Court against defendants 2 and 3.

Application allowed.

No. 108.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

APPELLATE. SIDE.

INAYAT KHAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SHABU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 480 of 1906.

Alienation by male proprietor of ancestral land—Suit by after-born son of such proprietor to recover possession of such land—Limitation—Starting point of—Punjab Limitation Act, 1900.

Held, that under the provisions of the Punjab Limitation Act a suit by a son of a male proprietor governed by the Customary Law of the Punjab to recover possession of ancestral land alienated by such proprietor during his life-time, must be instituted within twelve years from the date on which the alienation was attested by the Revenue officer in the register of mutations maintained under the Punjab Land Revenue Act, 1887, and a son of such proprietor born after the date of such alienation is not exempted from its operations by Section 7 of the Indian Limitation Act, 1877, and can claim no deduction on the ground of his minority, as when once time begins to run no subsequent disability to sue stops it.

Jowala v. *Hira Singh* (1) and *Ganpat* v. *Dhani Ram* (2) referred to.

Govinda Pellai v. *Thayam Mal* (3), not approved.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 19th February 1906.

Jalal-ud-din, for appellants.

Fazl-i-Hussain, for respondents.

The judgment of the Court was delivered by—

22nd Jany. 1907. JOHNSTONE, J.—The facts and pleadings, which appear in the judgments of the Courts below need not be repeated here. The crucial facts in the case are that the gift by Nurdad, then a sonless Gujar, was made in 1877 and mutation thereon was effected in 1878; that for some 10 years he remained sonless, one son being born to him in 1887 and another in 1888, two of the plaintiffs; that Nurdad died in 1903; and that the suit was brought to recover the gifted land from the alienees in 1905.

The first Court dismissed the suit. It held that plaintiffs had a *locus standi* to sue; that the gift was a valid one by custom; that the suit is not barred by Section 13, Civil Procedure Code, in consequence of a previous suit by Nurdad

(1) 55, *P. R.*, 1903. (2) 76 *P. R.*, 1906.
(3) 14, *M. L. J.*, 209.

himself; that, though Dittu, one donee, has died sonless, plaintiffs do not succeed to his share, which goes to the other donee by survivorship. The learned Divisional Judge decided the appeal lodged by plaintiffs against them on the two grounds that the suit is time-barred and that Section 13, Civil Procedure Code, fully applies.

We have heard plaintiffs' further appeal to this Court on the point of limitation alone. Having made up our minds that the suit has been rightly dismissed on this ground, we did not think it necessary to hear plaintiffs' counsel on any otherpoints.

The way we look at the limitation question is this: If in 1877-78 there was any reversioner of Nurdad's in existence capable of objecting to the gift, then time began to run at once in favour of the donees. Plaintiffs undoubtedly on this hypothesis had a right to sue for a declaration when they came into existence; but time did not then begin to run afresh for them, nor can they (in view of Section 9, Limitation Act 1877) take advantage of Section 7 of the same Act. Again, under that Act they had the right to sue for possession within 12 years of the death of Nurdad, but unfortunately for them the Punjab Limitation Act had meantime come into force, and the time, both for declaration and possession is 12 years from mutation, *i.e.*, from 1878. Here again they are on the horns of a dilemma. If time did not begin to run against them in 1878, it could only be because there was no living reversioner in 1878 to contest the gift, in which case plaintiffs have no *locus standi* at all; and if time did begin to run, it did not cease to run on the births of the plaintiffs, minors though they were.

In connection with the application of the Punjab Limitation Act we have been referred to Section 4, General Clauses Act (Punjab), and especially to the words "unless a different intention appears." To our minds nothing can be clearer than that the Punjab Limitation Act was intended to apply to all cases, falling within its purview, instituted after its coming into force.

It is hardly necessary to quote authority for the propositions stated above; but we may refer to the Full Bench ruling in *Jawala* v. *Hira Singh* (1), and to *Ganpat* v. *Dhani Ram* (2). On the other side we have been referred to *Govinda Pillai* v. *Thayam Mal* (3), where it seems to have been laid down that a minor born after an alienation is entitled to the benefit of Section 7, Limitation Act 1877. This is contrary to the views

(1) 55 *P. R.*, 1908, *F. B.* (2) 76 *P. R.*, 1906.
(3) 14 *M. L. J.*, 209.

of this Court, *see Umra* v. *Ghulam*, Civil Appeal 122 of 1905 (Division Bench Case); and we are unable to reconcile the ruling with the plain wording of Section 9, Limitation Act.

For these reasons we dismiss the appeal with costs.

Appeal Dismissed.

No 109.

Before Mr. Justice Johnstone and Mr. Justice Hurry.

APPELLATE SIDE.

FATEH DIN AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

RALLI AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 816 of 1905.

Person carrying on business for parties out of jurisdiction—ecognised Agent—Agent without special authority cannot sue on contract entered into by him on behalf of his principal—Civil Procedure Code, 1882, Sections 37, 51.

Held, that a manager of a branch-office of an export agency carrying on business in the name of the owners of the firm resident in England, under the instructions of a Chief Manager, cannot be regarded a recognized agent of the firm within the meaning of Section 37 of the Code of Civil Procedure, and that, in the absence of a special authority on this behalf, he cannot either subscribe or verify a plaint or sue for the enforcement of a contract entered into by him on behalf of his principals.

Nam Narain Singh v. *Raghu Nath Sahai* (1), *Mahabir Prasad* v. *Shah Wahib Alam* referred to.

First appeal from the decree of Lala Karm Chand, District Judge, Gujranwala, dated 28th March 1905.

Shah Din, for appellants.

Ishwar Das, for respondents.

The judgment of the Court was delivered by—

7th July 1906. HURRY, J.—The facts are given in the judgment of the District Judge. He has somewhat inconveniently disposed of 5 separate suits in one judgment, although the plaintiffs were different, and the contracts sued on were different.

In the present case Messers. Ralli Brothers have sued Fateh Din and Mangu for Rs. 6,054-11-0 for losses on breach of certain

(1) *I. L. R.*, 19, *Cal.*, 678. (2) *All., W. N.* (1891), 153.

agreements to supply 250 bags of cotton to the plaintiffs at Sangla. Plaintiffs asserted that defendants had broken their promise and had thereby involved them in a loss of the amount claimed.

Defendants raised a variety of pleas, including objections as to the frame and legality of the suit and as to the validity and binding force of the agreements.

Issues were raised on the contentions of the parties and the District Judge found for the plaintiffs on all the issues save as to proof of actual losses incurred. He decreed the suit for one-half the sum claimed, holding this to be a fair allowance.

Out of this judgment two appeals have arisen in connection with the present plaintiffs' suit. Plaintiffs (Messrs Ralli Brothers) appeal in Civil Appeal No. 483 for the full amount to be decreed to them, while defendants appeal in Civil Appeal No. 816 and again press their former objections.

The defendants' appeal has been first taken up and the preliminary question to be considered is whether the plaint was filed with proper authority.

There is no indication that the plaintiffs' firm consists of more than the 3 partners who figure in the plaint. So the first clause of the first ground of appeal has no force. A stronger point, however, is that Mr. Chronopolo was not entitled to lodge the suit on behalf of the plaintiffs who appear to live in London. This objection was substantially raised in the lower Court by Fateh Din, defendant, in his pleas and it can therefore be validly pressed in the appeal. It seems to me that this objection must prevail. The plaint is in the names of the 3 partners of the firm of Messrs. Ralli Brothers, through Mr. K. C. Chronopolo, their agent at Lyallpur. It is signed by Mr. Chronopolo, agent of the plaintiffs, and by a pleader for this agent.

It is verified by Mr. Chronopolo only. No power of attorney in favour of Mr. Chronopolo has been put in, but a letter is on the file, dated the 21st October 1902, from the agents at Karachi, intimating that *Mr. Chronopolo will take charge of the Lyallpur Agency*. This Mr. Chronopolo takes as his authority to sue and verify plaints for the firm. Further, he asserts that he brought the suit with the permission of the *Karachi* agents, obtained a few days ere filing the suit, but he declined to produce the letter as being privileged.

Now it is an obvious proposition that a defendant is entitled to question the authority of an agent to file a suit on behalf of

his principals, as if the authority is defective he is liable to be sued afresh at the instance of the principals (*Nam Narain Singh* v. *Raghu Nath Sahai* (1)). It is also clear that a defect of this kind cannot be cured, as a mere irregularity under Section 578 of the Civil Procedure Code, for the foundation of the suit is a valid plaint, and if there be no valid plaint the Court has no jurisdiction and there is no case to be tried by it.

Under Section 51, Civil Procedure Code, the plaint is to be signed by the plaintiff and his pleader (if any) provided that if the plaintiff is, by reason of absence, or for other good cause unable to sign the plaint, it may be signed by any person duly authorised by him in this behalf. Under Section 36 of the Code, appearances, applications, or acts may be done by the party in person or by his recognised agent or by a pleader duly appointed to act on his behalf.

The recognised agents in this Province include—

See Rules and orders of the Chief Court, page 1.

(*c*) *Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make or do such appearances, applications and acts.*

(*d*) *Persons specially authorised by parties to appear and act on their behalf in any particular suit.*

For the defendants-appellants it is urged that Mr. Chronopolo cannot take shelter under the former of these clauses, partly because it is not really he but the Karachi agents who carry on the trade and business of the plaintiffs, and partly because there are other agents expressly authorised in matters of filing suits. As regards the latter clause it is contended that at most Mr. Chronopolo was authorised to institute the suit by mere agents and not by any of the actual parties. For the plaintiffs it is answered that the present objection was not distinctly raised in the lower court; that it has often been held that in this Province a plaint can be filed by any one delegated to do so even without written authorization; that such a defect is not fatal and that the *Karachi* agents have sufficiently authorised Mr. Chronopolo to file the suit.

I think it must be held that Mr. Chronopolo cannot be held included in the 2 clauses (*c*) and (*d*) quoted above. The plaintiffs have executed a power of attorney, dated the 26th

(1) *I. L. R.*, 19 *Cal.*, 678.

April 1902, in favour of 4 gentlemen of Bombay and 4 gentlemen of Calcutta. It empowered them to *sue, appear in all courts, prosecute suits, appoint pleaders, sign and verify plaints.* There was further a power to *appoint 2 or more substitutes and to confer upon such substitutes the same powers or more limited powers.*

Now 2 of these Bombay attorneys, by a deed of substitution, dated 9th April 1904, nominated 5 gentlemen of Karachi to be their substitutes giving power to 2 substitutes (or substitute and Attorney conjointly) to execute the powers in clauses 1—11 and 14 and 15 of the power of Attorney referred to above.

It is clear, therefore, that 2 substitutes at Karachi have been given power to sue and appoint pleaders and sign and verify plaints. It is impossible to say that the *agent expressly authorised* referred to in clause (*c*) of the rules applicable to this Province necessarily means an agent actually present in the locality where the contracts are made or to be carried out. The dependence of the Lyallpur agency is clear from Mr. Chronopolo's own statement that he got permission to file this suit from the Karachi representatives of the firm. Indeed it would be an absurdity to suppose that the large Karachi Office should require an elaborate authority in writing to act and that agents appointed by them without a power should be free to represent the original plaintiffs without any authorisation whatever. I thus conclude that the Karachi substitutes were the agents expressly authorised to act throughout the areas of agencies under their control and, therefore, Mr. Chronopolo cannot sue under clause (*c*).

As to clause (*d*) it is evident that at most Mr. Chronopolo has the concurrence of the Karachi substitutes to sue. These substitutes are not parties but are merely themselves *recognised agents* of the plaintiffs. It has no doubt been held that in this Province a plaintiff can verbally authorise any person to file a plaint or act on his behalf, but there is no indication here that the plaintiffs, who live in England, have any knowledge of this suit or have given any special directions on the subject to any person. I hold, therefore, that Mr. Chronopolo cannot avail himself of clause (*d*) either.

As to the objection that the pleas did not distinctly dispute Mr. Chronopolo's status, I have already observed that the point was substantially raised in Fateh Din's pleas. It was there denied that he is a *karkun* manager for the plaintiffs. It was questioned if the plaintiffs could sue through a

Principal Officer as if they were a Company. There is no doubt that the status of Mr. Chronopolo to sue for his principals was taken exception to.

I have also found that the defect is not a mere irregularity. The question then remains what action should now be taken. Plaintiffs' counsel wishes, if it be needful, to be allowed to amend the plaint or to procure a power from Karachi at this stage, but I do not think this should be allowed. Had Mr. Chronopolo filed the plaint inadvertently before arrival of a power of attorney and supplied the omission as soon as objection was taken, an amendment would perhaps have been proper. Here Mr. Chronopolo has declined to produce the letter of permission which he says was given by the Karachi agents. In other words, he has taken no step whatever to cure the defect, which was pointed out by the opposite party at the earliest opportunity, up till the present moment. In *Marghub Ahmad* v. *Nihal Ahmad* (1) the Allahabad High Court in a somewhat similar case ordered the rejection of the plaint. On the other hand, in *Mahabir Prasad* v. *Shah Wahid Alam* (2) the same High Court appears to have merely dismissed the suit. I think, under the circumstances of this case, the present suit should be dismissed, the recognised attorneys of the plaintiffs having in no sense intervened in the case or applied to the lower court or to this Court to proceed with the suit at their instance.

I would accordingly dismiss plaintiffs' Appeal No. 483 and accept defendants' Appeal No. 816 and dismiss plaintiffs' suit.

Although defendants win on a technical ground, yet they put forward their objection at the commencement of the trial, so they must get costs in both Courts.

No. 110.

Before Mr. Justice Chatterji, C. I. E, and Mr. Justice Johnstone.

APPELLATE SIDE.

GANGA RAM—(DEFENDANT)—APPELLANT,

Versus

RALLA SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 62 of 1907.

Consent to action against public charities—Court cannot entertain suit asking reliefs not included in the consent—Civil Procedure Code, 1882, Section 539.

Held, that the provisions of Section 539 of the Code of Civil Procedure are express and are to be strictly adhered to, and a Court cannot entertain an

(1) *All., W. N.* (1899), 55. (2) *All., W. N.* (1891), 152.

action unless it is limited to matters included in the sanction of the Collector.

An action for the removal of a Mahant and that the public be given authority to make a new appointment cannot, therefore, be entertained where the sanction granted was to remove the present Mahant and to appoint a new Mahant in his place, as the object of the suit was for appointment by the public, whereas the Collector's consent was for an appointment by the Court.

Sajedur Raja Chowdhuri v. *Gour Mohem Das Baishnav* (1), and *Sayad Hossein Miyan* v. *Collector of Kaira* (2), referred to.

Further appeal from the decree of W. Chevis, Esquire, Additional Divisional Judge, Sialkot Division, dated 18th December 1906.

Grey and Duni Chand for appellant.

Beechey for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case three persons, claiming to be interested in the Hindu temple, known as the Baoli Sahib, Sialkot, bring a suit against the Mahant Ganga Ram, asking— *9th April* 1907.

(*a*) that it be declared that he is unfit for the post of Mahant and should be dismissed ;

(*b*) that " the public " be given power to appoint a new Mahant ;

(*c*) that a new scheme of management be settled for the temple.

The suit being one of the kind dealt with in Section 539, Civil Procedure Code, private persons can sue only under certain conditions as to sanction to sue. The first Court held that the conditions had been complied with, inasmuch as plaintiffs had received sanction from the Collector of the district. It then went on to hold that plaintiffs were interested persons and could sue; that defendant had been proved unfit for the post; that the temple had suffered severely through his misconduct, and upon these findings it dismissed the Mahant and declared that it was for the public " interested as contemplated by Section 539 of the Civil Procedure Code " to appoint a successor, subject to the sanction of the Collector.

The learned Divisional Judge, when both parties appealed to him, rejected defendant's appeal and accepted plaintiffs' ; ruling that sanction by the Collector was not necessary to appointment by the public.

(1) *I. L. R., XXIV Cal.*, 418. (2) *I. L. R., XXI Bom.*, 257.

Defendant files a further appeal here, and we have heard arguments on two points, *viz*—

(*a*) Whether sanction by the Collector to plaintiffs to bring a suit is sufficient sanction under the law;

(*b*) Whether, if that question be answered in the affirmative, the suit sufficiently conforms to the sanction actually given.

On the first point we have heard interesting and ingenious arguments. It is conceded that the Local Government has empowered all Collectors in the Punjab to exercise the "powers" of the Advocate-General under the Section; and perusal of Punjab Government Notification No. 783 A of 21st October 1885, shows that this is so. But Mr. Grey argues with much persistence that the "powers" spoken of in the last paragraph of the Section aforesaid do not include the powers to authorize suits by private persons but only the power to sue—in short, that under the notification the Collector might sue with the previous sanction, in each case, of Local Government, but could not empower other persons to sue. We are disposed to dissent from this view; but we need not insist upon the point, inasmuch as on the second question (b) we think Mr. Grey's client must succeed. Mr. Grey asserts that, so far as he knows, it is only in the Punjab that pivate persons sue under sanction of Collector; but *Sajedur Raja Chowdhuri* v. *Gour Mohem Das Baishnav* (1), shows that in Bengal at least this does happen.

It is evident to us that the Legislature intended, when it enacted Section 539, Civil Procedure Code, to lay down strict rules with a view to protecting trustees of institutions like the Baoli Sahib of Sialkot from vexatious and irresponsible suits, and clearly, in our opinion, the plaintiff in such suits must conform to the terms of the sanction given. We have stated above the prayers in the plaint: and these must be compared with the wording of the Collector's order, namely—

"I hereby give consent to the applicants to bring a suit for the following objects or any of them:—

(1) to remove Ganga Ram, the present Mahant, and appoint a new trustee (Mahant);

(2) to vest the property in the trustee and to recover such property for the purpose of the trust, if it has been improperly alienated;

(1) *I. L. R.*, 24 *Cal.*, 418.

(3) to settle a scheme for the management of the property."

Thus, we see that the Collector sanctioned a suit to appoint a new trustee (mahant), whereas the suit filed asks (*b*) that the public be given power to make the appointment. To our mind this is a very real and quite inadmissible variation. The Collector contemplated appointment by the Court, plaintiffs ask for appointment by the public. It is impossible to say that the Collector sanctioned such a prayer as has been put into the plaint. If close correspondence between the terms of the sanction and the prayers in the plaint filed upon that sanction is not insisted upon, it seems to us that the objects of Section 539, Civil Procedure Code, would be frustrated.

Section (2) of the sanction does not agree with anything in the plaint, but perhaps the words "or any of them" in the sanction make this variation immaterial. Section (3) corresponds with (*c*) in the plaint.

We do not think it is pedantic to insist that the first variation noted condemns the suit. It is not a mere variation in words, but a substantial variation, and it is one that the plaintiffs pressed in first appeal, and pressed successfully which shows that they themselves considered it a real and important consideration. It is suggested that the case was one at the worst for amendment of the plaint, and Mr. Beechèy in support of this proposition refers us to *Sayad Hussein Miyan* v. *Collector of Kaira* (1) which has been also relied upon by Mr. Grey in another connection. Mr. Beechey points out that in these the Court did not dismiss the suit, but merely excluded from the decree whatever was not covered by the sanction, but, inasmuch as in that case the plaint did actually agree with the sanction, the ruling does not help Mr. Beechey. In our opinion plaintiffs in the present instance are peculiarly debarred from amending their plaint at the present stage for they resisted in appeal even the variation of their prayer introduced into the decree by the first Court, which brought the matter of appointment of a new mahant more or less into line with the Collector's intention.

In these circumstances we think the proper course is to dismiss the suit, accepting the appeal and setting aside the decrees of the Courts below. In all the circumstances we think the parties should bear their own costs.

Appeal allowed.

(1) *I. L. R.*, XXI *Bom.*, 257.

No. 111.

Before Mr. Justice Johnstone and Mr. Justice Chitty.

APPELLATE SIDE.

GIRDHAR LAL AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

Versus

DEOKI NANDAN,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 363 of 1903.

Res judicata—Court of jurisdiction Competent to try subsequent suit—Civil Procedure Code, 1882, *Section* 13.

Held, that for the purposes of Section 13 of the Code of Civil Procedure, the competency of a Court to try such subsequent suit or the suit in which such issue has been subsequently raised as compared with another is not affected by the circumstance that in one case an appeal lies in the first instance to the Divisional Court and from that Court to the Chief Court, and in the other directly to the Chief Court, and therefore the decree in one operates as *res-judicata* in the other.

Shamas Din v. *Ghulam Kadir* (1), *Kanhaya Singh* v. *Deva Singh* (2) and *Narain Das* v. *Faiz Shah* (3) distinguished.

First appeal from the decree of T. P. Ellis, Esquire, District Judge, Delhi, dated 26th January 1903.

Muhammad Shafi and Piare Lal, for appellants.

Shadi Lal and K. C. Chatterji, for respondent.

The judgment of the Court, so far as is material for the purposes of this report, was delivered by

7th Novr. 1906.

JOHNSTONE, J.—A single judgment will suffice for the disposal of this appeal (363 of 1903) and of 362 of 1903, and 394 and 1050 of 1903.

The plaintiffs Girdhar Lal and Anandi Lal are jewellers and gold and silver-smiths carrying on business in Delhi and Calcutta. The defendant Deoki Nandan is a hawker of jewellery. The first suit between the parties was one by Deoki Nandan against Girdhar Lal for rendition of accounts. I will revert to this later—it is only indirectly connected with the appeals now before us. Thereafter Girdhar Lal and his nephew, on 18th March 1901, sued Deoki Nandan for a sum of money with interest, and (in the alternative) for an account, alleging that for four years or so (Sambat 1951 to Sambat 1955), plaintiffs had by arrangement been sending goods from Delhi to Deoki Nandan in Calcutta for sale by him; that on 24th March 1898 Girdhar Lal went to Calcutta and accounts were taken; that

(1) 20 P. R., 1891, F. B. (2) 27 P. R., 1879, F. B.
(3) 157 P. R., 1881, F. B.

Rs. 4,315-7-0 came out as the sum due to plaintiffs; that a further sum of Rs. 439-8-0 became due by Deoki Nandan, being the sum paid by plaintiffs to redeem ornaments belonging to plaintiffs and pledged by defendant, that out of this a sum of Rs. 798-3-3 had been paid by defendant, who thus owed Rs. 3,956-11-9, plus interest. The alternative prayer for accounts is inserted in case the Court should hold the alleged settlement of balance of March 1898 not proved.

Four days later, on 22nd March 1901, Deoki Nandan launched a suit against Girdhar Lal alone, in which he asserted that after Girdhar Lal's visit to Calcutta, during which no balance was settled as due, both parties travelled to Delhi; that at the Howrah Station Deoki Nandan became ill and so made over a box containing goods, papers, etc., to Girdhar Lal for custody, and waited for the next train; that on arrival at Delhi Girdhar Lal refused to return the box. On these allegations Deoki Nandan claimed return of the goods in the box or their value Rs. 3,974 and return of the papers, or their value Rs. 1,708 —total Rs. 5,682. The papers, he alleged, contained proof of outstanding claims Deoki Nandan had against third parties, some of which are said to have become now time-barred, hence the valuation.

Deoki Nandan denied, in reply to Girdhar's claim, that he owed anything or that any balance was arrived at in March 1898, while Girdhar in defence against the other claim alleged that the box of goods was handed to him as security for his claim against Deoki Nandan, and that he was not bound to return it till his claim was settled.

The learned District Judge, disposing of both suits in a single judgment, written nearly two years later, gave Girdhar a decree for Rs. 506-8-0 on a scrutiny of the accounts and evidence, and gave Deoki Nandan a decree of a peculiar and *primâ facie* unworkable kind, thus—Girdhar Lal, who has admitted receipt of certain goods with the box (list D), to return those goods and to restore "the outstanding."

Then it suggested, though this does not appear in the decree sheet, that Deoki Nandan, having got the papers—which apparently District Judge means when he writes "outstandings"—should sue his debtors and get what he can, finally suing Girdhar for damages on account of all lapsed outstandings.

The defects in this decree are obvious. What is to be done if the goods in list D are not returned? Or if the papers are not returned by Girdhar?

Four appeals have been filed. In Girdhar's suit we have the cross-appeals—

(i) No. 1050 of 1903 by Deoki Nandan, asking for cancellation of the decree for Rs. 506-8-0.

(ii) No. 363 of 1903 by Girdhar, asking for his *full* claim. [The grounds in this appeal are confusing,—mixing up *both* suits.]

In Deoki Nandan's suit we have cross-appeals.

(iii) No. 394 of 1903 by Deoki Nandan, asking for—

(*a*) *all* the goods claimed *or their value*;

(*b*) the cash amount of the outstandings : all now lost owing to Girdhar's conduct.

(iv) No. 362 of 1903 by Girdhar, asking for—

(*a*) cancellation of the decree as to goods and outstandings " as the transaction was a pledge by way of security;

(*b*) cancellation of the suggestion as to further suit by Deoki Nandan for damages.

[As regards the articles in list D aforesaid I should note that it appears that Deoki Nandan has executed his decree for the goods, and that Girdhar Lal has produced the box and its contents which are now lying in the Court below.]

We have heard these appeals exhaustively argued. Put briefly, the questions for this Court to decide appear to be these—

(A) Are any and, if so what, issues *res judicata* by reason of the result of Deoki Nandan's suit * for rendition of accounts?

*Chief Court Civil Appeal 433 of 1901.

(B) 1. Was there any settlement of accounts in March 1898 at Calcutta which should in all the circumstances be taken as binding?

(B) 2. What was the meaning of the handing over of the box at Howrah station to Girdhar?

(C) If there was such a settlement then as should be taken as a basis for the decision of Girdhar's suit, what modifications of the balance should be allowed in consideration of (*a*) obvious errors, (*b*) subsequent transactions?

(D) If there was no such settlement as aforesaid, then should not an account be ordered to be rendered by Deoki Nandan in accordance with Girdhar's alternative prayer?

Taking (A) first, I find that the earlier suit by Deoki Nandan was finally decided by a single Judge of this Court

(Harris, J.) on 13th February 1903. The suit was heard by a subordinate Judge of the 1st class, appealed to the Divisional Court, and appealed further to the Chief Court. Under the rules of business of this Court, as then in force, the case was triable by a single Judge; but it seems to me quite clear that a single Judge in such circumstances is the "Chief Court" exactly as a Division or Full Bench is. Again, the subordinate Judge of the 1st class, who tried the earlier case, could also have tried the present cases. But it is said that Section 13, Civil Procedure Code, does not apply because the course of appeal is different in the present cases as compared with that case: there the appeal lay to the Divisional Judge and from him to the Chief Court, here first appeal lay to the Chief Court. The only ruling to which our attention has been drawn and to which I need refer here is *Shamas Din* v. *Ghulam Kadir* (1). The point is not an easy one, but I am disposed to distinguish that ruling. To make the distinction quite clear I must make a long quotation from it, as follows:—

Cf. Sections 8, 10, Punjab Courts Act, and the Rules.

"The primary object of the rule as to competency of jurisdiction would appear to be *to avoid binding the superior Courts by decisions of inferior Courts, which were not and could not have been considered on the merits by the superior Court.* We think that this object may be attained by holding that the true test of the competency of the Court which decided the former suit or issue is not merely the jurisdictional powers of the original Court in which the previous suit was instituted, but the jurisdiction of that Court viewed in connection with the course of appeal allowed in that particular case, and the degree of finality attaching to the decisions of each of the Courts, original and appellate, which may be called upon to exercise jurisdiction in the case . . . . .

"In the present case, the Munsif who tried the first suit would have had jurisdiction to entertain the present suits, which, as we pointed out in the referring order, are of small pecuniary value. *At the same time he would not have tried the second suit with the same jurisdiction as the first,* inasmuch as the first suit was a small cause, and one appeal lay to the District Judge, whose decision was final, whereas the present suits are land suits appealable in the first instance to the Divisional Judge, with a possible further appeal to this Court. Under the above circumstances we think that we should hold, both upon principle and upon authority, that the Court deciding the

(1) 20 P. R., 1891, F.B.

"first suit was not a Court competent to try the subsequent "suits within the meaning of Section 13 of the Code of 1882."

Adverting especially to the two passages in this quotation which I have italicised I am inclined to hold that they constitute the *criteria* for decision of a point like the present, *viz.* (*a*) we must not so use Section 13, Civil Procedure Code, as to bind the superior Courts by decisions of inferior Courts, which were not and could not have been considered on the merits by the superior Court; and (*b*) a decision by an officer presiding in a Court passed in the exercise of a certain jurisdiction cannot be *res judicata* in a subsequent case triable by that officer but not triable in the exercise of that same jurisdiction but of what might be called a superior jurisdiction.

In the case now before us these *criteria* form no bar to the use of Section 13, Civil Procedure Code, because, as regards (*a*), in the earlier and in the present suits alike, there was an appeal on facts as well as law to the Chief Court: and, as regards (*b*), the subordinate Judge tried the earlier case under his ordinary powers, and he could have tried the present cases under the same powers. I would hold, then, that the decision of Harris, J., binds both the parties in this case.

What, then, did Harris, J., decide? He decided that Deoki Nandan had not proved that he was acting otherwise than as agent for Girdhar Lal, that therefore he could not call upon Girdhar Lal to account to him, and that as a matter of fact there was no settlement of accounts in Calcutta in 1898 between the parties. The first point here stated as decided is certainly *res judicata*. It was necessary to decide it, and the final order of Harris, J., dimissing plaintiffs' suit was wholly based on it. On the other hand, the decision that there had been no settlement of accounts had no effect upon the form or contents of the final order. It was unnecessary for the learned Judge to have expressed any opinion on the subject at all. Whatever his views upon it might have been, the final order would have been a dismissal of the plaintiffs' suit. But, if the Judge had held Deoki Nandan principal and Girdhar agent, and at the same time had found that no settlement of accounts took place, he would have been obliged to pass a very different final order, namely, an order for rendition of accounts. Two Punjab rulings bearing on this question have been quoted by Mr. Shafi—see *Kanhaya Singh* v. *Deva Singh and Nihala* (1) and *Narain Das* v. *Faiz Shah* (2), but I hardly think

(1) 27 *P. R.*, 1879, *F. B.* (2) 157 *P. R.*, 1889, *F. B.*

I need discuss them. I find, then, that it is *res judicata* that Deoki Nandan was agent and Girdhar principal, but not that there was no settlement of accounts; and so I decide question (A).

NOTE.—The rest of the judgment is not material to the report.—Ed., *P. R.*]

No. 112.

Before Mr. Justice Johnstone and Mr. Justice Hurry.

UTTAM CHAND,—(DEFENDANT),—APPELLANT,

Versus

LAHORI MAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 945 of 1904.

Pre-emption—Sale of two houses adjoining one another—Vendee and pre-emptor each having priority over one house by reason of vicinage—Pre-emptor not bound to acquire the whole bargain.

Held that in a case of sale of two houses adjoining one another a vendee whose right of pre-emption by reason of contiguity only extends to one house cannot defeat the next-door neighbour of the second house on the ground that by reason of his having rights over one house superior to plaintiff he has a right with respect to the other house equal to those of plaintiff.

A bargain of distinct properties by a person having preferential rights only to a portion of such bargain does not give him a right of pre-emption as regards the simultaneously purchased other portion.

In such a case the pre-emptor whose rights extend over only one lot is not bound to take over the bargain in its entirety.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 29th August 1904.

Oertel, for appellant.

Shelverton and Tirath Ram, for respondent.

The judgment of the Court was delivered by

JOHNSTONE, J.—In this pre-emption case both the Courts below have written detailed judgments, and the facts and pleadings fully appear therein. The first Court held— *28th April* 1906.

(*a*) that the custom of pre-emption did exist in the *Muhalla* Jalotian, Lahore City, in which the property in suit is situated;

(*b*) that plaintiff has not proved superior vicinage as compared with the second vendee, defendant 3

(*c*) that the sale to defendant 3 by defendant 2 is genuine;

(*d*) that plaintiff cannot claim to pre-empt separately that one of the two houses in suit which adjoins his house

and does not adjoin defendant 3's house ;——— ——— ———, and so forth.

Thus, the first Court dismissed the suit, whereupon plaintiff appealed to the Divisional Court, which has decreed for him as regards house No. 2, which is next to his own house, fixing the market-value of it at Rupees 950, from which it deducted Rs. 489 due to plaintiff from the vendor as proportionate share of mortgage-money out of Rs. 700 for which sum vendor had mortgaged both houses to plaintiff.

Defendant 3 having died, his son appeals to this Court against the decree of the Divisional Judge, alleging that the so-called two houses are one house ; contending that even if the houses are two, his right of pre-emption extends to both of them ; and further, that plaintiff must take the whole bargain or nothing, and as he cannot get the whole, he must get nothing ; that the price to be paid has been put too low ; and urging that plaintiff had waived his rights.

It was objected by plaintiff-respondent that waiver could not now be set up, but we over-ruled the objection on the ground that the evidence on which the contention of waiver is based was before the first Court and was discussed by it. That evidence consists of exhibit D. W. 1. However, on considering the effect of that document we hold that it does not prove waiver.

As regards the question whether the property is one house or two houses : the local commissioner found it two, because there is no internal communication between the two buildings ; there are separate tenants ; and the street doors are distinct. There can be no doubt the whole edifice was a single house once—*vide* mortgage-deeds of September 1900 and of December 1900. But in the mortgage-deed of January 1901 two houses are specified, one called *Makan Kalan* and the other *Makan Khurd*, the boundaries being separately detailed ; and we find the same description in both successive sale-deeds, and in exhibit D. W. 1 aforesaid, relied upon for another purpose by defendant 3. Considering all this, and also the fact that the two buildings seem to have been constructed at different times we have no hesitation in agreeing with the learned Divisional Judge that there are two houses and not one.

But defendant 3 contends that the moment the sale to him was complete, he became, by virtue of holding house No. 1, in which his right of pre-emption was superior to plaintiff's

next-door neighbour of house No. 2, which has been decreed ; and thus as to house No. 2 he had rights *equal* to those of plantiff. This is a proposition to which we cannot give our assent. In the first place plaintiff's right to sue arose on the sale by defendant 1 to defendant 2, and at that time defendant 3 had no contiguity with house No. 2 ; and again, it seems to us more than doubtful whether Mr. Oertel's ingenious argument is sound, whereby he utilises the purchase by his client of house No. 1 as giving him a right of pre-emption as regards the simultaneously-purchased house No. 2, in regard to which the moment before the sale he had no rights at all. Such a method of dealing with the matter would, in our opinion, lead to absurdity in the case, to take an illustration of the sale of a row of 20 houses to one of which a party's house was contiguous.

As regards the price we see no reason to differ from the learned Divisional Judge. It seems to us nearly certain that the sum of Rupees 150 was never really paid in advance ; and that the value is really about Rupees 950.

The contention that the Court below should not have decreed in part but, finding it could not decree in whole, should have dismissed the suit, hardly requires refutation. We see no reason why plaintiff should not get a decree for the part of the property, being a distinct part, as to which he has superior right—*vide* Rattigan's Digest, Explanation I to para. 106, and the rulings there quoted. We see no good ground for the distinction that the rule there laid down applies only to land and not to houses.

As regards the assignment of so much of the mortgage-money to one house and so much to the other, which was briefly discussed before us, we are unable to make any alteration. Appellant does not ask us to alter or explain what the Divisional Judge has ruled, and plaintiff has not appealed or filed cross-objections. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

No. 113.

Before Mr. Justice Johnstone and Mr. Justice Lal Chand.

APPELLATE SIDE.

DADU AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

KADU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 121 of 1907.

Civil procedure Code, 1882, *Section* 368—*Death of one of Several defendants—Application for substitution—Sufficient cause for not applying within prescribed period— Limitation Act*, 1877, *Section* 5.

Held, that ignorance of a defendant's death is sometimes sufficient cause for not applying for legal representatives to be brought on the record in the place of the deceased within the period prescribed therefor and a plaintiff can successfully plead his ignorance of the fact as a justification for such delay where defendants are numerous and live in a different village from plaintiff

Gaman v. *Baksha* (1), and *Amir Khan* v. *Dula* (2), referred to.

First appeal from the decree of Pandit Joti Parshad, District Judge, Jhang, dated 31*st October* 1906.

M. N. Mukerjee, for appellants.

Morrison, for respondents.

The judgment of the Court was delivered by—

15*th July* 1907. JOHNSTONE, J.—On April 8th, 1904, this suit was dismissed for default, and on 26th June 1904 a petition for review was rejected. Thereupon plaintiffs appealed to the Divisional Court, which, on 1st March 1905, accepted the appeal and remanded under section 562, Civil Procedure Code, apparently for re-trial of the prayer for restoration. A miscellaneous appeal to the Chief Court against this order of remand was dismissed on 20th December 1905. Evidence was then taken, and on 30th March 1906 an order restoring the case was passed, subject to the payment of compensation by plaintiffs by 1st May 1906. It was at the same time brought to notice that one or more plaintiffs had died, and it was directed that application for substitution should be put in. The case went on, and on 12th June 1906 application for substitution of names for a dead defendant, Wali, was made, and in the petition it was stated that, if any other defendants were dead, plaintiffs were not aware of the fact.

(For the dead defendant Sardara no substitution was needed, his heir being already a defendant.) Two or three weeks later defendants objected that the suit had abated, inasmuch as Wali had been dead more than three years; and on 31st October 1906

(1) 42 *P. R.*, 1887. (2) 43 *P. R.*, 1889.

the Court considered the matter, accepted defendants' view, and dismissed the suit with costs.

Plaintiffs have now appealed to this Court, and we are constrained to accept the appeal. In the first place, it is not really clear when Wali died. Defendants say it was more than 3 years before June 1906, *i. e.*, before June 1903; but on 6th October 1903, when a summons addressed to Wali reached the village and was handed to his brother, the latter did not say Wali was dead, but merely that he was not there and would appear on due date. This was recorded on the other copy of the summons. Again, in the partition proceedings of November 1903 no doubt Sada, son of Wali defendant, was examined, and so forth, but even there it was not definitely stated that Wali was dead, though probably he was.

Next, though we may take it that Wali died much more than six months before his heirs were brought on the record, we have to see whether there were extenuating circumstances in respect of the delay and sufficient cause for it. Plaintiffs and defendants live in different villages, and defendants were 18 at least in number. Again, the District Judge's idea that plaintiffs must have known of Wali's death at latest on 20th November 1903 is hardly warranted, for in partition proceedings sons often appear and are examined in absence of their fathers. Thirdly, when application for review was made in June 1904 and then an appeal was made to the Divisional Court, we do not find defendants objecting that Wali was long dead and so plaintiffs' suit must fail. Indeed, Wali's death was not mentioned. Nay, defendants themselves appealed, as stated above, in 1905 to the Chief Court and even there put in no plea that the suit had abated.

These facts afford sufficient reason for setting aside the District Judge's order. Probably plaintiffs never knew of Wali's death till March or even till May 1906; and ignorance of such a fact is often sufficient cause to prevent a suit from abating—*cf.*, *Gaman* v. *Baksha* (1). Even if they knew more than six months before they took action, it must be remembered that they are ignorant zamindars—*cf.*, *Amir Khan* v. *Dula* (2), and that they may have been misled by—

(*a*) the fact that until 1st May 1906 the case had not been restored to the file for regular trial; and (*b*) the circumstance that even defendants, as we have seen, acted, until 30th March

(1) 42 *P. R.*, 1887. (2) 43 *P. R.*, 1889.

1906, as if they did not consider the time had arrived for troubling about deceased parties and their heirs.

For these reasons we accept the appeal and set aside the order of the learned District Judge, and declare that the suit has not abated but should be proceeded with according to law. This is substantially a remand under section 562, Civil Procedure Code. The stamp on the appeal will be refunded. Other costs in this Court will be costs in the case.

Appeal allowed.

No. 114.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

APPELLATE SIDE.

KIRPA RAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

RAKHI, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 406 of 1907.

Limitation Act, 1877, *section* 12—*Applicability of—to application under section* 70 (b) *of the Punjab Courts Act*, 1884—*Deduction of time requisite for obtaining Copies of the Judgment and decree of the lower Appellate Court—Alienation by Hindu widow of self-acquired property of her husband—Right of reversioner to question such alienation.*

Held, that section 12 of the Limitation Act, 1877, applies to applications under section 70 (*b*) of the Punjab Courts Act, 1884, and that therefore the time requisite for obtaining Copies of the Judgment and decree of the lower appellate Court is to be excluded in computing the period laid down by clause (*i*) of section 70 (*b*) of that Act.

Kishen Dial v. *Ram Ditta* (1), overruled.

Held, *also* that there is no distinction between ancestral and acquired property inherited by a Hindu widow from her husband and a reversioner has as much right to contest her alienation of the one as of the other.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jullundur, Division, dated 5th January 1906.

Hukam Chand, for appellants.

Sukh Dial, for respondents.

The Judgments of the learned Judges were as follows:—

13th June 1907. RATTIGAN, J.—The first question that arises in this case is whether for the purposes of computing the period of 90 days specified in section 70 (1) (*b*), Proviso (*i*), of the Punjab Court's Act 1884 (as amended by Act XXV of 1899), the applicant is entitled to exclude the time spent in

(1) 20 *P. R.*, 1907.

obtaining copies of the Judgment and decree of the Lower Appellate Court? In *Kishen Dial* v. *Ram Ditta* (1), this question was answered in the negative and it was then further held, upon the particular facts of that case, that applicant had not shown "sufficient cause" within the meaning and for the purposes of the above Proviso. The decision in the case cited has, I understand, been followed in one or two subsequent Single Bench judgments and in the present case the learned Chief Judge, before whom this case came in Chambers, accepted that ruling to the extent that it held that the time requisite for obtaining copies of the decree and judgment of the Lower Appellate Court cannot be deducted in computing the period of 90 days prescribed by section 70 (1) (*b*), Proviso (*i*) of the Punjab Courts Act. He was, however, of opinion that in view of the practice of this Court hitherto, the mistake of the applicant in thinking that he was entitled to deduct the time spent in obtaining such copies should be held to amount to "sufficient cause". This question has been very ably and exhaustively argued before us, and after hearing these arguments I am satisfied that the judgment in *Kishen Dial* v. *Ram Ditta* (1) is erroneous, and I have the less hesitation in so holding as I was the author of that judgment. Upon further and better consideration, and especially after hearing Mr. Hukam Chand's arguments on the point, I have now no doubt that the provisions of section 12 of the Indian Limitation Act, 1877, are applicable in computing the period of 90 days prescribed in the aforesaid first *proviso* to section 70 (1) (*b*) of the Courts Act. Indeed, *explanation* (2) to this last mentioned section expressly provides that "in computing "the period of limitation aforesaid the provisions of the "Indian Limitation Act, 1877, shall be deemed to apply." Now the provisions of the Indian Limitation Act applicable for the purposes of computing the period of Limitation are contained in Part III of that Act and section 12 is within this Part. Mr. Sukh Dial argued that the Legislature could not have intended, when enacting the *second explanation* to section 70 of the Punjab Courts Act, to allow the deduction of time requisite for obtaining copies of the decree and judgment of the Lower Appellate Court, because such copies were not by law required to be filed with the application under section 70 (1) (*b*), whereas in the case of an appeal the copy of the decree is always necessary and the copy of

(1) 80 *P. R.*, 1907.

the judgment must also be filed unless the Court otherwise orders (section 541, Civil Procedure Code). This might have been a good ground for the Legislature to enact that for the purposes of section 70 (1) (*b*), of the Punjab Courts Act, the provisions of section 12 of the Indian Limitation Act, relating to the deduction of time requisite for obtaining such copies, should not be applicable. But the Legislature has not so enacted. On the contrary, it has in express and definite terms stated that "in computing the period of "limitation aforesaid, the provisions of the Indian Limitation "Act 1877, *shall be deemed to apply.*" These words are clear and can admit of no question, and as in construing a statute of limitation a favourable and liberal interpretation should be given to the words employed by the Legislature, I should, even if there were any ambiguity, feel constrained to hold that for the purposes of computing the period of 90 days prescribed by the first proviso to section 70 (1) (*b*) of the Punjab Courts Act, the whole of the provisions of section 12 of the Indian Limitation Act must apply. But I can see no ambiguity in the words of the Act, and I therefore hold that in computing the aforesaid period of limitation, the time requisite for obtainig the copies of the judgment and decree of the Lower Appellate Court must be excluded. In so holding, I do not question the correctness of my brother Johnstone's ruling, reported as *Mehar Singh* v. *Gurbachan Singh* (1) to the effect that it is not necessary for an applicant for revision under section 70 of the Courts Act to file such copies. It may not be necessary to files such copies, but the applicant, if he does file them is, I think, entitled to deduct the time spent by him in obtaining them. In the present case; if the time spent in obtaining the said copies is excluded, the application is admittedly within time, and I would, for the reasons given, hold the requisite deduction of time should be made and that the application should be admitted.

Turning now to the merits of the application, I have no hesitation in holding that the Divisional Judge dismissed the appeal presented to him upon a wholly erroneous view of the law. The alienation impugned is one by a widow and even if it be assumed that the property alienated by her was the self-acquired property of her husband, I can find no authority for the proposition that the reversioners of her husband have no *locus standi* to contest the validity of such

(1) 146 P. L. R., 1906.

alienation. The Divisional Judge, however, holds that "the "word *reversioner* implies that the property was ancestral," but for this proposition he cites no authority, nor indeed, so far as I know, would it be possible to support this view by reference to authority. The property was alienated by a widow and whether such property was the ancestral or self-acquired property of the widow's late husband, the latter's reversioners have the right to contest the validity of the alienation. Mr. Sukh Dial, for respondents, candidly admitted that he was unable to support the judgment of the learned Divisional Judge upon the ground on which it was based. I would, therefore, if my learned brother agrees, accept the appeal and remand the case to the Divisional Judge under section 562, Civil Procedure Code, for decision of the appeal upon the merits, and I would leave the question of costs to abide the event.

LAL CHAND, J.—I agree entirely. It appears to me further that the reason urged by Rai Sahib Sukh Dial for not excluding the time spent in obtaining copies of the decree and of the Judgment on which the decree is founded is neither sound nor justifiable. Section 12 of the Limitation Act does not provide for exclusion of such time in case the copies are required to be filed by law. No doubt, in order to claim the deduction of time, it must be shown that the copies were actually obtained and this fact can best be proved by filing the copies. But at the same time it appears to me to be eminently just and reasonable to allow the deduction regardless of the question whether such copies are or are not required by law to be filed. Whether remedy lies by an appeal or by application for revision against the decree passed by the Lower Appellate Court, such remedy cannot properly be availed of unless the appellant, or applicant, as the case may be, be in a position to know exactly what has been decided aginst him and on what grounds. Such information can be secured ordinarily if not merely by obtaining copies of the decree and of the judgment sought to be appealed or applied against. At any rate it can hardly be imagined as feasible or practicable for a suitor to take precise objections against the judgment and the decree without a detailed reference to, and a proper examination of, the judgment and of the decree after obtaining copies. It appears to me, therefore, that the law very justly intended and provided that the time spent in obtaining such copies should be excluded from computation and did not insist that the exclusion be allowed only when it was necessary by law to file copies of the

14th June 1907.

decree and of the judgment with the appeal or the application for revision, as the case may be. That such is the scope of the provisions of section 12 of the Limitation Act is rendered further clear by the last clause of the section, which, in computing the period of limitation prescribed for an application to set aside an award, allows the time requisite for obtaining a copy of the award to be excluded, although, so far as I am aware, it is not necessary by law to file a copy of the award with the application containing objections. On the merits of the question raised in this appeal I am again in perfect accord with my learned brother. The Divisional Judge has held "the parties are governed by "*Dharm Shastra* and under any circumstances the property "would go absolutely to the widow in preference to collaterals "of the 4th degree." I am not aware of any such provisions in the Hindu Law, and none was quoted at the hearing by the Pleader for the respondent. A widow under Hindu Law succeeds to a mere life estate with a restricted power of alienation, and, as pointed out by my learned brother, it is altogether immaterial whether the property inherited and alienated by a widow was self-acquired of her husband or was inherited by him from a common ancestor of his and of the claiming reversioners. Her right to alienate such property is positively restricted even so far that the Crown itself as an ultimate heir might challenge the alienation if effected without necessity—Mayne's Hindu Law, para 625. "The "self-acquired property of a man will descend to his widow "when his joint or ancestral property would not do so. "But she has no other or greater power over the one than "over the other"—para 645. The plaintiffs-appellants, therefore, as reversioners were entitled to challenge the sale and sue for a declaration that it shall not affect their reversionary rights. I, therefore, agree to the order of remand under section 562, Civil Procedure Code, leaving the question of costs to abide the result as proposed by my learned brother."

Appeal allowed

No. 115.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

GOHRA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

HARI RAM AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 513 of 1905.

Custom—Alienation—Alienation of ancestral property—Aroras of tahsil *Chakwal, Jhelum District—Hindu Law or Custom—Burden of Proof.*

Held, that in matters of alienation of ancestral property the Aroras of *tahsil* Chakwal in the Jhelum District are not governed by custom but by Hindu Law, and that a sale of ancestral land by a sonless proprietor in favour of his sister's son cannot bequestioned by his collaterals on the ground that it was made without necessity or consideration.

Members of non-agricultural tribes are not to be held bound by customs prevailing among agricultural tribes simply because they happen to own land and to be living with members of agricultural tribes, and the burden of proof, therefore, that in matters such as alienation or succession they are governed by custom, rests always on the party making such an allegation.

Khazan Singh v. *Maddi* (1), *Anant Ram* v. *Hukman Mal* (2), *Kartar Singh* v. *Mathar Singh* (3), *Hurnam Singh* v. *Devi Chand* (4), and *Baroo* v. *Makhan* (5) referred to.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 22nd February 1905.

Oertel, for appellants.

M. S. Bhagat, for respondents.

The judgment of the Court was delivered by

RATTIGAN, J.—The parties are Aroras of *tahsil* Chakwal in the Jhelum District, and the question which we have to decide is whether an alleged sale of ancestral land by a sonless proprietor in favour of his sister's son is or is not valid. *15th April* 1907.

The District Judge held that the sale in question was valid so far as the actual passing of consideration was concerned, and that as the parties were governed by Hindu Law and not by the ordinary customary rules, the said sale was valid and binding upon the plaintiffs, who are the reversionary heirs of the vendor. We might observe, in passing, that the District Judge was of opinion that the vendees had failed to prove that the

(1) 122 *P. R.*, 1898. (2) 84 *P. R.*, 1898.
(3) 62 *P. R.*, 1902. (4) 107 *P. R.*, 1901.
(5) 61 *P. R.*, 1903.

sale was for *zati zarurat*, and therefore for legal necessity. The District Judge is not very clear upon this point. Upon the first issue he finds that "part of the money was used to pay off a pressing creditor whose receipt is on the file." If this was the case, the sale was clearly valid *pro tanto*. It is unnecessary, however, for us upon the view which we take to discuss this aspect of the question. Admittedly the sole question before us is whether the vendor and the plaintiffs are governed in matters relating to alienation of ancestral property by Hindu law or by custom. If Hindu law applies, it is conceded that the alienation is valid. On the other hand, if custom applies, we should still have to ascertain whether among Aroras of this particular village (*mauza* Bhin, *tahsil* Chakwal) a sale or gift to a sister's son is invalid. The District Judge holds that the parties are governed by Hindu Law. The Divisional Judge, on the contrary, holds that custom rules, and upon this finding he has granted plaintiffs the decree prayed for. But this latter conclusion is not in any case warranted by the evidence on the record. So far as we know there is no such thing in existence, nor, indeed, could there be any such thing, as a body of general customary law. Tribes in various localities follow different customary rules, and because a certain rule of custom is observed among certain tribes in other parts of the Province, it would be unsafe to hold that the same rule must necessarily prevail in the case of totally different tribes in other parts of the Province. In the present case, even if we assume that these Aroras observe custom and do not follow the rules of their personal law, we would have to ascertain whether by that custom a sale or gift of ancestral land to a sister's son is invalid in the presence of near agnates. The learned Divisional Judge has *assumed* that such gifts or sale would be invalid, because these Aroras have adopted the customary rules observed by their co-villagers who are Muhammadan Bhines and Mair Manhas. It is, however, fairly well established now-a-days that the Muhammadan tribes of the Jhelum District recognise far more extensive powers of alienation in favour of daughters and sisters, and their respective descendants, than are recognized by other tribes, especially Hindu tribes, in the central parts of the Province (see as to this, *Sher Jang* v. *Ghulam Mohiuddin* (1), *Hassan* v. *Jhanda* (2)). Therefore, even upon the assumption that the parties follow custom, the Divisional Judge was not justified in holding that the alleged sale or gift was invalid. Before any such conclusion could be arrived at, it would be necessary to

(1) 22 *P. R.*, 1904. (2) 71 *P. R.*, 1904.

find what was the custom in such matters observed by the Bhins and Mair Minhas of this village. Presumably if the rulings referred to correctly represent the general feelings of Muhammadan tribes of this locality, custom would be in favour of, rather than opposed to, the alienation impugned.

But we do not feel called upon to give any decision upon this point as we are not satisfied that these Aroras have adopted customary rules in the matter of alienation. They are members of a tribe or caste which *primâ facie* does not belong to the agricultural community. They are also Hindus and the people among whom they are living in the village are Muhammadans—and Muhammadans who observe the general principles of Muhammadan Law to a larger extent than do other agricultural Muhammadan tribes. It is admitted that the vendor is a mere *malik kabza* in the village, and that none of the parties have any share in the village *shamilat*. There is also no proof that any of the parties have themselves cultivated the land held by them. As against these facts, plaintiffs can only rely on the fact that for some time past, possibly for one or two generations, the parties have owned land in the village. Is this latter fact sufficient to justify the conclusion that these Hindu Aroras, who are notoriously more a shop-keeping than an agricultural class, have adopted the custom of their Muhammadan neighbours? Who cannot think so. The leading authority in cases of this kind is *Khazan Singh* v. *Maddi* (1). In that case the learned Judges (Plowden, S. J, Frizelle, J.) made the following remarks: "The Bedis, as a class, are not a land-holding society like Jats "or Rajputs, or other dominant agricultural tribes, who have been "hereditary land-holders from countless generations. They are "more on the level of Sayads and Brahmins and Khatris to which "class they claim to belong. These non-agricultural classes are "sometimes met with as land-holders among other land-holders of "the land-holding tribes, an the custom may more or less resemble "those of the tribe among which they are found, in respect to "the inheritance of land and power of disposition. But the same "presumption cannot be predicated regarding any of these non-"agricultural classes, as a class, as may be properly made, as the "result of experience, in regard to agricultural tribes either per-"sonally or in particular localities." In the present case there is an absolute dearth of evidence to prove that these Aroras have in any respect followed custom in preference to the rules of Hindu Law. The learned Divisional Judges this. admit He also holds

(1) 122 *P. R.*, 1893.

that the *onus* was rightly placed on plaintiffs to prove that in the matter of alienations, regard was to be had to custom and not to Hindu Law. He further concedes that plaintiffs were unable to adduce any specific instances in support of their contention, and that the record of rights contained nothing in their favour. But he nevertheless held that the Aroras being "so few in number, would naturally adopt the custom of the "predominant body." The grounds upon which he arrived at this conclusion are that the Aroras were consulted when the *Riwaj-i-am* of the Jhelum District was prepared and that for two or three generations the present parties have been mainly living on agriculture. We do not consider these grounds sufficient to justify the learned Judge's conclusions. Some Aroras in other parts of the district may have been consulted by the Settlement Officer when the *Riwaj-i-am* was being prepared and they may have acquiesced in the answers given by their agricultural neighbours. But there is nothing in the *Riwaj-i-am* to show who those Aroras were or to which village they belonged, and not a single instance has been given in this case in support of the correctness of the *Riwaj-i-am*, which we may observe is in very general terms. And as regards the fact that the parties have held land for some time past, we have the authority of the ruling of this Court in *Khuzan Singh* v. *Maddi* (1) (and numerous other reported cases) for holding that the mere ownership of land is not enough to prove that members of a tribe which is not ordinarily an agricultural tribe, follow the customary rules generally observed by agricultural tribes. Nor can we agree with the learned Judge that these Arors being so few in number would "naturally adopt the custom of the predominant body." In this case "the predominant body" were Muhammadans whose rules are, it would seem, more in consonance with Muhammadan Law than with the customary rules obtaining among ordinary agricultural tribes of the central parts of this Province. There is therefore no *á priori* presumption that this small family of Aroras adopted the customs of the Bhins and Mair Minhas of their village. But even if they did, it is quite possible that even by such customary rules the sale (or gift) in question would be valid (see *Sher Jang* v. *Ghulam Mohiuddin* (2)), and even upon his own assumption the learned Divisional Judge was not warranted, in the absence of further enquiry upon this point, in holding that the said sale (or gift) was invalid.

In support of his contention, Mr. M. S. Bhagat, for respondents, relied on a decision given by the Commissioner in a case

(1) 122 P. R., 1893. (2) 22 P. R., 1904.

relating to of this Aroras village. This decision was, however, given in 1867 in a pre-emption case and the decision was based not on custom, upon which no enquiry was made, but upon the provisions of the Punjab Civil Code which was then in force. Obviously this decision can be of no help in the present case which has to be determined upon its own facts. The learned counsel also referred to *Anant Ram* v. *Hukman Mal* (1)—a case among Aroras of the Kasur *tahsil*, Lahore District. In this case it was held that the *onus* of proving custom lay upon the plaintiffs who asserted it, but it was then found that plaintiff had upon the evidence succeeded in establishing his contention. Clearly this case is no authority in support of the present contention. On the contrary it is an authority for the proposition that the plaintiffs in this case must fail, unless they can show by the evidence on the record that the parties observe custom and not their personal law, and upon the record as it stands, there can be no doubt that this has not been established. Mr. M. S. Bhagat recognized this and urged that plaintiffs should be given a further opportunity of proving their case. He urged that there was no definite issue on the point whether in the matter of alienation these Aroras were governed by Hindu Law or by custom, and that consequently the plaintiffs did not produce evidence which, had the issue been clearly set forth, they could have adduced. We cannot agree with the learned counsel. The third issue was perfectly clear. "If so" (*i.e.*, if the land was ancestral) "could Gohru legally alienate the land?" The first Court discussed this issue from the point of view whether Hindu Law or custom applied, and there can be no doubt that the parties themselves understood it in that light. The plaintiffs in their grounds of appeal to the Divisional Judge did not urge that they were misled by the form of the issue or ask for a further enquiry upon the point, and under these circumstances it is too late for them to ask us to remand the case for this purpose. All that they urged in those grounds of appeal was that they had by sufficient evidence proved that they followed custom, and that that custom did not recognize the validity of such alienations as that in dispute. It was not suggested that they had further evidence to produce in support of their case. Mr. Oertel, for appellants, has referred to a number of cases in which it has been ruled by this Court, that members of non-agricultural tribes are not to be held bound by customs prevailing among agricultural tribes simply because they happen to own land and to be living with members of agricultural tribes

(1) 62 *P. R.*, 1902.

Khazan Singh v. *Maddi* (1), *Katar Singh* v. *Mathar Singh* (2), *Harnam Singh* v. *Devi Chand* (3), *Baroo* v. *Makhan* (4), and *Atar Singh* v. *Prem Singh* (5). We do not consider it necessary to discuss these rulings in detail as we are of opinion that the plaintiffs have failed to show that among Aroras of their village there is any recognised customary rule which would preclude a sonless male proprietor from selling (or even gifting) a part of his ancestral landed property to the son of his sister.

It is not contested that if Hindu Law applies, the alienation in dispute, whether it was really a sale or merely a gift, would be valid, and as we find that Hindu Law does apply, we must accept the appeal. We accordingly reverse the decree of the Lower Appellate Court and restore that of the District Judge. Respondents must pay the appellants' costs throughout.

Appeal allowed.

No. 116.

Before Mr. Justice Rattigan.

SHANKAR LAL,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

ZORAWAR SINGH,—(DECREE-HOLDER),—RESPONDENT.

Civil Appeal No. 772 of 1904.

APPELLATE SIDE.

Execution of decree—Defective application for—Step in aid of execution—Limitation Act, 1877, *Schedule II, Article* 179 (4).

Held, that if an application defective in form as an application for execution of a decree contains a prayer for the issue of a notice under Section 248 of the Code of Civil Procedure and such notice is issued, it should be treated as an application to take some step in aid of execution within the meaning of Article 179 of the second Schedule to the Limitation Act, 1877.

Dhonkal Singh v. *Phakker Singh* (6) *Gopal Chander Manna* v. *Gosain Das Kalay* (7), *Kalka Dube* v. *Bisheshar Patok* (8), *Rama* v. *Varada* (9), *Prabh Singh* v. *Bal Kishen* (10), *Asgar Ali* v. *Troilokya Nath Ghose* (11), *Gopal Sah* v. *Janki Koer* (12), *Pandari Nath Bapuji* v. *Lila Chand Hatibhai* (13), *Bhagwan Jettu Ram* v. *Dhondi* (14), and *Sha Karam Chand* v. *Ghela Bhai* (15) referred to.

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(1) 122 *P. R*, 1893.
(2) 94 *P. R.*, 1898.
(3) 107 *P. R.*, 1901.
(4) 61 *P. R*, 1908.
(5) 12 *P. R.*, 1906.
(6) *I. L. R. XV All.*, 84.
(7) *I. L. R. XXV Calc.*, 594.
(8) *I. L. R. XXIII All.*, 162.
(9) *I. L. R., XVI Mad.*, 142.
(10) 6 *P. R.*, 1895.
(11) *I. L. R., XVII Calc.*, 631.
(12) *I. L. R., XXIII Calc.*, 217.
(13) *I. L. R., XIII Bom.*, 237.
(14) *I. L. R., XXII Bom.*, 83.
(15) *I. L. R., XIX Bom.*, 84.

Miscellaneous further appeal from the order of Kazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 12th July 1904.

Fazal-i-Hussain, for appellant.

Sukh Dial, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—The decree-holder obtained his decree in the Chief Court on the 30th May 1900, and on 16th May 1903 he filed an application for execution. The principal debtor, Babu Shanker Lal (a pleader) appeared in the Execution Court on the 27th July 1903, and on the 25th August 1903 certain objections were taken by him to the form of the application for execution. The application was accordingly returned to the decree-holder for amendment, and was subsequently duly filed within the time allowed by the Court for such purpose. When, however, the amended application was filed, the judgment-debtor above mentioned objected that the application was time-barred, inasmuch as it was itself presented after the expiry of the period of limitation, and limitation could not be saved by reason of the earlier application as the latter was so materially defective in form as not to amount to an "application made in accordance "with law," within the meaning of Article 179 (4) of the Limitation Act. *3rd Decr.* 1906.

The defects in the first application were as follows :—

(*a*) the names of all the judgment-debtors were not stated;

(*b*) in column (*d*) it was not stated whether an appeal had been preferred from the decree of the Chief Court which it was sought to execute;

(*c*) in column (*h*) it was not stated what amount of costs had been awarded; and

(*d*) in column (*j*) no mention was made of the property of the judgment-debtor which it was sought to attach. It is contended for the judgment-debtor that these omissions most materially affected the validity of the application and that such application by reason thereof was in law no application at all. In support of this contention reliance is placed on the cases reported in *Asgar Ali* v. *Troilokya Nath Ghose* (1), *Gopal Sah* v. *Janki Koer* (2), *Pandari Nath Bapuji* v. *Lila Chand Hatibhai* (3), *Bhagwan Jettu Ram* v. *Dhondi* (4), and

(1) *I. L. R., XVII Calc.*, 631. (2) *I. L. R., XIII Bom.*, 237.
(3) *I. L. R., XXIII Calc.*, 217. (4) *I. L. R., XXII Bom.*, 83.

Sha Karam Chand v. *Ghela Bhai* (1). For the respondent-decree-holder, Mr. Sukh Dyal referred to *Gopal Chander Manna* v. *Gosain Das Kalay* (2), *Kalka Dube* v. *Bisheshar Patok* (3), *Rama* v. *Varada* (4), and *Prabh Singh* v. *Bal Kishen* (5), at p. 30. He urged that the defects in the earlier application were not material and did not in any way prejudice the present appellant against whom alone of the judgment-debtors relief was prayed; and that in any event, even if the application could not be regarded as "an application for execution in accordance with law," there was in it a prayer for notice to be issued to the judgment-debtor under Section 248, Civil Procedure Code, and that notice was accordingly issued to that person. Thus according to this argument, there was a step in execution in accordance with law within the meaning of Article 179, clauses (4) and (5). In support of this latter argument reference was made to the ruling of the Full Bench of the Allahabad High Court reported as *Dhonkal Singh* v. *Phakker Singh* (6).

In reply Mr. Fazal-i-Hussain urged that Section 235, Civil Procedure Code, was imperative in its terms and that non-compliance with any of its terms was fatal, even if the omissions consisted in the failure to observe the requirements of clause (*a*), *viz.*, an omission to give the number of the suit. The learned counsel frankly admitted that, *quoad* this argument, the Full Bench decisions of the Allahabad and Calcutta Courts were against him, but he boldly asserted that these decisions were erroneous and should not be followed. But even if he were overruled on this point, he argued that the omission to specify the property to be attached (clause (*j*) of Section 235), was a most material omission, and rendered the application absolutely nugatory in point of law. He further contended that unless and until there was before the executing Court a valid application for execution, no notice under Section 248, Civil Procedure Code, could legally be issued to the judgment-debtor, and that consequently the latter part of Mr. Sukh Dyal's argument fell to the ground.

I am much impressed with these arguments and I fully admit their force. It seems to me, however, that the decided

(1) *I. L. R., XIX Bom.*, 84.
(2) *I. L. R., XXV Calc.*, 594, *F. B.*
(3) *I. L. R., XXIII All.*, 162.
(4) *I. L. R., XVI Mad.*, 142.
(5) 6 *P. R.* 1895.
(6) *I. L. R., XV All.*, 84, *F. B.*

weight of authority is against the view that the subsequent amended application (which was presented on the 9th January 1904) was time-barred. The present case is, on its facts, very similar to the case with which the Full Bench of the (*Dhonkal Singh* v. *Phakker Singh* (1), at pp. 88, 89) Allahabad High Court had to deal. There too, as here, "no inventory or description of "the property sought to be attached was given." There, as here, it was contended (in the words of the learned Chief Justice) that the application was barred by limitation as it was made more than three years after the date of the decree; that the subsequent application was not in accordance with law within the meaning of Article 179 of the second Schedule of the Indian Limitation Act as not having been in compliance with Section 236 or Section 237 of the Civil Procedure Code, and that the issuing of the notice under Section 248 of the Civil Procedure Code was on an application which was not made in accordance with law, and consequently was not such an order as was contemplated by Article 179. To this argument, the learned Chief Justice replied: "we can dispose of this contention at once. That order, "whether or not it ought to have been made or issued, was in "fact an order under Section 248 of the Code of Civil Procedure "and kept the decree alive for the purposes of execution." This view of the law was endorsed by Bannerjee, J., of the Calcutta High Court (p. 599, *Gopal Chander Manna* v. *Gosain Das Kalay* (2). This learned Judge, whose opinions are entitled to the highest respect, remarked with regard to an argument very similar to that advanced before me, "lastly, granting that the "application of the 7th July 1891 was informal and defective as "an application for execution of decree, it was at any rate, as "pointed out by the learned *vakil* for the respondent, an "application to take some step in aid of execution, that is to "say, to issue a notice, under Section 248 of the Code which was "here necessary, the decree having been passed more than one "year before. A notice was issued according to the prayer, "and the application and the notice were sufficient to keep the "decree alive."

So too in the present case, the application for execution, even if it were defective in form as an application of execution, undoubtedly and admittedly contained a prayer asking for notice to be issued to the judgment-debtor under Section 248 of the Code and upon the authority of the above cases, the notice which was thereupon issued to the judgment-debtor, Shanker

(1) *I. L. R., XV All.*, 84. (2) *I. L. R., XXV Calc.*, 594.

Lal, was effective for the purposes of keeping the decree alive as against him, he being the only one of the judgment-debtor against whom relief was really asked. Upon this view of the law I find it unnecessary to give any decision as to whether the particular omissions pointed out in the original application for execution were or were not such as to render the application in question no legal application for execution within the meaning of Section 230 of the Civil Procedure Code.

So far then, as Shanker Lal, who is the sole appellant-judgment-debtor, is concerned, it must be held that the amended application for execution which was filed on the 19th January 1904, is within time. I accordingly dismiss the present appeal with costs in this Court.

Appeal dismissed.

No. 117.

Before Mr. Justice Chatterji, C. I. E, and Mr. Justice Rattigan.

APPELLATE SIDE.

BHAGWAN DAS,—(DECREE-HOLDER),—APPELLANT,

Versus

RAM DAS,—(JUDGMENT-DEBTOR),—RESPONDENT.

Civil Appeal No. 120 of 1906.

Assignment of land revenue—Liability to attachment in execution of decree—Punjab Descent of Jagirs Act, 1900, Section 8 (3).

Held, that under clause (3) of Section 8 of the Punjab Descent of Jagirs Act, 1900, a sub-assignment of land revenue made with the sanction of Government is as incapable of attachment in execution of decree as the assignment itself.

Section 8 of the Punjab Descent of Jagirs Act, 1900, is not limited to assignment solely made by Government but also includes a sub-assignment made by the original assignees.

Miscellaneous further appeal from the order of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 2nd December 1905.

Ishwar Das, for appellant.

Sukh Dial, for respondent.

The judgment of the Court was delivered by

20th Novr. 1906. RATTIGAN, J —The Government of India by letter No. 234 B., dated 11th March 1862, made an assignment of land revenue in favour of Raja Teja Singh, and subsequently the latter made a

sub-assignment of part of this *jagir* to Rai Mul Singh. This sub-assignment was recognised as valid by the Government and duly sanctioned—(see letter No. 1103, dated 17th October 1881, from the Chief Secretary to Government, Punjab, to the Secretary to the Financial Commissioner, Punjab). A Notification under Section 8 of the Punjab Laws Act, 1872, (as amended by Punjab Act IV of 1900) was published in June 1904 with regard to the heritable assignments of land revenue made to Raja Teja Singh above referred to, and a Notification under the same section (No. 624, dated 21st June 1906) has recently been issued regarding the assignment of land revenue made by Raja Teja Singh and now in the hands of the male heir of Rai Mul Singh, Lala Ram Das.

The question before us is whether, despite sub-section (3) of Section 8 of the Punjab Laws Act, this latter assignment is liable to attachment in execution of decree against Lala Ram Das. The Divisional Judge who delivered judgment before Notification No. 624 was published, has held that it is not, inasmuch as the Notification issued with regard to the assignment in favour of Raja Teja Singh protects the whole *jagir* granted to the Raja including that portion of it which was sub-assigned by the Raja to Rai Mul Singh, although under the terms of the sub-assignment the interest of the Raja and his heirs in this latter portion of the *jagir* is limited to a reversionary interest which will be of actual benefit to the assignor's family only in the event of Rai Mul Singh's life becoming extinct.

Before us the question with which the learned Divisional Judge had to deal does not really arise, for there can be no doubt now that the assignment in favour of Rai Mul Singh is protected in express terms by the Notification No. 624 of the 21st June last. Revenue during the past years has already been realised, and the only point is whether future revenue can be attached, and consequently no difficulty arises as to whether the said Notification can be given retrospective effect to.

Mr. Ishwar Das fully realised this, and his sole contention was that the Notification relating to Rai Mul Singh's *jagir* is *ultra vires* because a notification under Section 8 can be issued only in respect of assignments of land revenue *made by Government*, whereas the assignment in favour of Rai Mul Singh was made by a private individual. We fail to find any force in this contention. The section is in very general terms and refers to "any assignment of land revenue", and is not limited to assignments made by Government. Moreover, in face of the fact that the sub-

assignment was made with the sanction of Government and was recognised by Government as valid, it is an over-subtle argument to urge that it was not an assignment of the kind for which Section 8 makes provision. No sub-assignment would have been valid without the sanction of Government and the effect in such cases of the grant of sanction is practically to convert the assignment into one made, if not directly, at least indirectly, by Government.

Mr. Ishwar Das indeed is on the horns of a dilemma. An assignment of land revenue can be validly made only by Government. If, then Government did not make the assignment in favour of Rai Mul Singh the act of Raja Teja Singh was a mere nullity *quoad* the assignment which he purported to make to Rai Mul Singh, the result being that in law the *jagir* as a whole is still the *jagir* of Raja Teja Singh and his heirs. In this case no portion of the *jagir* could be attached in face of the Notification No. 89, dated 1st June 1904, which protects that *jagir* from attachment.

If on the other hand it was a valid assignment, it must necessarily be so because the assignment by the Raja was, after recognition by Government, virtually an assignment by Government itself which can alone, according to the argument, make valid assignments of land revenue. And in this case no question can arise as to the validity of Notification No. 624, dated 21st June 1904. Thus in either case the assignment in the hands of Rai Mul Singh's heir is exempted from liability to attachment, and the decree-holder's claim must fail. But it is not really necessary to decide these points as it is, in our opinion, quite clear that Notification No. 624, which deals with the assignments in favour of Rai Mul Singh, was *intra vires* and within the purview of Section 8 of the Act. Mr. Ishwar Das could give us no authority for the contention that the general terms of Section 8 are to be limited to a particular kind or class of assignments of land revenue, and upon principle we can find no justification for placing so circumscribed a construction upon the plain words of the legislature or for holding that the Courts can control the action of Government under Section 8 by deciding whether a particular assignment is or is not, an assignment for the purposes of that section. If Government recognises as valid an assignment of land revenue and proceeds to take action under Section 8 with regard to such assignment, it is not, we conceive, open to the Courts to hold that such action is invalid because the assignment

is one which in the opinion of the Courts Government should not have recognised as such. That is a matter solely for the discretion of Government and not for adjudication by the Courts.

For these reasons we hold that the decree-holder's claim to attach the *jagir* in the hands of his judgment-debtor, Lala Ram Das, the heir of Rai Mul Singh, has been rightly disallowed and we accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 118.

Before Mr. Justice Rattigan.

SUNDAR DAS,—(OBJECTOR),—PETITIONER,

Versus

RAJA BALDEO SINGH,—(DECREE-HOLDER),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 2275 of 1906.

Execution of decree—Decree for possession of immovable property—Obstruction by person other than the judgment-debtor—Procedure—Civil Procedure Code, 1882, Section 331.

Held, that where in execution of a decree for possession of immovable property a person other than the judgment-debtor causes obstruction to the delivery of possession of the property claiming in good faith to be in possession thereof on his own account, the Court executing the decree cannot decline to investigate such claim even if subsequent to the objection the objector happens to be temporarily out of actual possession. The Court is bound to investigate the claim under Section 331 of the Code of Civil Procedure.

Petition for revision of the order of W. Malan, Esquire, District Judge, Rawalpindi, dated 7th May 1906.

M. S. Bhagat and Pestonji Dadabhai, for petitioner.

Beechey, for respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—The respondent, Raja Baldeo Singh of Poonch, obtained a decree against Mul Chand and Jai Ram, the latter being the eldest son of Mul Chand. From this decree Mul Chand and Jai Ram appealed to this Court and, pending their appeal, effected a mortgage of the property now in question in favour of one Ganga Ram. This appeal was dismissed, and on the 8th March 1906 the decree-holder applied for execution of his decree and on the 19th March 1906 an order was passed by the District Judge that he should be "placed in possession of

1st Decr. 1906.

"the property", *viz.*, a three storied house and a plot of land.

Ganga Ram objected but his objection was disallowed by order of the District Judge, dated 8th May 1906. He thereupon filed a suit against the decree-holder in the Court of the Sub-Judge, who, upon his application, ordered stay of execution until further orders. This was on the 16th May 1906, but meantime the *Nazir* had reported—on the 11th May 1906—that the present appellant, Sundar Das (another son of the judgment-debtor) was in possession of the house sought to be attached, and resisted attachment. On the 17th May the District Judge passed an order to the effect that Sundar Das "alleged some sort of "title and his resistance was apparently in good faith", and that "as a regular case was pending before Bawa Mihan Singh "between Ganga Ram and the decree-holder" it was unnecessary to proceed under Section 331, Civil Procedure Code.

The order staying execution issued by the Sub-Judge was withdrawn by that officer on the 19th June 1906, and on the 21st June the District Judge passed the following order :—

"Sundar Das is reported to have gone to Kashmir. He is, "therefore, no longer in possession of the house and land in "suit for the purposes of Section 264, Civil Procedure Code. A "warrant will now be given to decree-holder for possession of the "house and land mentioned in the Chief Court decree, dated "17th October 1905, under Section 263. Report on 12th "July 1906."

On the 12th July the *Nazir* reported that as regards the house No. 1, Lakhmi Chand (another son of the judgment-debtor) was in possession and refused to give it up to the decree-holder, whereupon the District Judge ordered that Lakhmi Chand's claim to the house should be investigated under Section 331, Civil Procedure Code. This claim is now being inquired into accordingly.

On the 5th July 1906, Sundar Das filed an appeal in this Court from the order of the District Judge, dated 21st June 1906, and this appeal was admitted by an order in Chambers which also directed notice on the ground that the order of the 17th May 1906 was open to revision.

Mr. Beechey, for respondent, contends that no appeal lies from either of these orders, and the learned council for Sundar Das admits that this contention is correct. It is contended, however, that the District Judge erred materially on the 17th

May 1906 in not proceeding to deal with the case under Section 331, Civil Procedure Code. To this contention Mr. Beechey, who lays great stress on the allegation that these proceedings are actuated solely with the object of causing delay, each of the judgment-debtor's sons being in turn put up to object to execution, argues that the District Judge could not act under Section 331 in face of the order of the Sub-Judge staying proceedings, an order which was only withdrawn on the 19th June. The learned counsel further urged that in any event this Court should not interfere on revision as the objector had other remedies, *e.g.*, by bringing a regular suit or by again resisting execution and so compelling the Court to take action under Section 331.

To this argument, Mr. Pestonji replies that the very terms of the order of the 17th May make it clear that the District Judge in not taking action under Section 331 was not influenced by the Sub-Judge's order staying execution and that in any case the latter order would not have precluded action under Section 331; that such action was obligatory on the District Judge under the circumstances; that it was unfair on the present petitioner that he should be compelled to institute a regular suit, in which he would be the plaintiff, when the Code expressly makes provision for an inquiry into his objections and claims by a proceeding in which he would be the defendant, and that in face of the order of the 21st June 1906, the petitioner could not, with any hope of success, resist further execution, as unless that order was set aside, his resistance would not be regarded as *bonâ fide*.

I have given the case very careful consideration and though I am reluctant to delay proceedings in any way, I am compelled to admit the force of Mr. Pestonji's arguments. It *may* be quite true, as Mr. Beechey alleges, that these claims on the part of Mul Chand's sons are being put forward for purposes of obstruction, but the fact remains that on the 17th May the District Judge held that Sundar Das in resisting execution was acting in good faith, and under these circumstances the District Judge was bound to investigate that person's claim under Section 331. Even if the contention is well founded that the District Judge could not proceed under Section 331 so long as the Sub-Judge's order of the 16th May was in force, it is obvious that there was no obstacle to such proceedings on the 21st June 1906, inasmuch as the Sub-Judge had withdrawn his order three days previously. This being so, the subsequent order of the 21st June was clearly wrong, for Sundar Das' absence from the house, an absence

which should have been presumed to be merely temporary, after the 17th May could not possibly destroy the claim to the property which, according to the District Judge, he *bonâ fide* entertained. This claim should have been made the subject of investigation in the manner provided by law even though Sundar Das happened to be temporarily absent on the 21st June and, therefore, did not on such date ask for an investigation. Section 331 of the Code is in imperative terms and in all cases in which its provisions are applicable, these provisions must be given effect to, and the inquiry, which may have been impossible on the 17th May, should have been made on the 21st June when the question of Sundar Das' claim once again came up before the District Judge for consideration. Nor is it any real answer to now urge that the petitioner has another remedy, and that consequently this Court should not interfere on the revision side. Mr. Pestonji's reply to this argument, as above summarised, completely meets the objection. It seems to me, on the general aspect of the question, that the petitioner's objection which has been found by the District Judge to have been preferred in good faith, must be made the subject of proper inquiry under Section 331, Civil Procedure Code, and I must accordingly accept this petition and direct the District Judge to take action with regard to it under that section. Probably it will be found possible, and will avoid unnecessary delay, to proceed with this claim *pari passu* with Lakhmi Chand's claim, but this is a matter which I must leave to the discretion of the District Judge. Under all the circumstances I leave the parties to bear their own costs in this Court, as I think that Sundar Das was himself to blame, to a large extent, for the course which things have taken.

Application allowed.

No. 119.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

BAKHT SAWAI AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SARDAR KHAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 694 of 1906.

Custom—Inheritance—Gurmani Bilochis of Dera Ghazi Khan tahsil—Widows' and daughters' right of inheritance—Muhammadan Law.

Held, that in matters of succession Gurmani Bilochis of the Dera Ghazi Khan *tahsil* were governed by custom and not by Muhammadan Law, and

that among them a widow is entitled merely to maintenance, and a married daughter does not in any case succeed to any portion of her father's ancestral property in the presence of male collaterals of the latter.

Further appeal from the decree of Lala Mul Raj, Additional Divisional Judge, Multan Division, dated 30th March 1906.

Morrison, for appellants.

Nanak Chand, for respondents.

The judgment of the Court was delivered by

RATTIGAN, J.—The parties are Gurmani Bilochis of the Dera Ghazi Khan *tahsil* and plaintiffs, who are the widow and the two daughters of the deceased M. Tayab Khan, sue for possession of $\frac{41}{72}$ of the latter's property. Plaintiff's contention is that Muhammadan Law is observed among their tribe. Defendants who are the brothers and nephews of the deceased assert that Muhammadan Law is not observed among them, and that by the ustomary rules which are so observed neither a widow nor a daughter has any right to the property. The Courts below are agreed in upholding this contention and after hearing all that Mr. Morrison had to urge in support of plaintiffs' further appeal we have no doubt that the decision arrived at is correct. *22nd Jany.* 1907.

From the answers recorded in the Customary Law of the Dera Ghazi Khan District, prepared by Mr. Diack, it is clear that with the exception of certain sections of the Nutkani tribe in Sangarh, the Bilochis of that district generally, and especially the Bilochis of Dera Ghazi Khan *tahsil*, follow not Muhammadan Law but Custom. According to the vernacular record of the *Riwaj-i-am* of the Dera Ghazi Khan *tahsil*, a widow is among them entitled merely to maintenance and daughters do not, in any case, succeed to any portion of their father's ancestral property in the presence of collaterals. The rule is apparently rather different in the Jampur and Rajanpur *tahsils*, for in those *tahsils* a daughter is said to be entitled to a share if there is no male descendant of the deceased's grandfather removed from deceased's grandfather by the same number of degrees as herself. But even in these *tahsils* the Bilochis obviously do not follow the strict Muhammadan Law (see Customary Law of the Dera Ghazi Khan District, page 17, answer to question 40).

In corroboration of this we have the evidence of plaintiff's own witness, Khan Muhammad Khan, who admits that, with the exception of his own family, Gurmani Bilochis of this *tahsil*, follow the rules of the ordinary Customary Law. He also admits that on the death of one Alam Khan, the deceased's

daughters obtained no share in the property which went to the deceased's brothers and nephews. Then, again, plaintiff's own agent, Fatteh Muhammad, admitted before us that his own sisters received no shares in his father's property, and in his evidence he confessed that on the death of Hayat, the father of M. Tayab Khan, the three daughters of Hayat received no share because Hayat had sons who survived him.

In answer to this plaintiffs have not been able to establish a single instance in which a widow has succeeded to a life-interest in her deceased husband's property, or daughters to a share in their late father's property.

Plaintiffs based their claims solely and exclusively upon Muhammadan Law which, they contended, was the law prevailing in their tribe, and they expressly stated that they preferred no claims based upon any customary rule which might be found to prevail among Gurmani Bilochis of this tahsil. There can be no doubt that the claim so based must fail, for there is no proof whatsoever that this tribe follow the principles of Muhammadan Law, whereas there is good evidence in support of the contention that amongst them Customary Law is observed. But even if the present claim had been based, in the alternative, upon Customary Law, it must have equally failed as it is clear from the evidence on the record, and from the answers recorded in the Dera Ghazi Khan *tahsil Riwaj-i-am* that widows get no life-interest in their late husband's ancestral property, and that daughters do not succeed to any part of their late father's ancestral property in the presence of his collateral relations.

We are therefore of opinion that plaintiffs have failed to substantiate their claims, and that their suit was rightly dismissed by the lower Courts. We were asked to remand the case for further inquiry but we cannot accede to this request. Plaintiffs were given every opportunity to produce evidence in support of their case, and not only did they fail to produce any such evidence but the evidence which they did adduce is strongly against their contentions, and support the statements in the *Riwaj-i-am*. Under these circumstances it would be only unnecessarily protracting the litigation and causing expense to the parties to order a further inquiry.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

No. 120.

Before Mr. Justice Rattigan.

RAJ BHAI,—(DEFENDANT),—APPELLANT,

Versus

YAKUB ALI AND OTHERS,— (PLAINTIFFS),— RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1012 of 1904.

Appeal from an order returning plaint for amendment—Remand by Appellate Court—No appeal from such order of remand—Civil Procedure Code, 1882, Sections 562, 588.

Held, that there is no further appeal from an order of remand passed under Section 562 of the Code of Civil Procedure whon such order is made by an Appellate Court on an appeal under Section 588 of the Code.

Venkatapathi Naidu v. *Tirumali Chetti* (1), *Vilayat Husen* v. *Maharaja Mahendra Chandra Nandy* (2), *Veeraswamy* v. *Manager, Pittapur Estate* (3) referred to. *Ram Prosad* v. *Sachi Dassi* (4) dissented from.

Miscellaneous further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 5th August 1904.

Petman, and Roshan Lal, for appellant.

Sohan Lal, for respondents.

The judgment of the learned Judge was as follows:—

RATTIGAN, J.—The facts of the case are as follows:— *16th Feby.* 1907.

On the 22nd April 1904 the Munsif passed an order directing that the plaint should be returned for amendment, and that it should be represented after amendment within 20 days. On the 9th May 1904 the plaintiff filed an appeal from the Munsif's order in the Court of the Divisional Judge: This was under Section 588 (6), Civil Procedure Code. On the 12th May 1904 the Munsif (though informed by plaintiffs' pleader that an appeal had been preferred to the Divisional Judge) directed that as the order of the 22nd April had not been complied with, the plaint should be rejected under Section 54, Civil Procedure Code.

On the 5th August 1904 the Divisional Judge accepted plaintiffs' appeal from the order of the 22nd April 1904, and held that the plaint contained no ambiguity and did not need any amendment. He accordingly remanded the case to the Munsif's Court under Section 562 of the Code. It was pointed out to the learned Judge that the Munsif had

(1) *I. L. R., XXIV, Mad.*, 447.
(2) *I. L. R., XXVIII All.*, 88.
(3) *I. L. R., XXVI Mad.*, 518.
(4) 6 *Calc., W. N.*, 585.

already rejected the plaint by the order of the 12th May, but the objection was over-ruled on the ground that the Appellate Court had merely to consider whether on the merits the appeal should or should not be allowed, regardless of any order that might have been passed after the date of the order appealed against and after the institution of the appeal.

Defendants have appealed to this Court, and the first question which I have to decide is whether an appeal lies. Mr. Sohan Lal contends that it does not, and he relies upon the final paragraph of Section 588 of the Code which provides that "the orders passed in appeals under this Section shall be final." His argument is that in the present case the order which was passed by the Lower Appellate Court under Section 562, Civil Procedure Code, was an order passed on an appeal under Section 588 (6) and that *as such* it was final. He distinguishes between the cases where an Appellate Court remands under Section 562 after there has been a regular appeal from a *decree* and the cases where the Appellate Court remands under Section 562 after there has been an appeal from an *order* which is made appealable by the provisions of Section 588. In the former cases the last paragraph of Section 588 can have no applicability, as the appeal is not under Section 588, and consequently, clause 28 of Section 588 gives a right of appeal to the High Court. In the latter cases, as the appeal is one under Section 588 any order passed on that appeal even if it be an order under Section 562, is not open to further appeal by reason of the bar prescribed by the last paragraph of Section 588. In support of his contention the learned pleader refers to *Venkatapathi Naidu* v. *Tirumalai Chetti* (1), *Vilayat Husen* v. *Maharaja Mahendra Chandra Nandy* (2). These cases, especially the first, are directly in point and are clear authorities in favor of Mr. Sohan Lal's argument. On the other hand, Mr. Petman relies on *Ram Prosad* v. *Sachi Dassi* (3) and *Veeraswamy* v. *Manager Pittapur Estate* (4). With all due deference, I confess that I am not able to follow the reasoning of the learned Judges in the first of these cases. It seems that the Sub-Judge had rejected the plaint as bad for misjoinder of causes of action and of persons. Plaintiff appealed to the District Judge who differed from the view taken by the first Court and remanded the case for decision on the merits. Defendants

(1) *I. L. R.*, *XXIV Mad.*, 447. (3) 6 *Calc. W. N.*, 585.
(2) *I. L. R.*, *XXVIII All.*, 88. (4) *I. L. R.*, *XXVI Mad.*, 518.

thereupon appealed to the High Court, and an objection was taken that no appeal lay. The learned Judges (Pratt and Gridt, JJ.) over-ruled this objection and observed: "This is, however, "not a second appeal under Section 584 against a decree but a "first appeal under Section 588 against an order passed under "Section 562. Such an appeal is expressly allowed, and that "being so, this Court must consider whether or not there were "valid grounds for ordering the remand." With every respect I find myself unable to accept this argument. The order of the Sub-Judge rejecting the plaint was "a decree" as defined in Section 2 of the Code, and consequently the appeal to the District Judge was not an appeal under the provisions of Section 588. When, therefore, the District Judge accepted that appeal and remanded the case under Section 562, he passed an order on an appeal which was not presented under Section 588. From such an order an appeal undoubtedly lay to the High Court under Section 588 (28), but this was because the final paragraph of Section 588 did not apply to the case. While, therefore, I quite agree that the High Court had power to entertain the appeal, I respectfully dissent from the ground upon which that appeal was held to be entertainable. The decision in *Veeraswamy* v. *Manager, Pittapur Estate* (1) is, if anything, against Mr. Petman's contention. The District Judge had reversed a finding of the Sub-Collector in proceeding under Act VIII of 1865, and had remanded the suit for disposal on the merits. The order of remand purported to be under Section 562, Civil Procedure Code, and the plaintiff preferred an appeal therefrom to the High Court. The Judgment of the High Court thus disposes of the objection that no such appeal lay: "A preliminary objection has been "taken that no appeal lies. In support of the objection it has "been argued that the adjudication by the Sub-Collector was not "a decree within the meaning of Section 262 of the Code, that "this being so the order of remand cannot be taken to have been "made under that Section, and that inasmuch as Section 588 "(28) of the Code only gives a right of appeal when the order is "made under Section 562, if the order was not under that Section, "no appeal lies". The learned Judges thus proceed to point out that the adjudication by the Sub-Collector was a decree as defined in Section 2 of the Code, and that consequently the order remanding the case was not one passed on an appeal presented under Section 588. On this ground, and on this ground alone, they held that an appeal did lie to the High Court. Obviously, this authority does not support Mr. Petman's contentions. On

(1) *I. L. R., XXVI Mad.*, 518.

the contrary, it would seem to be an authority distinctly against him. Both upon principle and upon authority, then, I hold that in a case such as the present, when the order of remand under Section 562 is passed, not on an ordinary appeal from a decree but on an appeal under Section 588 of the Code, a further or second appeal is barred under the concluding paragraph of Section 588.

As a further appeal will lie in this case from any decree which the Divisional Judge may eventually pass, I am not called upon to discuss or to decide certain questions raised by Mr. Petman as to the view of the Divisional Judge regarding the plaint, and as the alleged irregularity committed by that officer in reversing the order of the 22nd April 1904, after that order had been superseded by the order rejecting the plaint, the latter order having been passed several months prior to the date of the Divisional Judge's decision on appeal.

I accordingly accept this petition for review and, in lieu of my previous order, I dismiss this appeal with costs.

Appeal dismissed.

Full Bench.

No. 121.

Before Mr. Justice Reid, Chief Judge, Mr. Justice Chatterji, Mr. Justice Robertson, Mr. Justice Johnstone, and Mr. Justice Rattigan.

KANHAYA LAL,—(PLAINTIFF),—APPELLANT,

Versus

APPELLATE SIDE. THE NATIONAL BANK OF INDIA, LD., DELHI,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 791 of 1903.

Appeal—Appeal from order dismissing suit for non-appearance of plaintiff—Revision—Interference with exercise of jurisdiction—Finding on one issue even when sufficient does not preclude a Court from determining the other issues raised—Civil Procedure Code, 1882, *Sections* 102, 204,—*Punjab Courts Act*, 1884, *Section* 70

Held, by the Full Bench (Reid, C. J., and Chatterji, J., dissenting) that an order dismissing a suit for default of prosecution under Section 102 of the Code of Civil Procedure is not a decree as defined in Section 2 and is not appealable.

Per Reid, C. J., and Chatterji, J., contra that an order passed under Section 102 is a decree within the meaning of Section 2, and as such is appealable.

Held, further by the Division Bench (Johnstone and Rattigan, JJ.) in a case where a Court in the exercise of the discretion conferred on it by Section 204 of the Code of Civil Procedure had proceeded to give a decision upon all the issues framed by it though its finding on a particular issue was sufficient for the disposal of the case so far as the Court itself was concerned that in adopting such a course the Court had not acted either with material irregularity or in excess of its jurisdiction or without jurisdiction within the meaning of Section 70 of the Punjab Courts Act, and its order was consequently not subject to revision under that Section.

First appeal from the order of T. P. Ellis, Esquire, District Judge, Delhi, dated 26th May 1903.

Kirkpatrick and Shadi Lal, for appellant.

Grey, for respondent.

This was a reference to a Full Bench to determine whether an appeal lies against an order of a Court dismissing a suit for default under Section 102 of the Code of Civil Procedure.

The appeal originally came on for hearing before a Division Bench (Johnstone and Rattigan, JJ.). The learned Judges being unable to agree with the view expressed in *Pandit Rama Kant* v. *Pandit Ragdeo* (1), referred the case to a Full Bench with the following opinions:

JOHNSTONE, J.—On the 26th May 1903 the District Judge of Delhi dismissed for default under Section 102, Civil Procedure Code, the suit of Seth Kanhaya Lal against the National Bank of India, Limited. Kanhaya Lal has filed an appeal in this Court, and Mr. Grey, for defendant, has put in the preliminary objection that no appeal lies. The question is by no means an easy one. The value of the suit is high, approaching a lakh of rupees; and the view my learned brother and myself are disposed to take, as at present advised, *viz.*, that no appeal does lie, is opposed to the Full Bench ruling of this Court in *Pundit Rama Kant* v. *Pundit Ragdeo* (1). We might simply follow that ruling and, holding that the appeal is competent, proceed to hear it; but we prefer to refer the point again to a Full Bench, because it appears to us that certain important considerations were lost sight of or misapprehended in 1897. *21st Feby.* 1906.

Section 102, Civil Procedure Code, runs thus :—

"If the defendant appears and the plaintiff does not "appear, the Court shall dismiss the suit, unless the defendant "admits the claim, or part thereof, in which case the Court shall "pass a decree against the defendant upon such admission, and,

(1) 60 *P. R.*, 1897, *F. B.*

"where part only of the claim has been admitted, shall dismiss "the suit so far as it relates to the remainder."

Section 103 of the Code runs—

"When a suit is wholly or partially dismissed under "Section 102, the plaintiff shall be precluded from bringing a "fresh suit in respect of the same cause of action. But he may "apply for an order to set the dismissal aside; and if it be "proved that he was prevented by any sufficient cause from "appearing when the suit was called on for hearing, the Court "shall set aside the dismissal," &c., &c.

If an order does not amount to a "decree" (Section 2, Civil Procedure Code), it is only appealable if it comes under any sub-section of Section 588, Civil Procedure Code.

Orders under Section 103 appear in Sub-section 8 of that Section, but orders under Section 102 do not appear at all. Therefore an order under Section 102 is not appealable unless it can be called a "decree."

The following is the definition of "decree":—

"Decree means the formal expression of an adjudication "upon any right claimed, or defence set up, in a Civil Court, "when such adjudication, so far as regards the Court expressing "it, decides the suit or appeal. An order rejecting a plaint, or "directing accounts to be taken, or determining any question "mentioned or referred to in Section 244, but not specified in "Section 588, is within this definition; an order specified in "Section 588 is not within this definition."

The Full Bench ruling in *Pandit Rama Kant* v. *Pandit Ragdeo*, regarding the soundness of which I am more than doubtful, of course supersedes all earlier rulings of this Court; but, nevertheless, I think it will be useful to notice those earlier rulings. The first appears to be *Muhammad Ali* v. *Hyat* (1). There it was held that an order under Section 556, Civil Procedure Code, which is in its first paragraph for appeals the same as Section 102 is for suits, is not a "decree" and so not appealable. Then in *Bhagwan Singh* v. *Tari* (2), the same learned Judge (Plowden) ruled that a plaintiff who appeals against a decree made under Section 102, Civil Procedure Code, can only appeal, as in the case of a decree made in the presence of both parties, on the ground that the lower Court has erroneously decided some question of law or of fact, or that its procedure has been irregular and not in accordance with law. The plaintiff, it was

(1) 113 *P. R.*, 1879. (2) 82 *P. R.*, 1889.

said also, has no right to impeach such a decree merely on the ground that he had a good excuse for not being present on the date fixed in the lower Court, the proper and the only way in which a decree can be impugned on such ground being by a proceeding under Section 103. This case was quoted as an authority in the Full Bench decision now under consideration upon both the first and the second questions decided by the Full Bench. In my opinion its bearing on the first question, which is the question now before me, was misunderstood.

Turning to the Allahabad ruling I find one (the later) on my side and one against me. The earlier case *Ablakh* v. *Bhagirathi* (1) laid down that an appeal lay from an order under Section 102, Civil Procedure Code, because Section 103 did not expressly take away the right of appeal. It was not decided whether such an order was a decree or not, and thus the reasoning appears to me incomplete and imperfect. In *Mansab ali* v. *Nihal Chand* (2), there is what seems to me a complete and logical discussion of the matter. The case was decided under Section 10 of the Letters Patent of that High Court, but the ruling is quite in point. The Court pointed out that the Privy Council had decided in *Chand Kour* v. *Partab Singh* (3) and in an unreported ruling that a dismissal of a suit for want of prosecution could not operate as *res judicata* and it went on :—

"A dismissal in default is not 'the formal expression of "'an adjudication upon any right claimed or defence set up' "within the meaning of Section 2 of the Code of Civil Procedure. "Indeed, it would necessarily follow from the two decisions of "their Lordships of the Privy Council to which we have referred "that an order dismissing a suit or appeal for default could not "be treated as 'a formal expression,' &c. This view is also "supported by a consideration of Section 540, Civil Procedure "Code."

Then the Court explains the significance of the second sentence of Section 540 allowing an appeal from an original decree passed *ex parte*.

Then there are two Madras rulings *Gilkinson* v. *Subramania Ayyar* (4) and *Somayya* v. *Subbamma* (5). The first of these expressly follows *Mansab Ali* v. *Nihal Chand* (2), and the second follows or approves the first.

We have next to look at *Ram Chandra Pandurang Naik* v. *Madhar Purushottam Naik* (6) and *Shrimant Sagajirao* v. *Smith* (7).

(1) *I. L. R., 9 All.*, 427 (1887). (4) *I. L. R., XXII Mad.*, 231.
(2) *I. L. R., XV All.*, 359 (1893) (5) *I. L. R., XXVI Mad.*, 601.
(3) *I. L. R., XVI Calc.*, 98 *P.C.* (6) *I. L. R., XVI Bom.*, 23 (1891).
(7) *I. L. R., XX Bom.*, 736, (1895).

In the former we have on our point only the opinion, which it was perhaps hardly necessary to give, of Birdwood, J. He said an order of dismissal under Section 556, Civil Procedure Code, was a decree as being *an adjudication adverse to appellant's right to have his appeal heard* and as deciding the appeal. This *dictum* is criticised in a Calcutta case to be noted below, and it appears to me an unsatisfactory *dictum*. In *Shrimant Sagajirao* v. *Smith* the question of admissibility of appeal against an order under Section 102 was not discussed or decided; and the headnote is thus incorrect; What happened was that the Court below dismissed the suit for non-appearance of plaintiff, who applied for restoration under Section 103. The Court, finding the order of dismissal had quoted no section of the Code, held it was a dismissal under Section 158, Civil Procedure Code, and so the application was not competent. On appeal, the High Court ruled that the dismissal was under Sections 157 and 102, and that the Court below should have heard and decided the application under Section 103. It never ruled, so far as I can see, that an order under Section 102 was itself appealable, nor did it deal with the case as an appeal against such order. It directed the Court below *to hear the application under Section* 103.

Finally we have to notice the Calcutta cases.

Jagarnath Singh v. *Budhan* (1) is concerned with Section 556, Civil Procedure Code. The Judges, adverting to the earlier of the two above-mentioned Bombay cases, said that the order under Section 556 was not the "formal expression of an "adjudication upon a right claimed." It seemed to them rather "that through his fault the appellant has lost his right to obtain "the adjudication of his right claimed, that is, the right claimed "in the proceedings or suit;" and that "the right to be heard "does not come within the definition of a decree," and that "by "providing specially * for redress against such an order," the law appears not to contemplate an appeal against such an order. *Anwar Ali* v. *Jaffer Ali* (2) and *Amrito Lal Mukerjee* v. *Ram Chandra Roy* (3) followed this ruling.

* Section 103 and Section 558, Civil Procedure Code.

I venture to think the Bombay Judge's *dictum* might also be criticised in another way. When a suit (or appeal) is dismissed for default or on the merits, the Court does not say or decide that the plaintiff (or appellant) had no right "to be heard." It decides, in the case of dismissal for default, that, plaintiff (or appellant) being absent and defendant (or

(1) *I. L. R., XXIII Calc.*, 115, (1895). (2) *I. L. R., XXIII Cals.*, 837.
(3) *I. L. R., XXIX Calc.*, 60 (1901).

respondent) present and the defendant (or respondent) making no admission, the suit (or appeal) shall stand dismissed. In a case of dismissal on the merits the Court holds plaintiff (or appellant) has not proved his claim. In both cases it was ready to hear him; in neither case did it impugn his right to be heard.

But the learned Judges of the Calcutta High Court have since then taken the opposite view. In *Radha Nath Singh* v. *Chandi Charan Singh* (1), and in *Gosto Behary Sardar* v. *Hari Mohan Adak* (2), an order under Section 556, Civil Procedure Code, dismissing an appeal for default has been held to be a "decree". In the former case out of five learned Judges Prinsep, J., alone adhered to the former veiws of the Court. The learned C. J. discussed the matter shortly in his referring order, but in the judgments finally delivered in favour of the new view I can find no discussion at all. The learned C. J.'s opinion seems to have been based on the idea that the order "did decide the appeal".

Before us Mr. Grey attempted to draw a distinction between orders under Section 102 and orders under Section 556 in connection with this question, arguing that, even if the latter are "decrees," the former need not be so. I am unable to see any valid distinction.

The judgment in *Pandit Rama Kant* v. *Pandit Bagdeo* (3) was, as regards the present question, short. It referred back to the referring order and declared approval of the rulings therein noted. Those rulings, omitting a few not necessary to quote here, were the two Allahabad cases I have discussed, also the two Bombay cases, and the two Punjab cases. In the referring order, in my humble opinion, *Bhagwan Singh* v. *Pari* (4), seems to have been misunderstood, and *Shrimant Sagajirao* v. *Smith* (5), was also not altogether correctly apprehended. The Calcutta cases of *Jagannath Singh* v. *Budhan*, and *Anwar Ali* v. *Jaffer Ali*, were not noticed at all. All this seems to me sufficient ground for a reconsideration of the matter by another Full Bench.

It has been suggested that in the present case a decree has actually been drawn up dismissing the suit and awarding costs, and hence a "decree" within the meaning of Section 102 has been passed. I do not think this is sufficient to make the order a "decree." All up and down the Code are scattered provi-

(1) *I. L. R., XXX Calc.*, 680, *F. B.* (1903). (4) 60 *P. R.*, 1897.
(2) 8 *O. W. N.* 813 (1903). (5) 32 *P. R.*, 1889.
(3) *I. L. R., XX Bom.*, 737.

sions for "orders" in conjunction with which costs can be awarded, and the mere fact that here the Court below has chosen to put the matter into a decree form makes no difference.

I not only am of opinion that on a strict construction of the sections an order of dismissal under Section 102 or Section 556, Civil Procedure Code, is not a "decree" and is not appealable, but I think also that there are strong reasons for holding that the legislature could not have wished to allow an appeal in such cases. An order under Section 102 (or Section 556) can be passed only when plaintiff (or appellant) is absent and defendant (or respondent) present. If plaintiff (or appellant) was absent for sufficient reason, he always has his remedy under Section 103 or Section 558; and, where an appeal (or further appeal) lies, he even * has an appeal against a refusal to re-admit. If he was absent, not for sufficient reason, the absence was either contumacious or otherwise deliberate, or it amounted to *laches*. [In the present case the absence was undoubtedly deliberate and contumacious.] Can it be supposed that the legislature intended to allow an appeal by a plaintiff or appellant against an order of dismissal for default, in which appeal the said plaintiff or appellant must *ex-hypothise* plead;

* Section 588, (8) and (27), Civil Procedure Code.

I was guilty of *laches*, but I want my case restored; *or*, I knew the Court would sit that day to hear my case and I could have appeared, but I purposely did not?

The question for decision by the Full Bench, unless my learned brother wishes to put it in another way, will be—

Does an appeal lie against an order of a Court dismissing a suit for default under Section 102, Civil Procedure Code?

23rd Feby. 1906. RATTIGAN, J.—I agree with my learned brother's opinion in every respect except that I would prefer to reserve my opinion upon the question (which does not arise in this case) whether there is any distinction between the case of a dismissal in default in the original suit and the case of a dismissal in default of an appeal. Upon this point I am not prepared to say that there may not be a distinction between the two cases.

But upon the question now before us I am in entire agreement with my brother and have but little to add to the reasons given by him in support of his view that an order dismissing a suit in default under Section 102, Civil Procedure Code, is not a "decree" as defined in Section 2. It is, I need hardly say with great hesitation and diffidence, that I venture to doubt the soundness of the decision of the Full Bench as reported in

Pandit Ram Kant v. *Pandit Rugdeo* (1), and I should myself have certainly accepted that ruling without question, despite my own opinion on the subject, had the Full Bench given the question the consideration to which (as it seems to me) it is entitled. But, speaking with every respect, I do not think that the question has been discussed adequately in the few lines devoted to it, in the Judgment to which I refer. It is a question of considerable difficulty and upon it we have before us conflicting decisions of very learned Judges of the different High Courts. It is also a question which arises almost daily in the Courts Under these circumstances I venture to think that a more elaborate consideration than was accorded to it by the Full Bench was merited, and I am the more emboldened to say this when I find that the learned Judge who delivered the Judgment of the Full Bench was originally of opinion that an order under Section 102 dismissing a suit in default was not a "decree" from which an appeal could be preferred. At the time when he expressed this opinion the learned Judge (for whose opinion I have the highest respect) had before him the same authorities as were considered by the Full Bench, and I cannot in the subsequent Judgment find any reasons which can account for his change of opinion. No doubt, the question was argued more fully before the Full Bench, but from the Judgment itself it is not easy to gather the grounds upon which the learned Judge arrived at the conclusion that his former opinion was incorrect. So far as I can see, the Full Bench decided the question merely upon the weight of authority as that authority then stood, and it is because I am of this opinion that I now venture to express my doubt as to the correctness of the decision. Since then the point at issue has been the subject of consideration in other cases in the various High Courts, and I agree with my learned colleague that the decided weight of authority is now in favour of the contrary view. And in my opinion that other view is decidedly the more sound.

The very words of Section 102 are, I think, against the view that the *dismissal* of a suit is a decree. The section begins by enacting that "if the defendant appears and the plaintiff does "not appear, the Court *shall dismiss the suit.*" It then proceeds to enact that if "the defendant admits the claim or "part thereof" the "Court shall *pass a decree* against the "defendant upon such admission, and where part only of the "claim has been admitted, *shall dismiss the suit*, so far as it "relates to the remainder." Now, if in every instance, an

(1) 60 *P. R.*, 1897 *F. B.*

order passed under Section 102 was to be regarded as a decree, I see no reason why the legislature should not have enacted that "if the defendant appears and the plaintiff does not "appear, the Court shall pass a decree dismissing the suit," etc. Prior to the enactment of the Civil Procedure Code of 1882, it had already been decided by the High Court of Allahabad in *Mukhi* v. *Fakir* (1), and *Nand Ram* v. *Muhammad Bakhsh* (2), that an order under Section 556 of Act X of 1877 dismissing an appeal in default, "though it means "the formal expression of the Court's decision in respect of the "default of the appellant, does not come within the definition of "a decree in Section 2 of the Civil Procedure Code." In view of these decisions I consider that, if the legislature had when enacting Act XIV of 1882 intended to embrace orders under Section 102 dismissing suits in default within the definition of a "decree," they would have used words clearly and unmistakably indicative of that intention. This consideration taken in conjunction with the arguments expressed in my learned brother's order makes it quite clear to me that an order dismissing a suit in default under the section referred to was not intended to have the effect of a "decree". I also agree that such an order cannot reasonably be construed as "the formal expression of an adjudi- "cation upon any right claimed or defence set up." It is, *at most*, an adjudication (if that term can be so applied) that the plaintiff has lost his right to have an adjudication upon his case.

The decision of the majority of the Full Bench of the Calcutta High Court reported in *Radha Nath Singh* v. *Chandi Charan Singh* (3), is not, if I may say so, very satisfactory. The question is not discussed and the conclusion appears to me to be arrived at arbitrarily and upon *a priori* grounds. Personally I regard the dissenting judgment of Prinsep, J. as more convincing.

Upon the whole I think that the balance of authority is against the view which was accepted by the Full Bench in *Pandit Rama Kant* v. *Pandit Ragdeo* (4), and upon its merits the question which my learned brother suggests that we should refer to a Full Court, should, in my opinion, be decided in the negative. For the reasons given I concur with him that the question should be referred for further consideration, but as the decision which is now impugned was that of a Full Bench of 3 judges, the present reference should, I think, be decided by the Full Court.

(1) *I. L. R., III All.*, 382,
(2) *I. L. R., II All.*, 616.
(3) *I. L. R., XXX Cal.*, 660 *F. B.*
(4) 60 *P. R.*, 1897, *F. B.*

Upon the reference the following opinions were recorded by the learned Judges constituting the Full Bench :—

CHATTERJI, J.—This case has been referred to a Full Bench of five Judges in order to consider whether the decision of a previous Full Bench of this Court in *Pandit Rama Kant* v. *Pandit Ragdeo* (1) that an appeal lies from the dismissal of a suit for default under Section 102, Civil Procedure Code, is correct. The question propounded for the present Full Bench by the learned Judgees referring the matter is — *7th May* 1906.

Does an appeal lie against an order of a court dismissing a suit for default under Section 102, Civil Procednre Code ?

The referring order gives several reasons for thinking that the view of the previous Full Bench is erroneous. I shall refer to some of these hereafter, but one of the grounds is that the balance of authority is now against that opinion. I shall therefore begin by a review of the leading authorities bearing on the question before us.

I may mention here that in *Pandit Rama Kant* v. *Pandit Ragdeo* (1) a distinction is drawn between orders dismissing appeals in default and orders dismissing suits. I use the term order in its ordinary grammatical sense and not in the sense which it is used in the Code of Civil Procedure. The object of drawing the distinction evidently was to confine the effect of the decision of the Full Bench to the latter class of cases which alone was before it for adjudication. Mr. Justice Johnstone is of opinion that there is practically no difference between the two classes and authorities relating to both have been discussed and freely relied on in the referring order. The exclusion of appeals dismmissed in default from the scope of the pevious Full Bench decision does not, I think, militate against its correctness on the point actually decided, but on further consideration I am disposed to concede that the line of demarcation between the two classes is practically impalpable and that rulings on appeals dismissed in default may with advantage be referred to in disposing of the question before us. The consequences of non-appearance of the plaintiff or of the appellant are very similar if not identical and the same procedure for explaining the non-appearance and for re-admission is provided for both. The only tangible difference is that in Section 556 the words "for default" occur which are not found in Section 102, but if this has any effect, I should think it makes the position of the defaulting appellant somewhat weaker than that of the defaulting plaintiff, so that

(1) 60 P. R., 1897 F. B.

rulings in favour of the former may safely be applied in favour of the latter.

Coming now to the authorities they may I think be classified thus —

Rulings on Section 102, Civil Procedure Code: *Ablakh and another* v. *Bhagirathi* (1), *Bhagwan Singh* v. *Pari* (2), *Sahib Ditta* v. *Roda* (3), *Gosto Behary* v. *Hari Mohan* (4).

In all these cases it was held that an order of dismissal under Section 102, Civil Procedure Code, is a decree and is appealable as such. *In Bhagwan Singh* v. *Pari* (2), as pointed out in *Pandit Rama Kant* v. *Pandit Ragdeo* (5), page 263, the point is assumed and not actually decided.

In *Sahib Ditta* v. *Roda* (3), the Full Bench case was simply followed.

The contrary view, that the dismissal under Section 102 is not a decree and is not appealable, was taken in the following cases. *Amrito Lal Mukherjee* v. *Ram Chandra Roy* (6), *Gilkinson and another* v. *Subramania Ayyar* (7), *Maharaja Vizianagram* v. *Lingam Krishna Bhupati and others* (8), *and Somayya* v. *Subbamma* (9).

In *Gilkinson's* case:—The Judgment of their Lordships of the Privy Council in *Mussammat Chand Kour* v. *Pertap Singh* (10), was relied on for holding the dismissal of a suit under Section 102, Civil Procedure Code, not to be a decree. In the next case this was followed, while in the last case, which relates to a different question, it is simply stated, mentioning *Gilkinson's* case, that an appeal does not lie.

In the Calcutta case: two rulings under Section 556, to be presently mentioned, were followed.

Rulings on Section 556, *Civil Procedure Code*:—*Muhammad Ali* v. *Hyat* (11), *Mussammat Amna* v. *Mussammat Askari Begam* (12), *Mansab Ali* v. *Nihal Chand* (13), *Jagan Nath Singh* v. *Budhan* (14), *Anwar Ali* v. *Jaffar Ali* (15).

The first Punjab case was one under Act X of 1877 before it was amended by Act XII of 1879 and the definition of decree in it was more comprehensive. Nevertheless it was held that the order of dismissal of an appeal in

(1) *I. L. R., IX All.* 427.
(2) 32 *P. R.*, 1889.
(3) 83 *P. R.*, 1902.
(4) 8 *C. W. N.* 313.
(5) 60 *P. R.*, 1897 *F. B.*
(6) *I. L. R., XXIX Cal.*, 60.
(7) *I. L. R., XXII Mad.*, 221.
(8) 12 *M. L. J.* 473.
(9) *I. L. R., XXVI Mad.*, 599.
(10) *I. L. R., XVI Cal.*, 98.
(11) 113 *P. R*, 1879.
(12) 9 *P. R.*, 1883.
(13) *I. R., XV All.*, 359.
(14) *I. R., XXIII Cal.*, 115.
(15) *I. L. R., XXIII Cal.*, 899.

default should not be treated as a decree and no decree drawn up. The second Punjab case was under Act XIV of 1882 and took the same view.

In *Mansab Ali's* case, which was not exactly one under Section 556, the scope of that section and Section 102 was considered. The Privy Council Judgment in *Mussammat Chand Kour's* case, cited above, was relied on by the party contending for the principle that dismissals under those sections do not amount to decrees. The Court held that such dismissals do not amount to adjudications upon any right claimed or defence set up within the meaning of Section 2 of the Code.

In the Calcutta cases:—The Bombay case *Ram Chandra Pandurang* v. *Madhav Purushottam Naik* (1) was differed from, and it was held that a dismissal under Section 556 did not come within the definition of a decree under the Code.

The contrary view was taken in the following cases :—

Radha Nath Singh v. *Chandi Charan Singh* (2) *Ram Chandra Pandurang* v. *Madhav Purushottam Naik* (1).

The first was a Full Bench Judgment and the two Calcutta cases *Jagan Nath Singh* v. *Budhan* (3) and *Anwar Ali* v. *Jaffar Ali* (4) were over-ruled and the Bombay case approved (vide referring order at p. 663). In the latter case, however, the expression of opinion was given by only one of the two Judges forming the bench.

I have given the leading authorities in the above list. It will be seen therefrom that those bearing directly on Section 102, Civil Procedure Code, are comparatively few. But including the rulings on Section 566, which, in my opinion, ought to be considered in this connection as they generally have been in the past, the present position on the question before us may be roughly summed up thus —

The later decisions of the Allahabad Court and the Madras Court are against the view propounded in *Pandit Rama Kant* v. *Pandit Ragdeo*. The Calcutta Court over-ruling previous decisions to the contrary is now clearly in favour of dismissals of suits, as well as appeals for non-appearance being treated as decrees and therefore appealable. The Bombay Court has not given any clear opinion but it has not up to the present said anything contrary to the view expressed by Mr. Justice Birdwood

(1) *I. L. R., XVI Bom.*, 23.
(2) *I. L. R., XXIII Cal.*, 115.
(3) *I. L. R., XXX Cal.*, 660.
(4) *I. L. R., XXIII Cal.*, 829.

in *Rama Chandra Pandurang* v. *Madhav Purushottam*. Our Court has of course up to the present followed the Full Bench decision in *Pandit Rama Kant's case* but excluding it from consideration there is not I should think any weight of authority against the opinion of the Full Bench. The case of *Mansab Ali* was considered in the Full Bench Judgment and the only later Judgments taking the same view are those of the Madras Court. The two Calcutta Judgments in *Jagan Nath Singh* and *Anwar Ali's cases* are not noticed in the Full Bench Judgment, though they were probably considered, but they and the Judgment in *Amrito Lal Mukherjee's* case (1), have been superseded by the Full Bench Judgment in *Radha Nath Singh's case*, and that given in *Gosto Behary* v. *Hari Mohan Adak* (2). We do not thus stand alone in holding the opinion that an order of dismissal under Section 102, Civil Procedure Code, is a decree, and I am doubtful whether my brother Rattigan is right in saying that the balance of authority is against that view. I do not think it is.

The main point underlying the decision of the question before us is whether or not the order of dismissal is a decree. Most of the authorities decide it in the affirmative or negative without giving any reasons, but in *Mansab Ali's* case and in *Gilkinson's* case the matter is discussed somewhat fully so also in the Calcutta Full Bench Judgment. The two former cases cite the Judgment of their Lordships of the Privy Council in *Mussamat Chand Kour* v. *Partap Singh* as supporting their view, and great stress was laid on it in the argument before us. The process of reasoning is something like this: Their Lordships laid down that a Judgment by default under Section 102, Civil Procedure Code, does not operate as *res Judicata*. But a decree would operate as such, hence their Lordships must have held that a dimissal under the section is not a decree. Not being a decree it is not appealable under Section 540, Civil Procedure Code. It was also pointed out that there can be no adjudication when the law lays down that on plaintiff being found absent the suit must be dismissed. Lastly, it was brought to our notice that the order under Section 102 is not final within the meaning of Explanation IV of Section 13 of the Code of Civil Procedure.

If their Lordships of the Privy Council have laid down by necessary implication in the case cited that the order under Section 102, Civil Procedure Code, is not a decree, the matter is concluded,

(1) *I. L. R., XXIX Cal.*, 60. (2) *VIII Cal., W. N.* 818.

and there can be no further argument. I must therefore examine the Privy Council Judgment before I proceed further.

The material facts in *Mussammat Chand Kour* v. *Partab Singh* are that two of the reversioners of *Mussammat Chand Kaur*, who was a Hindu widow in possession of a widow's estate, brought a suit against her in 1878 for an injunction restraining her from alienating her property which they alleged she intended to do. That suit was dismissed in default of appearance by the plaintiffs. In 1879 the widow made a gift of the property to a third party, and the reversioners in body sued for a declaratory decree invalidating the gift in so far as their reversionary rights were concerned. It was pleaded that the suit was barred by the previous proceedings. Their Lordships over-ruled the contention on the ground that the previous order barred only the two plaintiffs who brought the former suit and not the others from bringing a fresh suit on the same cause of action, and that the cause of action in the new suit was entirely distinct, and did not exist at the time of the former claim. They said:—

"The provisions of Sections 102 and 103 of Act X of 1877 "require therefore to be considered. The dismissal of a suit "in terms of Section 102 was plainly not intended to operate in "favour of the defendant as *res Judicata*. It imposes, however, "when read along with Section 103, a certain disability upon the "plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of "action." * * * * *

Now there is nothing said in the Judgment as to the dismissal under Section 102 not being a decree. The contention that because they say the section is not intended to operate as *res Judicata*, they mean thereby also to say that the dismissal order under it is not a decree, appears to me to be a very far-fetched argument and, at best, an inconclusive one.

In the first place if their Lordships had meant to lay this down there is no reason why they should not have said so, the point being a simple and obvious one, which would have supported their *dictum*. It cannot be lightly assumed that they missed saying it through inadvertence. In the next place we ought to take their remarks as a whole and not pick out a portion apart from the context and base an argument thereon. I cannot refrain from quoting here certain observations of the Lord Chancellor of England in a recent case which have a material bearing in this connection. His Lordship said "that every Judgment must be read as

"applicable to the facts proved or assumed to be proved, since "the generality of the expressions which may be there are not "intended to be expositions of the whole law, but governed and "qualified by the particular facts of the case in which such "expressions are found." (*Quim* v. *Leathan* (1) at p 506.) We need not perhaps go so far as the Lord Chancellor in construing the Judgment of the Privy Council. It is obvious that their Lordships were considering Section 102 and 103 together; in fact they expressly say so and from such consideration, interpreting Section 102, I venture to think that the sentence in which Section 102 alone is mentioned and is said not to be intended to have the effect of *res Judicata* cannot be torn from the context and treated as a construction of that section singly without reference to anything else. The very next sentence contradicts such an argument, for the effect of Section 102 is deduced by comparing and taking it in connection with Section 103. How can it be said that this part of the construction of Section 102 is based upon a consideration of both sections, but that what is said in the previous sentence stands by itself and is based upon a consideration of Section 102 alone? In fact the two sentences taken together contain a complete construction of the section, *viz.*, that it does not operate as *res Judicata*, but precludes a second suit on the same cause of action, and each sentence is incomplete without the other. The fundamental and elementary rule of construction of documents, *viz.*, that it should be read and construed as a whole is violated to my mind if we take the one sentence referring to Section 102 by itself and ignore the following one. I have no doubt in my mind that their Lordships had Section 103 in their minds when they penned the sentence and that their whole opinion was based on a comparison and consideration of both sections. I hold accordingly that their Lordships did not lay down that dismissals under Section 102 are not decrees under the Code of Civil Procedure.

Nor does such a consequence flow necessarily from their Judgment. A decree may not in every case have the full effect of *res Judicata*. For exemple, a man sues for certain property as the son of the last heir and his right is denied and issues are framed. Suppose the case is compromised by giving him a sum of money in lump without admitting his right, and a decree is passed on that compromise. Such a decree would not operate as *res Judicata* by establishing the plaintiff's right as son in future contests with the same defendants. Even if this were not so, the

(1) *L. R. App., Cas* (1901) 495 *at p.* 506.

operation of a decree may be limited by statutory provision and that alone will be the guide in judging of its effects. Here Section 103 has laid down the consequences of a dismissal under Section 102, the decree under the latter section (assuming it to be such *ex-hypothesi*) being one of a very special character. The rejection of a plaint under Section 54, Civil Procedure Code, is another illustration in point. It is a decree but does not operate as *res Judicata* because Section 56 limits its effects.

The whole argument based on the Privy Council Judgment appears thus to me to be untenable.

On the question whether or not a dismissal under Section 102 is an adjudication so as to satisfy the definition of the term decree in Section 2 of the Code, a good deal can be said on both sides. Eminent Judges have held that it is, while others hold that it is not. Speaking for myself, I see no insuperable difficulty in holding such a dismissal to come within the category of an "adjudication." The word *adjudication* is not defined in the Code. In England it means, giving, or pronouncing, judgment or decree (*Wharton's Law Lexicon*); the judgment or decision of a Court (*Sweet's Law Dictionary*); and the term is principally used in Bankruptcy proceedings. In common parlance it may be said to mean a deliberate determination by the judicial power. (Webster). It connotes an exercise of the judicial mind in coming to a decision.

Now according to the contention before us, which I understand the learned referring Judges to favour, the decision of a case in a certain way inflexibly laid down by statute cannot be treated as an adjudication. On plaintiff's failing to appear, his suit must be dismissed, and there is no option left to the Court. But so must it be decreed in whole or in part if defendant admits it in whole or in part. In neither case is any exercise of the judicial mind required. The Court is compelled to record an order provided by the law. I confess I do not see any material distinction between the two cases, or if there is any distinction, it is one in degree and not in kind. In the one case the plaintiff being absent, the Court declares him disentitled to the relief claimed by dismissing the suit, in the other the Court grants the relief claimed to the extent admitted by defendant. There being no room left for the exercise of the judicial mind in either case, there is no impropriety in my opinion, in treating the adjudication as *involved* in the order passed by operation of law. I agree with the majority of the

Judges forming the Full Bench in *Radha Nath Singh's case* (1), that the word *decree* should not receive a narrow construction, and that we should be chary of adopting one that would lead to injustice. I shall advert to this point further on. I treat this Calcutta Judgment as one bearing on the scope of Section 556, Civil Procedure Code, as the language of all the Judges clearly shows, and look upon the reference to the decree drawn up in that case by the learned Chief Justice as merely illustrative of his argument and not as limiting it to that decree.

If the contention is admitted it will have to be conceded that where a suit is partly dismissed in default and partly decreed upon admission, the order under Section 102 will have a twofold character and will be partly a decree and partly not a decree, and that plaintiff will have no right of appeal (as regards the dismissed part) while he or the defendant will have that right as to the portion decreed (on the ground of mistake, etc). This would certainly be an anomaly, though I adn it the difficulty is not *insuperable*. I think a construction that leads to an anomaly is to be avoided unless we are driven to it by the plain language of the enactment. The language here is certainly not plain, and there is much diversity of judicial opinion on the narrow construction sought to be put on the term *decree* by which alone the dismissal under Section 102 can be excluded from the category of decrees. In this conflict of opinion I should be disposed to adopt the more liberal construction, and would adhere to the one adopted in the previous Full Bench Judgment and deprecate any departure from it.

Moreover, it is by no means clear that an adjudication in the sense contended for is not often involved in dismissal orders under Section 102. Take an instance for example in which the plaintiff is not present in person but is represented by a pleader or *mukhtar*, as he is allowed to be in all cases, but those in which his personal attendance is specially required, and the Court holds that the pleader or *mukhtar* is not properly authorized or is disqualified from appearing, and plaintiff is in consequence held not to have appeared, and his suit is dimissed. Here the non-appearance of the plaintiff is itself a matter adjudicated on, and it may be, at the instance, and on the objection, of the defendant, and the dismissal is the result of that adjudication. How can such an order be excluded

(1) *I. L. R., XXX Cal.*, 660.

from the category of decrees ? and if it cannot, is the effect of the contention to be limited to cases in which such questions do not arise ? If so, what is the special merit of a construction that will not apply to the *whole* class of dismissals under Section 102. A case of this kind is mentioned by Mr. Justice Bhoshyam Ayangar in *Somayya* v. *Subbamma* (1).

In *Roebuck* v. *Henderson* (2), the Divisional Judge refused to allow an advocate to represent the appellant before him. In the present case I understand the plaintiff to say that he was quite wrongly held to be in default. Such instances can be multiplied to any extent.

This brings me to the consideration of another point connected with cases of the sort above described. What is the plaintiffs' remedy in such cases if the Court's order excluding the representative is wrong ? It is useless for him to apply for re-admission under Section 103 for *ex hypothesi*, not intending to appear personally and his representative being wrongly prevented from appearing, there is no sufficient cause for his *non-appearance*. His complaint is that he was not in default and that his agent or pleader was wrongly not allowed to appear. It seems to me that his only remedy is by appeal, and if an appeal is not permitted, he is left without any remedy at all, unless possibly a review is allowed, a point not urged or discussed before us and which cannot be regarded as settled.

The argument based on explanation IV of Section 13 also does not appear to be of much force. The order under Section 102 is final as far as the Court passing it is concerned, as it cannot alter it unless an application is made under Section 103 and the objections of the opposite party are heard and the inquiry, if any, necessary to substantiate the grounds of the application is completed and results in the plaintiffs' favour. In the case of decrees generally a review of judgment is the only means by which the Court can interfere with its Judgment. For a decree under 102, Section 103 supplies the procedure under which the Court can set it aside. In fact where explanation 4 speaks of orders, which the Court can set aside without a review it refers to interlocutory orders and not orders disposing of the case by which it is withdrawn from the Court's cognizance. A Court dismissing a suit under Section 102 ceases to exercise jurisdiction over it and is not competent to take cognizance of it again, unless it is moved under Section 103. Further, in a Calcutta case, *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (3),

(1) *I. L. R., XXVI Mad.*, 599. (2) 54 *P. R.*, 1896.
(3) *I. L. R., XXVI Cal.*, 598.

a review was entertained without an application under Section 103. If this is correct, it supports the view I am taking.

Again, that construction is preferable, unless forbidden by the plain language of the statute or by necessary implication from it, which is most consonant to justice and which avoids grave danger of injustice to the litigating public. Now suppose a big firm of bankers or merchants has branches at different stations where it is represented by agents. A large sum of money is due to the members of the firm at one of the branches, and a suit is instituted for its recovery. Though arrangements are made for plaintiff being represented by the agent and by a pleader, it happens that both fail to appear and the claim is dismissed. It might happen that the principals might not know of this order until after the expiry of thirty days and the right to apply under Section 103 has become hopelessly barred. It would lead to grave injustice if an appeal is not permitted, and the plaintiff not allowed the benefit of the elastic provisions of Section 5 of the Limitation Act.

On the other hand, there can be no corresponding harm if an appeal is held to lie. No one can be really injured by the Court of appeal being able to consider the correctness of the lower Court's procedure and of the law applied by it. The utmost that can be urged against it is that an appeal lengthens the proceedings to a certain extent, but this is of no moment whatever when we consider the great injury that may be inflicted on the plaintiff by making Section 102 not appealable. No one can have a vested right to an advantage which entails damage and injustice on his opponent. The illustration given by my brother Johnstone to show the absurdity of giving a right of appeal to a plaintiff, who has been contumaciously absent, does not seem to me, with great deference to him, to be quite apposite. We are here discussing a general rule about the right of cognizance by the Court of appeal. The illustration relates to a point on the merits of a particular appeal. Of course if the plaintiff's absence has been negligent or contumacious, the Appellate Court will dismiss the appeal and uphold the dismissal by the lower Court. But it cannot be laid down that contumacious or negligent plaintiffs shall not have the right of appeal, and, if they do not exhaust the whole class of plaintiffs against whom orders under Section 102 can be passed, how can the argument hold? Besides, no plaintiff will appeal admitting his own contumacy or negligence, and there will be no means of finding out his delinquencies until the Appellate Court goes into the merits, which it can do only after entertaining the appeal.

I need not say much on the history of the Section. Under Act VIII of 1859, dismissals of suits for default of plaintiff's appearance and *ex parte* decree were expressly made non-appealable. In Act X of 1877 there was no corresponding provision forbidding appeals and so also in Act XIV of 1882, and the High Courts began to hold conflicting opinions as to the right of appeal in both classes of cases. For example the Allahabad Court held that no appeal lay from an *ex parte* decree, *Lall Singh and others* v. *Kunjin* (1). Our Court, however, steadily ruled that *ex parte* decrees were appealable. *Vide*, *Radha Prashad* v. *Hirde* (2), *Chuni Lal* v. *Bodar Mal* (3), and *Court of Wards* v. *Fatteh Singh* (4). The Allahabad Full Bench Judgment was over-ruled by another Full Bench, *Adjodhia Pershad* v. *Balmokand* (5). The matter was settled by Act VII of 1888 adding the last clause to Section 540, but the conflict of opinion in respect of Sections 102 and 556 remains unsettled by the Legislative up to the present day.

The abrogation in the new Procedure Codes of the prohibition against appeals in such cases existing in Act VIII of 1859 seems to tell strongly in favour of the view that orders under Section 102 are appealable, which is not sufficiently rebutted by the Legislative not having dealt with this class of case as it has with *ex parte* decrees, it not having at the same time declared them to be non-appealable. The matter is complicated by numerous considerations arising from amendments of various sections from time to time, but at best, the argument does not help those who allege the non-appealable character of dismissals under Section 102.

Reference may here be made to orders of a similar nature to those under Section 102 being held to be appealable, *viz.*, dismissals under Section 136 and Section 381, the provisions of which are analogous. It has been held that they are decrees and appealable. See *Khushali Mal* v. *Pala Mal* (6), and *Williams* v. *Brown* (7). The argument is not conclusive, but goes some way to support the view that orders of dismissal under Section 102, Civil Procedure Code, are decrees and capable of appeal. See in particular the construction of the word decree by Petheram, C.J., in the case last mentioned.

To sum up: The point before us is one of pure procedure. The Judgment of the Full Bench in *Pandit Rama Kant* v. *Pandit*

(1) *I. L. R., IV All.*, 387, *F. B.*
(2) 60 *P. R.*, 1883.
(3) 2 *P. R.*, 1886.
(4) 75 *P. R.*, 1881.
(5) *I. L. R., VIII All.*, 354.
(6) 43 *P. R.*, 1898.
(7) *I. L. R., VIII All.*, 108.

Rgdeo (1), has settled the point for this Province for the last ten years, and no wrong or injury or inconvenience to the public is shown to have resulted therefrom. I should think therefore that the ruling ought to be upheld, unless it is shown to be flagrantly wrong or clearly opposed to the language of the Code, or the intentions of the Legislature. I have examined the main arguments for the opposite view with care, and in my opinion, they fail to convince me that the Full Bench Judgment is erroneous.

Making the utmost allowance for the arguments, I hold that they are inconclusive, and the best proof of this is the conflict of judicial opinion on the question. Under these circumstances I think we should maintain that Judgement which has for the last ten years fixed the law on the subject. There is no knowing if we set it aside now on grounds that have been urged before us, that we may not have to reconsider the point again if other Judges think there are flaws in our reasoning and prefer the ruling of the old Full Bench. *Stare decisis* is ordinarily a good principle, and I can think of no case where we can act upon it with more propriety and advantage than in the present instance. Perhaps it should not also be forgotten that a new Code of Civil Procedure is under the consideration of the Legislature.

I accordingly adhere to the view I expressed in *Rama Kant's* case and reply on the point referred in the affirmative.

14th May 1906. REID, C.J.—I concur with my brother Chatterji. The Judgment reported as *Mansab Ali* v. *Nihal Chand* (2), is of Judges for whose Judgments I have great respect, but I concur in my brother Chatterji's view of their interpretation of the Judgment of their Lordships of the Privy Council in *Chand Kaur* v. *Partab Singh* (3). Their Lordships considered Sections 102 and 103 of the Code together, holding that the dismissal of a suit in terms of Section 102 was plainly not intended to operate in favour of the defendant as *res judicata*, but that it imposed, when read along with Section 103, a certain disability upon the plaintiff whose suit was dismissed, precluding him from bringing a fresh suit in respect of the same cause of action, and I concur in the reasons recorded by my brother Chatterji for holding that their Lordships' Judgment does not support the contention that an order of dismissal under Section 102 is not a decree. *Gilkinson* v. *Subramania Ayyar* (4), merely followed *Mansab Ali's* case. A plaintiff has to open his case and *protanto* the burden is upon him. If he fails to discharge this burden, whether from absence

(1) 60 *P. R.*, 1897, *F. B.*
(2) *I. L. R.*, *XVI Cal.*, 98, *P. C.*
(3) *I. L. R.*, *XV All.*, 359.
(4) *I. L. R.*, *XXII Mad* 221.

of evidence or from personal absence, his suit is dismissed and there is an adjudication that he has failed to establish his claim. In *Radha Nath Sing's* case Prinsep, J., recorded no reasons for dissenting on this point from the rest of the Full Bench, who adopted the reasons recorded by Maclean, C.J., in the referring order. My brother Chatterji has, moreover, recorded weighty reasons, in which I concur, for not overruling *Rama Kant's* case, even if it be held that the balance of authority either way is even or slightly against that ruling. To upset Full Bench decisions on slight differences of opinion is, where no general injustice or hardship is established, in my opinion, a practice to be discouraged. Finality and certainty are desirable in the interests of the public.

For these reasons my answer to the question referred is in the affirmative.

ROBERTSON, J.—I confess to having felt very great doubts as to the correct answer to the question referred to the Full Bench; but for my respect for the principle of *stare decisis* my difficulties might have been somewhat less. 18*th May* 1906.

The question referred is—

Does an appeal lie against an order of a Court dismissing a suit for default under Section 102, Civil Procedure Code.

Now clearly if this is an order, no appeal lies. The question is, can it be held to be a decree?

A decree is the "formal expression of an adjudication upon "any right claimed or defence set up, in a Civil Court, where "such adjudication, as far as regards the Court expressing it, "decides the suit or appeal."

Now after giving the matter my most careful consideration, I am unable to come to the conclusion that a dismissal under Section 102 is in any way an adjudication upon any right or defence. With all deference to the views expressed in *Radha Nath Singh* v. *Chandi Charan Singh* (1), if those views were intended to apply generally to dismissals under Section 102, I should be unable to concur with the views expressed by the learned Chief Justice in his referring order at page 663. It has been argued, however, and I think with much force, that the views therein expressed refer to the particular case before the Court only which was one under Section 556, and in which the order passed went beyond a mere dismissal of the appeal in default; *inter alia* in that it decreed interest on the costs against the appellant.

(1) *I. L. R., XXX Cal.*, 660.

It appears to me that so far from a dismissal under Section 102 being an adjudication, the one thing which is absolutely forbidden by the section is any attempt at adjudication. The entire evidence might be on the record, the case for the plaintiff might be overwhelmingly strong, yet if the plaintiff is not present the Court is absolutely forbidden to express, formally or otherwise, any adjudication upon any right claimed, even though the existence of such right may have been proved to the hilt. The Court can and must do one thing and one thing only, it must dismiss the suit without adjudication. Further, the order so passed does not as far as the Court passing it is concerned decide the suit, and here I must differ from my learned brother Chatterji. For Section 103 is equally peremptory with Section 102. Under Section 102 if the plaintiff is absent, it does not matter why, the suit must be dismissed except in so far as the defendant, if present chooses to admit the claim, in which case only shall a decree be passed against him. This latter is of course clearly a decree and therefore appealable, but that is in no way material to the point in issue. But under Section 103 we have a procedure laid down with equal peremptoriness.

If it is proved that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court *shall* set aside the dismissal (observe the word *dismissal*, not *decree* is used) and shall appoint a day for proceeding with the suit. In face of the provision of Section 103 can it be said that a dismissal under Section 102 is "final" within the meaning of Explanation IV to Section 13, Civil Procedure Code?

Now an order under Section 103 refusing to restore a case to the list is not a decree, but an order, and is appealable under Section 588 (8). Now in what sense is an order of dismissal passed under Section 102 any more an adjudication of a right, than an order passed under Section 103? It is, if anything, rather less so, for it is *ex parte*, whereas under Section 103 the plaintiff at least may be present. But clearly a refusal to restore a case dismissed under Section 103 is not a decree.

But further, if a dismissal under Section 102 is a decree, why should it not act as *res judicata*, and why is it necessary to say in Section 103, when a suit has been wholly or partially dismissed under Section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action? If the dismissal under Section 102 is a decree, surely these words Section 103 are surplusage.

In regard to this question of *res judicata* their Lordships of the Privy Council made some observations in *Chand Kaur* v. *Gopal Singh* (1). They say: "The provisions of Sections 102 and 103 "of Act X of 1877 remain therefore to be considered. The "dismissal of a suit under Section 102 was plainly not intended "to operate in favour of the defendants as *res judicata*. It "imposes, however, when read along with Section 103, a certain "disability upon the plaintiff, whose suit has been dismissed. "He is thereby precluded from bringing a fresh suit in respect "of the same cause of action." The only meaning I can place upon these words is that a dismissal under Section 102 taken by itself is clearly not intended to operate by way of *res judicata*, but that when we take 103 along with it, we find that though clearly not intended to operate as *res judicata*, it does impose a certain restriction upon the plaintiff, whose suit has been so dismissed in regard to the same cause of action. That is to say that, but for Section 103 it would impose no restriction at all, *ergo* it is argued their Lordships cannot regard a dismissal under Section 102 as a decree. Without going so far as to say that their Lordships intended to lay down that an order of dismissal under Section 102 is not a decree, I think there is much force in the arguments put forward by the learned counsel for the respondent in support of that contention and that the deductions drawn is not an unfair one.

Section 103, it is argued on the one hand by providing an easy and inexpensive remedy for a wrong dismissal under Section 102, obviates the necessity of an appeal, and all possibility of injustice is precluded by allowing an appeal from a refusal to restore a case to the list under Section 103. On the other side it is argued that Section 103 merely provides an additional summary remedy, leaving the ordinary remedy unaffected.

I do not propose to go through all the conflicting authorities quoted by my brother Chatterji, but would like to say that I regard a dismissal under Section 102 and a dismissal under Section 556 as standing on a different footing.

The wording of the corresponding sections is different. In Section 102 and Section 103 the terms are equally peremptory. If the plaintiff is absent, his suit shall be dismissed—Section 102; if he applies under Section 103 and shows sufficient cause for his absence, the Court *shall* set aside the order of dismissal. Under Section 556 if the appellant does not attend, his appeal shall be dismissed in default. But under Section 558 if he

(1) *I. L. R., XVI Cal.*, 98.

proves that he was prevented from attending by any sufficient cause, the Court *may* re-admit the appeal. In Section 103 we have the word "shall," but in Section 558 discretion is given and the word is "may".

Further, there is this great distinction that in the one case there is a complete record and an adjudication and without question a decree. In the other there is only a dismissal in default and there is no appeal under Section 588 from an order under Section 568, as there is from an order under Section 103. The two things stand upon a different footing. When an appeal is dismissed in default, the decree of the first Court subsists and becomes the decree of the second Court, thus entirely differentiating this case from a dismissal under Section 102 where there is no subsisting decree at all.

It is argued by the learned counsel for the respondent that the matter is one which has already been decided by a Full Bench of the Court and that the principle of *stare decisis* should be applied.

The previous Judgment of this Court in *Pandit Rama Kant* v. *Pandit Ragdeo* (1), does not, however, go very fully into a discussion of the point involved. Indeed, the Judgment of the Full Bench on this point occupies only 12 lines and differs from the view already expressed by two of the Judges forming the Full Bench in their referring order. In view, therefore, of the opinions expressed by my brothers Rattigan and Johnstone, I feel that I am not justified in accepting that ruling as final and in declining to consider the case *de novo*.

My brother Chatterji having fully dealt with the authorities I need not go over them again. I will merely remark that for reasons given above, I hold authorities that a dismissal in default under Section 556 is a decree are not entirely in point. That this was also the view of the Calcutta Court, receives some support from the fact that in reporting the decision of the Calcutta Full Bench in *Radha Nath Singh* v. *Chandi Charan Singh* (2) the Judgments in *Jagan Nath Singh* v. *Budhan* (3) and *Anwar Ali* v. *Jafir Ali* (4) are mentioned as being overruled, whereas the ruling in *Amrita Lal Mukerji* v. *Ram Chandra Roy* (5) in which it is held that an order dismissing a suit under Section 102 is not a decree, was not so mentioned as overruled although brought to the notice of the Full Bench. As regards

(1) 60 P. R., 1897 F. B.
(2) I. L. R., XXX Cal., 660.
(3) I. L. R., XXIII Cal., 115.
(4) I. L. R., XXIII Cal., 827.
(5) I. L. R., XXIX Cal., 60.

Section 102 we have the Full Bench ruling of this Court. *Pandit Rama Kant* v. *Pandit Rajdeo* (1), and the ruling in *Ablukh and another* v. *Bhagirathi* (2) by the Allahbad High Court to the effect that an order of dismissal under Section 102 is a decree. On the other side we have the Judgment in *Amrita Lal Mukerjee* v. *Ram Chandar Roy* (3) and a series of Rulings of the Madras Court following *Gilkinson and another* v. *Subromania Ayyar* (4). This was followed in *Somayya* v. *Subama* (5) and in *Maharaja of Vizianagram* v. *Lingam Krishna Bhupati and others* (6). A similar view was taken in *Mansab Ali* v. *Nihal Chand* (7), by the Allahbad High Court, though in that case the dismissal had been under the Letters Patent and not under Section 102. The proper interpretation of their Lordships of the Privy Council's judgment in *Chand Kaur* v *Partab Singh* (8), is discussed.

The learned Judges of the Allahbad Court say; "Indeed it "would necessarily follow from the two decisions of their Lord- "ships of the Privy Council to which we have referred that "an order dismissing a suit or appeal for default could not be "treated as a formal expression of an adjudication upon any "right or defence set up." The second ruling of the Privy Council referred to was stated to be to the same effect as that in *Chand Kuar* v. *Partab Singh*. With the reasoning of the Judges of the Allahabad Court in *Mansab Ali's case* I concur. This Judgment has already run to considerably greater length than I intended. I will not recapitulate, but I hold that an appeal does not lie from an order under section 102, Civil Procedure Code, dismissing a suit in default, because, *inter alia*, such an order, though it may be an adjudication upon the question whether the plaintiff was or was not present, the only point upon which the Court was allowed by law to adjudicate, it is not on expression upon any right claimed or defence set up. Such adjudication being expressly forbidden by law in the section itself.

For the reasons given above, I hold that the question referred should be answered in the negative.

JOHNSTONE, J.—I have little to add to the views I expressed in the referring order. The question relates to Section 102, Civil 22*nd May* 1906.

(1) 60 *P. R.*, 1897 *F. B.*
(2) *I. L. R.*, *IX All*, 427.
(3) *I. L. R.*, *XXIX Cal.*, 60.
(4) *I. L. R.*, *XXII Mad.*, 321.
(5) *I. L. R.*, *XXVI Mad.*, 601.
(6) 12 *Mad.. L. J. Rep.* 473.
(7) *I. L. R.*, *XV All.*, 359.
(8) *I. L. R.*, *XVI Cal.*, 98.

Procedure Code, and not to Section 556; and though I am still disposed on the whole to treat the sections as being on the same footing, it is not necessary for me to insist upon this. I approve, if I may venture to say so, of the manner in which my brother Rattigan has elucidated certain points in his referring order, and I have been much confirmed in my views by the learned Judgment of my brother Robertson.

I have a great respect for the principle *stare decisis*; but in my opinion the present case is of too important a nature to warrant our letting a decision stand which, in my humble opinion, is unsound. I am unable to concur in the suggestion that no harm is done by allowing an appeal where, by law properly interpreted, no appeal lies. In my opinion the law as contained in Section 103 and Section 588, Civil Procedure Code, provides ample safeguards that no injustice will be done, and to allow an unnecessary appeal as well against orders under Section 102, Civil Procedure Code, in a litigious Province like the Punjab is in itself an injury to the public.

Great as is my respect for the opinions of my brother Chatterji, especially in connection with questions of procedure, I find myself unable to agree with him in his discussion of the definition of "decree" in Section 2, Civil Procedure Code. No doubt "adjudication" has the meaning or meanings which he attributes to it; but the words in the definition are "adjudication *upon any right claimed or defence set up.*" A plaintiff claims Rs. 500 on a book debt against a defendant, but defaults under Section 102, Civil Procedure Code, and the suit is dismissed. I am unable to see how there is here any adjudication upon the right claimed, that is, how it can be said that the Court has decided whether plaintiff is entitled to Rs. 500. The Court merely rules, as it has to rule under the section, that it refuses to adjudicate, that is, it declines to help plaintiff or to say whether he is entitled to the money or not.

Nor am I at all in accord with my brother Chatterji in his minimising of the importance of the ruling of the Privy Council in *Mussammat Chand Kaur* v. *Partab Singh*. To my mind the decision that an order under Section 102, Civil Procedure Code, does not operate as *res judicata*, coupled with the first sentence of Section 108, Civil Procedure Code, is nearly conclusive on the question whether an order of dismissal under Section 102 is a decree or not. I am unable to see the force of the illustrations relied upon by my learned brother of cases where even a decree may not act as *res judicata*.

My idea has always been that a party can only appeal when he is able to *assert* that the order appealed against is wrong. How can a plaintiff whose suit has been dismissed under Section 102, he being absent, be heard to say that the order was wrong and should not have been passed? If he was absent, the law gave the Court no option—it was bound to dismiss the suit. That Court can, of course, reconsider the order, if it is moved thereto under Section 103; but the order under Section 102 is, on the facts before the Court on the day of hearing, absolutely sound.

I would, in short, answer the question referred by saying that an order of dismissal under Section 102, Civil Procedure Code, is not a decree and is not appealable.

RATTIGAN, J.—I agree with my brothers Robertson and Johnstone that the question referred to the Full Bench must be answered in the negative, and I also agree with the reasoning, by which my brothers arrive at that conclusion. As, however, we are differing not only from the ruling of a previous Full Bench upon this same question, but also from the opinions expressed upon this reference by the learned Chief Judge and my brother Chatterji, I think it only meet and proper that even at the risk of repetition I also should state the grounds upon which I base my opinion. *2nd June* 1906.

The question is whether an appeal lies from an order dismissing a suit in default under Section 102, Civil Procedure Code. Now, it is an undoubted proposition of law (for which there is, the very highest authority—*see Mumakshi Naidoo's case* (1) that a right of appeal in a matter which comes under the consideration of a Judge cannot be assumed; such right must be given by statute or by some authority equivalent to a statute. We must therefore see whether the Code of Civil Procedure, which is the only relevant authority in the present case, gives a right of appeal from such an order, and for this purpose we have to refer to the two sections of the Code which make provisions for appeals. These sections are Section 588, under which certain specified "orders" as defined in Section 2, are expressly made appealable, and Section 540, which in general terms provides that "unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the *decrees* or any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts". The section

(1) *L. R.* 14, *I. A.*, 165.

also provides that "an appeal may lie under this section from an original decree passed *ex parte*". Orders under Section 102 (if they be orders as defined in Section 2) are not referred to in Section 588, and, therefore, in order to see whether an appeal lies from an order dismissing a suit in default under the former section, we have to consider whether such an order is a "decree" as defined in Section 2. Is it, in other words, "the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court," which said adjudication, so far as regards the Court expressing it, decides the suit or appeal." In my opinion, it is not and cannot be regarded as such an adjudication. A suit may be dismissed under Section 102 at any stage of the proceedings, it may be dismissed even before issues are framed, and it may be dismissed at the very last hearing when the record is practically complete and the case is ripe for decision. But at whatever stage the dismissal takes place, the Court cannot adjudicate upon either the right claimed or the defence set up. It *must* dismiss the suit, no matter what the merits of plaintiffs' claim may be. In *Zainab Begam* v. *Munawar Hussain* (1), the Court (Brodhurst and Tyrrell, JJ.) observed: "On the "day fixed for hearing, and on adjourned dates, the appellant did "not attend in person or by pleader. The subordinate Judge "then had but one legal course open to him to dismiss the appeal "in default (Section 556). It was illegal to try the appeals on "the merits. The Judgment given in this way is a nullity "and must be cancelled." I venture, with all respect, to think that this decision is correct and that its correctness is unimpeachable. If, therefore, a Court is bound, when a plaintiff fails to appear on the date of hearing, to dismiss the suit and cannot give any decision upon the merits, how can it be said in reason, that the order dismissing the suit is *per se* an adjudication upon the right claimed, in the sense that it decides that the plaintiff is disentitled to the relief claimed? Accepting the definition of "adjudication" given by Webster and quoted by my brother Chatterji, *viz.*, "a deliberate determination by the judicial power" and assuming that "it connotes the exercise of the judicial mind in coming to a decision," what right claimed or defence set up is thus deliberately determined after the exercise of its judicial mind, when the Court without any reference whatever to the rights claimed or the defence set up, is compelled to dismiss the suit. Simply and solely because plaintiff is not present? In such case the Court, if it can be said to deliberately determine anything at all or to in any way exercise its judicial mind, deliberately determines merely that

(1) *I. L. R., VIII All.*, 277.

plaintiff is absent. But how can it be said that an adjudication as to the presence or absence of plaintiff is an adjudication upon the right claimed by plaintiff or upon the defence set up by the defendant? Moreover, if by dismissing the suit in default, the Court is to be regarded as adjudicating upon the right claimed by plaintiff and must be assumed to decide that plaintiff is disentitled to the relief sought, the adjudication must necessarily be considered as going to the whole of plaintiff's case and as being a complete adjudication both as regards the claim preferred and the defence set up. If, for example, there are ten issues in the case it must, I presume, be taken that all ten issues are decided against plaintiff, or is an Appellate Court, when the case comes, before it entitled to pick and choose and to say that such and such an issue must alone be regarded as having been adjudicated upon? Could the Legislature have possibly intended to compel a Court against its own clear convictions to decide an issue aginst plaintiff on the merits simply because he appears to be absent on a particular date? For example, the defendant pleads that the suit is barred by time, or that the Court has no jurisdiction to entertain the suit. At the second hearing issues having been fixed at the first hearing, the plaintiff is absent and the suit is dismissed in default. The Court is itself satisfied that defendants' pleas are perfectly untenable, but is it to be taken to have decided those pleas in favour of defendant? If not, to what extent is the order of dismissal of an adjudication upon the right claimed or the defence set up? In *Bhagwan Singh* v. *Pari* (1), Plowden, J., in a decision which I understand to meet with the approval of my brother Chatterji, observed as follows:—

"As I understand the Code, a plaintiff who appeals against a "decree made under Section 102 can only appeal as in the case of "a decree made in the presence of both parties, on the ground "that the lower Court has erroneously decided some question "of law or fact, or that its procedure has been irregular and not "in accordance with law.....Further, it seems to me clear that "the plaintiff had no right to impeach the decree merely on the "ground that he had a good excuse for not being present on the "date fixed in the lower Court. The proper, and it seems to me "the only, way in which a decree can be impugned on this ground "is by a proceeding under Section 103. A proceeding under that "section imputes no error to the Court in making the decree, it "alleges new matter as ground why it should be set aside. On "any other view the provisions of the law of limitation might "be overridden. A person not applying under Section 103 "within 30 days is absolutely barred from applying under that

(1) 82 P. R., 1889.

"section, the period not being extendible. But if he may appeal "against the decree on the same ground, on which he may apply "under Section 103, the period is virtually extendible, when the "period for appeal is longer than 30 days, or when he can show "cause for not appealing within 30 days, if that is the period "fixed for appeal. It seems to me that it is precisely because an "explanation, however satisfactory, of the absence of a party is "irrelevant and is inadmissible as a ground of appeal that Section "103 and Section 108 have been enacted for plaintiffs and defend-"ants, respectively, and that an appeal is granted under Section "588 from orders adverse to applicants under these sections." It is impossible not to feel the force of these remarks. If an appeal lies from an order dismissing a suit in default, the scope of that appeal must be restricted to matters other than those for which Section 103 makes provision. In other words, the plaintiff can appeal merely upon the merits of his claim and of the defence set up, or upon the ground that the procedure of the Court was not in accordance with law. Indeed, unless I misunderstand my brother Chatterji, the plaintiff must appeal, if he appeals at all, upon the whole case, for the order of dismissal is an adjudication that he is not entitled to relief at all. But if this is so, upon what materials is the Appellate Court (which upon the assumption that an appeal lies to it, entertains the whole case) to come to a decision in those cases where the order of dismissal has been passed at a very early stage, *e.g.*, before any evidence is given in the case? And how is the plaintiff-appellant to comply with the requirements of Section 541, Civil Procedure Code? What are the objections to the decree appealed against which he is to set forth concisely and under distinct heads in his memorandum of appeal? He could only urge, as far as I can see, that the decree was wrong, he could not possibly enter into details, for the obvious reason that neither the Judgment nor the decree of the lower Court give any such. Then, in the majority of cases would the appeal be of the slightest use to him? Assume that the order of dismissal is a decree and that it decides that the plaintiff is not entitled to the relief claimed because he is not present to prosecute his case. In every case when the plaintiff was actually absent, the decree would be absolutely correct and unimpeachable, and the Appellate Court would be bound, I presume, to uphold it. It could not consider the question whether plaintiff's explanation of his absence was, reasonable or satisfactory, for, as pointed out by Sir M. Plowden that would be a wholly irrelevant question in an appeal from an order under Section 102. The only question for the Appellate

Court would be, whether or not plaintiff was actually in default. If he was, the Appellate Court would be as much bound to dismiss the plaintiff's appeal as the first Court was bound to dismiss the suit. The only case then in which an appeal would be of the slightest use to a plaintiff would be when he was actually present, though the Court had found him to be absent and such cases must, I conceive, be of very rare occurrence. For them an application for review or an application to the High Court for revision would seem to be sufficient remedy. But however this may be, the difficulties of holding that an order dismissing a suit in default is a decree as defined in the Code, when it is obvious that the Court at the time of passing such order does not, and cannot, adjudicate, except under what I would, with every respect, call a very strained construction of the term, upon the rights claimed, or the defences set up, are so insuperable that for this reason alone I would hold that such orders cannot be regarded as decrees. But in addition to this, we have the decision of their Lordships of the Privy Council to the effect that an order under Section 102 cannot operate as *res-judicata* (*Chand Kaur* v. *Partab Singh* (1)). This case has been elaborately discussed by my brothers Chatterji and Robertson, and it is unnecessary for me to say more than that the construction put upon it by my brother Robertson is the one which commends itself to me. This is also the construction which was adopted in *Mansab Ali* v. *Nihal Chand* (2), and *Gilkinson* v. *Subramania Ayyar* (3). It seems to me upon principle, and quite apart from authority, that if an order dismissing a suit in default is a decree, if it adjudicates upon the right claimed by the plaintiff, such adjudication being, so far as the Court expressing it is concerned, a final decision of the suit, that order must *ipso facto* operate as *res judicata*. If it does, then for what purpose were the opening words of Section 103 inserted in that section? Upon this assumption, they would be absolutely surplusages.

Having thus endeavoured to explain, as briefly as possible, the general ground upon which I hold that an order dismissing a suit under Section 102 is not a decree, I proceed to consider the chief objections urged by my brother Chatterji against that view. In the first place it is said that the balance of judicial authority is really in support of the contrary view. I confess that I do not think so. On the contrary, I still think, as I thought when referring the question to the Full Bench, that the preponderance of authority supports the view which I myself venture to

(1) *I. L. R., XVI Cal.*, 98 *P. C.*; *L. R., XV I. A.* 156. (2) *I. L. R., XV All.*, 359.
(3) *I. L. R., XXII Mad.*, 221.

entertain. Before referring to these authorities, I must repeat that I consider that " there is (in the words of the Full Bench Judgment reported as *Pandit Rama Kant* v. *Pandit Ragdeo*) an essential distinction between an order dismissing an appeal for default and one disposing of an original suit in accordance with the provisions of Section 102, Civil Procedure Code." Whether an order under Section 556 is a decree or not, is not a question before us, and upon it I would propose to reserve my opinion until the question comes up for determination. But while I do not think that an order under Section 102 can by any possibility fall under the definition of a decree, I am not, as at present advised, prepared to say that an order under Section 556, which by dismissing an appeal in default confirms the decree appealed against, is not in itself a decree. But if orders under Section 556 are not decrees, *à fortiori* orders under Section 102 are not, and consequently while these decisions which lay it down that appeals do not lie from orders under Section 556 can legitimately be regarded as supporting the view which I take regarding orders under Section 102 ; it does not at all follow that decisions which lay it down that orders under Section 556 are appealable as decrees can be claimed as supporting the opposite view. With these remarks I proceed to detail the authorities.

The rulings which decide that orders dismissing a suit or appeal in default are decrees are the following :—

Punjab cases—

Pandit Rama Kant v. *Pandit Ragdeo* (1).

Bhagwan Singh v. *Pari* (2), *Sabib Ditta* v. *Roda* (3)—following *Pandit Rama Kant's* case.

Allahabad case—

Ablakh v. *Bhagirathi* (4). (It was doubted whether the order was really one under Section 102).

Calcutta cases—

Radha Nath Singh v. *Chandi Charan Singh* (5), *Gosto Behary Sardar* v. *Hari Mohan* (6)—following the Full Bench decision.

Bombay case —

Ram Chandra Pandurang v. *Madhar Purushottam* (7).

(1) 60 *P. R.*, 1897, *F. B.* ( ) *I. L. R.*, *IX All.*, 427.
(2) 32 *P. R.*, 1889. (5) *I. L. R.*, 30 *All.*, 660, *F. B.*
(3) 83 *P. R.*, 1902. (6) 8 *Cal.*, *W. N.*, 313.
(7) *I. L. R.*, *XVI Bom.*, 26.

As regards the above cases I would observe (1) that in *Bhagwan Singh's* case, a single Judge ruling, the learned Judge remarked that "according to rulings of some of the Hight Courts an appeal lay from the *ex parte* decree and no objection has been taken to the decree made thereon by the defendant."

The question whether the orders under Section 102 was a decree, was thus not argued before the learned Judge, and it was assumed that it was a decree; (2) *Sahibditta's case* merely followed the Full Bench ruling in *Rama Kant's case*; (3) in *Rama kant's case* the ultimate decision of the Full Bench is opposed to the previous views of two of the then learned Judges who constituted the Full Bench; (4) in *Ablakh's case* a doubt is expressed whether the order then under appeal was passed under Section 102, if it was not, the opinions expressed by the learned Judges would necessarily be merely *obiter dicta*; (5) *Radhu Nath Singh's case*, I agree with my brother Robertson in the opinion that strictly speaking the Full Bench gave its decision merely upon the particular decree then before the learned Judges, and there is nothing in any of the Judgments to warrant the assertion made in the head-note to the effect that *Jagarnath Singh's case* (1), and *Anwar Ali's case* (2), over-ruled; (6) *Gosto Behary's case* purports to follow the Full Bench ruling in *Radha Nath Singh*; and (7) in *Ram Chandra Pandurang's case* Birdwood, J. expressed an opinion (which was admittedly *obiter*) to the effect that an order under Section 556 was a decree.

The cases *per contra* are as follows:—

Punjab—

Mussammat Amna v. *Askari Begam* (1), *Muhammad Ali* v. *Hyat* (4).

Allahabad—

Mansab Ali v. *Nihal Chand* (8).

Madras—

Gilkinson v. *Subramania Ayyar* (6), *Somayya* v. *Subbamma* (7). *Maharaja Vizianagram* v. *Lingam Krishna* (8).

Calcutta—

Jagarnath Singh v. *Budhan* (9), *Anwar Ali* v. *Jaffer Ali* (10), and *Amrita Lal Mukerjee* v. *Ram Chandra Roy* (11).

(1) *I. L. R., XXIII Cal.*, 115.
(2) *I. L. R., XXIII Cal.*, 827.
(3) 9 *P. R.*, 1883.
(4) 79 *P. R.*, 1890.
(5) *I. L. R., XV All.*, 359.
(6) *I. L. R., XXII Mad.*, 231.
(7) *I. L. R., XXVI Mad.*, 599.
(8) 12 *Mad., L. J.* 473.
(9) *I. L. R., XXIII Cal.*, 115.
(10) *I. L. R., XXIII Cal.*, 837.
(11) *I. L. R., XXIX Cal.*, 60.

Taking then the cases as a whole, I think I am justified in adhering to my opinion that the weight of authority is really against the view adopted in *Pandit Rama Kant's* case.

The next point made by my brother Chatterji is in connection with the Judgment of their Lordships of the Privy Council in *Mussammat Chand Kaur's case*. It is urged that their Lordships do not in express terms state that an order under Section 102 is not a decree, and in the second place that when they decided that an order under Section 102 did not operate as *res judicata*, their decision was based upon a consideration of Section 103 no less than of Section 102. I confess I cannot understand how any inference can be drawn from the omission on the part of their Lordships to state that the order under Section 102 was not a decree. It probably seemed to them that it was quite sufficient for the purposes of that case to decide that "the dismissal of a suit in terms of Section 102 was plainly not intended to operate in favour of the defendant as *res judicata*." It was not necessary for their Lordships to add in so many words that an order under Section 102 was not a decree. And I am also unable to understand how it can be maintained that their Lordships intended to decide that it was only by reason of Section 103 that it could be held that an order under Section 102 could not operate as *res judicata*. They say distinctly that an order under Section 102 was never intended to operate as *res judicata*. Having said this, they then, in another sentence, proceed to point out that, though an order of the kind cannot operate as *res judicata*, it does, in continuation with Section 103, preclude the plaintiff from bringing a fresh suit upon the same cause of action. The very word "however" in the third sentence is, I venture to think, fatal to the construction which my brother Chatterji would put on their Lordships' Judgment.

It is next contended that it is most anomalous that while an order dismissing a suit in default is not a decree, and therefore not appealable, an order under the same section partly or wholly decreeing a suit upon admission is a decree and appealable. Why, it is asked, if the "decision of a case in a certain way inflexibly laid down by statute can not be treated as an adjudication" should an order under Section 102 wholly or partly decree in a suit upon admission be treated as a decree? The Court in such cases is compelled to record an order provided by the law and there is no exercise of the judicial mind. The answer to this objection appears to me to be obvious, and to be found in the very language of the section.

The Legislature has expressly declared that in every case when the plaintiff is absent his suit *shall* be dismissed, unless the defendant admits the claim in whole or in part. If the defendant does so admit the claim, the Court is bound to pass a decree in accordance with the admission, and as the Legislature has expressly enacted that a decree shall be made in such cases, it is scarcely profitable to discuss the question whether such an order can in truth be regarded as an adjudication upon the right claimed. Had the Legislature declared that in the event of plaintiff's absence, defendant not admitting any part of the claim, the Court shall pass a decree dismissing the suit, the present discussion would have been equally unnecessary. It may be an anomaly that in a case when the suit is partly dismissed and partly decreed upon admission, an appeal should lie in respect of the part decreed and not in respect of the part dismissed, but for this anomaly (if it be such) the Courts are not responsible.

But (it is said) an adjudication in the sense contended for, is often involved in dismissal orders under Section 102. For instance, the non-appearance or alleged non-appearance of the plaintiff may have to be adjudicated upon, and this possibly at the instance of defendant. No doubt such an adjudication may be necessary at times, but the order would not thereby become a decree unless the adjudication is in respect of the right claimed or the defence set up, and finally decides the suit. Personally I cannot regard it as such.

It is next suggested by my brother Chatterji that injustice and hardship will often result if it be held that an order of dismissal in default is not appealable, whereas there can be no corresponding harm if an appeal is held to lie.

For my own part, I do not take such a pessimistice view as does my brother, nor do I anticipate that any appreciable injustice or hardship will result if we hold that an order of dismissal under Section 102 is not open to appeal.

As I have already endeavoured to point out, it is only in those comparatively rare cases in which a plaintiff is really present either in person or by agent, but is erroneously held not to be present, that an appeal would be in any sense effective. In all other cases, and certainly in the instances given by my brother Chatterji as an illustration, an appeal would be a mere mockery. As observed by Plowden, J., in *Bhagwan Singh* v. *Pari*, it would not be open to such an appellant to show that his absence was due to causes over which he had no control, or that it could be otherwise satisfactorily explained.

A plea of that kind is entertainable under Section 103, and under that Section alone. Nor could the appellant be permitted, if regard is had to logic, to discuss the merits of his case, for if the original Court could not go into the merits and was bound to dismiss the suit immediately it found that plaintiff was absent, surely it would be most illogical and most anomalous to allow the Appellate Court to set aside the order of dismissal and consider the case upon its merits. Take the illustration given by my brother Chatterji. A firm of bankers, having branches at various places, sues through its local agent for recovery of money due to one of the branches. The firm makes every arrangement for the due conduct of the case by its agent and also employs a pleader: both the agent and the pleader, however, fail to appear at the hearing. The Court has no option but to dismiss the suit, and it does so. The principals do not hear of the order until after the expiry of 30 days, and consequently the rights to apply under Section 103 is barred. Now, supposing that the firm appeals, what is the Appellate Court to do? Can it allow the appellants to explain the absence of their agent and pleader on the day of hearing? If so would not the provisions of the law of limitation, laid down in inflexible terms for applications under Section 103, be rendered nugatory? On the other hand, can the Appellate Court do what the original Court admittedly could not do, namely, enter into a consideration of the merits of plaintiff's suit? Surely not. Can it be seriously maintained that in such cases the Appellate Court is not bound equally with the original Court to at once dismiss the appeal as soon as it finds that the plaintiff was in fact not present at the date of hearing? It may possibly happen that hardships will arise in cases of dismissals for default under Section 102, but as I have said, I do not think that such hardships will *frequently* result. In any case, however, even if hardship does arise, occasionally, that is not (as remarked in *Jamna Bibi* v. *Sheikh Jahan* (1), at page 537) "a "consideration which can weigh with us in interpreting the law." On the other hand, unless a right of appeal from orders of dismissal under Section 102 is given in express terms, or by necessary implication, we cannot, I conceive, hold that an appeal does lie, simply because no great harm may result therefrom. As pointed out by their Lordships of the Privy Council in the case cited by me, a right of appeal cannot be given by statute or authority equivalent to statute. And as regards the possible harm that may ensue, if we erroneously hold that an appeal lies, I agree with my brother Johnstone that "to allow an unnecessary appeal in a litiguous Province, like

(1) *I. L. R., XXIV All.*, 537.

"the Punjab, is in itself an injury to the public," and, I would add to the respondent, who runs the risk of having a favourable decision upset by a Court which *ex hypothisi*, has no jurisdiction in the matter.

Finally, my brother Chatterji refers to orders of a "similar nature" to those under Section 102, which in some instance have been held to be appealable, *e. g.*, dismissals under Section 136, 381 of the Code. I do not think that this argument has much force, for it is scarcely a justifiable method of construction to interpret one section of the Code which deals specifically with a certain matter, by reference to another section, which deals with an entirely different subject. If, however, reference is to be made to other sections and to rulings of the Courts thereunder, I think that a reference to Sections 97 and 98 is far more apposite. In *Lucky Charn Chowdhry* v. *Budurrunnissa* (1), two learned Judges of the Calcutta High Court (Wilson and Field, JJ.) held that orders dismissing a suit under Section 97 or Section 98 are not decrees, and are therefore not appealable. The first named learned Judge observed in the course of his Judgment: "A decree must be an expression of opinion upon the "rights of the parties, but this was a dismissal wholly apart from "the merits of the case. We are, therefore, disposed to "think that this is not a decree but an order only. That "view is confirmed by the latter part of the definition of a "decree, which expressly says that a certain class of orders, "more or less analogous to those under Section 97, shall be decrees, "but says nothing of orders under Section 97. Then, again, a "large number of orders analogous to those made under Section 97 "are expressly made appealable under Section 588, whereas orders "under Section 97 are not mentioned." The similarity of Sections 97, 98 and 99 with Sections 102 and 103 is such that this decision may be regarded as practically an authority upon the question with which we are now concerned.

As regards other sections of the Code, I would only observe that the rulings of the Courts are by no means harmonious. For instance, the decision of the Bombay High Court in *Man Singh* v. *Mehta Hariharram* (2), that an order under Section 136 is a decree, is opposed to a strong expression of opinion to the contrary in *Lucky Charn Chowdhry* v. *Budurrunnissa* (1). Again, while the Bombay and Madras High Courts *Bhikaji Ram Chandra* v. *Purshotam* (3), and *Subbayya* v. *Sanimadayyar* (4), appear to hold that an order under Section 366

(1) *I. L. R., IX Call.*, 627. (3) *I. L. R., X Bom.*, 220.
(2) *I. L. R. IXX Bom.*, 307. (4) *I. L. R., XVIII Mad.*, 496.

is virtually a decree, the High Court of Allahabad is decidedly of opinion that it is not, *Himida Bibi v. Ali Hussain Khan* (1). The reasons assigned by the learned Judges in the case last cited, for their opinions are relevant to the present discussion. Referring to the Bombay case, they say: "The learned Judges who decided that appeal appear to have overlooked the very important provisions of Section 371, which allow a person claiming to be the legal representative of a deceased to apply for an order to set aside the order of abatement. It cannot therefore be said that an order under the first paragraph of Section 366 is an adjudication which as far as the Court expressing it, decides the suit or appeal. Moreover, it is provided by clause 20 of Section 588 of the Code that an applicant whose application to set aside an order of abatement is refused, can appeal from such order of refusal." This reasoning would clearly apply to Sections 102 and 103 of the Code, as well as to Sections 366 and 371.

I have now considered all the objections urged by my brother Chatterji in his learned Judgment against the view which I venture to take in respect of the question now before us, and I have only to add that there is nothing in that Judgment which satisfies me that my view is wrong. On the other hand, I have given reasons, which appear to me at all events to be satisfactory, for holding that an order of dismissal under Section 102 is not a decree and not appealable. I quite agree that a Court should endeavour to abide by its decisions and that a long-established ruling, especially if it be a Full Bench ruling, should not be set aside, save for good and sufficient causes. I should, therefore, hesitate to be a party to over-ruling the decision in *Pandit Rama Kant* v. *Pandit Raydeo*, were I not satisfied beyond all doubt that that decision is erroneous, and that by allowing an appeal in cases in which no appeal lies, it tends to prolong litigation and to inflict a wrong on persons, who have a right to claim that they should not be subjected to the expense, harassment and risks of appeals, which the law does not countenance.

The case having been referred back to the Division Bench (Johnstone and Rattigan, JJ.) was disposed of by the following Judgment delivered by—

15*th March* 1907. RATTIGAN, J.—The majority of the Full Court has ruled that no appeal lies from an order under Section 102, Civil Procedure Code, dismissing a suit in default and consequently the appeal filed in this case must fail, but Mr. Kirkpatrick has filed a

(1) *I. L. R., XVII All.*, 172.

petition for revision of the order of the District Judge. Mr. Grey objects that under the circumstances the proper procedure for this Court to adopt is to pass an order dismissing the appeal with costs, and to thereafter deal with the petition for revision.

In view of this objection Mr. Kirkpatrick withdraws the petition and asks us to treat the memo of appeal already filed as an application for revision. We proceed, therefore, to consider the case in this light.

Mr. Grey contends that there has been no such irregularity in the procedure of the lower Court as would justify us in interfering on revision, and he also argues that in passing the orders, which he did, the District Judge acted (whether wisely or otherwise) within his jurisdiction. To decide this question we must briefly refer to the facts of the case.

Plaintiff brought a suit against defendants for recovery of a total sum of Rs. 93,032-8-3, but his suit comprised two entirely separate claims. In the first place he claimed to recover a sum of Rs. 83,032-8-3 with interest as being the amount which he was wrongfully compelled to pay upon a decree obtained against the Delhi Cotton Mills Company.

In the second place he claimed Rs. 10,000 as damages for alleged illegal acts committed by defendants in realizing the first mentioned sum from him. Upon the pleadings of the parties, the District Judge framed certain preliminary issues which will be found at page 83 of the printed paper book (hereinafter referred to as the book) and upon those issues decided that "the payment" (by plaintiff) was entirely voluntary and for plaintiff's own interest, and "that his remedy is, under Sections 69 and 70 "of the Contract Act, against the Delhi Cotton Mills." The District Judge then proceeded to say, "I dismiss the case for "recovery with costs. The case will proceed on the question of "damages for illegal attachment. Pleas to be filed for the 28th "instant." This order was dated the 18th November 1902.

On the 3rd December 1902 the learned counsel for the plaintiff filed an application couched in the following terms:— "In the case noted in the heading, the Court has dismissed "the plaintiff's claim for refund of about Rs. 83,000, and as regards "the remaining part of the claim for damages the case has been "ordered to be proceeded with. It is therefore prayed that a "decree sheet may be prepared in respect of the part of the claim dismissed." Upon this application the District Judge explained that it was not necessary for him to pass a decree at that stage of the case as the true meaning of his order of the

18th November 1902 was merely that he had *pro tanto* disallowed the claim for recovery of the said sum of Rs. 83,000, and that he did not intend by the said order to imply that the case stood dismissed. He added that "the final order in the case is the "one on which the decree will be based." Plaintiff thereafter applied for a review of the order of the 18th November 1902, but the application was rejected by the District Judge on the 21st March 1903, and the learned Judge again pointed out that the effect of the order impugned was merely that the Court had given its finding on certain issues, but had declined to pass a decree until the other issues had been decided. On the same date various other issues were framed, which are set out at page 7 of the book.

The plaintiff subsequently called various witnesses, whose evidence was taken on the 16th and 17th April 1903, and on the latter date certain evidence was also taken on behalf of defendants.

On the 25th May 1903 an application was filed by the plaintiff, which after setting out certain facts, stated in paragraph 8, that "under the above circumstances it is very difficulty for the "plaintiff to prosecute the case in respect of this part of the "claim, *i. e.*, the claim for damages. Hence it is prayed that "*according to Section 373 of the Civil Procedure Code he may be* "*permitted to withdraw a part of his claim*, i. e., *the claim for* "*Rs.* 10,000 *on account of damages, and that a decree may be* "*prepared in terms of the order dated the 18th November* 1902 *dis-* "*missing the claim for Rs.* 83,005."

Upon the same date the Court passed an order refusing to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit. Though correct in other respects, this order was so far erroneous that it assumed that plaintiff wished to withdraw from the suit altogether. The application distinctly stated that the plaintiff desired to withdraw only from that part of the claim, which was for Rs. 10,000 as damages; as regards the rest of the claim plaintiff reiterated the prayer (which had already been refused) that a decree should be passed in terms of the order of the 18th November 1902. Immediately after the Court passed this order the plaintiff's pleader stated that his client withdraw from the claim for Rs. 10 000, damages, but he added that the plaintiff did not withdraw from the suit as regards the rest of the claim. The defendant's counsel thereupon contended that the evidence for the defence should be taken so as to allow the Court to come to a decision on all the issues raised, and in

support of his contention relied on the provisons of Section 204, Civil Procedure Code. The Court held that the defendant was entitled to have this evidence taken and that it was advisable to give a finding on all the issues. The learned Judge added :—" As the case stands now only one issue—one of " law—has been decided, and the issues of fact framed have " not been decided. Under Section 204 the whole of the issues " in the case must be decided and defendant is entitled to " produce his evidence thereon.

The plaintiff and his pleader objected to this order and thereafter refused to appear further in the case, though the Court pointed out to them that the effect of their refusal to appear would be that the suit as a whole would have to be dismissed in default. The Court further gave the plaintiff an opportunity of reconsidering his determination and stated that if on the following day he decided to continue his case he would be allowed to do so. The plaintiff, however, failed to appear (and wilfully refrained from appearing) on the following day, with the result that the suit was dismissed in default.

These being the facts, are there any grounds upon which this Court is justified in revision in interfering with the order of the District Judge ? We confess that we are unable to find any. Mr. Kirkpatrick argues that the claim for the recovery of Rs. 83,005 had been finally disposed of by the order of the 18th November 1902, and that consequently when the plaintiff abandoned his claim as regards the Rs. 10,000 damages, the Court was bound to close the case and to pass a decree.

In other words, that as soon as the plaintiff stated on the 25th May 1903, that he withdrew from the claim, *quaod* the Rs. 10,000, the Court had no jurisdiction to continue the hearing of the case. No doubt, when a plaintiff withdraws absolutely from his suit and gives it up *entirely*, the Court cannot proceed with the further hearing of it. But this is not what happened in this case. The District Judge had, by a preliminary order, decided that *part* of plaintiff's claim must fail, but, as he was careful to explain in two subsequent orders, which must have been thoroughly understood by the plaintiff and his advisers, the meaning of that order was not that plaintiff's suit was dismissed even in part, and that the Court's intention was merely that to the extent of that claim, its finding on the preliminary issue, which was one of law, was against plaintiff. After that order was passed, plaintiff went

on with his case and produced evidence on the other issues framed. When he had done so, and after defendant had called *part* of his evidence, plaintiff suddenly decided to abandon the second part of his claim, at the same time expressly stating that he did not withdraw from the other part. Under these circumstances what was the proper course for the Court to adopt? The plaintiff had *not* withdrawn from the suit. He had, no doubt abandoned part of his claim, but we know of no authority which lays it down as a principle of law that in a case when a plaintiff abandons part of his claim the Court is thereby debarred from continuing the hearing of the suit, even though as regards the other part of the claim it may have held, on a preliminary issue, that the plaintiff must fail. The Court's view on this preliminary issue may prove to be erroneous, and it is surely within its competency, especially if the defendant so desires, to go on with the case and to give a finding on the other issues in order to avoid the necessity of a remand. Section 204 of the Code provides that in suits "in which issues have been "framed the Court shall state its finding or decision, with "the reasons thereof, upon each separate issue, unless the "finding upon any one or more of the issues be sufficient for "the decision of the suit." In *Devarakonda Narasamma* v. *Davarakonda Kanaya* (1), it was held that there was nothing in this section to prevent the Court from deciding all the issues raised in a case, and in *Tarakant Bannerjee* v. *Puddomoney Dossee* (2), their Lordships of the Privy Council remarked: "It "is much to be desired that in all appealable cases the Courts "below should, as far as may be practicable, pronounce their "opinions on all the important points," in order to avoid, the possibility of a remand. To a like effect is the *dictum* in *Shib Charan Lal* v. *Raghu Nath* (3), at page 195, and though the decisions of the High Court of Calcutta relied upon by Mr. Kirkpatrick *Barhamdeo Narain Singh* v. *Mackenzie* (4), and *Nana Lal Rai* v. *Bonomali Lahiri* (5), may not be quite reconcileable with this view, we cannot hold that a Court acts without jurisdiction or with material irregularity, if, in the exercise of its discretion, it proceeds to give a decision on all the issues framed by it, though its finding on any particular issue may be sufficient for the disposal of the case so far as that Court itself is concerned. In the present case the mere facts that plaintiff abandoned

(1) *I. L. R., IV Mad.*, 184. (3) *I. L. R., XVII All.*, 174.
(2) 6, *W. R., P. C.* 63. (4) *I. L. R., X Cal.*, 1095.
(5) *I. L. R., XI Cal.*, 544.

part of his claim and that as regards the other part of the claim the Court had decided, on a preliminary issue of law, that the plaintiff must fail, did not preclude the Court, in our opinion, from giving its findings on the other issues of fact, especially in view of the fact that, after the passing of the order of the 18th November 1902, and the framing of the other issues, the plaintiff had elected to give evidence in support of his case. But even if we must assume that it was, under the circumstances of the case, unnecessary for the Court to decide the other issues, we cannot on that account hold that the Court in deciding that it ought to give findings upon those other issues acted either with material irregularity or in excess of its jurisdiction or without jurisdiction. The Court obviously thought that some at all events of the other issues were concerned with the part of the claim which it had held, upon a preliminary point of law, could not be established, and it accordingly decided to give a finding upon these issues. In so deciding, it may have been wrong, but (without holding that its decision was wrong) are we to hold that its decision, even if erroneous, is open to revision? We cannot think so. At most all that can be urged is that the Court erred in law, but such error would not *per se* afford ground for this Court's interference on the revision side.

Moreover, the course adopted by the plaintiff in this case puts him out of Court at once. Assuming that the Court was wrong in taking the course it did, it would have been open to the plaintiff to protest against its procedure and to have thereafter made it a ground of appeal when (in the event of the decision of the Court upon the whole suit being against him) he had to prefer an appeal to the Superior Court. The plaintiff, however, contumaciously declined to accept the ruling of the Court and refused to put in any further appearance in the case, with the inevitable result that his suit as a whole had to be dismissed in default.

Upon a review of the facts we find ourselves unable to hold that this is a case in which we should be justified in interfering on the revision side, and we accordingly decline to entertain the memo of appeal as a petition for revision.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

No. 122.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

APPELLATE SIDE.

BUTA SINGH,—(DEFENDANT),—APPELLANT,

Versus

TARA SINGH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 888 of 1906.

Custom—Pre-emption—Pre-emption on sale of house property—Mohalla Wadharian, Sialkot City—Compensation for improvements made by vendee.

Found that the custom of pre-emption in respect of sales of house property by reason of vicinage prevails in *mohalla* Wadharian in the city of Sialkot.

Held, that as a general rule a purchaser of immovable property subject to the right of pre-emption who has effected improvements in spite of the pre-emptors warning not to do so, is under no circumstances entitled to recover their market value, but might be allowed to remove them if that can be done without injuring the property.

First appeal from the decree of Sardar Balwant Singh, District Judge, Sialkot, dated 30th June 1906.

Ishwar Das and Gobind Das, for appellant.

Pestonji Dadabhai and Nanak Chand, for respondent.

The Judgment of the Court was delivered by—

1st June 1907. CHATTERJI, J.—This case and Civil Appeal No. 805 of 1906 are cross appeals and will be decided by one Judgment. They arise in a suit for pre-emption of a house in *muhalla* Wadharian, in the city of Sialkot, which has been decreed by the District Judge. The defendant now appeals on the grounds that the suit should have been dismissed as there is no custom of pre-emption in this *muhalla* and that the sum allowed for improvements is too small. The plaintiff appeals on the ground that the price has been fixed at too high a figure, and that nothing, or at all events not the sum fixed by the lower Court, should have been allowed for improvements

The parties are related by marriage, and the case has therefore been conducted with much bitter feeling on both sides. The defendant is a man of wealth and position while plaintiff is the cousin of defendant's wife and his family is said to have derived considerable benefit from the connection.

Taking up defendant's appeal first for consideration, we are of opinion that the custom of pre-emption is sufficiently established in the subdivision of Sialkot in which the house is situate. The

reasons for the finding of the lower Court, that the custom exists in this *muhalla*, appear to us to be quite sound. In the first place there have been several cases in this *muhalla* in which the custom has been affirmed, and there have been numerous others in other *muhallas* of the city. The learned pleader for the defendant-appellant minutely criticized some of the Judgments previously passed granting decrees for pre-emption, but we find ourselves unable to reject a multitude of judicial decisions in favour of pre-emption on the ground that the findings on the evidence should have been otherwise and that the proper kind of instances, or a sufficient number of them, was not before the Court. Such a treatment of those cases is practically impossible now as the Court hearing the evidence is the best Judge of its value and as the decisions have been generally acquiesced in. In the case of *Alla Ditta* v. *Muthra* a full enquiry was made and the custom was found to exist. The objection taken to this Judgment is that it is not a case of *muhalla* Wadharian, but of *Kucha Kharasian*; but the Judgment clearly recites that the *Kucha* is part of the *Muhalla*; and we cannot hold this to be wrong merely on the strength of the old *Khasra* map of 1865, which shows *Kucha Kharasian* in a different colour. No question arises here of the house in suit not being in the Wadharian *muhalla*, and that case is at all events an instance of the custom being found to exist in an adjacent *muhalla*; and one instance of a judicial decision affirming the existence of pre-emption on contiguity in this *muhalla* is referred to in the Judgment; besides another precedent from another *muhalla*. In *Gobind* v. *Gura Ditta* in 1891, the custom was found to exist in this *muhalla*, and there is also an instance of a claimant for pre-emption having got a sale effected in his favour. The instances from other *muhallas* show that the custom is generally prevelent in the city of Sialkot, and the facts (1) that it is not found to prevail in the new *muhalla* of Karimpura, and (2) that in 1906, in *Rahim Bakhsh* v. *Karim Bakhsh* the Divisional Judge, following the principles laid down by this Court, held that the custom could not be held to be proved to exist in *muhalla* Hakim Hisam-ud-din because no specific instance could be cited from it, do not affect the finding in regard to *muhalla* Wadharian, which is an old *muhalla*, and in which several instances have been proved, apart from the numerous others proved generally in other and adjoining *muhallas* of the city. Of course there have been numerous sales in the *muhalla*, but a claimant for pre-emption does not always come forward to litigate, and the want of claim generally proves nothing, while a single successful claim

goes far to establish the custom. The Court below also noted on inspection of the spot that most of the sales relied on by the defendant were to people who would be entitled to pre-emption.

In short in our opinion the evidence in support of the custom of pre-emption is so clear that we have not called upon respondent's counsel for a reply on this point. We find accordingly in concurrence with the lower Court that the custom of pre-emption based on contiguity exists in *muhalla* Wadharian. There is no question that plaintiff is entitled to claim pre-emption if the custom is found.

The value of the improvements and the plaintiff's liability for them are points raised in both appeals and we shall consider these in disposing of the appeal of the plaintiff.

The first question for determination in the latter's appeal is whether the District Judge is right in finding that the price was fixed in good faith in the deed of sale, and that the whole of the purchase money mentioned therein was paid to the vendor. After hearing the arguments of the parties and reading of the record we are compelled to come to a conclusion different from that of the District Judge. Rupees 5,000 were paid before the Sub-Registrar and that officer's endorsement is in great detail and contains the serial numbers and value of the currency notes in which, with the exception of Rs. 50 in silver, the payment was made. The endorsement is of an exceptional character and differs from the usual run of such endorsements in which the total sum or the number of currency notes paid over is simply mentioned. It was probably made in this form at the vendee's request so that it might be impossible thereafter to deny that the full sum of Rs. 5,000 was, to the registering officer's personal knowledge, handed over to the seller. Compared with the careful and strictly businesslike nature of this payment, that of Rs. 10,00 before the execution and registration of the deed is singularly slovenly and unbusinesslike. To prove the payment two witnesses, Sundar Singh (page 68) and Shamas Din (page 69), and a receipt signed by the seller Ram Chand, dated 3rd October 1904, *i. e.*, more than three weeks before the date of execution of the sale-deed, which was filed very late, are produed. The receipt recites that Rs. 700 had been paid on 20th August and Rs. 300 at the date of the document. It is admitted that there is no independent proof of the payment of Rs. 700. The witnesses are of the ordinary kind, and Shamas Din, who proves nothing about the payment, is defendant's servant, and merely deposes to payment of Rs. 300. The defendant has not in the witness-box sworn to the payment nor has he produced any books of account showing

it. This statement that his wife supplied the money from her private funds does not satisfy us that it was in fact made. On the other hand, plaintiff has called one Bulaki Ram to depose that on 21st August 1904 Ram Chand borrowed Rs. 500 from him which, with Rs. 100 previously owed by him, Ram Chand repaid on 3rd November 1904 by giving one of the currency notes for Rs. 1,000 taken from defendant as part of the price of the house sold and entered in the Sub-Registrar's endorsement and taking the balance Rs. 400 from the witness. All these transactions are entered in Bulaki's books. Ram Chand had on 27th May 1904 mortgaged the house to his brother-in-law Sukh Dial for Rs. 500 (see page 13), and on 21st August 1904 he repaid the loan and had the payment endorsed on the back of the mortgage-deed (see page 15). Defendant's case is that he supplied the money (Rs. 700) out of which the mortgage-money was paid, but of this, as already stated, there is no independent proof, whereas plaintiff's version is strongly corroborated by Bulaki Ram and his books. The District Judge has rejected the books, but in our opinion not on any cogent grounds, while it is not probable that Rs. 700 were advanced by defendant, without an acknowledgment which should have been forthcoming now or at all events mentioned in the receipt for Rs. 1,000.

On the whole we can come to no other conclusion than that the payment of Rs. 700 is not proved. We accept the receipt so far as to hold that Rs. 300 were paid under it. Doubtless some earnest money was paid but Rs. 1,000 seems to be too large a sum to pay for such a purpose in the ordinary course of things and the proof therefore should have been cogent.

It follows that the price was not fixed in good faith and the market value of the house has to be assessed. This may be taken in connection with the value of the improvements.

The right of the defendant to recover his outlay in improvements depends upon a rule of equity the application of which varies with the facts of each case on which it is brought to bear. Strictly speaking, defendant is not entitled to be reimbursed for improvements which were not made in good faith. Here there was a defect of title in that the purchase was liable to be defeated at the suit of a pre-emptor. Where no claim is made for a long time, there may be an equity against compelling the purchaser, not to improve his property on the mere chance of a claim for pre-emption being made, but here notice of claim was given without loss of time on 12th November 1904, within three weeks of the sale, and, again on 21st December, and the suit itself was filed on 16th January 1905. The plaintiff asserted the fact of the notices having been

given, in his plaint, and the defendant did not challenge it and we are, therefore, justified in assuming from the postal receipts filed that notices were so given. Plaintiff also on suing applied for an injunction to stop building so that he had done all he could to prevent a claim being made for improvements. Defendant apparently was very reckless in pushing on his building operations. Perhaps he hoped to induce plaintiff who was his relation to forego the claim but has failed. He would not be entitled to recover the market value of his improvements under the circumstances and at best be allowed to remove them when it could be done without injuring the house. There is, however, another rule of equity under which any benefit that will accrue to the plaintiff from defendant's expenditure should be paid for by the former provided, of course, that the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them. There is no doubt that certain reconstructions have taken place in the house, and some additions have been made which have permanently increased its value and suitability as a place of residence, and for these we think a reasonable sum ought to be paid by the plaintiff. But it is extremely difficult to assess the value of these improvements. The defendant claimed Rs. 4,000 on account of them (page 39), and even in this Court he asks for Rs. 3,686-11-6 in his appeal. Jhanda for defendant (page 73) produced books of account and said that the expenditure amounted to Rs. 4,283, and again that it was Rs. 4,574-12-0 up to 17th April 1906. Counsel before us admits that it cannot be predicated that all entries in the books refer to this house nor what portion of the expenditure was incurred on its account. In these circumstances we must reject the books and attempt to arrive at some conclusion from the rest of the record. There were two experts appointed to value the house with the improvements, but their estimates differ largely. That of Ram Parshad, Sub-Divisional Officer, Military Works, Rawalpindi, contains full details, but it is said that his rates are too low and there, probably, is some foundation for the complaint. On the other hand the estimate of Mr. Fitz Holmes wants particulars and is apparently too high. Fitz Holmes was unable to say what new work had been done to the house. Mr. Ram Parshad's report mentions the new works in detail and estimates their value at Rs. 479-7-0 and the cost of the parapet wall of the roof at Rs. 92 and of repairs at Rs. 148. It is, however, said that a new *chaubara* has been built on the top story, but that the value of this has not been allowed for by him. It is difficult to say if this is true as the

report gives merely the kinds of work for which separate valuations are made and does not mention the rooms, &c., of the house.

Ram Parshad was appointed commissioner for valuation by agreement of parties and his report, unless shown to be wrong, is entitled to *weight*. He was minutely examined on interrogatories and no question was put to him about the omission of the *chaubara*. It is unlikely that this should be so if there was a real omission or that he would make such an omission. It is probable, therefore, that the work of the *chaubara* is included in the various kinds of new work done to the house by the defendant given in Ram Parshad's report.

There is no reason to think that the house was sold under the proper value, and if the price actually paid was Rs. 5,300 we should be safe in holding that the real price was about that sum. As the house is no longer in its original state, it is practically impossible to obtain any further information about its value in that state. We accordingly find that the market price of the house was Rs. 5,300.

As regards improvements it is difficult to arrive at exact valuation of the benefits they have conferred on the house and the amount by which they have enhanced its value. We must take figures and the details from Ram Parshad's list and according to them they are worth Rs. 720. But as Ram Parshad's rates are said to be low and in order to be on the safe side we increase the rates and raise the amount to Rs. 1,000 in lump. Defendant would then be entitled to Rs. 5,300 paid for the house and Rs. 1,000 for the improvements or Rs. 6,300 in all. Of course this cannot be very exact as we do not know to what extent the fabric of old house has been replaced by the improvements. But as Ram Parshad's estimate of the value of the house with the improvements amounts to Rs. 5,979 the extra amount we allow ought to be a fair compensation for the latter.

We accept plaintiff's appeal and reduce the amount payable by him to defendant for the house and the improvements to Rs. 6,300 with costs on that sum in the Divisional Judge's Court and on Rs. 1,760 in this Court. This sum will be deposited in Court within two months from this date failing which plaintiff's suit shall stand dismissed with costs.

The defendant's appeal is dismissed with costs.

Appeal dismissed.

No. 123.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

APPELLATE SIDE.

SAIF ALI KHAN,—(PLAINTIFF),—APPELLANT,

Versus

FAZL MEHDI KHAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 759 of 1906.

Plaint—Presentation of insufficiently stamped plaint—Payment of deficiency after the expiry of limitation allowed for the suit—Date of institution of suit—Limitation Act, 1877, Section 4, Explanation—Court Fees Act, 1870, Sections 6, 28—Civil Procedure Code, 1882, Section 54 (A).

Where a plaint was presented within the prescribed period of limitation on an insufficient stamp, and on discovery of the mistake the requisite deficiency was made good within the time fixed by the Court, but after the expiration of the limitation allowed for the suit.

Held, that having regard to the provisions of the Explanation to Section 4 of the Indian Limitation Act, 1877, and Sections 54 of the Civil Procedure Code and 28 of the Court Fees Act, 1870, the suit should be regarded as having been instituted on the date when the plaint was first presented and that it was therefore in time.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 25th May 1906.

Muhammad Shafi, for appellant.

Oertel, for respondents.

The judgment of the Court was delivered by

11th June 1907. CHATTERJI, J.—The material facts of this case are briefly these. It is a suit for pre-emption of certain land much of which is subject to river action. The area in dispute is 1,246 *kanals* 1 *marla* of which an insignificant fraction consisting of only one *khasra* number is assessed to revenue, Rs. 2-10-0. The sale took place on 24th June 1904 and in the deed of sale the fields sold are mentioned with the *jama* above stated. In the list filed with the plaint also the lands are so described. The plaintiff instituted his suit on 22nd June 1905 or only two days before the expiration of limitation upon a stamp calculated on five times the revenue, but he stated the value of the land to be Rs. 1,866 and claimed pre-emption on payment of that sum.

The defendants in the written pleas filed on 5th July 1905 objected that the Court fee was insufficient and that it should have been paid on the market value, which he put at Rs. 12,700, the bulk of the land being unassessed. Plaintiff's pleader on

being asked, agreed to make up stamps on the market value, Rs. 1,866 stated in the plaint. The Court appointed a local commissioner for the purpose of valuation and on receiving his report ordered the plaintiff to pay Court-fee on Rs. 4,284, the value assessed by him. This order was passed on 23rd January 1906 and the deficiency was made good on the 25th.

The defendants then urged *inter alia* that the suit was barred by time, that there was no proper plaint filed on 22nd June 1905 as the Court-fee paid was insufficient and that the suit was properly instituted only when the stamps were made good on 25th January 1906, about seven months after the period of limitation had expired.

Both the lower Courts have dismissed the claim as barred by time because plaintiff should have stamped his plaint on Rs. 1,866, the market value of the land admitted in it, and that, having deliberately omitted to do so, his subsequent making up of the Court-fee could not validate the original institution of the suit.

The case was argued at considerable length by counsel on both sides and a great number of precedents were cited. It may be said generally that the current of authority in the Calcutta and Madras High Courts and in this Court is on the whole in favour of plaints insufficiently stamped when filed being treated as valid from the date of presentation when the Court permits the proper amount of Court-fee to be made good. The Allahabad Court, however, in recent years has uniformly held the contrary opinion.

In the present instance the lower Courts have too readily assumed that plaintiff consciously and deliberatly filed his plaint without proper Court-fee. There is no proof whatever affirmative by indicating that he acted in this way. The deed of sale reciting the land sold with the *jama* payable without mentioning that it was assessed on only a very small portion, as well as the list furnished by the *patwari* are calculated to mislead, unless attention is specially directed to the fact that the bulk of the land is unculturable and unassessed, and that, therefore, Court-fee must be paid as respects the latter on its market value. As soon as the defect was pointed out by the defendants, plaintiff's pleader offered to pay the fee on the market value stated in the plaint and when such value was fixed by a local commissioner and the plaintiff was called upon to pay the proper sum, it was made good within two days. We do not think there is any good reason for attributing bad faith to plaintiff.

There is no doubt that the plaint was duly presented, barring the question of Court-fee, under Section 48, Civil Procedure Code, and that the Court in levying extra Court-fee, and in appointing a commissioner for the purpose of valuation acted under Section 9 of the Court Fees Act and in the exercise of the powers mentioned in clauses (*a*) and (*b*) of Section 54 of the Code. There is equally no doubt that the plaint was received and registered and notice issued on it through mistake or inadvertence on the part of the Court or its proper officer. Under Section 6 of the Court Fees Act the plaint should not have been received or allowed to be filed in the circumstances of this case, and therefore under Section 28 the presentation was of no validity. But the Court thought fit to direct the plaint to be properly stamped, as it is empowered to do by that section, and it has been so stamped in compliance with its order. It follows as laid down in the section that the plaint and every proceeding relative thereto is as valid as if it had been properly stamped in the first instance.

In our opinion it is not possible to get over these consequences by any legitimate method of construction. We have already said there is no proof that plaintiff wilfully understamped his plaint in order to avoid payment of duty. If the Court thought that the payment was being evaded in *bad faith* it might possibly, in a proper case, refuse to allow further payment of duty, but it is difficult to see how it could have done so on the facts of this case. But whether it had such power or not, it thought fit to allow the stamps to be made good, and when that was done, the validation of the original presentation in our opinion inevitably and necessarily followed by operation of law. A substantially similar view was taken in *Partab Singh* v. *Kishan Dyal* (1). We cannot see how the Court could change its mind subsequently and undo the effect of its action unless such power is conferred by law.

We are further unable to see, with all deference to the authorities that lay down the contrary, how the Limitation Act can be said to prevent the validation of the plaint in circumstances like the above. Section 4, *Explanation* of the Indian Limitation Act, 1877, provides that a suit is instituted in ordinary cases when the plaint is presented to the proper officer. The presentation of the plaint is regulated (1) by the Code of Civil Procedure, the provisions of which were not violated by the plaintiff when he filed his plaint in this case, and (2) in certain particulars

(1) 130 P. R., 1890.

by the Court Fees Act, which requires that the plaint shall be properly valued and imposes on the Court the duty of enforcing that rule. Under Section 9 of the Court Fees Act and Section 54, Civil Procedure Code, the Court has got the plaint properly stamped on the value ascertained by inquiry. Section 28 of the Court Fees Act lays down in clear terms that the effect of such stamping is to validate the original presentation of the plaint. It is difficult to see what the Limitation Act, an Act, be it observed not in *pari materia*, has got to do with the interpretation of Section 28 of the Court Fees Act, or why the plain language of that section should not be enforced because it would have the effect of nullifying a contention on the head of limitation.

The plaint was admittedly filed within the period prescribed for the suit in the Limitation Act, and satisfied all the requirements of the Code of Civil Procedure. It was insufficiently stamped and thus offended against a fiscal law. That law prescribes the penalty for the breach and itself provides the means of getting over the consequences of that breach. The Court is bound to give effect to its provisions and to see that the public do not evade the payment of their dues under it, but this is the only consideration regulating its action and not the pleas of the defendants in the case before itself. If the plaint is a nullity under the Court Fees Act if it is not properly stamped, the defendant is undoubtedly entitled to take advantage of it, but he cannot complain if the provisions of the Act for getting rid of the defect are lawfully applied by the Court for that purpose. Besides, it is a well settled rule that fiscal enactments require to be strictly construed and that penal provisions cannot be extended in their scope. A Court cannot be prevented from receiving the deficient Court-fee and thereby validating a plaint from the original date of presentation because a possible plea of limitation would be defeated thereby nor justified in declining to receive such fee.

Even if it is right to refuse to exercise the discretion to receive the deficient Court-fee on such a ground the validation that results after acceptance of such fee cannot again be annulled, nor has the Court any power to reconsider and set aside its decision. The Court Fees Act does not give any such power, and its provisions must be taken to be complete for, and to be the sole guide in, all matters within its scope. It deals with revenue realizable in the shape of Court-fees, and when a question arises under it the matter is one exclusively between the State and the person who is liable to pay the fee, and there

can be no hardship or injustice to a third party if a penalty prescribed by it is remitted or the consequences thereof abrogated by the Court in accordance with its provisions.

The views propounded above are in accordance with *Partab Singh* v. *Kishen Dyal* (1) and *Tara Singh* v. *Muhammad* (2), the latter case is very analogous in its facts to the present one. *Jhanda Khan* v. *Bahadar Ali* (3) was also a similar case, in which the Court refused to take additional Court-fees on the value assessed by a commissioner, because the limitation for the suit had then expired. It was held that under Section 54, Civil Procedure Code, the Court was bound to give plaintiff the option to make up the deficient Court-fee. This Court was of opinion that assuming Section 28 of the Court Fees Act gave a discretion to the Court to refuse to receive the deficient stamp on a document filed before it, such a provision was controlled in respect of plaints by Section 54 of the Code of Civil Procedure, which required that plaintiff should be given the opportunity to file the additional stamp. The reasoning of the learned Judges harmonizing with the Court Fees Act, the Limitation Act, and the Code of Civil Procedure, at page 37 of the report, has much to recommend it, and if it be accepted the case of the present plaintiff becomes still stronger, for in the foregoing remarks we have not assumed that Section 54, Civil Procedure Code, by implication can cure the defect in the plaint *ab initio*, but have relied on the Court's exercise of its discretion in making plaintiff file the deficient stamps for validating the proceedings from the beginning under Section 28 of the Court Fees Act, and in *Jhanda Khan* v. *Bahadar Ali* (3) the Court had refused to receive the stamps. Without derogating from the force of the reasoning we are of opinion that Section 28 is of general application. The view of Section 54, Civil Procedure Code, taken in this judgment, with which we agree, is supported by an earlier ruling. *Sardar Khushal Singh* v. *Puran Singh* (4).

We are unable to agree with the opinion of the Allahabad Court in its latest pronouncement on this subject *Chatarpal* v. *Jagram* (5). The facts of that case are very similar to those of the present case. The learned Judges did not in the judgment discuss the law, but followed an earlier decision of the Court. *Muhammad Ahmad* v. *Muhammad Siraj-ud-din* (6). They admitted that the case was beyond doubt a hard one, but did not consider that hard cases should be allowed to make bad law. It

(1) 130 *P. R.*, 1890.
(2) 74 *P. R.*, 1903.
(3) 3 *P. R.*, 1893.
(4) 156 *P. R.*, 1888.
(5) *I. L. R.*, *XXVII All.*, 411.
(6) *I. L. R.*, *XXIII All.*, 423.

was laid down in the last named judgment that Section 28 of the Court Fees Act did not cover a case of under-valuation of the suit, and that under Section 54 (*a*) and (*b*), Civil Procedure Code, the Court could not grant time for payment of deficient stamp duty so as to extend the period of limitation. In our opinion the limitation prescribed for suits should not be introduced as an element in interpreting the word "presented" in the explanation to Section 4 of the Limitation Act, and as the word is not defined in the Act, the obvious intention is that it is to be interpreted in accordance with the Acts which specially deal with the subject, *viz.*, the Code of Civil Procedure and the Court Fees Act in the matter of Court-fee payable. The view taken of the scope of Section 54 (*a*) and (*b*) of the Code of Civil Procedure in it is also opposed to that of this Court in *Sardar Khushal Singh* v. *Puran Singh* (1), which to our minds appears to be the sounder of the two. We refer here to another judgment of the same Court, *viz.*, *Balkaran Rai* v. *Gobind Nath Tiwari* (2), in which it was ruled that where an appeal has been filed on insufficient stamp, which was subsequently made good, this stamping could not validate the original presentation except under Section 28 of the Court Fees Act, an order under which could only be passed by a Judge, and solely on the ground of mistake or inadvertence. This judgment relates to appeals alone, but the principles it lays down were disapproved by the Legislature, which enacted Section 582 A, Civil Procedure Code, to counteract its effect. Under that section an appeal insufficiently stamped by mistake has nevertheless the same effect and will be as valid as if it had been properly stamped, provided that the requisite stamp is supplied within a reasonable time fixed by the Court after the discovery of the mistake. The Full Bench case and Section 582 A, Civil Procedure Code, have no further bearing on the present discussion than to afford an indication that the interpretation we are disposed to put upon the Court Fees Act is in accordance with the intention of the Legislature. *Jainti Prasad* v. *Bachu Singh* (3) is a ruling on the interpretation to be put on clauses (*a*) and (*b*) of Section 54, Civil Procedure Code, and it was held therein that the time fixed for making good the deficient stamp duty must be one which is within the limitation prescribed for the suit. *Durga Singh* v. *Bisheshar Dayal* (4) takes the same view. In our opinion, however, with all deference to the learned Judges, the interpretation of Section 54 by our Court in *Sardar Khushal Singh* v. *Puran*

(1) 156 *P. R.*, 1888. (3) *I. L. R.*, *XV All.*, 65, *F. B.*
(2) *I. L. R.*, *XII All.*, 129, *F. B.* (4) *I. L. R.*, *XXIV All.*, 218.

Singh (1), and *Jhanda Khan* v. *Bahadar Ali* (2), appears to be more in consonance with the object of the Legislature and more correct. The other construction is likely sometimes to lead to great injustice and hardship. An important suit may, for instance, be instituted long before the expiration of limitation and may after a protracted inquiry on the merits be found on objection by defendant at a late stage to have been slightly undervalued and instituted on deficient stamp. The deficiency may not be more than a fraction of a rupee, but the suit must nevertheless on this ground be dismissed. Such an interpretation amounts to laying traps for suitors which no vigilance or foresight on their part can avoid, and is, therefore, we venture to think, repugnant to the true intent or scope of a purely fiscal enactment like the Court Fees Act. There is nothing in that Act or even in the Limitation Act which directly or necessarily leads to such a result, and all such refinements in the extension of their penal provisions ought to be avoided.

Though we have the misfortune to differ from the Allahbad High Court, we are glad to find that we are supported not only by previous rulings of this Court, but by the authority of the Calcutta and Madras High Courts in a series of decisions. *Moti Sahu* v. *Chhatri Das* (3) is a case in point, in which, though the deficiency was discovered on the very date of presentation, the filing of the requisite stamps under the order of the Court was held to validate the original presentation. This view was approved and followed in *Surendra Kumar Basu* v. *Kunja Behari Singh* (4) and in *Rajkishori Koer* v. *Madan Mohan Singh* (5). With reference to the Madras High Court, it is only necessary to refer to *Cheunappa* v. *Raghunatha* (6) in which an analogous point in appeal is decided declining to follow the Allahabad Full Bench case reported in *Balkaran Rai* v. *Gobind Nath Tiwari* (7) above cited, and this was before the enactment of Section 582A, Civil Procedure Code. *Patcha Saheb* v. *Sub-Collector of North Arcot* (8) and *Assan* v. *Pathumma* (9) in which the question was ably discussed by Mr. J. Subramania Ayyar. . . . . The Bombay High Court also in a recent judgment, *Dhondiram bin Laxman* v. *Taba Savadan* (10) has taken a similar view in a case like the present. Lastly, the remark of their Lordships of the Privy Council in *Skinner* v. *Orde* (11), that in cases of this kind

(1) 156 *P. R.*, 1888.
(2) 8 *P. R.*, 1893.
(3) *I. L. R.*, *XIX Calc.*, 780.
(4) *I. L. R.*, *XXVII Calc.*, 814.
(5) *I. L. R.*, *XXXI Calc.*, 75.
(6) *I. L. R.*, *XV Mad.*, 29.
(7) *I. L. R.*, *XII All.*, 129.
(8) *I. L. R.*, *XV Mad.*, 78.
(9) *I. L. R.*, *XXII Mad.*, 494.
(10) *I. L. R.*, *XXVII Bom.*, 330.
(11) *I. L. R.*, *II All.*, 241 *P. C.*

"the plaint is not converted into a plaint from that time (*i.e.*, "when the deficiency is made good) only but remains with its "original date on the file of the Court and becomes free from "the objection of an improper stamp when the correct "stamp has been placed on it" is most pertinent in this connection. In our opinion the weight of authority in favour of the construction we are putting on the Court Fees Act, the Civil Procedure Code, and the Limitation Act in respect of institution of plaints and deficiency in stamp duty appears to be overwhelming.

Lakha v. *Munshi Ram* (1) was cited in the argument for the respondents as supporting their contention, but it has no bearing on the question before us. There the plaint was not stamped at all and was sent by post. Here there was no question of mistake or inadvertence, and the Court had no power under Section 28 of the Court Fees Act to receive the stamps subsequently filed by plaintiff of his own motion, and the action of the Court was altogether *ultra vires*. The same view was taken in *Partab Singh* v. *Kishan Dyal* (2).

In short our opinion is—

(1) That the word "presented" in the explanation to Section 4 of the Indian Limitation Act should be interpreted in accordance with the provisions of the Code of Civil Procedure, Section 48.

(2) That the Court Fees Act and the Civil Procedure Code should be read together in regard to the presentation of plaints and the making up of stamp duty, but not with the provisions of the Limitation Act, which is not an Act in *pari materia*.

(3) That under Section 54 of the Civil Procedure Code and Section 28 of the Court Fees Act deficiency in stamps can be made good by order of Court irrespective of the question whether on the date of filing them the limitation for the suit has expired or not.

(4) That under Section 28 of the Court Fees Act on the making up of the deficiency of stamp duty by order of Court the plaint and all proceedings relative thereto are validated from the date of original presentation, even though the limitation for the suit had since expired.

(5) That once the stamps are taken by the Court the order cannot be subsequently set aside, nor the validation of the original presentation annulled.

(1) 30 *P. R.*, 1900. (2) 130 *P. R.*, 1890.

We accept the appeal and, reversing the decrees of the lower Courts, remand the case to the Court of first instance for trial on the merits.

Respondents will pay costs in all the Courts.

Appeal allowed.

No. 124.

Before Mr. Justice Rattigan.

APPELLATE SIDE.

DAREHAN KHAN AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

SOHAURA MAL,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 685 of 1906.

Pre-emption—Sale of a share of joint property to a stranger—Subsequent acquisition of another sharer's interest by vendee—Suit by a third co-sharer with respect to first sale alone.

Held, that a person who was at the date of sale a co-sharer in the land cannot claim pre-emption in respect of a sale of that land as against the vendee who at the date of sale was not a co-sharer therein but became a co-sharer before the plaintiff instituted his suit for pre-emption.

Miscellaneous further appeal from the order of F. J. Dixon, Esquire, Divisional Judge, Multan Division, dated 20th March 1906.

Beechey, for appellants.

Roshan Lal, for respondent.

The judgment of the learned Judge was as follows :—

3rd Novr. 1906. RATTIGAN, J.—The facts of this case are not disputed and are briefly as follows :—On the 29th October 1903 one Alla Wasaya sold certain land to Sardar Darehan Khan ; and on 11th February 1904 one Khan sold certain other lands in the same *khatas* to the said vendee. On the 20th October 1904 plaintiff, who has throughout been a co-sharer in the said *khatas* with the exception of a small plot of land, in which he is merely a tenant-at-will, sued for pre-emption in respect of the sale of the 29th October 1903, the later sale of the 11th February 1904 not being challenged. The first Court dismissed the claim on the ground that at the time when plaintiff sued, the defendant had become a co-sharer in the *khatas* and had thus an equal right with plaintiff. This decision was reversed on appeal by the Divisional Judge, who held that as the vendee was not a co-sharer in the *khatas* at the date of the sale in question, plaintiff had the right of pre-emption claimed by him, except in respect of the plot of land above referred to, which forms no part of the *khatas* in which plaintiff is, and always has been, a co-sharer.

Apart, then, from the dispute as regards this plot of land, as to which the plaintiff has clearly no right of pre-emption, the question is whether under the circumstances as above detailed plaintiffs can claim a preferential right on the ground that at the date of the sale the vendee was not a co-sharer in the *khatas* though before the suit for pre-emption was instituted the latter had by his subsequent purchase of the 11th February 1904, which stands unimpeached, become such co-sharer? I have heard all that Messrs. Beechey and Roshan Lal had to urge in support of their respective cases, and the conclusion at which I have arrived is that the first Court was right in dismissing the plaintiff's suit.

A right of pre-emption is a *jus ad rem alienam acquirendam* and not a *jus in re aliena*; or, in other words, the pre-emptor can, if he so wishes, by adopting the proper procedure acquire another person's property in preference to third persons, whose rights to such property are, in the eye of customary law, as enunciated in the Punjab Laws Act, inferior to his. But a pre-emptor has no right or interest *in* such property until his right of pre-emption is duly established by the decree of the Court and he has satisfied the terms of that decree, and if before he institutes a suit for the purpose of establishing his right of pre-emption, he has lost his pre-emptive right, either by some act of his own or by other circumstances quite unconnected with any voluntary act on his part, he cannot claim his preferential rights as against a person who, at the date of suit, is in possession of the land as proprietor with rights which, for the purposes of pre-emption, are equal to those of the claimant. I have said that the pre-emptor's right in the land, as distinguished from his right to acquire the land, are perfected and completed only when he obtains and satisfies the decree, but from this I do not wish it to be inferred that his right to claim pre-emption would necessarily be defeated by an alienation made after the *litis contestatia*. The doctrine of *lis pendens* might apply to such cases. But this is not the question before me. The case with which I have to deal is simply whether A, who was at the date of sale a co-sharer in the land, can claim pre-emption in respect of a sale of that land as against a person who at the date of sale was not a co-sharer therein, but became a co-sharer before the plaintiff instituted his suit for pre-emption?

There can be no doubt, upon the authorities of *Amirullah Shah* v. *Tabe Hussein* (1), *Mahtab-ud-din* v. *Karam Ilahi* (2),

(1) 138 *P. R.*, 1884. (2) 73 *P. R.*, 1898.

Topan Mal v. *Ditta* (1), *Atma Ram* v. *Devi Dyal* (2), and *Muhammad Ayub Khan* v. *Rure Khan* (3), that a pre-emptor who loses his rights of pre-emption after the date of sale and before bringing his suit cannot claim to pre-empt the property in virtue of the right originally possessed by him. And as remarked by Harris, J., in *Khan* v. *Mahanda* (4), it is immaterial whether the pre-emptor has lost his right of pre-emption by a voluntary act on his part or by circumstances beyond his control. What the Courts have to look to is the question whether at the date of the institution of the pre-emption suit as well as at the date of the sale the plaintiff has preferential rights compared with the rights of the defendant in possession of the land. This proposition is, I venture to think, in accord with the real nature of the right of pre-emption and with the trend of authority (see, in addition to the rulings above referred to, *Ram Hit Singh* v. *Narain Rai* (5), *Janki Prasad* v. *Ishar Das* (6), and *Ram Gopal* v. *Piari Lal* (7), upon principle, it is but logical to hold that if before the person, who has at the date of sale preferential rights of purchase, institutes a suit for the purpose of establishing his right, the original vendee is able to acquire rights equal to those of the claimant *qua* pre-emption, the sale to the latter cannot be subsequently set aside at the instance of the claimant. Admittedly the original vendee could defeat the claimant's right by reselling the land before the institution of the pre-emption suit to a third person who had equal rights *quoad hoc* with the pre-emptor, and I can see no difference in principle why the vendee should not be able to defeat the pre-emptor's right equally successfully by acquiring for himself, before the institution of such suit, such equal rights.

The Divisional Judge has referred to two decisions in support of his conclusions, but neither case seems to me to be in point. In *Muhammad Ayub Khan* v. *Rure Khan* (3), it was held that a person who became a co-sharer *after the date of the sale* could not claim to have a right of pre-emption in respect of such sale and could not therefore sue for pre-emption. Here the point is not whether the defendant could have sued for pre-emption in respect of the sale of the 29th October 1903, but whether he is not entitled by reason of the sale of the 11th February 1904, which made him a co-sharer in the *khata*, to successfully resist the claim made by the pre-emptor in October 1904. In *Muhammad Nawaz Khan* v. *Mussammat Bobo Sahib* (8),

(1) 47 *P. L. R.*, 1905.
(2) 49 *P. R.*, 1901.
(3) 95 *P. R.*, 1901.
(4) 39 *P. R.*, 1902.
(5) *I. L. R. XXVI All.*, 389.
(6) *I. L. R. XXI All.*, 374.
(7) *I. L. R., XXI All.*, 441.
(8) 44 *P. R.*, 1903.

the other case referred to by the Divisional Judge this distinction is very clearly brought out. In this latter case Chatterji, J., remarked: "It is also urged that defendant having at all events "immediately parted with his own house ought not to be allowed "to retain the one in suit in the strength of his ownership of "that house. *But he is defendant, not plaintiff*, and the question "of priority must be decided with reference to the circumstances "existing at the time of his purchase, and if he was "entitled to purchase at the time of sale, he did not forfeit his "right by parting with his own house afterwards. *It would "have been different had the plaintiff been in his position.*" For the reasons given I hold that at the date of institution of the present suit plaintiff had not a right of pre-emption in respect of the sale to defendant in October 1903 and that his suit should therefore have been dismissed. I accordingly accept the appeal and dismiss plaintiff's suit with costs throughout.

Appeal allowed.

No. 125.

Before Mr. Justice Rattigan

HAKIM,—(PLAINTIFF),—PETITIONER,

Versus

RALYA,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 1967 of 1906.

Small Cause Court, Jurisdiction of—Suit for damages for breach of betrothal contract—Small Cause Courts Act, 1887, *Schedule II, Article* 35 (*g*)—*Revision—Defect of jurisdiction—Punjab Courts Act*, 1884, *Section* 70 (*a*).

Held, that a suit for damages for breach of a betrothal contract comes within clause (*g*) of Article 35 of the second schedule to the Provincial Small Cause Courts Act, and as such is excepted from the jurisdiction of a Court of Small Causes.

Nura v. *Alla Ditta* (1), *Hakim Muhammad Ashraf Hussein* v. *Syed Muhammad Ali* (2) referred to.

Held, also, that where it appears that an inferior Court has heard an appeal which was entertainable by a superior Court, the Chief Court is not bound to interfere under its revisional powers unless failure of justice has resulted from such defect.

Hansa v. *Ram Singh* (3) cited.

The judgment of the learned Judge was as follows:—

RATTIGAN, J.—The facts alleged in the plaint were that Ralya, defendant, had betrothed his daughter, Mussammat Nand Kour, to Moti, plaintiff No. 2, but had subsequently given her in 16*th Feb.* 1907.

(1) 132 *P. R.*, 1889. (2) *I. L. R., XXIV Mad.*, 652.
(3) 36 *P. R.*, 1902, *F. B.*

marriage to a third person. Plaintiffs, who are father and son, sue for Rs. 500 as compensation, and assess their damages as follows :—

(1) Rs. 80 paid to Ralya on the day of the betrothal;

(2) Rs. 250, the value of jewellery and garments subsequently given to Ralya for the use of Mussammat Nand Kour;

(3) Rs. 100 paid to Ralya for expenses in connection with the proposed marriage; and

(4) Rs. 70 as compensation for breach of contract.

The questions before me are (*a*) whether the District Judge had jurisdiction to hear and decide the appeal to his Court, and (*b*) whether, if he had no such jurisdiction, this Court should interfere on the revision side, regard being had to the remarks of the Full Bench in *Hansa* v. *Ram Singh* (1).

The answer to the first question depends on whether the suit is a suit cognizable by a Small Cause Court, or an 'unclassed' suit as defined in Section 3 of the Punjab Courts Act.

In my opinion the ruling of this Court in *Nura* v. *Alla Ditta* (2) is directly in point. In that case plaintiff sued to recover Rs. 150 from defendant on the ground that the latter had taken that sum from the plaintiff, promising to give him his daughter in marriage, but had failed to do so. The learned Judges (Frizelle and Rivaz, JJ.) held that the claim fell within clause (*g*) of Article 35 of the Provincial Small Cause Courts Act, 1887, the expression "compensation" as used in that clause having the same meaning as in Section 73 of the Indian Contract Act, 1872.

For respondents Mr. Kharak Singh refers to the decision of the High Court of Madras in *Hakim Muhammad Ashraf Husain* v. *Sayed Muhammad Ali* (3), where it is laid down that a suit for compensation for breach of promise of marriage is a suit of the nature of an action for breach of promises as understood in English law and that a suit by a plaintiff who claims damages for breach of a contract of marriage entered into between his father and the father of the girl does not fall under clause (*g*) of the article. But clause (*g*) refers also to suits for compensation for breach of contract of betrothal, and I see no reason why plaintiff No. 1, who entered into the contract with

(1) 36 *P. R.*, 1902, *F. B.* (2) 182 *P. L.*, 1889.
(3) *I. L. R.*, *XXIV Mad.*, 652.

defendant No. 1, should be debarred from suing the latter for compensation for its breach.

I hold, therefore, that the suit was an unclassed suit, and as it was of value exceeding Rs. 100 the District Judge had no jurisdiction to hear it. But am I on this account bound to interfere? Mr. Nanak Chand contends that I am, and argues that the remarks of the Full Bench in the case cited have reference merely to those cases where a superior Court hears and decides an appeal which should properly have been presented to an inferior Court. If, on the other hand, urges the learned counsel, an inferior Court hears an appeal which was entertainable by a superior Court, the parties are necessarily prejudiced, as they were entitled to have their case decided by an officer who from his position must be more experienced than the officer who has in point of fact determined the appeal. This argument is not without force, but without attempting to lay down any general rule, I think that this Court must in all such cases have regard to the particular facts and must decide in each case upon these facts whether or not the defect of jurisdiction has actually prejudiced the party who complains of the want of jurisdiction. This is how I read the judgment of the Full Bench, and I do not think that the learned Judges intended to draw any such distinction as Mr. Nanak Chand now contends for.

In the present instance the case has on appeal been very carefully and fully considered by the District Judge, who is an officer of experience, and Mr. Nanak Chand was not able to point to any circumstance from which prejudice to his client might be inferred. I accordingly reject this application with costs.

Application dismissed.

No. 126.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

NARPAT RAI AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

DEVI DAS AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 806 of 1906.

Arbitration—Agreement to refer to arbitration—Application to file such agreement—Order allowing agreement to be filed—Right of appeal from such order—Civil Procedure Code, 1882, Section 523.

Held, that when a Court acting under Section 523, Civil Procedure Code, causes an agreement to refer to arbitration to be filed and passes an order of

reference thereon an appeal lies from such order which is a "decree" within the meaning of that expression as defined in the Code.

Jhangi Ram v. *Budho Bai* (1), *Ghulan Jilani* v. *Muhammad Hussain* (2), *Pounusami Mudali* v. *Mandi Sundara Mudoli* (3), *Thiruvenga Dattiengerh* v. *Vaidanatha Ayyar* (4), *and Janodkey Nath Guha* v. *Brojo Lal Guha* (5) cited and followed.

Katik Ram v. *Bahu Lal* (6) and *Basant Lal* v. *Kunji Lal* (7) distinguished and not approved.

First appeal from the decree of Sheikh Miran Bakhsh, Sub-Judge, Lahore, dated 7th July 1906.

Grey, Muhammad Shafi, Sukh Dial and Tirath Ram, for appellants.

Beechey, Ganpat Rai and Durga Das, for respondents.

On the question of right to appeal, the following judgment was delivered by

19*th Jany.* 1907. RATTIGAN, J. (JOHNSTONE, J., concurring).—Mr. Beechey, for respondents, urges as a preliminary objection that no appeal lies in this case, and the question which we have to decide, upon this objection, is whether an appeal lies when the Court acting under Section 523, Civil Procedure Code, causes an agreement to refer to arbitration to be filed and makes an order of reference thereon. It is common ground between the parties that an appeal lies in such a case only if the order of the Court is "a decree" as defined in Section 2 of the Code, that is to say, if it is "the formal expression of an adjudication upon any right claimed or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal."

We have the authority of the Full Bench of this Court for the proposition that an order under Section 523 of the Code refusing to accept an application under that section is a decree and appealable as such (*Jhangi Ram* v. *Budho Bai* (1)). The question now before us is whether an order accepting such an application and making the order of reference as prayed for is also a decree.

Mr. Beechey argues that there is an essential difference between the two cases. If the application is rejected, the Court has finally adjudicated upon the matter before it so far as it is concerned. But if the application is accepted and a reference is thereon made to the arbitrators, the first step is taken in proceedings

(1) 84 P. R., 1901, F. B. (4) *I. L. R., XXIX Mad.*, 303.
(2) 25 P. R., 1902, P. C. (5) *I. L. R., XXXIII Calc.*, 757.
(3) *I. L. R., XXVII Mad.*, 255. (6) *I. L. R., XXVI All.*, 205.
(7) *I. L. R., XXVIII All.*, 21.

which are to be treated as a suit. The acceptance of the application (so Mr. Beechey contends) is the initial step in the suit. Once this step is taken, the "suit" really begins and the subsequent proceedings are proceedings in the suit so started, and the suit does not terminate until the arbitrators have given their award and the Court has passed a decree in the terms of the award. In support of his argument, the learned counsel referred to the provisions of Section 524, Civil Procedure Code, which provide that "the foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under Section 523 and to the award of arbitration, and to the enforcement of the decree founded thereon." These provisions, according to the learned counsels' argument, clearly imply that the "suit" is not terminated *ipso facto* on the making of the order of reference. The learned counsel further urged in support of his contention, that the order of reference under Section 523 does not in any sense, so far as the Court making it, decide the "suit." The Court, it is urged, has still to wait the award of arbitration, and its final adjudication takes place only when it makes its decree upon the award. As another, but subsidiary argument, it is said that it would be most anomalous that there should be two decrees in one and the same suit, the one "decree" being the order of reference under Section 523 and the other "decree" being the decree made on the award. The latter argument does not seem to me to be fatal to appellants' contention, for, though anomalous, there can undoubtedly in some cases be two decrees in one and the same suit. For example, in a suit for dissolution of partnership there is first the preliminary decree for dissolution, and secondly the final decree. (See Nos. 132 and 133 of the form decree in Schedule IV of the Civil Procedure Code). I am not prepared, however, to say that there is no force in Mr. Beechey's argument in the other respects, but feel that the question before us is really concluded by the expression of opinion in their Lordships of the Privy Council decision in the case of *Ghulam Jilani* v. *Muhammad Hassan* (1). In this case their Lordships pointed out that the chapter in the Code of Civil Procedure on *Reference to Arbitration* (Chapter XXXVI) deals with arbitration under three heads—

(1) "Where the parties to a litigation desire to refer any matter in difference between them in suit. In that case all proceedings from first to last are under the supervision of the Court."

(1) 25 P. R., 19 , P. C.

(2) "Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court."

(3) "When the agreement of reference is made, and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to award."

The present case obviously falls under the second of the above headings, and with reference to such cases their Lordships observed: "In cases falling under heads II and III proceedings "described as a suit and registered as such must be taken in "order to bring the matter—*the agreement to refer*, or the award, "as the case may be—under the cognizance of the Court. That is, "or may be, a litigious proceeding—cause may be shown against the application—*and it would seem that the order made thereon is "a decree within the meaning of that expression as defined in the "Civil Procedure Code.*" This, no doubt, is a mere *obiter dictum*, but even so, the Courts of this country are not entitled, in my opinion, to decide counter to so clearly an expressed opinion of the highest Court of Appeal. The Full Bench of the Madras High Court, with reference to the passage cited, remarked: "This is a considered *dictum* and is, we think, fully in accordance with the scheme and policy of the Code." (*Pounasami Mudali* v. *Mandi Sundara Mudali* (1), at page 258). Mr. Beechey relies upon the decisions of the Allahabad High Court in *Katik Ram* v. *Babu Lal* (2) and *Basant Lal* v. *Kunji Lal* (3), but these cases are clearly distinguishable, the decision in them being that an order under Section 525 refusing to file an award is not appealable. These decisions are, however, opposed to the ruling of the Full Bench of this Court in *Jhangi Ram* v. *Budho Bai* (4), and to a number of rulings of the other High Courts (*e. g.*, *Thiruvenga Datiiengarh* v. *Vaidanatha Ayyar* (5), and *Janodkey Nath Guha* v. *Brojo Lal Guha* (6)).

I would, therefore, hold upon the authority of the passage quoted from Ghulam Jilani's case and the ruling in Jhangi Ram's case (for I cannot personally see any vital distinction *quâ* the right of appeal, between an order accepting or an order rejecting an application under Section 523) that an appeal lies in the present case.

(1) *I. L. R., XXVII Mad*, 255.
(2) *I. L. R., XXVI All.*, 205.
(3) *I. L. R., XXVIII All.*, 21.
(4) 84 *P. R.*, 1901, *F. B.*
(5) *I. L. R., XXIX Mad.*, 303.
(6) *I. L. R., XXXIII Calc.*, 767.

No. 127.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

BARKAT ALI,—(DEFENDANT),—APPELLANT,

Versus

JHANDU,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 732 of 1906.

Custom—Alienation—Gift of ancestral property by childless proprietor in favour of strangers—Awans of Jullundur District.

Held, that by custom among Awans of the Jullundur District a childless proprietor is not competent to make a free and absolute gift of his ancestral land to strangers and non-relations in the presence of his male agnates.

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Jullundur Division, dated 14th March 1906.

Gurcharan Singh, for appellant.

Shiv Narain, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—This appeal and No. 66 of 1906 are cross appeals and will be disposed of by one judgment. *3rd April* 1907.

The material facts are given in the judgments of the Lower Courts. The parties are Awans of Phulpur and Kadianwali in the Jullundur *tahsil* and District, and the disputed land is situate at the latter place, while plaintiffs are landholders and residents of Phulpur. The settlement pedigree tables of both villages show the relationship of the plaintiff to Roda, the original proprietor of the land, who made a gift of half of it to Jiwa, defendant's uncle.

In this appeal by the defendant the questions for decision are (1) whether the land has descended from Ashraf, the common ancestor of the plaintiffs, and Roda, (2) whether the heirs of the donor have by custom a right of reversion.

In the cross appeal the points for determination are—

(1) whether the plaintiffs are entitled to recover the half share which Jiwa did not get by gift, but got possession of without title and made over to Mahtab, his brother:

(2) whether the plaintiff's claim to the house is established.

Taking up the defendant's appeal first, we are clearly of opinion that the land is ancestral. The *qaifiat* of the settlement pedigree of Kadianwali shows that Ashraf got it from his father-in-law, Ditta, one of the original proprietors of the village, and

the plaintiffs are therefore entitled to claim as reversioners of Jiwa—who got one half by gift—on failure of his direct male line. It is argued on the second point that among Awans the power of alienation is plenary, and that therefore the principle of return of the gifted land to the agnatic relations of the donor is not applicable in the present case. We have referred to the authorities bearing on the powers of Awan proprietors to alienate ancestral land in their possession in the presence of agnates and the latest of them, *Khudayar* v. *Fatteh* (1), in which the earlier rulings are cited and considered, is a case from the Jhelum District. We are unable to hold on these rulings and on the evidence offered in this case that an Awan in the Jullundur District has absolute and uncontrolled right to give away ancestral land to strangers and non-relations to the prejudice of his collateral relations, though his powers of disposition are undoubtedly large, and we see no reason to think that the ordinary principle of reversion of the gifted land to the donor's line on failure of the donee's lineal heirs does not apply in the present instance.

We accordingly reject defendant's appeal.

As regards plaintiffs' appeal, we are unable to find any specific evidence as to the existence of the house claimed or to differ from the first Court's opinion on this point. As regards the half share of land not gifted to Jiwa, but held by him and made over in his life-time to his brother Mahtab, we hold that Jiwa's possession was adverse and that plaintiffs' right to sue accrued on Roda's death, more than thirty years ago. It is too late now for plaintiffs to make any claim to this share.

The cross appeal must also fail.

We dismiss both appeals with costs.

Appeal dismissed.

No. 128.

Before Sir William Clark, Kt., Chief Judge.

HAZARA,—(PLAINTIFF),—PETITIONER,

Versus

REVISION SIDE.

BISHEN SINGH,—(DEFENDANT),—RESPONDENT.

Civil Revision No 97 of 1907.

Specific Relief Act, 1877, *Section 42—Suit for declaration—Further relief —Amendment of plaint.*

Held that a suit for a declaration should not be dismissed merely because the plaintiff being able to seek further relief has omitted to claim it. In

(1) 8 P. R., 1906.

such a case the Court must allow plaintiff to amend his plaint by asking for the further relief.

Petition for revision of the order of Kazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 5th June 1906.

Devi Dial, for petitioner.

Kharak Singh, for respondent.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—Plaintiffs' suit was to have cut certain trees on plaintiffs' land, which had been sold to defendant as they were damaging plaintiffs' crops. The suit was couched in the form of a declaratory suit to the effect that defendants were not entitled to keep the trees standing on plaintiff's land. *2nd May* 1907.

The first Court gave the plaintiffs a declaratory decree to the above effect with a direction that defendant should cut the trees.

The learned Divisional Judge, Kazi Muhammad Aslam Khan, held that the suit would not lie; he said "The plaintiffs "had a consequential relief to seek in this case, that is, a "permanent injunction to restrain the defendant to allow the "trees to stand in their land and to cut them .... "as this relief was not sought, the suit for a declaration could "not lie" and he dismissed the suit.

The action of the Divisional Judge was thus instead of settling the dispute existing between the parties to render useless the whole of the litigation between the parties, and to throw plaintiff back on a fresh suit to secure the same object.

It is most desirable whenever possible that Courts should settle the dispute that has arisen between parties; this was done in this case by the first Court and should not have been undone by the Divisional Judge. If there was any irregularity in the first Court in not having required formal amendment of the plaint, this could have been rectified by the Appellate Court.

I accept the revision and remand the case under Section 562, Civil Procedure Code, for disposal of the appeal on the merits.

Court fee on this revision will be refunded. Other costs will be costs in the case.

Application allowed.

No. 129.

Before Sir William Clark, Kt., Chief Judge.

APPELLATE SIDE.

RAM MAL AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SHAHAMAD KHAN,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 355 of 1906.

Appeal—Appeal from exercise of discretion—Grounds of interference.

Held that a Court of appeal ought not to interfere with the exercise of the discretion of an original Court unless there is some substantial grievance.

Further appeal from the decree of Maulvi Inam Ali, Divisional Judge, Shahpur Division, dated 20th January 1906.

M. S. Bhagat, for appellants.

Shahab-ud-din, for respondents.

The judgment of the learned Chief Judge was as follows :—

6th April 1907. CLARK, C. J.—Plaintiffs sued for Rs. 1,963 on account and the first Court decreed Rs. 1,797 allowing interest at Re 1-8 *per cent. per mensem.* Defendant appealed and the second Court decreed Rs. 1,637 allowing interest at Re. 1 *per cent. per mensem.* Plaintiff now appeals claiming interest at Rs. 2 *per cent. per mensem.* I think defendant would have been well advised, if he had accepted the decision of the first Court and plaintiff would have been equally well advised if he had accepted the decision of the second Court. Appeals about trifles, when there has been substantial justice done, should be discouraged. Parties should accept a decision by a Court, unless there is some substantial grievance. No sufficient reason is made out for disturbing the rate of interest as fixed by the second Court. The appeal is dismissed. Parties will bear their own costs of this appeal.

Appeal dismissed.

No. 130.

Before Sir William Clark, Kt., Chief Judge.

REVISION SIDE.

PURAN,—(PLAINTIFF),—PETITIONER,

Versus

MAMUN,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 1001 of 1906.

Occupancy rights—Succession to—Common ancestor not occupying land—Entry in Wajib-ul-arz *over-riding provisions of law—Agreement—Punjab Tenancy Act,* 1887, *Sections* 111, 112.

Held, that under Sections 111 and 112 of the Punjab Tenancy Act, 1887 an entry in a record of rights prior to 1871 providing rules over-riding the

provisions of law with respect to succession to land in which a right of occupancy subsists should be deemed to be an agreement and enforced as such notwithstanding the restrictions contained in proviso to Section 59.

Petition for revision of the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 12th January 1906.

Shah Nawaz, for petitioner.

Miran Bakhsh, for respondent.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—The facts of this case are given in the judgment of the Divisional Judge which runs as follows:— *11th Jany.* 1907.

"Mamun, defendant, and Ata Muhammad, defendant, are "sons of Jhande Khan and the other defendants are descendants "of Ranjhe Khan.

"Suba was occupancy tenant of fields No. 586 and 662 "at his death and was succeeded by his widow Mussammat "Bego.

"Mussammat Bego having died, the defendants have "taken possession of these fields and mutation has taken "place in their favour as heirs of Suba.

"The proprietors of the land now sue to eject "defendants as trespassers and claim possession of these "two fields. Defendants allege that Jhande Khan, Suba and "Ranjhe Khan were brothers and sons of Murad Khan, who at "one time occupied the land.

"There is a clear provision in the *Wajib-ul-arz* of the "Settlement of 1852 and in the *Wajib-ul-arz* of the Settlement "of 1884 which gives the right of succession among occupancy "tenants to collaterals whether or not the common ancestor "held the land. Thus Section 59 of Tenancy Act does not "apply, and if defendants are collaterals of Suba, they are "entitled by Sections 111 and 112 of the Tenancy Act to succeed "to the land under the clause in the *Wajib-ul-arz*.

"The Lower Court has held that defendants are not "collaterals of Suba, chiefly on the ground that Mamun, "defendant, when shown in the Settlement record as agent of 'Mussammat Bego is described as her '*braderzada*', but "it is clear that the word '*bradarzada*' was not intended to "mean 'son of Bego's brother', but referred to the relationship "between Mamun and Mussammat Bego's husband. I have "sent for and examined the Settlement records of 1852 and 1884.

"It is true that at the first Settlement of 1852 the names "of Jhande Khan, his sons or Suba were not included among

" the occupancy tenants of the village. It is also true that " Ranjhe Khan's father's name cannot be found in the old " Settlement records and that, though Ranjhe Khan's sons at " the Settlement of 1852 were occupancy tenants in the village " and held a part of the land now in dispute with other land, " they did not hold the whole of the land in dispute. Field " No. 586 formed part of old field No. 572 which at the Settle- " ment of 1852 was held by Ranjhe Khan's sons, but No. 662, " which corresponds to old Nos. 559, 553, 557, 552 and min. 556, " was in the possession of the proprietors (*khudkasht*) at the " Settlement of 1852.

" It is not clear how Suba came into possession of land as " occupancy tenant, but it cannot be disputed that after Settle- " ment of 1852 he was recorded as occupancy tenant of land " which he got partly from Ranjhe Khan's sons and partly " from the proprietors.

" In 1878 mutation proceedings took place by which " Jhande Khan became recorded occupancy tenant of half the " land which was then in possession of Suba. These mutation " proceedings show that Jhande Khan and Suba were brothers " and sons of Murad Khan, and the proprietors whose state- " ment was recorded admitted Jhande Khan's right as co-sharer " with his brother saying that his name had been omitted from " the revenue records owing to his absence on service when they " were prepared.

" Thus there is no doubt that Mamun and Ata Muhammad are " nephews of Suba, and as it is not likely that they would admit " the descendants of Ranjhe Khan as co-heirs with them- " selves to Suba unless Ranjhe Khan had been Suba's brother, " and as one of the fields left by Suba was held by Ranjhe " Khan's sons at the Settlement of 1852, and hence was probably " at one time held by a common ancestor of Suba and Ranjhe " Khan, I see no reason to doubt that all the defendants are " collaterals of Suba.

" With reference to my order of 23rd October 1905 I do not " consider it necessary to award special costs for the adjourn- " ment on that date. Neither party can be held responsible " for the adjournment because without adjourning I could not " have examined the Settlement Records, and without examining " the original Settlement Records I could not have decided " the appeal.

" I accept the appeal and, reversing the Lower Court's " decree, I dismiss the plaintiff's suit with costs throughout."

He holds that under the entries in the *Wajib-ul-arz* of 1852 and 1884 there is a special agreement as regards succession to occupancy rights, over-riding the law laid down in Section 59 of the Punjab Tenancy Act, and that under this agreement collaterals succeed whether or not the land was held by the common ancestor of the claimant and the last occupant of the land.

It becomes necessary therefore to consider carefully Sections 111 and 112 of the Tenancy Act.

These sections are an amendment of Section 2 of the Tenancy Act of 1868, and are with reference to the question of how far parties should be allowed to contract themselves out of the terms of the Act, either by existing or future contracts. Section 2 of the old Act saved all written agreements between landlords and tenants and gave the force of agreements to all entries in Settlement Records made and sanctioned prior to the year 1871 as regards question of rent, ejectment, alienation and succession and compensation. The intention of the Act of 1887 was to curtail the right of persons to contract themselves out of the terms of the Act especially as regards rent, ejectment and compensation, but the validity given by the law of 1868 to entries in Settlement Records prior to 1871 was maintained, and the right of persons in future to contract themselves out of the terms of the Act, except as regards the matters noticed above, was declared.

Parties can therefore by written agreement either prior or subsquent to 1871 settle on a law of succession different from the succession prescribed in the Act.

In this case we have to consider the effect of the entry in the *Wajib-ul-arz* of 1852 (prior to 1871) and the effect of the entry in the *Wajib-ul-arz* of 1884 (subsequent to 1871), *i.e.*, whether they are agreements or not. The wording of Section 112 is that an entry prior to 1871 with respect to the succession to land in which *a right of occupancy subsists* is an agreement.

In 1852 Suba had a right of occupancy only in field No. 586, and none in No. 662 which was held by the proprietors in their own hands. It is therefore only as regards No. 586 that the entry amounts to an agreement, it does not constitute an agreement as regards No. 662 in which at the time no right of occupancy subsisted. I think that the word "subsists" refers to subsisting at the time of making the entry, and does not refer to land in which occupancy rights were subsequently acquired and subsisted at the time of the suit.

As regards No. 662 we have to consider whether the entry in the *Wajib-ul-arz* of 1884 Settlement is an agreement.

This question is discussed at some length in *Dilsukh Ram* v. *Nathu Singh* (1) at page 356. The reasoning there is I think correct, there was no intention of the parties to enter into an agreement in the sense of mutual promises, there was only an expression of opinion that the succession should follow a particular course.

I therefore hold that there was no agreement in the *Wajib-ul-arz* of 1884 and the course of succession laid down in Section 59 of the Tenancy Act must prevail as regards field No. 662.

I therefore accept the appeal so far as to decree the suit as regards field No. 662 and dismiss it as regards field No. 586.

Parties will bear their own costs throughout.

Appeal allowed.

No. 131.

Before Sir William Clark, Kt., Chief Judge.

REVISION SIDE.

LADHU,—(PLAINTIFF),—PETITIONER,

Versus

SARDAR MUHAMMAD,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 725 of 1907.

Pre-emption—Limitation as regards rights already accrued—Punjab Pre-emption Act, 1905, Sections 2 (3), 28, 29.

Held, that Section 29 of the Punjab Pre-emption Act, 1905, is the substantive section fixing the period of limitation and by Section 2 (3) it applies to every claim to the right of pre-emption whether that right has accrued before or after its commencement.

Section 28 is not a substantive section, it only provides a period of one year from the 11th May 1905 during which, in spite of the shorter period provided by Section 29, parties might exercise rights of pre-emption which had already accrued to them and which might be barred under the latter section.

Petition for revision of the order of C. H. Atkins, Esquire, Divisional Judge, Ferozepore Division, dated 29th November 1906.

Durga Das, for petitioner.

Chatterji, for respondent.

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(1) 98 *P. R.*, 1894, *F. B.*

The judgment of the learned Chief Judge was as follows :—

5th June 1907.

CLARK, C. J.—This is a pre-emption suit. The sale took place on 5th August 1904. Mutation of names took place on 27th June 1905. The Pre-emption Act came into force on 11th May 1905. The suit was instituted on 27th June 1906.

The sale included a share of *shamilat*, and Article 120, Schedule II, of the Limitation Act, gave plaintiff six years' limitation under the old Pre-emption Law. Plaintiff's right to sue had accrued before the new Act came into force and the Lower Courts have held that Section 28 of the new Act is the substantive section laying down the period of limitation for such suits and that plaintiff's suit is barred.

This view of the law is, I think, wrong, the object of Section 28 was simply to provide a period of one year during which, in spite of the new period provided by Section 29, parties might exercise right of pre-emption, which had already accrued to them, and which might be barred under Section 29. Section 29 is the substantive section fixing the period of limitation, and by Section 2 (3) it applies, "to every claim to the right of pre-emption "whether that right has accrued before or after its commence-"ment."

Section 28 therefore has no bearing at all on this case, Section 29 is the section that fixes the period of limitation, and it gives plaintiff one year from the date of the attestation.

The suit is therefore not barred by limitation on the grounds found by the Lower Courts.

I accept the revision and set aside the orders of the Lower Courts and direct the first Court to dispose of the case.

Court fee on this revision will be refunded, other costs will be costs in the case.

Application allowed.

No. 132.

Before Mr. Justice Chatterji, C.I.E., and Mr Justice Johnstone.

APPELLATE SIDE.

GULZARI MAL,—(PLAINTIFF),—APPELLANT,

Versus

KISHAN CHAND,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 123 of 1906.

Trust and trustee—Suit by settlor against trustee on failure of the object of a trust to recover trust funds for himself—Starting point of limitation—Unsigned statement of account in defendant's books—Acknowledgment—Mutual account—Indian Limitation Act, 1877, Sections 10, 19, Articles 64, 85, 120—Contract—Contract to pay a debt barred by Limitation Law—Contract Act, 1872, Section 25 (c).

Held that where the author of a trust on failure of its objects sues to recover trust property in the hands of a trustee for his own use and not for the purposes of the trust, Section 10 of the Indian Limitation Act is inapplicable.

Such a suit being a suit to reconvey trust property to the settlor the limitation applicable is that prescribed in Article 120 and will commence to run from the date of the failure of the object of the trust.

Kherodemoney Dossee v. *Doorgamoney Dossee* (1), *Greender Chunder Ghose* v. *Mackintosh* (2), *Jasoda Bibi* v. *Parmanand* (3), *Hemangini Dasi* v. *Nobin Chand Ghose* (4), *Cowasji* v. *Rustomji* (5) cited and followed.

Held also that a bare statement of account in a defendant's books in the hand-writing of the plaintiff himself such as "Daskhat (plaintiff) rupia 53,526-5-9 hisab samajke baqi nikal li" made up largely of a barred item transferred from another account which had not been signed by the defendant or his authorised agent in that behalf is useless for the purposes of limitation and does not create a fresh starting point, as it neither amounts to an acknowledgment within the provisions of Section 19, nor to an account stated under Article 64 of the Limitation Act or to a promise to pay within the meaning of Section 25 (c) of the Indian Contract Act. In such a case the transfer of the barred item without observation of due formalities to a mutual open and current account even with defendant's consent cannot over-ride the Law of Limitation.

Sadasook Agarwalla v. *Baikanta Nath* (6), *Ram Dita* v. *Ibrahim-ud-din* (7), *Chowksi* v. *Chowksi* (8), *Ranchhoddas* v. *Jeychand* (9), *Gangaprasad* v. *Ramdayal* (10), *Mahbub Jan* v. *Nur-ud-din* (11), *Ganesh* v. *Gyanu* (12), and *Velu Pillai* v. *Ghose Mahomed* (13), referred to and distinguished.

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(1) *I. L. R., IV Calc.*, 455.
(2) *I. L. R., IV Calc.*, 897.
(3) *I. L. R., XVI All.*, 256.
(4) *I. L. R., VIII Calc.*, 788.
(5) *I. L. R., XX Bom.*, 511
(6) *I. L. R., XXXI Calc.*, 1043.
(7) 122 *P. R.*, 1889.
(8) *I. L. R., VIII Bom.*, 194.
(9) *I. L. R., VIII Bom.*, 405.
(10) *I. L. R., XXIII All.*, 502.
(11) 102 *P. R.*, 1905.
(12) *I. L. R., XXII Bom.*, 607.
(13) *I. L. R., XVII Mad.*, 293.

First appeal from the decree of H. Harcourt, Esquire, District Judge, Delhi, dated 25th November 1905.

Pestonji Dadabhai, for appellant.

Shadi Lal, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—The material parts are briefly these Plaintiff's father, Hazari Mal, and defendant's father, Kanhya Lal, were brothers and partners in business at Delhi. In 1892 after plaintiff's father's death, a separation took place through an arbitrator, one Lala Kanhya Lal. The award of the arbitrator, which is printed at page 1 of the supplementary printed record, recites that Rs. 62,000 in cash were due by defendant's father as the share of Hazari Mal, Rs. 3,000 on account of furniture and half of a *tavela* and Rs. 7,400 on account of jewels of plaintiff's wife. Two houses valued at Rs. 10,000 were also to be given on account of that share. Plaintiff's share was to be made up thus: 30*th March* 1907.

(*a*) The title deeds of the houses were to be made over to plaintiff's wife Mussammat Piari, who was to hold possession and enjoy the rents without power of alienation, the properties to revert to plaintiff Gulzari Mal in case she died without male issue.

(*b*) The ornaments to be held by Mussammat Piari without power of alienation except to her daughters, sons-in-law and daughters-in-law.

(*c*) Rs. 30,000 out of the Rs. 65,000 mentioned above (62,000 + 3,000) to remain deposited in Mussammat Piari's name as owner without power of alienation, except with reference to the interest which was to be payable to her at 6 *per cent. per annum*, after the lapse of one year from the date of the award, no interest being payable for that year. After her death plaintiff's issue to be entitled to this money.

(*d*) The remaining sum of Rs. 35,000 was to remain with Kanhya Lal without interest for one year and thereafter on interest at 8 annas *per cent. per mensem* to the credit of the plaintiff. Rupees 5,000 could be drawn out of it by the plaintiff for purposes of business and other sums hereafter for the same object with the approval of Kanhya Lal and the arbitrator, the restriction to remain in force for 10 years, after which he was to have full powers of disposal. Kanhya Lal was given the

entire joint business and the assets thereof subject to the above payments on account of plaintiff's share. A decree was passed by the District Judge of Delhi in terms of the award by consent of parties on 18th August 1892.

Plaintiff's wife died without male issue many years ago, it is not clear from the record now many, but it is undisputed, more than six years before suit. From a copy of an extract from the register of deaths filed in this Court by Mr. Shadi Lal and accepted by Mr. Dadabhoy, it appears that she died on 2nd April 1893. In 1904 plaintiff tried to realize the amount he considered due from defendant in execution of the decree of 1892, but it was finally ruled by the Chief Court on 10th April 1905 that he was bound to file a fresh suit. On 20th April 1905, plaintiff brought the present suit. He alleged that after the award the parties had dealings and that on 7th June 1902 the account was adjusted between them, and defendant struck a balance for Rs. 53,526-5-9 including the item of Rs. 30,000 deposited in Mussammat Piari's name in his own book in plaintiff's favour.

The defendant disclaimed all knowledge of the original jointness between the parties' ancestors and of the award, but admitted that two sums of Rs. 35,000 and 30,000 were credited to plaintiff and Mussammat Piari respectively in his books, that the plaintiff had dealings, but that not one farthing had been paid on Mussammat Piari's account, that the amount stated referred to in the plaint had been entered in his books during his absence by collusion between plaintiff and defendant's *munim*, and that nothing was due to plaintiff but about Rs. 13,500 owed by him to defendant. He also pleaded that plaintiff has no right to claim the Rs. 30,000 entered in Mussammat Piari's name and that the claim for this sum was barred by time, Mussammat Piari having died nine years before suit. Other technical objections to the claim need not be set out here, as they are not pressed before us.

The issues framed by the District Judge were—

1. Whether the entry in defendant's book, dated 7th June 1902, amounts to an acknowledgment within the meaning of Section 19 of the Limitation Act.
2. Is it in any case a statement of account that will give a fresh period of limitation.
3. If it is, may not defendant go behind it.

The District Judge found that the entry was not signed even by defendant's agent, and that defendant did not agree to it. He held that the suit as based on the balance was not

tenable and accordingly dismissed it without costs. He incidentally expressed the opinion that plaintiff had not been given the Rs. 30,000 by the award and the sum was kept perfectly distinct from the Rs. 35,000 given to plaintiff himself, and that his claim to the former sum was not clear in equity, but inconsistently allowed this equity to sway him in not awarding costs.

The case was argued at great length by counsel for the parties and the plaintiff's contentions before us were substantially these—

(1) That under the award the sum of Rs. 30,000 was plaintiff's money, Mussammat Piari having been given only a life interest in it, and that in any case the plaintiff is entitled to recover it from defendant on Mussammat Piari's death without male issue.

(2) That the sum was held by defendant and his father as a trustee, and that no limitation applies to the present suit in so far as that sum is concerned.

(3) That the account was stated in defendant's book by defendant's agent with authority and was never repudiated by the defendant within the subsequent period during which the parties had dealings and must necessarily have come to his knowledge and that defendant's conduct amounted to ratification if authority was not expressly or impliedly given before.

(4) That the claim is within time—

(*a*) as the amount stated gives a fresh starting point;

(*b*) as it amounts to a fresh promise within the meaning of Section 25 (3) of the Indian Contract Act.

It was admitted that if Section 10 of the Limitation Act did not apply, the limitation governing the suit was that provided in Article 120 of the Act.

It was also suggested that the account may be treated as a mutual open and current account and the limitation prescribed in Article 85 applied to it.

These contentions were strenuously opposed by the other side.

The points for determination in this appeal group themselves under two main heads—

I. Whether the plaintiff has any right to the Rs. 30,000 credited in defendant's books in the name of Mussammat Piari, his wife, and set apart for her by the award.

II. If so, whether the claim is within limitation.

In order to satisfactorily decide the limitation point, the facts should be first disposed of, and we therefore proceed to consider the first question.

In our opinion there cannot be any rational doubt that the sum of Rs. 30,000 was plaintiff's money, though the arbitrator set it apart for the maintenance of Mussammat Piari during her life-time. The money was provided out of his share in the joint shop and from the Rs. 65,000 cash which were due to him on account of that share. This is expressly stated in the award, and it was clearly mentioned that the cash, ornaments and immovable property of that share were to be paid to and for (*uske waste*) Gulzari Mal in a certain way, which has already been described in an earlier part of this judgment. There cannot be the least doubt that the property was the plaintiff's, and the arbitrator merely made an arrangement for the well being and comfort of plaintiff's wife, to which plaintiff assented and that the arbitrator never intended that the property should not revert to plaintiff on the death of his wife without male issue. The case may be looked at in two ways. Mussammat Piari was only to have life interest in the property, the reversion being with the plaintiff, and this is the right way of regarding it. Or assuming, for argument's sake, that Mussammat Piari had been constituted full owner, so that inheritance is to be traced to her, it is obvious that by Hindu Law plaintiff is her heir. The arbitrator did not declare that on her death without male issue defendant was to be entitled to the money. The point is so simple and so obvious that we are unable to understand the difficulty the District Judge felt about it. The first question must be decided in plaintiff's favour.

On the question of limitation the first point for consideration is whether Section 10 of the Limitation Act is applicable to the claim. There was much argument on this point, but after due consideration we are obliged to hold that Section 10 has no application. It is possibly a fair argument that defendant's father was under the award constituted the trustee for Mussammat Piari to keep charge of the money, to pay the interest to her during life, and to hand it over on her death to any male issue she might leave. The plaintiff may be said to be the author of the trust, as he acquiesced in and accepted the award of the arbitrator in this matter. But when Mussammat Piari died the trust came to an end and Section 10 ceased to be applicable. It might have applied to a claim to enforce the trust by Mussammat Piari against defendant's father and defendant, but

on her death the money reverted to the plaintiff, the position of the latter was changed and they could not be treated as trustees under an express trust for a specific purpose.

This is not only apparent from the words of Section 10, which should be construed with reasonable strictness, but is concluded by authority. In *Kherodemoney Dossee* v. *Doorgamoney Dossee* (1) it was held that Section 10 applies to express trust alone and excludes implied trusts, and those resulting from operation of law, and that it does not apply to a suit to recover trust-money in the hands of the trustee, on failure of the objects of the trust for the plaintiff's own use and not for the purpose of the trust. Garth, C. J., regretted the narrow scope of the section, and wished that it was more comprehensive, but nevertheless felt bound to construe the section as it stood. This was followed in *Greender Chunder Ghose* v. *Mackintosh* (2). The same view was taken in *Jasoda Bibi* v. *Parmanand* (3). See also *Hemangini Dasi* v. *Nobin Chand Ghose* (4). In *Cowasji* v. *Rustomji* (5), it was ruled that the section does not apply even to suits to declare trust created for a specific purpose void and to enforce resulting trusts, the limitation for the latter being that provided by Article 120 of the Limitation Act. Assuming that there was an express trust in this case in favour of Mussammat Piari and for a specific purpose, *viz.*, providing her with maintenance from the income for life, and this trust ceased on her death, though the defendant and his father themselves held what had been trust-money for plaintiff's benefit. This was a resulting trust according to the language of the text-books. In the Indian Trusts Act II of 1882, Chapter IX, a case like the present would be covered by Section 83, but Chapter IV deals with obligations *in the nature of trusts*. They are classed differently from actual and specific trusts, which would come under Section 10 of the Limitation Act. Thus it is clear that this contention of the plaintiff-appellant is untenable.

As regards the remaining contentions under the head of limitation, it is clear that they hinge on the alleged balance brought out or struck in defendant's books. It is worded as follows:

Daskhat Gulzari Mal rupia 53,526-5-9 *hisab samajke baqi nikal li.*

It is not signed by the defendant or his *munim* but by the plaintiff. After the balance the dealings went on and the

(1) *I. L. R., IV Calc.*, 455. (2) *I. L. R., XVI All.*, 256.
(3) *I. L. R., IV Calc.*, 897. (4) *I. L. R., VIII Calc.*, 788.
(5) *I. L. R., XX Bom.*, 511.

amount was carried in the books of defendant down to Bhadon Sudi 1960 when a debit of Rs. 2,500 is entered against the plaintiff. After this there is a debit of Rs. 48,216-7-9 against plaintiff, which had been credited to him on account of Mussammat Piari's item of Rs. 30,000 and interest when the disputed balance was struck with the remark that, as the District Judge had decided that plaintiff could not recover this sum in execution of decree, the former credit was wiped out by this debit.

Defendant denied that the balance was struck and the credit of Mussammat Piari's item brought into the plaintiff's account with his knowledge or consent or with authority, and alleged that it was the result of collusion between his *munim* and plaintiff. This plea must be disposed of before we can accept the balance in evidence, and give effect to the credit of Rs. 48,216-7-9 aforesaid and discuss the legal arguments founded on them.

After a consideration of the evidence and probabilities, we are of opinion that this defence is not established.

The plaintiff and Ranjit Singh, late *munim* of the defendant, swear that the credit was entered in defendant's books and the account settled in his presence and with his consent. The defendant has, we think, successfully shown from his books and by other evidence that on the day the balance was struck he was away from Delhi. But this does not necessarily show that the balance was fabricated by Ranjit Singh and the plaintiff. The statement was made some years after the date of the balance, and the inaccuracy may well have been due to forgetfulness. But even if defendant's presence has been falsely stated, it does not follow that the balance is also false, for it is not unusual to find true cases supported by false evidence. Ranjit Singh says defendant told him to make up accounts of the interest on the Rs. 30,000 and to settle the amount, and this may be perfectly true without defendant being actually present when the accounts were finally made up and the balance brought out. It appears clear that dealings went on for nearly fifteen months after the balance which were duly entered in the same account and Ranjit Singh continued to be employed as *munim*. He was in fact dismissed, Mr. Shadi Lal told us, shortly before the present suit was instituted. It is difficult to believe that he would be employed and the dealings go on if so great a fraud had been perpetrated by him. It is still more difficult to believe the explanation given by counsel that defendant never looks after his business and never saw the account books within the period

under discussion. If he acts like this which cannot however be believed, there would be ground for thinking that the *munim* doing the business of the shop has authority to make such settlements. But in fact it was for defendant to have gone into the witness-box and sworn to the fraud and to the explanation now offered through counsel. But he has not dared to do this, and we cannot believe that it was the fault of his lawyers that he was not called to dispose to these matters. The words of the final re-debit against plaintiff also negative the allegation of fraud and collusion. Had defendant not been aware of the balance and the account had been collusively settled behind his back, he would have clearly made mention of it when the debit was made. On the contrary, the words used suggest the inference that defendant had considered himself liable to pay the money and had entered the credit on that understanding, and made the debit entry when he was agreeably surprised to find that the District Judge held he was not liable.

It is indeed not intelligible how defendant could have denied that the money belonged to plaintiff on Mussammat Piari's death, and we think that he understood himself to be liable for it, plaintiff was supine about drawing it out, thinking that the account was a single one and it suited defendant to let it remain with him. As an honest banker defendant knew he was liable for interest, which had been expressly fixed at 6 annas *per cent. per annum* by the arbitrator, though drawn only once by Mussammat Piari, and it is not strange that in 1959 Sambat he should have ordered the interest to be calculated and the plaintiff's account to be consolidated. The dealings then went on as before, and it is only when defendant's business got bad and it became inconvenient and difficult to pay such a large sum, that recourse was had to legal objections to stave off payment and plaintiff was driven to Court.

We therefore find that there was no fraud or collusion, and that the account was made up and the balance settled with defendant's knowledge and consent. At any rate he must be presumed to have ratified the act of his *munim*. This defence therefore fails.

The question then arises what is the effect of the so-called balance on the limitation applicable to the claim.

(*a*) As an acknowledgment or account stated.

(*b*) As a promise under Section 25 (3) of the Contract Act.

(*c*) As an entry in a mutual open and current account.

It is obvious that as an acknowledgment under Section 19 or account stated under Article 64 of the Limitation Act, the balance in question is valueless. It is not signed by the defendant or his *munim*, and it contains no words acknowledging liability or stating account on his behalf. The words simply mean that plaintiff had understood the account and had brought out the balance as correct. Ranjit Singh says plaintiff signed the balance in token of acceptance. Such a balance does not save limitation, which as already stated is six years from the date of Mussammat Piari's death, when the plaintiff's right to recover the money credited in Mussammat Piari's name accrued to him. The whole dispute centres round the item of Rs. 48,216-7-9 for without it the balance would have been a little over five thousand, and the subsequent dealings set forth in the plaint would have made plaintiff a debtor to the extent of many thousands instead of a creditor for the amount claimed. It is quite clear also that the credit was made and the balance brought out after the lapse of six years from Mussammat Piari's death, so that the so-called acknowledgment was not made nor the account stated within limitation. Thus the balance is quite infructuous in this respect. *Sadasook Agarwalla* v. *Baikanta Nath* (1) and *Ram Ditta* v. *Ibrahim-ud-din* (2) have no application as their facts were different.

The argument under head (*b*) is equally untenable. The fatal objection of want of defendant's signature personally or by duly authorized agent is applicable under this head also. Moreover, there is no promise to pay, which is an essential part of a contract falling under Section 25 (3) of the Contract Act. The contract must be an express one according to the authorities, *i. e.*, not to be deduced by implication from a mere acknowledgment. See *Chowksi* v. *Chokusi* (3) and *Ranchhoddas* v. *Jeychand* (4). See also *Gangaprasad* v. *Ramdayal* (5) and the authorities cited therein. The language of the balance discussed in *Mahbub Jan* v. *Nur-ud din* (6) was different, and was held to contain a promise to pay. Sadasook Agarwalla's case cited above and *Ram Ditta* v. *Ibrahim-ud din* (2) are equally not in point. This contention, therefore, must also be decided *against* plaintiff-appellant.

The same difficulty appears in plaintiff's way with reference to his contention under the third head. The

(1) *I. L. R., XXXI Calc.*, 1043.
(2) 122 *P. R.*, 1889.
(3) *I. L. R., VIII Bom.*, 194.
(4) *I. L. R., VIII Bom.*, 405.
(5) *I. L. R., XXIII All.*, 503.
(6) 102 *P. R.*, 1905.

defendant's books kept the item of Rs. 30,000 separate until the credit of Rs. 48,216-7-9 took place, and the dealings were started with the credit of Rs. 35,000. The subsequent transaction partake of the nature of mutual open and current accounts, as these were reciprocal demands from time to time and transactions on each side, creating independent objections as laid down in *Ganesh* v. *Gyanu* (1) and *Velu Pillai* v. *Ghose Mahomed* (2), parties sold pearls, gems and jewels and passed *hundis* to each other and this character of the accounts continued to the end. In a balance struck in defendant's book on Asar Sudi 1st, Sambat 1954, plaintiff was debtor to the defendant to the extent of Rs. 6,569-6-6, and so he would be to the extent of several thousands in the account for the period subsequent to the last balance of Rs. 53,526-5-9, if the item of Rs. 48,216-7-9 was struck out. Assuming, therefore, that the account would fall under Article 85, the dispute would nevertheless rage round the credit of the last mentioned item which was brought in from another account, *viz.*, that relating to Rs. 30,000 in the name of Mussammat Piari. The question still would be was the item rightly credited and can defendant be held liable on it now that he denies his liability. If the item was brought into the account after it had become barred by time, the defendant can only be made liable if the credit can be held to be a promise in writing duly signed within the meaning of Section 25 (3) of the Contract Act. We have already seen that it was not, and there is no doubt that the item was already beyond time when the credit entry was made. The defendant can repudiate his liability in spite of his original assent to the credit, unless his assent has been given in a form that gets over the limitation law, and the mere transfer of a barred item from another account into a mutual open current account, even with defendant's consent, places plaintiff in no better position than he would have been in had he sued for the item individually on the strength of the credit entry. The argument perhaps serves to obscure the real issue at first sight, but is of no avail to get over the plea of limitation.

We are obliged therefore to hold that the claim is barred by time. The appeal must accordingly fail, but in view of the facts of the case and the hardship inflicted on plaintiff by defendant's action in first agreeing to pay and then refusing to do so, he should not be made to pay defendant-respondent's costs.

The appeal is therefore dismissed but without costs.

Appeal dismissed.

(1) *I. L. R., XXII Bom.*, 607. (2) *I. L. R., XVII Mad.*, 298.

Full Bench.

No. 133.

Before Sir William Clark, Kt., Chief Judge, Mr. Justice Robertson, and Mr. Justice Shah Din.

APPELLATE SIDE.

FAQIR ALI SHAH,—(DEFENDANT),—APPELLANT,

Versus

RAM KISHEN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 548 of 1906.

Pre-emption—Son's right to claim pre-emption on death of his father on a cause of action accrued to the latter in his life-time.

Held, by the Full Bench that a right to sue for pre-emption upon a cause of action which accrued to a person in his life-time passes at his death to his successor who inherits the property through which the right had accrued.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Multan Division, dated 11th April 1906.

Grey and Roshan Lal, for appellant.

Oertel and Harris, for respondents.

This was a reference to a Full Bench made by Robertson and Shah Din, JJ., to determine whether a right to sue for pre-emption upon a cause of action which had accrued to a person in his life-time passes at his death to his successors on their inheriting his land.

The order of the Division Bench referring the question of law to a Full Bench was as follows :—

SHAH DIN, J.—The facts of the case, so far as they are material for purposes of this reference, are as follows:—

On 29th March 1899, Miran Bakhsh, defendant No. 3, purchased the well in suit known as the Shahwala well, which was the property of defendants Nos. 1 and 2, at an auction sale held in execution of a decree against the owners thereof, for Rs. 8,000. On 4th May 1899, Miran Bakhsh sold the well to Sayad Faqir Ali Shah, defendant No. 4, for Rs. 8,000. On 29th November 1899, Faqir Ali Shah sold one-third share of the well to Rama and Sahara, defendants Nos. 5 and 6. The plaintiffs brought the suit for pre-emption, out of which the present appeal has arisen, on 9th February 1900 against the original owners and Miran Bakhsh and Sayad Faqir Ali Shah, alleging that they being landowners in the village in which the well in dispute is situate had a preferential right of pre-emption in respect of it as against the auction-purchaser and the second vendee, who owned no land in the said village. On 26th February 1900, the

plaintiff applied for Raman and Sahara, sub-vendees from defendant No. 4, to be impleaded as co-defendants, and they were impleaded accordingly.

It appears that at the time of the original auction sale, as also at the time when the resale to Sayad Faqir Ali Shah took place, the present plaintiffs-respondents were not land-holders in the village. It was their father Irapat who was a proprietor in the village at the time, and he having died some time in January 1900, the plaintiffs succeeded as his heirs to the land owned him and brought the present suit in February 1900 to enforce the right of pre-emption which admittedly had accrued to their father in his life-time.

Various pleas were raised in defence to the plaintiffs' claim in the Court of first instance, but it is unnecessary to notice them at this stage of the case. It may, however, be noted, that the case came up to this Court once before in 1905 for decision of the question whether there had been a waiver of the right of pre-emption on the part of the plaintiffs' father Irapat in respect of the sales in question, and was remanded for decision on the merits after a finding on the point of waiver in plaintiffs' favour.

The Courts below have now decided that Faqir Ali Shah was not a land-holder in the village at the time of the sale to him in May 1899, and have accordingly decreed the plaintiffs' claim conditional on payment of Rs. 8,000. Two appeals have been preferred to this Court, one by Faqir Ali Shah and the other by Raman Mal and Sahara; the points raised in both the appeals being substantially identical, namely (1) that the plaintiffs had no *locus standi* to sue for pre-emption in respect of the sales in dispute as heirs of Irapat, their father, inasmuch as the alleged right of pre-emption was personal to Irapat and not having been exercised by him during his life-time died with him and did not survive to the plaintiffs; (2) that the suit was bad for misjoinder of parties and of causes of action; and (3) that Faqir Ali Shah was a landowner in the village in which the well in suit is situate at the time of the sale to him, and that therefore the plaintiffs' right of pre-emption, if any, was not superior to his.

As regards the last two points, we are clearly of opinion that they are devoid of force. The objection as to misjoinder was not raised in the pleas and was not seriously pressed before us, and rightly, as we think that obviously the suit was not bad for misjoinder of parties and of causes of action. As

to the contention that Faqir Ali Shah was a proprietor in the village at the time of the sale to him in May 1899, we need only say that after referring to the evidence upon the record, on which reliance was placed in argument on his behalf, we have no hesitation in agreeing with the concurrent finding of the Courts below on this point, and we over-rule the contention as untenable.

There, then, remains the first point in regard to the plaintiffs' right to sue for pre-emption upon a cause of action which had accrued to their father in his life-time, and which, it was urged, did not survive to the plaintiffs as heirs to their father's land in the village in question. This point was pressed upon our attention by Mr. Grey with great force and earnestness in the course of a learned argument, and he cited the following authorities, which, though not precisely in point, he claimed as fortifying his position :—

Dhani Nath v. *Budhu* (1), *Rukan Din* v. *Ilam Din* (2), *Muhammad Ayub Khan* v. *Rure Khan* (3), *Lashkari Mal* v. *Ishar Singh* (4), *Dilganjan Singh* v. *Kalka Singh* ( ), *Ram Chand* v. *Durga Prasad* (6), *Mangal* v. *Sahib Ram* (7).

For the plaintiffs respondents Mr. Harris relied on *Fateh Khan* v. *Muhammad* (8).

We may note in passing that although the question of the plaintiffs' right to sue under the circumstances explained above was not raised by the defendants in their pleas in the Court of first instance nor in their grounds of appeal to the Lower Appellate Court, yet as it was specifically raised in the memorandum of appeal filed in this Court, and is a purely legal question (and not one of fact) depending for its decision on facts which are undisputed and apparent on the face of the record, we allowed the appellant's learned counsel to argue it. The respondents' counsel was in no way taken by surprise having had sufficient opportunity of meeting the case on the ground thus raised.

As the point urged by the appellant is one of some nicety and not free from difficulty, and as it is apt to arise in cases governed by the Punjab Pre-emption Act (II of 1905), and as after bestowing upon it our best consideration we are unable to formulate a definite opinion in regard to it, we think it desirable to refer it to a Full Bench for decision and we refer it accordingly.

(1) 136 *P. R.*, 1894.
(2) 100 *P. R.*, 1900.
(3) 95 *P. R.*, 1901.
(4) 94 *P. R.*, 1902.
(5) *I. L. R.*, *XXII All.*, 1.
(6) *I. L. R.*, *XXVI All.*, 61.
(7) *I. L. R.*, *XXVII All.*, 544.
(8) 98 *P. R.*, 1898.

Upon the reference to the Full Bench the following judgments were delivered :—

CLARK, C. J.—Where a right of pre-emption is claimed under Section 12 of the Punjab Laws Act in virtue of being a land-holder the right is inherent in the land. No questions are asked as to the nature of the land, as to whether it is ancestral or acquired, or as to how it was obtained, by inheritance or purchase; it is sufficient that the claimant owns the land. 23rd *May* 1907.

It is clear, therefore, that ordinarily a transfer of land passes the right of pre-emption, and the loss of the land involves the loss of the right of pre-emption. So much so that a right of pre-emption already acquired is lost if the land which gave rise to it is parted with—*vide Atma Ram* v. *Devi Dyal* (1) and *Muhammad Ayub Khan* v. *Rure Khan* (2).

The further question then arises whether such transfer of land does not pass the right of pre-emption on with reference to other lands already sold. *Primâ facie* there seems no reason why it should not.

It becomes convenient here to divide transfers into two clauses: (*a*) transfers by inheritance, (*b*) transfers by some voluntary act of the owner.

As regards the former there are no precedents. As regards the latter there are some precedents, the more important being *Sheo Narain* v. *Hira* (3) and *Muhammad Ayub Khan* v. *Rure Khan* (2) which decide that in such cases the right of pre-emption does not pass.

The Allahabad case is a Full Bench case. Four of the Judges simply state their answer to the question referred without any discussion of subject. Mahmud, J., discusses the subject and referring to Muhammadan Law says :—

"Under that law, when the ownership of the pre-emption "tenement is transferred or devolves by act of parties or by "operation of law, the transfer or devolution passes pre-emption "to the person in whose favour the transfer or devolution "takes place; but the rule is essentially subject to the proviso "that such person cannot enforce pre-emption in respect of any "sale which took place before such transfer or devolution. "This rule must also be applied to the present case. The reason "why, although the right of pre-emption runs with the land,

(1) 49 *P. R.*, 1901. (2) 95 *P. R.*, 1901.
(3) *I. L. R.*, *VII All.*, 585.

"the plaintiff in this case cannot be allowed to enforce it, "is that to rule otherwise would in effect be to allow a "'stranger' to oust one who is not a 'stranger' at the time of "the sale. * * * * * * * * *

* * * * * * * * * * * *

"If the purchaser at the later sale (and this is the position "of the plaintiff here) were to be allowed to pre-empt in "respect of the previous sale, the consequence would be that "whilst the purchaser in the earlier sale could maintain a suit "to enforce pre-emption in respect of the later sale, the "purchaser at such later sale could maintain a pre-emption suit "in respect of the earlier sale. There would thus be two suits "equally maintainable but wholly inconsistent with each other, "for each plaintiff would call the other a 'stranger' and the "object of each suit would be to preclude the plaintiff in the "other suit from the co-parcenary."

Mahmud, J.'s decision is based therefore mainly on the inconveniences and injustices arising out of a voluntary transfer, and none of his arguments apply to a transfer by inheritance. His view is even more apparent in *Rajjo* v. *Lalman* (1), where after saying that the very object and basis of the right of pre-emption is to prevent the introduction of strangers as co-sharers in the property, he says: "The right is essentially based "upon the injury which such inconvenience is supposed to cause. "From its very origin and nature, the right of pre-emption is "not one which is to be enforced merely as an instrument of "capricious power or vindictiveness. It is a transient right in "its very conception and nature, and being a personal privilege "of the pre-emptor cannot be made the subject of sale or "bargain of any other kind. Any attempt on the part of the "pre-emptor to bargain with it, is taken to indicate conclu-"sively that the injury of which the pre-emptor complains in "suing to enforce pre-emption is unreal, and that the claim is not "dictated by *bonâ fide* motives."

In addition to these objections, there is a very reasonable danger that once a desirable property has been sold, any number of persons hungering after that property might set about to buy small plots, not with any desire to own those plots but simply as a foundation for pre-emption suits. This would be a great hardship to the original vendee exposing him to a number of suits, which he had no reason to anticipate at the time of his purchase, and would be otherwise of very undesirable state of affairs.

(1) *I. L. R., V All.*, 180.

While, therefore, there is good reason why voluntary transfers should not pass a right of pre-emption as regards properties previously sold, those reasons do not apply to transfers by inheritance. As regards transfers by inheritance the general principle should apply that the right of pre-emption passes with the land.

Mr. Grey laid great stress on Sections 13 and 16 of the Punjab Laws Act urging that the father was the person on whom the notice had to be served, and that it was he who had the right to sue, and that the right was thus a personal one that could not be inherited by the son. The right was no doubt a personal one in the father based on his land, but I can see no reason why such right cannot be inherited by the son. If the father had waived or otherwise disposed of his right this would no doubt be binding on the son, as the father was representing the whole estate.

Where, however, the father has done nothing of the kind, but has simply taken no steps in the matter, there seems to me no reason why the son should not step into the shoes of his father and take the same action as the father could have done. The son inherits the other causes of action belonging to his father and why not this one? Nor do I see why the son cannot come in under Section 16, simply alleging that no notice as required by Section 13 was served on his father.

I should, therefore, reply to the question referred that plaintiffs' right to sue for pre-emption upon cause of action which had accrued to their father in his life-time passed to them at his death on their inheriting his land.

ROBERTSON, J.—I concur in the conclusion come to by the learned Chief Judge. When an involuntary transfer takes place by inheritance the succession to the land takes the whole bundle of rights which go with the land, and there is no hiatus in respect of the right of pre-emption. *25th May* 1907.

SHAH DIN, J.—I agree in the answer to the reference as proposed by the learned Chief Judge. *24th May* 1907.

Full Bench.

No. 134.

Before Sir William Clark, Kt., Chief Judge, Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

APPELLATE SIDE.

HAMIRA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

RAM SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 1209 of 1906.

Custom—Inheritence—Sister's right to succeed as a daughter of the penultimate male holder.

Held by the Full Bench that among parties following customary law the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter, and she must, therefore, in such matters be regarded as a sister of that proprietor and not as a daughter of his father.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 31st March 1906.

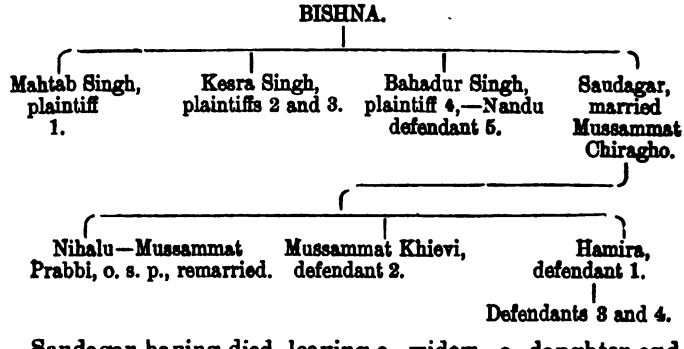
Gobind Das, for appellants.

Sohan Lal and Sheo Narain, for respondents.

This was a reference to a Full Bench made by Chatterji and Johnstone, JJ., to determine that when a proprietor following the Customary Law of the Punjab dies leaving no sons but a sister, should, for purposes of inheritance, the sister be regarded as a sister of that proprietor or that a daughter of his father.

The order of the Division Bench (Chatterji and Johnstone, JJ.) referring the question of law to a Full Bench was as follows :—

6th May 1907. JOHNSTONE, J.—In this case the pedigree of the parties is as follows :—



Saudagar having died, leaving a widow, a daughter and a son, the last named succeeded, after his death without issue and on

the remarriage of his widow, his widow Chiragho succeeded. Plaintiffs claim the property left by Mussammat Chiragho as being the proper heirs of Nihalu, last male holder. The property consists of land, house and moveables.

The first Court found that defendant 2 and her sons were better heirs than plaintiffs; that the property is not proved ancestral; that the widow, plaintiff Kirpo, is not entitled to sue; that no moveable property of Mussammat Chiragho came to defendants 1 to 4. The suit having been dismissed on these findings, plaintiffs appealed to the learned Divisional Judge, who agreed as to Mussammat Kirpo, agreed that the property in suit is not ancestral *qua* plaintiffs but was acquired by Saudagar, found that the parties follow agricultural custom, and finally held that even as regards acquired immoveable property plaintiffs as collaterals excluded the sister of Nihalu and her husband and sons, the view being taken that plaintiff 2 is to be treated as the sister of the last male holder Nihalu and not as the daughter of the penultimate male holder Saudagar. The claim for houses and land was decreed.

This revision petition has been admitted under Section 70 (1) (*b*) of the Courts Act, the grounds of appeal in effect being that succession did not pass to Mussammat Chiragho as mother of Nihalu but as widow of Saudagar, and that the property should be considered as the property of Saudagar and should go to his *daughter* defendant 2 rather than to plaintiffs.

In Civil Appeal 599 of 1904 decided by my learned colleague and myself on 17th July 1905 we pointed out the essential difference between the case of a daughter and the case of a son and declined to adopt the theory that when a man without brothers dies sonless in a tribe in which daughters exclude collaterals his sister also excludes collaterals as being the daughter of the penultimate male holder, and in Civil Appeal 1087 of 1906 and Civil Appeal 1370 of 1906 we again decided the same point in the same way.

On the other hand in *Khuda Yar* v. *Sultan* (1) in which, however, the matter was not discussed directly, a sister contesting with collaterals was taken to have presumption on her side as being daughter of the original owner; and this was followed in the Division Bench Judgment appended to *Daya Ram* v. *Sohel Singh* (2). There, Charan Singh, son of Sewai Singh, was the last male holder, and it was laid down that, inasmuch as the property was acquired by Sewai Singh, "on

(1) 108 *P. R.*, 1900. (2) 110 *P. R.*, 1906, *F. B.*

" the death of Charan Singh without issue, the inheritance is " to be considered as the inheritance of Sewai Singh's daughter's " son and not as the inheritance of Charan Singh's sister's " son, *Khuda Yar* v. *Sultan* (1) and other cases quoted by me " before." In the judgments recorded by the learned Judges who sat on the Full Bench aforesaid, I find the learned Chief Judge (in connection with the point now directly before us) merely remarked (page 396)—" Now by Customary Law " a sister's son is frequently put in the same position as " a daughter's son," and quoted a few rulings. Then Chatterji, J., doubted, page 406, whether a sister's son could be treated as daughter's son of the penultimate holder, but left the matter to the Full Bench. Reid, J., gave no opinion on this point, nor did Robertson, J., while Kensington, J., contented himself with remarking, page 413 : " That a sister's sons are, generally " speaking, looked on as more remote possible heirs than a " daughter's sons, may be readily admitted, certainly where " ancestral land is concerned. But cases arise, and *the present* " *seems to me one of them*, where no rational distinction can be " drawn between the two classes, etc."

Perusal of the Full Bench judgments as a whole shows that this question was not referred to the Full Bench, *and is not one of the points decided by it.* In these circumstances I conceive we have against us the Division Bench ruling appended to, *Daya Ram* v. *Sohel Singh* (2), at page 414, and the *dictum* of Kensigton, J., which, however, only related to the case then in hand and its peculiar facts. I am still strongly of opinion that the point has been rightly decided in Civil Appeal 599 of 1904, Civil Appeal 1087 and 1370 of 1906 quoted above, and it may therefore be necessary to refer the case to a Full Bench. With these remarks I send the case to my learned colleague.

6th May 1907. CHATTERJI, J.—I agree in referring the case to a Full Bench holding the same views as my learned brother.

The judgment of the Full Bench was delivered by

26th July 1907. CLARK, C. J.—The question for decision by the Full Bench is this :—

When a proprietor, following the Customary Law of the Punjab, dies leaving no sons but a sister, should, for purposes of inheritance, the sister be regarded as a sister of that proprietor or as a daughter of his father?

That is, should her rights of inheritance be those of a daughter and not of a sister?

(1) 103 *P. R.*, 1900. (2) 110 *P. R.*, 1906, *F. B.*

The question has been fully discussed in Civil Appeal No. 599 of 1904, and we may say at once that we agree with the reasoning and conclusion of that judgment that the sister's rights are those of a sister and not of a daughter, and we direct that that judgment be published as an appendix to this judgment.

The two main authorities against our view are *Khuda Yar* v. *Sultan* (1 d the final decision of the Divisional Bench in *Daya Ram* v. *Sohel Singh* (2). In neither of these judgments was there any independent discussion of the subject. In *Daya Ram* v. *Sohel Singh* the controversy on which the Full Bench passed decision was whether the case should be governed by custom or Hindu Law. The case was eventually decided by custom and the principle of the parity of the sister and the daughter was utilized in determining what the custom was.

On an independent consideration of the subject itself we are unable to agree with the views adopted in those judgments. *Mussammat Jaidevi* v. *Harnam Singh* (3), *Gaman* v. *Mussammat Aman* (4), and *Mussammat Desi* v. *Lehna Singh* (5), were relied upon as showing that widows succeeded not as mothers of their deceased sons, but as widows of their sons' fathers, on the principle that when a line dies out it is treated as if it never existed.

In these cases this principle was used to explain why women should lose their life estates by remarriage, which they could not have done if they had succeeded as mothers, but we are asked now to extend this principle, and make it a governing principle, which should of itself regulate the law of succession.

We do not think that a principle of this kind can be followed up to all its logical conclusions. If it were, absurd results would follow, a paternal aunt and a grand-paternal aunt would in this case be in the same position as daughters.

A principle that would lead to such absurd conclusions cannot be a sound principle to follow to its ultimate conclusion.

In no system of law that we are aware of are the claims of daughters and sisters placed on the same footing, and we cannot imagine that the agriculturists of this province by a subtle train of reasoning would ever have put them on the same footing.

(1) 103 *P. R.*, 1900. (3) 117 *P. R.*, 1888.
(2) 110 *P. R.*, 1906, *F. B.* (4) 171 *P. R.*, 1888.
(5) 46 *P. R.*, 1891, *F. B.*

It is then argued that in the special facts of this case, the property not being ancestral, and Mussammat Chiragho having inherited as the widow of Saudagar, the claims of Mussammat Khievi and her sons should prevail.

We are unable to see that any case is made out for departing from the ordinary order of succession of sisters. No instances have occurred on which a custom could be founded.

Our decision is that defendants can only claim to succeed on the strength of Mussammat Khievi being the sister of Nihalu and not on the strength of her being the daughter of Saudagar, and we dismiss the appeal with costs.

Appeal dismissed.

NOTE.—The case No. 599 of 1904 cited in the above judgment is published below—

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Johnstone.

SAIDAN BIBI AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

APPELLATE SIDE. *Versus*

FAZAL SHAH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 599 of 1904.

Further appeal from the decree of Major G. O. Beadon, Divisional Judge, Hoshiarpur Division, dated 31st March 1906.

Gobind Das, for appellants.

Sheo Narain and Sohan Lal, for respondents.

The judgment of the Court was delivered by

17th July 1907. JOHNSTONE, J.—In this case plaintiffs, who are sister and sister's son of the last male holder, Haider Shah, claim his land and house as against defendants who are collaterals of Haider Shah in the seventh degree. Both the Courts below have held that custom is in favour of defendants, the burden of proof on the point being on plaintiffs, and so they have dismissed the suit. Two defendants, Nos. 2 and 6, owning (we must take it) $\frac{1}{2}$ and $\frac{1}{24}$ shares, respectively, confessed judgment; but the Courts below have ignored this. This point has been raised in further appeal, and to clear the ground we may say at once that we see no reason to refuse the plaintiffs a decree for these two shares.

As regards the other shares the questions we have to decide are in effect these—

(*a*) On which party is the burden of proof ?

(*b*) If on plaintiffs, have they proved any special custom in their favour

(The issues framed by the first Court are rather confusing; the above shews the lines on which the case has been argued before us.)

As regards (*a*) I need only refer to Section 24, Rattigan's Digest, 6th Edition, page 30, to the *Riwaj-i-am* of Revised Settlement, Q. 27, of Rawalpindi (which is absolutely uncompromising), and to the rulings in *Faiz-ud-din* v. *Mussammat Wajib-un-nissa* (1), penultimate para., page 255, *Ilahia* v. *Qasim* (2), *Mussammat Jindwaddi* v. *Hussan Shah* (3), and *Fatteh Muhammad* v. *Daulat Khan* (4). There is on the other side the *Wajib-ul-ars Chakwar* of the Regular Settlement, Section 5, which is a little confused and contains some irrelevant matter, but which seems to lay down that *daughters*, if married in the family, take *along with* uncles and father's first cousins and their descendants, but if married elsewhere, are excluded by their near collaterals, while nothing is said directly about their competition with more distant collaterals.

The inference doubtless is that they, if married in the family, exclude more distant collaterals, and in the present case plaintiff 2 is married in the family. But the value of this document is considerably weakened by the circumstance that it contains details, which can never have been followed and which are wholly at variance with Punjab agricultural custom. Thus, it says that, where near collaterals exclude daughters, those collaterals share by *shariat*, and also that when daughters, as being married in the family, share with near collaterals, again the shares will be by *shariat*. In my opinion it can safely be stated that such a custom as this never prevailed and has never been given effect to. There is probably not a man in the village who could make a division of property according to strict Muhammadan Law, or who understands its elaborate rules. Thus, it would appear that the compilers of this section of the *Wajib-ul-ars* must have been to some extent drawing upon their imagination.

Another reason for holding that this document affords no rule and raises up no presumption in favour of the plaintiffs in

(1) 71 *P. R.*, 1892. (3) 41 *P. R.*, 1895.
(2) 24 *P. R.*, 1905. (4) 46 *P. R.*, 1895.

the present case is that it deals with daughters only. In this connection the learned pleader for the plaintiffs argues ingeniously enough that plaintiff 1 claims not so much as sister of Haider Shah as in the capacity of daughter of Alaf Shah. Alaf Shah died and was succeeded by his son Haider Shah, who died without issue or widow and was succeeded by his mother Mussammat Azim Kali. It is contended that upon the death of this lady we should look at Alaf Shah, her deceased husband, and see who *his* heir is, and that thus the contest is between a daughter, plaintiff 1, and the defendants. It is also said that, even if we have to find the heir of Haider Shah, undoubtedly the last male holder, we should go up the line to his father and then come down to plaintiff 2, his daughter. In support of this argument we are referred to *Ghulam Muhammad* v. *Muhammad Bakhsh* (1), at page 17, penultimate para., where the right of representation is explained, to the middle para., at page 62 in *Sita Ram* v. *Raja Ram* (2), and especially the words "a mother "succeeds, not as a mother, but as the widow of the father" to pages 256, 257 in *Faiz-ul-din* v. *Mussammat Wajib-un-nissa* (3), last para. of page 256, where in a manner the case of succession of a sister is assimilated to that of a daughter by the device of going back to the father from the brother and then coming down to the sister; to *Gaman* v. *Mussammat Aman* (4), and especially the words "the general principle ..... is that "where a line dies out, it is treated as if it never existed." Now if it was the function of this Court, when it had evolved a theory, which explains certain phenomena of custom, to insist upon applying that theory wherever it could logically be applied, regardless of facts, no doubt there would be much to be said in favour of the above argument; but it is rather our function, in matters of disputed custom, to discover what the actual practice is and give effect to our discoveries. There is no binding force or sanctity in the theory itself; it is merely a convenient method of giving order to our thoughts. In the present instance, as we have already seen, daughters and sisters have not commonly or in practice ever been treated as being on a similar footing. The theory has never been put forward to support the claims, for instance of a paternal aunt against distant collaterals, such a claim has in my experience never been made. We have only to compare Section 23 of Rattigan's Digest with Section 24 to see how differently the respective claims of daughters and sisters have been treated in the past; perusal

(1) 4 P. R., 1891, F. B. (3) 71 P. R., 1892.
(2) 12 P. R., 1892, F. B. (4) 171 P. R., 1868.

of Chief Court rulings, of which there are scores, dealing with daughters and sisters brings out the same tale; in no *Wajib-ul-arz* or *Riwaj-i-am*, with which I am acquainted, are sisters treated as the daughters of their brothers' fathers and not as sisters; and lastly even in *Faiz-ud-din* v. *Mussammat Wajib-un-nisa* (1), quoted above, we have only to look at the last two lines of page 255 and the opening lines of the next page to see how purely academic are the abstract remarks on pages 256 and 257 relied on by the plaintiffs' pleader.

My general conclusion, then is, that the burden of proof is on plaintiffs to prove a special custom in their favour, even against collaterals of the seventh degree I should say even that, initially, the burden of proof would be upon them when they are contesting with ascertained collaterals, however distant. I also hold that rules and practice relating to daughters have no bearing on the present case; for reasons which we can conjecture but which need not, for our purpose, be ascertained, daughters' claims have been largely recognised and sisters' claims have not.

Turning, then, to the evidence in the case we find that most of it relates to daughters and so is irrelevant. The essential difference between the position of a daughter and that of a sister has been pointed out in *Ilam Din* v. *Mubarak* (2), last para., page 547. Virtually only three instances of succession of sisters to be found—cases 10, 12 and 16 in plaintiffs' list—and the evidence regarding them is meagre and unsatisfactory. In one of them it is said by a witness that there was a gift. In one the event is said to have happened in Sikh times and the evidence is purely oral. Even as regards daughters the right of succession has apparently been so insecure that in nearly all the ascertained instances there have been gifts. The rulings we have been referred to—*Mussammat Fatima* v. *Ghulam Muhammad* (3), and so forth—are all concerned with daughters.

The matter of *res judicata* with reference to the litigation of 1876 has not been argued before us, and I do not think I need touch it. I would, if my learned colleague agrees, dismiss the appeal except as regards the shares of defendants 2 and 6, for which plaintiffs should have a decree. I would make the parties bear their own costs throughout as the case was one not free from doubt.

CHATTERJI, J.—I agree in the foregoing judgment though with some reluctance as the parties belong to an endogamous tribe and 11th July 1907.

(1) 71 P. R., 1892. (2) 140 P. R., 1888.
(3) 172 P. R., 1889.

the respondents are remote agnates of the seventh degree. But there can be no doubt that customary law does make a distinction in practice between a sister and a daughter which cannot be got over by any theory that succession has to be traced to the last male owner who left issue, whatever value it may have to explain or illustrate the general principles regulating succession in that law. Besides no system of law is faultlessly logical and anomalous, and even absurd distinctions can be found in almost all. Concrete facts must always prevail over abstract theories. Robertson's *Customary Law of the Rawalpindi District*, answer to question 27, is entirely against the plaintiffs, and enquiry in this case which was full, failed to bring out any appreciable number of precedents in favour of the sister.

The appeal will be dismissed except as regards the shares of defendants 2 and 6 for which plaintiffs will have a decree, but the parties will pay their own costs throughout.

Appeal dismissed.

No 135.

Before Sir William Clark, Kt., Chief Judge.

APPELLATE SIDE

AHMED BUKHSH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

HUSAIN BIBI,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 518 of 1907.

Muhammadan Law—Gift made in contemplation of death—Death illness.

Held, that a gift made by a sick person aged eighty, three days before his death must be regarded as made in contemplation of death within the meaning of Muhammadan Law relating to death-bed dispositions and is therefore inoperative as such.

Mussammat Bakht Begum v. *Faja Khan* (1), *Hafiz Karim Bakhsh* v. *Begam Jan* (2) and *Mussammat Salamti Jan* v. *Muhammad Shafi* ( ) referred to.

Ghulam Mustafa v. *Hurmat* (3), dissented from.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jullundur Division, dated 27th October 1906.

Sukhdial, for appellants.

Golak Nath, for respondent.

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(1) 104 P. R., 1881. (2) 61 P. R., 1893.
(2) 52 P. R., 1895. (3) I. L. R., II All., 854.

The judgment of the learned Chief Judge was as follows :—

CLARK, C. J.—The first question for decision is whether Mussammat Husain Bibi was the wife of Ali Bukhsh. It is proved that she had been living with him as wife for ten or twelve years. She was treated by him as wife, and lived in the same house as his first wife, and in the deed of gift he acknowledged her as his wife. *14th June* 1907.

She had been previously married, but there was no allegation that the previous husband was alive at the time she came to live with Ali Bukhsh and there was no enquiry on the point : it was assumed that she was a free woman at the time, and nothing was advanced against this view by the plaintiff.

Continual co-habitation as husband and wife raises a presumption of marriage—*vide* Wilson's *Anglo-Muhammadan Law*, para 30. I agree with the Divisional Judge that Mussammat Husain Bibi is the lawful wife of Ali Bukhsh.

The next question is whether this gift of November 19th, 1902, was a death-bed gift.

It is proved that Ali Bukhsh died on 22nd November 1902, he was actually ill on the 19th November, and had been ill some time before. He was some eighty years of age. The question of what constitutes a mortal illness is discussed in *Mussammat Bakht Begum* v. *Faja Khan* (1) where under somewhat similar circumstances it was held that the donor died of the illness from which he was suffering when he executed the deed. The question is further discussed in *Hafiz Karim Bukhsh* v. *Begam Jan* (2) at page 259 and in *Mussammat Sulamti Jan* v. *Muhammad Shafi* (3) at page 277.

The deed was registered at the house of the donor. The donor did not attend at the registration office. It is not clear whether the Divisional Judge knew this when he attached so much weight to his appearing before the Sub-Registrar. I have no hesitation in holding that this was a death-bed gift.

It was argued for defendant that even as a death-bed gift, the gift was on account of dower, and of the nature of *hiba-bil-iwaz* and valid. *Ghulam Mustafa* v. *Hurmat* (4) was relied upon. Mr. Amir Ali in his book on *Muhammadan Law* has given very good reason for distrusting that ruling, and it was not as a matter of fact found that the gift in that case was a death-bed gift. In my opinion this gift was entirely invalid.

(1) 104 *P. R.*, 1881.
(2) 52 *P. R.*, 1895.
(3) 61 *P. R.*, 1893.
(4) *I. L. R.*, *II All.*, 854.

I may add that there is no proof that any dower was ever fixed for Mussammat Husain Bibi. No marriage ceremony or formality of any kind is proved.

There remains then the question to what share of the property defendant is entitled as the wife of Ali Bukhsh; further enquiry will be necessary on this point as it is not clear whether parties follow Muhammadan Law or custom.

I accept the appeal and set aside the order of the Divisional Judge. I remand the case under Section 562, Civil Procedure Code, for the Divisional Judge to determine what property defendant is entitled to as the wife of Ali Bakhsh.

Appeal allowed.

No. 136.

Before Mr. Justice Johnstone and Mr. Justice Lal Chand.

APPELLATE SIDE.

BHAGWAN DAS AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SIDHU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 503 of 1907.

Pre-emption—Agreement creating right of occupancy—Sale—Perpetual lease—Punjab Pre-emption Act, 1905, *Sections* 3 (5), 4.

Held that an agreement by which a landowner created a right of occupancy in another person in consideration of money payment plus annual rent and services and whereby a right of reversion on the happening of a certain event was expressly stipulated for is not a sale within the meaning of Sections 3 (5) and 4 of the Punjab Pre-emption Act, 1905, and cannot therefore be the subject of pre-emption.

Dewanutulla v. *Kazem Molla* (1), *Baboo Ram Golam Singh* v. *Nursing Sahoy* (2), *Moorooly* v. *Babu Huree Ram* (3), and *Nihal Chand* v. *Rai Singh* (4) cited.

Jehana v. *Chowdri Jiwin Khan* (5), *Ghibi* v. *Hayat* (6), and *Rubna* v. *Kahn Singh* (7) distinguished.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 3rd December 1906.

Shadi Lal, for appellants.

Beni Pershad, for respondents.

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(1) *I. L. R., XV Calc.*, 184.
(2) 25 *W. R.*, 43.
(3) 8 *W. R.*, 106.
(4) 43 *P. R.*, 1892.
(5) 193 *P. R.*, 1882.
(6) 120 *P. R.*, 1883.
(7) 179 *P. R.*, 1888.

The judgment of the Court was delivered by

LAL CHAND, J.—On 11th April 1905 defendants 1 and 2, who are proprietors in village Basuwal in *tahsil* Una of the Hoshiarpur District, executed and registered an agreement in favour of defendant 3, who is found to be a member of an agricultural tribe but resided, as alleged by the plaintiff, in a different village. The principal stipulations embodied in this agreement were as correctly summarised by the Munsif that Atar Singh, defendant 3, was made an occupancy tenant on payment of Rs. 2,300 as *nazrana* and would enjoy and possess the same rights as other occupancy tenants in the village and shall similarly be liable to render services to the landlord. Further a fixed annual rent of Rs. 12 *per annum* was reserved, the tenant was empowered to effect improvements, such as sinking a well, planting a garden and building pucca houses, and finally it was stipulated that in case the tenant died without issue (*aulad*) the land would revert to the landlord. The plaintiffs-appellants, who are occupancy tenants in the village Basuwal sued in the Munsiff's Court for pre-emption asserting their right to pre-empt the transfer on the ground that defendant 3 was an utter stranger. The defendants resisted the claim by pleading that the transfer sought to be pre-empted was not a sale, but a mere lease in perpetuity and therefore could not be pre-empted. The Lower Courts have concurred in accepting the validity of the defendants' contention and have dismissed the suit, and the sole point for decision in appeal presented by the plaintiffs in this Court is whether the transfer in question is liable to a claim for pre-emption under the Punjab Pre-emption Act. *24th July* 1907.

The decision depends entirely on an interpretation of the agreement and application of Sections 3 and 4 of the Local Pre-emption Act. By Section 4 the right of pre-emption is described to arise in respect of agricultural land only in the case of sales and in respect of village immoveable property or urban immoveable property in the case of sales or of foreclosures of the right to redeem such property. There is no question here as regards urban or village immoveable property. The term 'land' is defined by Section 3 (1) to mean land as defined in the Punjab Land Alienation Act and to include any right of occupancy acquired or existing under the Punjab Tenancy Act, 1887, or under any earlier law. It was urged for the appellants that the subject matter of transfer in this case was a right of occupancy within the definition of land under Section 3 (1). This appears to me to be extremely doubtful. As I understand the definition it refers to and contemplates a right in existence previous to the transfer, and not a

right which is created and brought into existence by the transfer itself. The same person cannot at the same time be a proprietor and an occupancy tenant of the same land. Defendants 1 and 2, therefore, before they executed the conveyance in question were merely proprietors of the land and not its occupancy tenants. By the conveyance a right of occupancy was conferred on defendant 3 by defendants 1 and 2, and the right therefore came into existence only subsequent to the execution and registration of the document. Until this event occurred no such right existed, and therefore what was transferred was a future right of occupancy. When the right was brought into existence by the conveyance, it became an occupancy right under the Tenancy Act, and may possibly be said to be a right acquired under the Tenancy Act of 1887. But such acquisition is the subsequent effect of the registered transfer and could not be held to be an acquired right at the time when the conveyance was executed. In fact even the execution of the conveyance did not create the right until the document was actually registered. I am, therefore, to say the least, not at all clear that there was in this case a transfer of agricultural land as defined by Section 3 (1) and am rather inclined to hold that there was no such transfer. But even conceding this matter, I am strongly inclined to agree with the view taken by the Lower Courts that the transfer in question is not a sale.

There is no proper definition of sale in the Punjab Pre-emption Act, but by Section 3 (5) a sale is merely explained as not to include sales in execution.

The term "sale" is, however, defined both by the Contract Act and the Transfer of Property Act. Under Section 77, Contract Act, "sale is the exchange of property for a price. It involves "the transfer of the *ownership* of the thing sold from the seller "to the buyer." Section 54 of the Transfer of Property Act defines—"Sale is a transfer of ownership in exchange for a price "paid or promised or part paid and part promised."

It is clear, therefore, that according to either of these two definitions a sale involves the transfer of ownership. No other definition was cited or quoted by the counsel for appellant. It appears to me that a transaction by which ownership is not transferred but is expressly reserved can in no sense whatever be held to be a sale. The ownership need not be the full proprietary right. It may represent but a partial interest in the property, such as the right of a mortgagee or of an occupancy tenant. But if the person executing conveyance purports not o transfer his rights and interests in full and permanently

but only a part or for a period and reserves the rest for himself, it is not a transfer by way of sale. It may be a mortgage if the alienation is temporary only with a promise to redeem and with certain stipulations which usually characterise the various classes of mortgages. Or it may be a lease if the transfer be of a right to enjoy the property for a period or permanently in consideration of price, service or other thing of value to be rendered periodically or on specified occasions.

The stipulations embodied in the agreement in question in this suit, as already set out, shew clearly that in this case the transferor did not part in perpetuity with his full rights as an owner, but reserved valuable rights for himself. He reserved the right of reversion to himself as landlord in case the transferee died childless, thus excluding the collaterals of the transferee from succession, and further stipulated for an annual payment of cash rent by the transferee in lieu of enjoyment of possession. This is not at all a case of severance of all connection with the property, but on the other hand a permanent relation is created by the agreement between the parties as landlord and tenant, the landlord reserving certain valuable rights in his own favour. If this is not a lease, it would be hardly conceivable what would be a lease. By Section 105 of the Transfer of Property Act a lease of immoveable property is defined as "a transfer of a right to enjoy such property made "for a certain time or in perpetuity in consideration of a price "paid or promised or of money, a share of crops, service or "anything of value to be rendered periodically or on specified "occasions to the transferor by the transferee, who accepts the "transfer on such terms." The definition so given seems to me to be exactly applicable to the transfer in question in the present case, and if the contract is a lease, it cannot at the same time be a sale. As a proprietor cannot both be a proprietor and an occupancy tenant at the same time, so a transfer cannot simultaneously and concurrently be both a sale and a lease. To hold otherwise would result in confounding and obliterating altogether the defining lines which mutually distinguish and intermark the various well recognised modes and classes of transfers of immoveable property. There is no analogy it seems to me between the present case and the case of a sale of occupancy rights by an occupancy tenant, on which great stress was laid in his argument by the appellant's counsel. A sale of occupancy right would clearly fall within the definition of sale as a transfer of ownership, but it would by no stretch of imagination or language fall within the definition of a lease, and

this circumstance alone is enough to distinguish and separate the two cases and show that the analogy sought to be established is altogether false and baseless.

I am therefore clearly of opinion that the transfer in dispute is not a sale. The view I take is clearly supported by *Diwanutulla* v. *Kasem Molla* (1), following two previous decisions of the same High Court in *Baboo Ram Golam Singh* v. *Nursing Sahoy* (2) and *Moorooly* v. *Baboo Huree Ram* (3).

The view taken by the Calcutta High Court was not founded on any peculiarities of the Muhammadan Law as was contended by the counsel for the appellant, who did not quote any definition of a sale or lease under Muhammadan Law which may be said to have influenced these decisions. He merely referred to the circumstance that these decisions had been quoted as authorities in Wilson's *Anglo-Muhammadan Law* in the Chapter relating to Pre-emption. But this is entirely inconclusive to support the contention. On the other hand, it is clear that the decision in *Moorooly Ram* v. *Baboo Huree Ram* (3) which was followed in two later decisions, proceeded entirely on the well marked distinction between a sale and a lease, a distinction which almost exactly in the same terms was subsequently embodied in the definitions of sale and lease enacted in the Transfer of Property Act. The decision in *Dewanutulla* v. *Kasem Molla* (1) was evidently quoted with approval in *Nihal Chand* v. *Rai Singh* (4). Great stress was laid in argument for appellant on this last case to support his contention, but so far as I am able to understand the judgment, it does not appear to me to have decided the matter now in issue. The document sued upon in that case purported to be a lease in perpetuity granted in consideration of a cash premium. No future rent was reserved and as pointed out by the judgment the largest possible rights (short of absolute ownership) including an unrestricted power of alienation were conferred upon the lessee. The District Judge had construed the document as a sale of a transferable right of occupancy within the meaning of Section 10, and in the absence of an appeal by the plaintiff, it was not considered necessary to consider whether the document really conveyed a sale of proprietary rights. The main question considered and decided was, whether the provisions of Section 10 were applicable to a transaction by which a proprietor created a right of

(1) *I. L. R., XV Calc.*, 184. (3) 8 *W. R.*, 106.
(2) 25 *W. R.*, 43. (4) 43 *P. R.*, 1892.

occupancy in another person for consideration, and was not a sale of occupancy rights by an occupancy tenant. This question was held to be concluded by certain authorities which are quoted. But there was no decision or discussion as to whether the transaction was a sale or a perpetual lease, and no definitions or authorities were referred to on this subject excepting *Dewanutulla* v. *Kazem Molla* (1), already alluded to. On the face of the transaction there was no reservation of rent or of periodical payment as required by the definition of lease under Section 105 of the Transfer of Property Act, and the conveyance there sued upon may possibly therefore if the question had arisen have been held to be a sale. The other decisions relied upon for appellant which are all quoted in *Nihal Chand* v. *Rai Singh* (2) seem to me to be equally inapplicable to the present dispute.

Bolaki Shah v. *Hafiz Esan* (3) was decided under the provisions of Act IV of 1872 prior to its amendment by Act XIII of 1878. By Section 10, Act IV of 1872 as originally enacted, the right of pre-emption was defined to extend to "all permanent dispositions of property," and it was accordingly held that a permanent disposal of rights of cultivation in favour of another person fell within the section. It is however significant, and especially remarkable, that by the amendment effected in 1878 the words "permanent disposition of property" as originally enacted were altered, and the term "sale" was substituted in their place, thus expressly restricting the scope and range of a right of pre-emption despite the decision in 1874, which extended it to a lease in perpetuity. If it were still intended to extend the right to perpetual leases, the phraseology as originally used was certainly more exact and would have been maintained and not altered into a more restricted form of transfer such as is a sale. In *Jahana* v. *Chowdri Jiwan Khan* (4), the contents of the document sued upon are not given in the judgment. There was evidently no reservation of periodical payment and the conveyance is described in the judgment as a transfer by way of sale for the sum of Rs. 10 of a right of occupancy.

There was naturally no discussion whether the transaction was a perpetual lease or sale, but the question discussed and decided was that the transaction represented a sale of "immoveable property," and for this purpose the definition of immoveable property as given in Act 1 of 1868 was referred to.

(1) *I. L. R., XV Calc.*, 184. (3) 67 *P. R.*, 1874.
(2) 43 *P. R.*, 1892. (4) 196 *P. R.*, 1882.

The distinction between a sale and a lease was never alluded to, and after premising that the transaction was a sale of immoveable property as defined in Act I of 1868, the main point discussed and decided was whether the occupancy rights sold were transferable or not. This is further apparent from the question which was remanded for enquiry, *viz.*, " whether " when a proprietor of land creates a right of occupancy in " such land by way of sale for a cash consideration *as in the* " *present case*, the transaction is one which by custom gives " rise to a right of pre-emption."

On receipt of the return Barkley, J., observed :

" It therefore now remains to decide whether the deed of " 25th August 1878, which purport to be a sale to Jahana for " the sum of Rs. 10 of a right of occupancy, was a conveyance " of a transferable right of occupancy."

These extracts from the judgment make it quite clear that the conveyance sued upon purported on the face of it to be a sale, and was taken and treated as such throughout without any doubt or discussion. *Ghiba* v. *Hayat* (1) is absolutely irrelevant. The only question decided in the case was that the suit was barred by limitation and hence not maintainable. It was further pointed out, though " not " necessary to decide, " that the registered lease did not purport to give any transferable right, and hence no right of pre-emption could be presumed to arise, though evidence might be given to show that such right existed by custom.

In the only remaining case *Rukna* v. *Kahn Singh* (2), again there was no dispute or discussion as regards the point in issue in the present case. A proprietor in the course of a suit in which his tenant claimed occupancy rights came to terms with him, and in consideration of the payment of a sum of money, which he called *nazrana*, gave him a cultivating right. The plaintiff treated the transaction as a sale, and sued for pre-emption. It was not contended by the defendant that the transaction was not a sale, and the only remark in the judgment bearing on the question is as follows :—

" The plaintiff has treated this transaction and, probably, " with reason, as a sale and claimed the pre-emption of it." It was found that the right created was non-transferable and after further enquiry directed for the purpose, it was held that the plaintiff had failed to prove any custom which would entitle him to pre-empt such right. The facts of this

(1) 120 *P. R.*, 1883. (2) 179 *P. R.*, 1883.

case were very peculiar. The transaction represented merely a settlement of pending disputes as to rights of occupancy, and under the circumstances it is difficult to imagine how the case can be treated as an authority for holding that the lease in dispute in the present case is really a sale.

It is thus clear that out of five authorities quoted by the counsel for appellant the first was decided under a different phraseology which has since been amended, in the second the document purported to be a sale and was treated as such without dispute or discussion, the third was disposed of solely on the question of limitation, the fourth was a case of settlement of a pending dispute relating to occupancy rights which was treated to be a sale, and the fifth mainly turned on the question whether Section 10 applied to a creation of occupancy by a proprietor and not merely to a sale of occupancy rights by occupancy tenants.

In none of these cases the contents of the deeds sued upon even remotely approached the definition of a lease given in the Transfer of Property Act for in no case was payment of rent reserved as in the present case, nor was a right of reversion to the exclusion of collaterals expressly stipulated for as in the present case.

I fail to recognise how these cases can be held to contradict or contravene the distinction between a sale and a lease as laid down in these cases by the Calcutta High Court and as finally enacted in the provisions of the Transfer of Property Act by the Indian Legislature. At any rate I find insuperable difficulty in pronouncing on the contents of the agreement in question in this case that it is a sale and not a lease.

In discussing this matter, I have restricted my attention solely to the question of interpretation of the agreement, and of Sections 3 and 4 of the Punjab Pre-emption Act, and have left out of sight altogether any general consideration which may have a bearing on this question. One thing, however, is clear that under the Tenancy Law a proprietor has an absolute right either to prevent an alienation of occupancy rights or have a preferential right to purchase where the right is transferable without his consent. It is therefore clear that an occupancy tenant is incapable of substituting another person for himself as an occupancy tenant without the consent of his landlord.

It would really be strange and highly anomalous if it were held that the landlord has no such choice when he wishes to

create an occupancy right for the first time, and that by force of pre-emption law another occupancy tenant, who might even be ill-disposed towards him, can place himself in such cases in the position of an occupancy tenant without the landlord's consent and against his will. Barring the rights of reversioners, which are sufficiently safe-guarded otherwise, there is no expediency either that a proprietor should be discouraged from creating occupancy rights in other persons. In fact the expediency may possibly look the other way. But such discouragement would exactly be the consequence if it were held that an occupancy tenant can pre-empt the creation of an occupancy right by the landlord. There is no fear likewise of admitting a stream of strangers. The Punjab Land Alienation Act and the Customary Law as propounded by this Court are sufficient guarantees against any such admission. According to the agreement in this case the lessee, a retired Subadar, is described as a resident of the village. But it would not be material even if he were not. He is a member of an agricultural tribe and a member of the same caste as the proprietor, and the alienation is recognised as complying fully with the requirements of the Land Alienation Act. I would, therefore, for the reasons already given and on a proper interpretation of the agreement sued upon, hold that the plaintiff is not entitled to sue for pre-emption as held by the Lower Courts, and would dismiss this appeal with costs.

Appeal dismissed.

No. 137.

Before Mr. Justice Johnstone.

APPELLATE SIDE.

RUKMAN DEVI,—(PLAINTIFF),—APPELLANT,

Versus

SAIN DAS,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 426 of 1907.

Succession certificate—Rival claimants—Competency of Court to refuse to either claimant—Procedure—Succession Certificate Act, 1889, Section 7.

Held, that under Section 7 of the Succession Certificate Act, 1889, a District Court is bound if there are more applicants than one to determine with all convenient speed to which of the rival claimants a certificate should be granted, taking from the grantee such security as may appear necessary.

It is not competent to such Court to refuse to adjudicate merely because difficult questions of law or fact arise or the matter is in issue in a regular suit.

Miscellaneous first appeal from the order of Lala Karm Chand, District Judge, Gujranwala, dated 10th January 1907.

Dani Chand, for appellant.

Govind Das, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—This is a peculiar case. The parties each want a succession certificate in connection with a long list of debts due to Mathra Das, deceased. The present appellant, widow of Mathra Das, claims under a will of Mathra Das, while respondent, who also applied for a certificate, is deceased's brother and asserts that the will is invalid. He has also brought a regular suit to have the will declared invalid. *3rd August* 1907.

In these circumstances I think the District Judge was hardly right in dismissing both succession certificate applications. It is said by appellant and admitted on the other side that the debts aforesaid are one by one becoming time-barred, and until a certificate is granted to some one this process will continue. This is very much against the interests of whichever party is ultimately successful.

Section 7 of the Act makes it incumbent on the Court to pass a definite order giving certificate to one applicant or another with all convenient speed. If the question of title is in doubt, the Court should decide it on *primâ facie* grounds to the best of its ability, give a certificate accordingly, and take security. It should not refuse to adjudicate because difficult questions arise or because the matter is in issue in a regular suit, which may not come to a final decision, what with appeals and so forth, for years.

I accept the appeal, set aside the District Judge's order and restore the case to his file. The District Judge should also restore the respondent's application in the same way by way of review upon respondent's applying for this; and then the District Judge should without delay give a certificate to the party *primâ facie* entitled.

Appeal allowed.

No. 138.

Before Mr. Justice Johnstone.

REVISION SIDE.

ALLAH DITTA,—(PLAINTIFF),—PETITIONER,

Versus

RAJ KUMAR,—(DEFENDANT), —RESPONDENT.

Civil Revision No. 1418 of 1907.

Custom—Pre-emption—Kucha *Billa Kabutarbaz*, Mohalla *Kabuli Mal*, *Lahore City*—*Superiority of co-sharership over mere contiguity*—*Burden of proof*—*Punjab Laws Act*, 1872, *Section* 11.

Found that the custom of pre-emption prevails in *Kucha* Billa Kabutarbaz which is a part of *Mohalla* Kabuli Mal, a sub-division of the city of Lahore for the purpose of Section 11, Punjab Laws Act, 1872, and that a co-sharer in the property sold has a preferential right as against the owner of an adjoining house.

The existence of a custom of pre-emption in the neighbouring *kuchas* is sufficient to prove the existence of such a custom in a *kucha* into which they run although no case of pre-emption may have occurred in it.

Petition for revision of the order of A. Kensington, Esquire, Divisional Judge, Lahore Division, dated 20th February 1904.

Oertel, for petitioner.

Pestonji Dadabhai and Sheo Narain, for respondent.

The judgment of the Court was delivered by

26th July 1907. JOHNSTONE, J.—The remand has now been made and I see that the first Court has found—

(*a*) that defendant is a co-sharer in the adjoining house ;

(*b*) that co-sharership is a superior kind of vicinage to mere contiguity ;

(*c*) that no sub-division can be defined in which *kucha* Billa Kabutarbaz is situate.

The learned Divisional Judge agrees as to (*a*) and (*b*), and he proceeds to discuss (*c*). He points out that the *kucha* is a small blind alley and cannot be in itself a sub-division, but he finds that in three *kuchas* close by and running into this *kucha* the right of pre-emption has been exercised. He also points out that in a recent law suit it has been ruled that these lanes belong to *Muhalla* Kabuli Mal.

I will first take up the matter of the existence of the custom in the *kucha* Billa Kabutarbaz. No doubt it has been doubted in several cases of Lahore City whether the anciently recognised

sub-divisions called *guzars* can now be accurately identified, see *Hakim Rai* v. *Muhammad Din* (1), *Gokal Chand* v. *Mohan Lal* (2), but this to my mind is immaterial. There are undoubtedly sub-divisions though it may be impossible to lay out boundaries so as to separate off the whole area of the city into parts; and in many cases portions of the city have been treated as sub-divisions for pre-emption purposes. The city cannot be taken as a whole, and so, where exact identification of boundaries is impossible, we must take up the matter in a reasonable way. I wish to lay down no general rule; but I say with confidence that when we find a small blind alley, in which no case of pre-emption has occurred and lanes running into it in which cases have occurred, it is a reasonable inference that in that section of the town the custom does prevail, and so it prevails in the blind alley. Any other conclusion would be pedantic in the extreme.

The next question is whether plaintiff's or defendant's vicinage is superior. I laid the burden of proof on defendant-vendee, and I think *Jai Devi* v. *Noubat Rai* (3), is sufficient authority for this. In my opinion the rule laid down there is judicious and sensible, whether some of the remarks in the judgment may be open to criticism or not. No doubt cases of competition between co-sharers and neighbours are not forthcoming, but again I would call it pedantry, pure and simple to hold that this concludes the matter against plaintiff. The superior rights of co-sharers have always been recognised in every department of pre-emption law, see Section 12 (*a*), Act IV of 1872, and the new Act. Though Courts administer the law, they also administer common sense, and, in my opinion, the superiority of co-sharership over mere contiguity is obvious and patent, and is one of those things which can be taken for granted. The reason why contests have not occurred is no doubt that neighbours virtually never dream of asserting equality with co-sharers.

I allow the revision and give plaintiff the decree prayed for. He must deposit Rs. 145 in Court within one month of this date and then he will take the house subject to mortgage rights. If he fails to pay into Court, suit stands dismissed with costs throughout. If he pays, vendee pays the whole of his costs.

Application allowed.

(1) 88 P. R., 1901. (2) 6 P. R., 1905.
(3) 71 P. R., 1905.

No. 139.

Before Mr. Justice Robertson and Mr. Justice Kensington.

APPELLATE SIDE.

RALLIA AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

GOKAL CHAND,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 491 of 1906.

Right of suit—Party without right or interest in subject matter—Maintainability of suit by—Unnecessary trial of issues concerning private affairs of parties.

A testator governed by Hindu Law bequeathed all his real and personal estate in the absence of a son to his widow for life and after her death to her daughter's son, and in default of such issue it was to revert absolutely to the first taker and expressly desired that neither his brother nor any of his family should under any circumstances inherit or interfere. The testator died and left surviving him his widow and a minor daughter. Some five months later the widow announced the birth to her of a posthumous son. Thereupon the brother of the testator sued for a declaration that the alleged newly born child was not the lawful son of the testator.

Held, that as by the terms of the will the plaintiff had no due right or interest of any kind in the estate of the testator, he being neither an immediate nor a prospective reversioner, the suit was not maintainable.

In such circumstances the unnecessary trial of issues concerning private affairs of parties should be avoided and the Courts must see that unscrupulous persons in plaintiff's position are not allowed to unnecessarily drag into publicity private matters with which the case is not directly concerned. In the present case there was no occasion for taking evidence on the points whether the boy was a suppositious child, or whether the testator and his wife had the capacity to beget a child.

Rule of construction of Hindu wills considered.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jullundur Division, dated 8th February 1906.

Oertel, for appellants.

Ishwar Das, Sheo Narain and Sohan Lal, for respondent.

The judgment of the Court was delivered by

26th April 1907. KENSINGTON, J.—The first ground of appeal has not been pressed in argument and is on the face of it not maintainable. The plaintiff elected to value his suit at Rs. 500 and was within his rights in doing so, even though the suit may indirectly involve property of considerable value.

We think it necessary to say that the line upon which the suit has been conducted in the first Court, and to some

extent also in the lower Appellate Court, is improper on the pleadings, and has led without sufficient ground to a very extensive enquiry, the whole of which might have been avoided if the Courts had been content to examine carefully the main issue in the case. In particular the District Judge has allowed himself to drift off from that main issue to extraneous matters which need never have been dragged into Court at all. And in dealing with those matters he has introduced into his judgment and discussed with quite unnecessary profusion of detail a variety of technical questions on medical points which would have been much better left untouched. We cannot approve of the license given to the plaintiff to require evidence to be produced at great length on these questions, or of the attitude assumed by the Court in dealing with that evidence. In our view of the case the whole of it was irrelevant, but even if the question of Rallia's legitimacy could be properly investigated by a declaratory suit in the nature of one for perpetuation of testimony, the Court should have declined to permit the plaintiff to use it as a means of inflicting upon defendant's family the dishonour of having all sorts of the most private matters openly discussed in Court without any attempt at judicial reserve. The question which the Court set itself to determine was whether the defendant Rallia was a supposititious child. If this question had to be decided, evidence as to the facts was relevant, but further speculations in regard to the capacity of the late Lala Sagar Mal and his wife Mussammat Karm Devi to beget a child, and all the medical detail, connected therewith, was beyond the fair scope of the trial.

When Mr. Ellis took over the case the issues had been already fixed. Of these the 1st, 3rd and 4th dealt with questions concerning plaintiff's right to bring the suit and the validity and effect of a will, while the 2nd covered the question of Rallia's parentage. There has been no attempt in either Court to deal with anything but the last question. The District Judge recognised the possibility that the will might have an important bearing on the case (last paragraph but one of his judgment at page 14 of the paper book), but expressed no opinion as to its legal force, giving as his reason (page 4) that before him it was frankly conceded that issues 1, 3 and 4 were unnecessary. We find it difficult to believe that the defence can have really been so ill advised as to give up these issues even

in the District Court. And in the 5th ground of appeal to the Divisional Court it is distinctly urged that the District Judge was mistaken in thinking that they had been given up. Nevertheless the learned Divisional Judge entirely ignored this main ground of appeal giving no reason beyond an obviously incorrect assertion (page 21, line 42) that the validity or otherwise of the will was not before the Court.

We much regret that the Courts should have so seriously misapprehended the position before them, being apparently misled by the rancour with which the plaintiff was improperly permitted to conduct his case. On the one hand there were certain plain and not very recondite questions of law to be considered, as to which Civil Courts were eminently qualified to adjudicate. On the other there was a mass of contentious evidence, much of it on speculative points on which only the most cautious opinion could be properly hazarded by a Judge even if he was compelled to discuss them. Yet we have one Court after another avoiding its plain duty on the law points and confidently advancing the rashest opinions on the speculative questions, though they included matters upon which even a medical expert would speak with the utmost diffidence.

With these remarks we propose to leave aside all the discussion bearing on the question whether Mussammat Karm Devi could have given birth to a child or did in fact do so in August 1904. We must, however, point out that much of the argument on the point is vitiated by misapprehension of the evidence of Rai Achhru Ram. That officer, the credibility of whose evidence is rightly held to be beyond doubt, is supposed to have made a statement (page 4, lines 40—46) that the late Lala Sagar Mal informed him of his wife's pregnancy at some time between June and September 1903, and this is seized on as giving an almost conclusive reply to the otherwise ample evidence as to Mussammat Karm Devi's condition in 1904. The real fact is, however, that Rai Achhru Ram was frequently seeing Lala Sagar Mal up to within a short time of the latter's death in March 1904, and the conversation referred to may very well have been held at a time which entirely destroys the argument.

Both Courts appear to have started with an unwarrantable assumption which unconsciously biassed them in their consideration of the remaining evidence on all that part of the case.

Assuming that no posthumous son was born to Lala Sagar Mal, the course of succession by Hindu Law would have been as follows :—

(1) The widow, defendant 2, Mussammat Karm Devi ;

(2) The daughter, Mussammat Jiwi, defendant 3 (recently married) ;

(3) The daughter's children, if any ;

(4) The brother, Gokal Chand, plaintiff, (as the parents have already died). It has been held generally, except in Bombay, that a daughter takes an estate in life interest only, and it is therefore probably correct to say that plaintiff has a reversionary interest in Lala Sagar Mal's property, remote though it may be, which he would have been entitled to protect if his brother had died intestate.

But Lala Sagar Mal did leave a will, the genuineness of which is not open to doubt, dated the 9th September 1903. Plaintiff's pleader has suggested that this is not an actual will, but a mere draft. This contention is impossible in face of the fact that the document is entirely written (in English) by Lala Sagar Mal himself, from the evidence of Rai Achhru Ram as to conversation with the testator about it in 1903, and, most important of all from plaintiff's own admission that he found among his brother's papers after death not only the will produced but also the original draft prepared by Rai Bhag Mal. The Lower Courts have not discussed the will, but as it is on the record and conclusively proved to be genuine, no remand is required to determine its effect. The only question is as to its construction, and we have no difficulty in dealing with that at once. The authorities about wills are summarised in paragraph 429 of Mayne's Hindu Law. It is enough to say that "the single rule "of construction in a Hindu, as in an English will, is to try and "find out the meaning of the testator, taking the whole of the "document together, and to give effect to this meaning."

The document is short and of such importance to the defendants that we reproduce it in full in view of the possibility that it may be lost hereafter. It runs as follows :—

"I, Sagar Mal, Mandror," son of Lala Surat Ram Mondror, "of Jullundur city, do hereby declare that if I die sonless this "will be my last will and testament.

"1*st*.—That all my death ceremonies should be done "according to the usual rites and customs of my brotherhood.

" 2*nd*.—That if I die before Bibi Jiwi's (that is my daughter " Jiwi Bibi's) marriage, the marriage should be celebrated " according to the usual custom of my family.

" 3*rd*.—I leave all my immoveable and moveable property to " my wife till her life. After that she can give it to her " grandson if Bibi Jiwi gets one, *but not to her* parents or any " of her brothers.

" 4*th*.—In all the cases failing I leave the whole property at " her disposal, but she will have no power to let the property go " to her father's family.

" 5*th*.—Karm Devi will have the charge of everything " after my demise till her death, and this house that I have built " will go to *dharmarth*.

" 6*th*.—I would like to make a special mention of Lala Gokal " Chand or his adopted son or other of my relatives, so that they " may have no interference in my affairs after me.

SAGAR MAL,

9th September 1903."

For present purposes the operative clauses of this will are 3, 4 and 6. We construe these as directing in the clearest possible manner that in the absence of a son the widow, Mussammat Karm Devi, will take the whole estate for life in the first instance, and under certain circumstances absolutely, subject only to a provision that she shall not alienate to her father's family. With certain restrictions her powers of disposal are complete, and the testator's manifest desire was that neither the plaintiff nor any of his family should, under any circumstances, inherit or interfere in any way.

Considering the sort of life led by Lala Sagar Mal, the way in which he had built up his own fortune such as it was, and his admittedly unhappy relations with his own family, we cannot even say that the will is hard or unjust to the plaintiff. The latter appears to have had no sort of moral claim to the property, but whether he had or not is immaterial. He is deliberately excluded and the Courts are bound to give effect to the testator's wishes.

From this it follows that whatever the facts may be about the boy Rallia, the plaintiff has no status to maintain the present suit. He is neither an immediate nor a prospective reversioner. In the last resource it is open to the widow to give the property to Rallia himself if she so desires, or to any other stranger if he be

one, and plaintiff cannot control her. So far as Lala Sagar Mal's property is concerned the plaintiff is entirely out of Court.

A further argument was addressed to us that if a supposititious son is introduced the plaintiff is entitled to now place the facts beyond dispute so as to avoid the possibility of that son hereafter claiming the whole or part of his own (plaintiff's) property. As to this we think it enough to say that this is not the ground on which the suit is brought. Further, if plaintiff really does fear any such eventuality, it is open to him to at once protect himself absolutely by, in his turn, making a will disinheriting Rallia. He does not require the assistance of the Courts by the indirect and harassing remedy of a declaratory suit, and it would be an improper exercise of judicial discretion to grant him specific relief under the circumstances. A speculative suit of the kind involving immediate offence of the gravest kind to Lala Sagar Mal's family, with no sort of corresponding benefit to the plaintiff, cannot be brought as of right.

There is no just pretext for dragging the defendant's private affairs before the world in the shameless way attempted. We can only regret that owing to the incorrect attitude assumed by the Lower Courts the attempt should have been so far successful. A gross injury has been done to the defendants by permitting the machinery of the law to be used for an improper purpose, but we cannot now do more than make it clear how entirely we disapprove of the manner in which the plaintiff was unfortunately permitted to conduct the suit.

Holding that the suit is not maintainable we set aside the findings of the Lower Courts as being given on matters which do not concern the plaintiff, without expressing any opinion on the merits of the case on the sole issue which they have discussed.

The appeal is accordingly accepted and the decrees of the Lower Courts are reversed. The plaintiff's suit is dismissed absolutely with costs throughout to the defendants.

Appeal allowed.

No. 140.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

APPELLATE SIDE.

HAKIM SINGH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

WARYAMAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 25 of 1907.

Declaratory decree—Suit by a person in possession for a declaration of title in immovable property—Cause of action against defendant—Adverse entry in revenue papers—Limitation Act, 1877, Schedule II, Article 120.

Held, that a suit for a declaration of his title to immovable property by a person in possession as proprietor is not barred if brought within six years from the time when the defendant attempts to oust him from the land although a right to sue the defendant who had been recorded as owner of the property in the Settlement Record had already accrued and become barred.

Nathu v. *Buta* (1), *Natha Singh* v. *Sadiq Ali* (2), *Futteh Singh* v. *Khark Singh* (3), and *Francis Legge* v. *Rambaran Singh* (4) referred to.

Further Appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 19th March 1906.

Sukh Dial, for appellants.

Harnam Das, for respondents.

The judgment of the Court was delivered by

28*th March* 1907. ROBERTSON, J.—The important facts in this case are as follows :—

One Mussammat Sukhan died on 1st March 1895.

After her death, the members of the *patti*, in which the land which she had held was situate, claimed to be the owner of the land. This claim was contested by the plaintiffs-appellants and defendants Nos. 1, 2 and 3, who set up their own title and alleged their possession. As to mutation the revenue authorities had the names of the *pattidars* entered as owners, and the names of plaintiffs and defendants 1, 2, 3 entered as in possession. The plaintiffs appealed and the order was upheld by the Deputy Commissioner on 25th January 1898 who referred any one aggrieved to a civil suit. Admittedly this gave the plaintiff a cause of action under Section 45 of the Land Revenue Act.

The possession of the plaintiffs was not however disturbed, and they did not see fit to bring a declaratory suit. But on

(1) 27 *P. R.*, 1881. (2) 88 *P. R.*, 1882.
(3) 20 *P. R.*, 1900. (4) *I. L. R.*, *XX All.*, 35.

22nd September 1904 the *pattidars* applied for partition and the defendants objected and were directed to bring a regular suit to establish their title on 21st December 1904. They accordingly brought the present suit on 15th February 1905. It is contended, and has been held by the learned Divisional Judge, that this suit is barred by limitation, the argument being that a cause of action having arisen on 19th December 1897, when the plaintiffs' claim to be entered as owners was rejected and the defendants' names entered, the suit is time-barred under Act 120 of the Limitation Act, as no new cause of action has arisen giving rise to a fresh period of limitation.

For the appellant it is urged that that though undoubtedly a cause of action arose in 1897, and if no other cause of action had arisen since, the suit would be barred, a fresh cause of action constituting a fresh invasion of plaintiffs' title did occur, when it was attempted to oust the plaintiffs from possession by means of partition in 1904, so that the claim is within time. This is the only question before us.

The rulings quoted to us have been all examined.

In *Francis Legge* v. *Rambaran Singh* (1), it was held that a suit for a declaration based on an entry made in the settlement records more than 11 years before was barred. There had in that case been no fresh invasion of the plaintiffs' right, so the case is not on all fours with that before us.

Natha Singh v. *Sadiq Ali* (2) is a ruling by a single Judge which does not help us much, but which so far as it goes supports the view put forward by the appellant, as in that case it was held that the suit was not barred under Article 120, although more than six years had elapsed since the entry, because the defendants were attempting to make use of the entries to oust the plaintiff from the land. In that case it was held not to be shown that defendants had had any part in the making of the entry.

Futteh Singh v. *Khark Singh* (3) is not very much in point.

Nathu v. *Buta* (4) is however almost exactly in point.

In that case it was held that though a suit for a correction of a settlement entry might be barred (a suit to which a

(1) *I. L. R., XX All*, 35. (3) 88 *P. R.*, 1882.
(2) 20 *P. R.*, 1900. (4) 27 *P. R.*, 1881.

declaratory suit under Section 45 now corresponds), "there seems "to be no reason why the Courts should not have tried and "decided the question of the proprietary title of the plaintiff "and given him a decree declaratory of such title if it were "proved."

It must be noted that it is only the procedure laid down in the Land Revenue Act for the partition of land which forces the plaintiffs to come in as plaintiffs. In the ordinary course being in possession, it would be upon any one asserting a superior title to prove it before ousting them, and an entry in the records would be no title in itself, but merely a piece of evidence of title and the failure of the party in possession to bring a declaratory suit could not have operated to extinguish his title. Moreover the declaratory decree is a form of relief which it is discretionary to seek as well as discretionary to grant. A man is not bound to bring such a suit on any and every possible invasion of his title, and such suits are not encouraged by the Courts unless they are clearly necessary. If we held the plaintiffs' suit forced upon them, be it remembered by defendants' action and the procedure laid down for partition to be barred, we should hold that, though in possession, their title has been extinguished in effect by their neglect to sue. We think that they were entitled to use their discretion whether or not they would use the permission given in Section 45 to sue or not, but that they are not debarred from bringing a suit within the period of limitation to contest the much more serious invasion of their title involved in the attempt to oust them from possession.

We think the plaintiffs had a fresh cause of action from the order of the Revenue Officer in partition proceedings on 21st December 1904 and could bring this suit within six years from that date.

We accordingly accept the appeal and remand the case under Section 562 for decision on the merits. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal allowed.

No. 141.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

SANDHE KHAN,—(PLAINTIFF),—APPELLANT,

Versus

BHANA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No 1032 of 1906.

Vendor and purchaser—Personal covenant of indemnity against defective title—Acquisition of property by pre-emptor—Defective title—Right of pre-emptor to enforce covenant against original vendor.

Held, that a personal covenant of indemnity in a deed of sale under which a vendor guarantees his title in the property conveyed solely to the original vendee and in which he agrees to indemnify that vendee if disturbed by adverse claims cannot be held to enure for the benefit of a pre-emptor who succeeds in obtaining a decree for possession by pre-emption.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 19th July 1906.

Muhammad Shafi, for appellant.

Beechey, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts of this case are sufficiently given in the following judgment of the learned Divisional Judge :— *28th March* 1907.

The land in dispute was mortgaged by defendants Nos. 1 to 4 to one Jowahir Mal for the sum of Rs. 1,228, who sold his rights to Sandhi Khan, plaintiff, on 1st of June 1904. On 12th of December 1904 defendants Nos. 1 to 4 sold the equity of redemption to Megh Raj, defendant No. 8, for Rs. 4,700. On 19th of December 1904 Munshi and others filed a suit for the possession of ⅛th share in the land, on the ground that defendants Nos. 1 to 4 had no right to sell their share. In this case the plaintiff was also impleaded as a defendant and he filed written pleas while this case was pending, the plaintiff sued Megh Raj, the vendee, for the possession of the whole land by pre-emption. On 15th June 1905 Sandhi Khan compromised with the vendee, and a decree on the basis of this compromise under which he was to pay Rs. 2,472 to the vendee was passed in plaintiff's favour. On 30th August 1905 Munshi and others' claim against Megh Raj, Sandhi Khan and others was decreed. The present suit was filed by Sandhi Khan for the recovery of ⅛th share of the price paid by him for the land decreed in Munshi and others' favour, on the ground that under the terms of the sale-deed executed by the defendants Nos. 1 to 4 in Megh Raj's favour, they (the defendants) were bound to recompense him for the loss that he had suffered on account of Munshi and others' decree. The lower Court, on the authority of the Chief Court Judgment reported in Punjab Record No 24 of 1901 and No. 93 of 1902, held that the pre-emptor stood in the shoes of the vendees, and that therefore the condition as to the payment of any loss that might accrue to the vendee, on account of lack of title applied equally in favour of the pre-emptor. Defendants appeal against that order.

The only question which we have to decide is whether or not a condition in the original deed of sale in which the vendor guarantees his title in the land solely to the original vendee, and in which he agrees to compensate that vendee if disturbed is one which enures for the benefit of the pre-emptor who succeeds in obtaining a decree for possession on pre-emption.

The learned Divisional Judge held that it did not, and after carefully considering all the rulings quoted to us and the arguments put forward we agree with that view. None of the rulings quoted—*Kulu* v. *Bhupa* (1), *Zahar Khan* v. *Mustajab Khan* (2), *Hakam Singh* v. *Indar* (3), *Baldeo Das* v. *Piare Lal* (4), *Bogha Singh* v. *Gurmukh Singh* (5), *Gobind Dayal* v. *Inayatullah* (6), *Durga Prasad* v. *Shambhu Nath* (7), *Tajammul Husain* v. *Uda* (8), and *Ahmad Shah* v. *Walidad Khan* (9)—appears to us to support the contention. They all lay down the necessity for the pre-emptor to discharge all the burdens undertaken by the original vendee. But a pre-emptor has no right to the advantage of any purely personal covenant by the vendor in favour of the vendee, which is a thing quite separable from the sale of immoveable property. The pre-emptor is neither the representative of the vendor, nor the assignee of the *vendee*, nor has he any right of pre-emption over any personal covenant. He must take over the whole bargain as regards the immoveable property in so far as his rights to pre-empt extend, and they do not extend to personal covenants such as that of indemnity included in the original sale-deed in this case. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

No. 142.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

JAHAN KHAN AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,
Versus
DALLA RAM AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 487 of 1906.

Contract—Civil Court—Power of to decline to enforce a valid contract on mere assumption that it is for the benefit of a person prohibited by law to enter into such contract.

Held, that a Civil Court has no power to decline to enforce a contract which is legal and binding in every respect on the face of it as between

(1) 30 *P. R.*, 1898.
(2) 55 *P. R.*, 1899.
(3) 46 *P. R.*, 1902.
(4) 24 *P. R.*, 1901.
(5) 93 *P. R.*, 1902.
(6) *I. L. R., VIII All.*, 775.
(7) *I. L. R., VIII All.*, 86.
(8) *I. L. R., III All.*, 688.
(9) 96 *P. R.*, 1906.

the parties on a mere assumption that in reality it is intended for the benefit of a third person against whom a statutory prohibition to enter into such contract exists.

Further appeal from the decree of W. A. Harris, Esquire, Additional Divisional Judge, Shahpur Division, dated 28th February 1906.

Sukh Dial, for appellants.

Ishwar Das and Gobind Das, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts in this case appear to be as follows :— *11th Jany.* 1907.

The plaintiffs Jahan Khan and others sue for possession of certain land mortgaged to them by one Ali Khan on 5th March 1904 for Rs. 2,210. The consideration is stated to be.

Rs. 1,877 on account of book debts to Mul Chand, Megh Raj and Bela Ram. Rs. 256 to be paid to one Ude, a previous mortgagee, the mortgage being without possession. The mortgagor admits the debt of Rs. 1,877 to have been due to Mul Chand, Megh Raj and Bela Ram, but says that this debt has now been discharged. He also admits that Rs. 256 was due to Ude. Petty items were Rs. 45-5-0 cash and Rs. 35 expenses of registration. The mortgagor also pleaded that the real mortgagees are Mul Chand, Megh Raj and Bela Ram, and tries to shelter himself behind the Alienation Act.

Now it is quite clear that Mul Chand, Megh Raj and Bela Ram have given up their claim against the defendant-mortgagor. It is also quite clear that Ali Khan executed the mortgage in favour of the plaintiffs, and that under that mortgage he the plaintiff, an agriculturist, is entitled to possession. He has obtained a discharge for the mortgagor of the debt of Rs. 1,877 which is all that concerns the mortgagor in that connection, and he has tendered Rs. 256 and paid that sum into Court for Ude, the previous mortgagee, whose hypothecation gave him no claim to possession. It was not contended here that the mortgagee was not entitled to possession as against the mortgagor. He has fulfilled, *qua* the mortgagor, the terms of the mortgage.

The learned Divisional Judge, however, writes, " an import- " ant Act like the Punjab Alienation of Land Act is not to be " permitted to be circumvented by rival money lenders, and I " shall not allow it." That is not a correct way of looking

at the matter. All acts of the legislature are equally important and equally to be carried out by the judiciary who are not entitled to go beyond them. Here we have a mortgage, perfectly legal on the face of it, executed in favour of an agriculturist who seeks the aid of the Courts to enforce his rights, as between him and the mortgagor there is no infringement whatever of the Land Alienation Act in granting the relief claimed. The object of the Act is not to prevent money-lenders from recovering sums jointly due to them by any legal means in their powers, and if they can induce an agriculturist to pay off a debt due to them and to take a mortgage from their debtor as security for himself there is nothing in the Act to prevent such a course. Indeed the object of the Act is attained, rather than defeated by what has occurred here. Without the Act, Mul Chand, Megh Raj and Bela Ram, non-agricultural money-lenders, would undoubtedly have taken the mortgage themselves and obtained possession of the land. The Act prevents this, though of course they could have taken a mortgage in one of the specified permissible forms. But Jahan Khan is prepared to lend the debtor the money necessary to pay off the money-lenders and to take the land in mortgage himself, he being an agriculturist and we are only asked to decree him relief. If Mul Chand, etc., really are at the back of Jahan Khan, the Land Alienation Act can be properly invoked should they ever attempt to assert any right to the possession of the land in virtue of the mortgage now before us. So far as Jahan Khan is the mortgagee, Jahan Khan asks for possession under his deed; he is entitled to it, and there is nothing in the Land Alienation, or any other Act, which justifies us in refusing him the relief to which he is legally entitled. We accordingly accept the appeal, set aside the judgment and decree of the learned Divisional Judge, and decree plaintiffs' claim to possession against the mortgagor with costs throughout.

As regards Ude, the holder of the previous mortgage without possession, it was unnecessary to have made him a party; he denies that Rs. 256 is all that is due to him, and he is not in possession and cannot resist the present claim to possession. As regards him therefore the suit is dismissed with costs throughout.

No. 143.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

THAKARIA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

DAYA RAM,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 899 of 1906.

Punjab Pre-emption Act, 1905, Section 28—Applicability to rights already accrued—Change of rule as to existence of custom no ground against applicability.

Held, that Section 28 of the Punjab Pre-emption Act, 1905, applies to every suit where the right to sue for pre-emption had not expired at the date of the commencement of the Act.

The fact that where under the old Act a special custom for the enforcement of a right was required to be substantiated by a plaintiff, the new Act relieves him of the burden of proving that custom and confers those rights on him by Statute, has on effect as on the applicability of the section to rights which were not barred by the law of limitation at its commencement.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 9th July 1906.

Sukh Dial, for appellants.

Sheo Narain, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts are fully given in the judgment of the Lower Courts. *29th March* 1907.

It is admitted fully here that if the Pre-emption Act, II of 1905, Punjab, applies, then the plaintiffs have a right to pre-empt and the appeal must fail. It is, however, urged that the claim is barred by limitation. Under the old Pre-emption Act the plaintiff would not have succeeded in a claim to pre-empt, unless he could have proved a special custom, which it is suggested he clearly could not have proved in this case. Consequently it is urged he had no right to pre-empt, until that right was conferred upon him by the new Act.

It is urged, therefore, that the plaintiff, who had no right to pre-empt under the old Act and whose claim is created by that Act, comes within the purview of Section 29 of the Act and not Section 28, and that his suit is barred in consequence. Section 28 says—"If any person who has "at the commencement of this Act a right to sue for pre-emption

"which is not provided for under Article 10 of the second "schedule of the Indian Limitation Act, 1877, and is not "barred under Article 120 of the said schedule, may exercise "such a right at any time within one year from the date "of such commencement."

Mr. Sukh Diyal argues that as the plaintiff had no right to pre-empt before the commencement of the new Act, he had no right at the commencement of the Act, and as his right is one created by the Act, Section 29 applies, and his right to sue is barred.

We think that this is a strained interpretation to put on the Act, and that the distinction between a right to sue and a right of pre-emption has been overlooked. All that a limitation clause deals with is the right to sue not the substantive rights on which a suit is based.

Now it was clearly open to the plaintiff at the commencement of the Act to sue for pre-emption on the same allegations as were made in this suit. And had he succeeded in proving his right under the custom in force in his village he would have got his decree. The probability that he would have failed in such a suit is quite beside the question. He clearly had the right to sue, and Section 28 only deals with the right to sue. No doubt the new Act relieves him of the burden of proving that he has such a right by custom, and confers it on him by Statute, but that does not affect his right to sue, it only affects the subsequent course of the suit.

Section 29 applies clearly only to the future. Section 28 is intended to provide a period of at least one year for all persons who had the right to sue at the commencement of the Act. Section 29 provide for the period of limitation in all cases in which the right *to sue* accrues after the commencement of the Act. In this case as the plaintiff clearly had a right to sue at the commencement of the Act, though he might not have been able to establish his claim, he is entitled to the benefit of Section 28 and had one year within which to sue from the date of the commencement of the new Act II of 1905. He has, therefore, sued within time. The result is that the appeal ails and is dismissed with costs.

Appeal dismissed.

No. 144.

Before Mr. Justice Johnstone and Mr. Justice Lal Chand.

SUNDAR AND OTHERS,—PLAINTIFFS,

Versus

WAZIRA AND OTHERS,—DEFENDANTS.

} REFERENCE SIDE.

Civil Reference No. 22 of 1907.

Jurisdiction of Civil or Revenue Court—Common land—Partition—Suit for declaration that land was not subject to partition—Punjab Land Revenue Act, 1887, Section 158 (XVII)—Punjab Tenancy Act, 1887, Section 77 (3) (i).

Held, that a suit by occupancy tenants against the whole of the individuals forming the proprietary body to establish that they in common with all the residents of the village are entitled to graze their cattle over the village common land, and that therefore it should be exempted from partition is not barred from the cognizance of the Civil Courts either by clause XVII of Section 158 of the Punjab Land Revenue Act, 1887, or by clause (*i*) of Section 77 (3) of the Punjab Tenancy Act, 1887.

Case referred by Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, on 15th January 1907.

The judgment of the Chief Court was delivered by

JOHNSTONE, J.—In the village of Samur Kalan, *Tahsil* Una, District Hoshiarpur, there is a large area of *shamilat* which the *maliks*, defendants in the present case, wish to have partitioned. Plaintiffs are the occupancy tenants in the village. They sue for the following relief or reliefs :—That the right of grazing over the whole *shamilat* area, which plaintiffs in common with all the inhabitants of the village enjoy, be declared intact; that it be laid down that the said area is for use by and for the grazing of plaintiffs and all the residents; and that the land be kept exempt from partition. *16th July* 1907.

This reference has been made by the learned Divisional Judge in order that it may be authoritatively ruled whether the case is one for a Civil or a Revenue Court. Doubt has arisen in the mind of the Divisional Judge owing to the conflict between two unpublished rulings of this Court, *viz.*, *Shib Dial* v. *Pala* (Civil Appeal No. 703 of 1894), and *Dasu* v. *Paras Ram* (Civil Appeal No. 34 of 1900).

Section 116, Punjab Land Revenue Act, 1887, draws the distinction, in connection with partition cases, between (*a*) questions of title, and (*b*) questions as to the property to be divided or the mode of making partition. Under Section 158 (2) (*xvii*), jurisdiction of Civil Court is ousted in respect of "any claim "for partition of an estate, holding or tenancy, or any question "connected with, or arising out of, proceedings for partition, *not*

"*being a question as to title* in any of the property of which "partition is sought." Lastly, Section 11 of the Civil Procedure Code authorizes the trial by Civil Courts of all suits of a civil nature except where the jurisdiction of these Courts is expressly barred by law. Now, in my opinion, when these plaintiffs ask that the land in suit be exempted from partition, and also perhaps when they ask that their right of user of the whole of it be confirmed, they do raise a question of title. I do not think this point requires elaboration ; and therefore Section 158, Punjab Land Revenue Act, at all events does not oust the jurisdiction of the Civil Court in the present case.

But we have also to reckon with Section 77 (3) (*i*) of the Punjab Tenancy Act,—"any other suit between landlord and "tenant arising out of the lease or conditions on which a "tenancy is held",—and here we must examine the two unpublished rulings quoted above. The earlier case (Shib Dial's) was decided by Roe and Reid, JJ. The case is exactly on all fours with the present. There too plaintiffs, occupancy tenants, objected to partition of *shamilat* by the defendants, *maliks*, on the ground that plaintiffs had right of grazing all over the land in suit ; and there too these rights were not confined to *maliks* and occupancy tenants, but were enjoyed by all residents in the village. The learned Judges held that, inasmuch as the plaintiffs claimed the rights "as a condition attaching to their tenancy," the case came under clause (*i*) aforesaid and so was cognizable only by a Revenue Court.

In the later case (Dasu's) the Bench consisted of Chatterji and Anderson, JJ. Again it was a dispute, upon partition, of *shamilat* between tenants and proprietors. It was laid down that the suit was one for a Civil Court because of the question of title involved. Section 77, Tenancy Act, was not touched upon.

Speaking with all due respect I am constrained to express the opinion that the *dictum* in Shib Dial's case is unsound. I do not agree that the claim is made in this case, or was made in that case, really on the basis of tenancy ; that is, I do not think this right of grazing accrued to these tenants because they were tenants. It belongs to all residents in the village ; and a man, not a tenant but merely resident in the village one day, who became an occupancy tenant (say by inheritance) next day, does not gain any new rights of grazing by acquiring his new status.

And there is another fatal objection, in my opinion, to the application of clause (*i*) aforesaid. It applies only to suits

"between landlord and tenant." Now my feeling is that the jurisdiction of the Civil Courts in connection with title to or interest in land should not be deemed ousted unless the law is unmistakably clear. Can it be said that a suit by all the occupancy tenants in a village, tenants holding severally under a variety of *maliks* against not only their own landlords but also a number of proprietors with whom the plaintiffs have no concern, is a suit between "landlord and tenant?" I take these words as meaning a suit between a landlord and *his* tenant or a tenant and *his* landlord, and not a suit between a tenant and somebody who may be a proprietor but is not his landlord. The present suit seems to me to be one by the body of occupancy tenants against the body of village proprietors as such.

I would hold that the suit is one for a Civil Court.

No. 145.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

MIRAN BAKHSH AND OTHERS,—(DEFENDANTS),—PETITIONERS,

Versus

AHMAD AND OTHERS,—(PLAINTIFFS),—RESPONDENTS. } REVISION SIDE.

Civil Revision No. 619 of 1906.

Limitation—Suit by a reversioner of a male proprietor entitled to possession of ancestral land on the death of the widow of such proprietor—Limitation Act, 1877, Schedule II, Article 141—Punjab Limitation Act, 1900, Article 2.

Held, that a suit on the death of the widow of the last male proprietor by a reversioner for possession of ancestral land alienated by the husband of the widow is governed by Article 141 of the Indian Limitation Act, 1877, and not by Article 2 of the Punjab Limitation Act, 1900.

Petition for revision of the order of Captain B. O. Roe, Additional Divisional Judge, Jhelum Division, dated 24th October 1905.

McDonald, for petitioners.

Golak Nath, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—The question of limitation argued in this case is founded on the following facts :— *4th April 1907.*

The land in dispute belonged originally to one Teja who sold it to his son-in-law Mehr Dad, father of defendants-petitioners, for Rs. 700 on 3rd January 1885. It is not exactly

ascertained when Teja died, but after his death the present plaintiffs, who are his nephews, sued the present defendants on 24th July 1890 for recovery of possession of lands sold to their father by Teja in 1885. Their claim was dismissed on the ground that Teja had left a widow Mussammat Jiwani, who was then alive, and that during her life-time they had no right to sue for or recover possession. A suit for a declaration instituted shortly after to protect their reversionary interest against the sale met a similar fate on the ground that it was barred by limitation. Teja's widow, Mussammat Jiwani, died about 1904, and thereafter the present suit for possession was instituted on 19th May 1905. The Lower Courts have decreed the claim. The defendants now seek in revision to set aside the decree on the sole ground that the suit is barred by limitation under Act XV of 1877, as well as under the special Law, Punjab Limitation Act No. I of 1900. It is argued that the suit is barred by limitation under the general Act, as it was instituted beyond twelve years from the date of Teja's death, and that if the special Act was held applicable owing to death of Jiwani, widow of Teja, in 1904, then the suit was barred as no declaratory decree had been obtained, and the suit was instituted more than twelve years after the date of delivery of possession by Teja to defendants' father under the sale.

We are unable to accept the validity or soundness of either of these contentions. It appears to us that the suit is not barred under the general law of limitation. Article 144 applies only in case no other article be held applicable, to a suit for possession of immovable property.

A suit by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female is specially provided for by Article 141. The present suit instituted shortly after Mussammat Jiwani's death in 1904 is therefore amply within time under Article 141. The question is whether the special Punjab Act No. I of 1900 is applicable to the case and bars the suit. Section 2 of the Act makes the Act applicable to every suit of any description specified in the schedule annexed to the Act, and provides for a dismissal of such suit if instituted after the period of limitation prescribed therefor in the same schedule. Clause 1 of the schedule is obviously inapplicable to a suit for possession, and the question therefore is whether a suit of this nature falls within the purview of clause 2 of the schedule.

Clause 2 of the schedule is not expressly worded so as to include a suit of the description contained in Article 141 of the

general Limitation Act. It relates to "a suit by the heirs of a male "proprietor governed by the Customary Law of the Punjab to "recover possession of ancestral land alienated by such "proprietor during his life-time." As observed in Mitra's Law of Limitation at page 222: "As a general rule the language of "an Act (specially if it is a modern Act) should be strictly "construed. This rule is of course applicable to statutes of "limitation which being restrictive of the ordinary right to "take legal proceedings are so far disabling Acts. Before such a "law is applied to any individual case it must be clearly shown "to come within some specific rule enacted by the law. Where "the law specifies the particular cases for which a particular "period of limitation is provided, it ought not to be interpreted "so as to include cases not within the strict meaning of the "words used. Where the law does not unequivocally and in "precise language bar the proceedings, it is construed in favour "of the right to proceed."

The matter is not altogether free from difficulty, but after due consideration we are of opinion that the clause in question cannot be interpreted so as to include a case where the suit for possession is instituted on death of the widow of the male proprietor who had alienated the property and was unmaintainable during the life-time of such widow, she being incompetent to sue to set aside the alienation. Such cases apparently fall under Article 141, Act XV of 1877, and if it were intended to overrule the provisions of that article, the language would have been more express and explicit. Section 2 of the Punjab Act no doubt says: "Notwithstanding anything to the contrary "in the second schedule of the same Act contained," but the operation of the section is expressly restricted to suits of the description specified in the schedule annexed to the Act, and if a case does not by clear language fall within the purview of such schedule, the provisions of the general Act would continue to be applicable. The case contemplated under clause (2) of the schedule was evidently a case where the person suing for possession was entitled to object to the alienation and to recover possession of the property alienated on death of the alienor. This is rendered evident by the second clause in the third column which prescribes twelve years from the date of death of the alienor in case a declaratory decree has been obtained. It could not possibly have been intended that if a person is not entitled to sue for possession owing to intervention of a widow's estate, still his suit for possession would be barred if not instituted within twelve years from the date of death of the alienor,

although he had obtained a declaratory decree and was willing to sue at once on the alienor's death. If he did sue, his suit would be dismissed as it was dismissed in this case on the ground that he was not entitled to sue for possession as long as the widow of the alienor was alive. We do not consider that clause (2) was intended to cover a case which would lead to such manifest injustice and absurdity.

In such cases it is necessary to deviate a little from the literal meaning of the words and out of respect to the Legislature put a reasonable construction upon them. Mitra's Limitation, page 218:

"But where a literal construction would lead to an "absurdity or would necessarily create difficulties and injustice, "the Legislature could not be taken to have intended or "contemplated such a result." Mitra's footnote, page 219.

Reading then clause (2) as a whole with the provision contained in the third column for commencement of time, and looking to the general scope and intention of the Act, we are of opinion that it was not intended to include a case of the nature under consideration. It is not directly referred to in explicit terms, and the language being so far ambiguous must be construed in favour of the right to proceed. The natural interpretation of the words "suit "by the heir of a male proprietor to recover possession of "ancestral land alienated by such proprietor" would be to apply them to a person on whom the inheritance devolved on death of the alienor and who was competent to object to the alienation. The view we take does not in any manner contravene the authority of these cases, where a remote male collateral is held barred owing to inaction of a nearer heir who was competent to object, but did not sue in time for possession by setting aside the alienation. Such cases stand on a different footing altogether and would be barred under the provisions of either Act, Article 141 being altogether inapplicable. We, therefore, hold that the suit is not barred under Act XV of 1877 and that the Punjab Limitation Act I of 1900 is not shown to be applicable to the case and therefore does not bar the claim. This was the sole point urged in the argument, the other grounds on the merits of the case having been abandoned at the first hearing. We, therefore, dismiss the application for revision with costs.

Application dismissed.

No. 146.

Before Mr. Justice Kensington.

CAMERON AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

BULAKI MAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 708 of 1906.

Execution of decree—Order rejecting application for stay of execution—Appeal—Civil Procedure Code, 1882, Section 545.

Held, that an order under Section 545 of the Code of Civil Procedure refusing to stay execution of a decree is not appealable.

Ramchandra Kastur Chand v. *Balmokand Chaturbhuj* (1) cited.

Miscellaneous first appeal from the order of F. T. Dixon, Esquire, Divisional Judge, Lahore Division, dated 8th June 1906.

The judgment of the learned Judge was as follows :—

KENSINGTON, J.—No one appears to support the appeal. *7th Novr.* 1906.

The question whether an appeal lies from an order under Section 545, Civil Procedure Code, refusing to stay execution, has been considered in various rulings quoted under the section in Rampini's edition of the Code. *Ramchandra Kastur Chand* v. *Balmokand Chaturbhuj* (1) is the latest decision on the point and the one which commends itself to me.

Holding that no appeal lies I must set aside the interim order of 23rd June 1906 and dismiss the appeal.

Appeal dismissed.

No. 147.

Before Mr. Justice Reid.

NATHU,—(DEFENDANT),—PETITIONER,

Versus

AMIR CHAND,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 1352 of 1907.

Joint Hindu family—Suit against a member of—Death of defendant pending suit—Decree against son as legal representative—Right of son to question the legality of the debt covered by the decree in execution proceedings.

Held, that the son of a member of a joint Hindu family who had on the death of his father been impleaded in a suit for the recovery of a debt due

(1) *I. L. R.*, XXIX *Bom.*, 71.

from the deceased as his legal representative is entitled in execution proceedings to question the legality of the debt in respect of which the decree sought to be executed was passed.

Amar Chandra Kundu v. *Sebak Chand Chowdhry* (1) referred to.

Petition for revision of the order of S. W. Gracey, Esquire, Divisional Judge, Amritsar Division, dated 28th May 1907.

Sukh Dial, for petitioner.

Shiv Narain, for respondent.

The judgment of the learned Judge was as follows :—

29th July 1907. REID, J.—The petitioner was brought on to the record of the suit as legal representative of his deceased father, and the Court held that the question of the alleged immoral nature of the mortgage in respect of which rent was claimed could not be considered in that suit.

In execution immovable property, alleged to be joint family property, has been attached, and the Lower Appellate Court has held that—"the discussion as to the immorality "of the original mortgage debts is superfluous."

Amar Chandra Kundu v. *Sebak Chand Chowdhry* (1) is authority for the contrary view. The majority of the Full Bench held that, when, on the death of a member of a joint Mitakshara family, against whom a decree for money has been passed, his son is brought on the record as his legal representative, the question of the liability of the ancestral property, which the son acquires by survivorship, for the debt covered by the decree may be determined in the execution proceedings and a suit is not necessary.

In my opinion the fact that here the son was impleaded as legal representative before decree does not make the law applicable to the two cases distinguishable. The Court which passed the decree treated the son as the legal representative of his father and as above stated declined to consider questions which did not arise in the suit against the father.

The Lower Appellate Court should have decided the question of liability raised by the son including the question whether the property attached was joint family property and whether the decree was based on immoral debts and consequently not executable against the said property.

(1) 11 *Calc., W. N.*, 593, *F. B.*

Under Section 70 (1) (*a*) of the Courts Act I set aside the order of the Lower Appellate Court and remand the appeal for disposal. Costs of this Court to be costs in the cause.

Application allowed.

No. 148.

Before Sir William Clark, Kt., Chief Judge and Mr. Justice Reid.

SARAN AND COMPANY,—APPELLANTS,

Versus

BASHESHAR NATH,—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 688 of 1906.

Interest—Vendor and purchaser—Purchaser bound to pay interest on purchase-money withheld by him.

Held, that a purchaser at a sale in insolvency proceedings of immovable property who is put into possession and fails to pay the purchase-money, is liable to pay interest to the vendor on the amount unpaid up to date of payment.

Kanye Lall Das v. *Shama O. Dawn* (1) followed.

Miscellaneous first appeal from the order of T. P. Ellis, Esquire, District Judge, Delhi, dated 1st June 1906.

Muhammad Shafi and Ram Bhaj Datta, for appellants.

Shadi Lal and Wazir Singh, for respondent.

The judgment of the Court was delivered by

REID, J.—At the hearing Mr. Shadi Lal, for the Liquidator, contested the right of counsel for the respondents to appear contending that they had not been instructed by an authorised person. The objection was overruled, as it appeared that counsel were instructed in pursuance of the resolution of a meeting of Saran and Company with Ramaunj Dial of Dial and Company, in the chair. A further objection that the order of the District Court was not a final order and was therefore not appealable was also overruled. It is true that the order appealed did not fix the rate or amount of interest payable, but it decided the important question of liability to pay interest and the appellants were, in our opinion, entitled to come up on

15th July 1907.

(1) *I. L. R., XXI Calc.*, 566.

appeal at once, without awaiting the decision of the rate or amount of interest. A decision in their favour would obviate the necessity of a decision of the rate or amount. The order finally decided, as far as the Court below was concerned, that interest was payable, and obviously affected the rights of the parties. Such an order passed under Section 244 of the Code of Civil Procedure would be appealable, and Section 169 of the Indian Companies Act gives an appeal. The first point argued for the appellants is that the postponement of payment of the purchase-money was the result of an arrangement between Saran and Company, on one side, and the District Judge and Liquidator, on the other, and that the District Judge, as vendor, had not jurisdiction to pass an order saddling the purchasers with interest. Counsel for the appellants cited no authority for holding that the District Judge acted in a ministerial, not in a judicial capacity, when passing orders in connection with the terms of the sale, and we see no reason for holding that the District Judge had not jurisdiction to pass an order for payment of interest. Whether such order is justified is another matter. On the 28th August 1901 the District Judge passed the following order:—"Extension of time for payment of sale-money "after hearing the parties about my proposal of the 27th of "July 1901 and taking their written representation into con- "sideration I am of opinion that the purchasers be given "time to pay the purchase-money until the point of lien is "ultimately and entirely disposed of, with only this safeguard "to protect the interest of the shareholders and unsecured "creditors, that the purchasers be given over possession of "the premises, machinery, etc., of the Jamna Mills Company, "Limited, at once, that they should agree that in case of the "point of lien being found totally or partially against the "lien-holders and the purchasers being called on to deposit "the purchase-money or any portion of it, and its default,—this "sale should be considered as cancelled and, in the resale ordered, "the machinery of the mills purchased by them or some of "them, along with others from the National Bank, whether "fitted or not, with all the improvements, additions, etc., made "by them during the interval, would be sold along with the "present effects of the Company, and the whole proceeds up to "Rs. 22,000 ? (2,20,000) would go to pay the shareholders and "unsecured creditors, or any of them, as the case may be, "according to the law, after deducting the amount of the "lien allowed in part if any, and the balance if any, going to "the purchasers.

" This order would be carried out on the 31st of August " if the purchasers would bring the purchasers of the machinery " other than themselves to agree to these arrangements as " guarantees and have the machinery freed from any lien or " claim of the Bank, otherwise the order giving extension to " deposit the purchase-money will stand as nil, and the earnest- " money being forfeited, steps would be taken to resell the " property.

" Further, in the case of the purchasers agreeing to these " arrangements they would pay to the Liquidator the money, " Rs. 2,000 odd paid, spent in erecting temporary shade on the " roof, etc."

Counsel for the appellants contended that under Section 647 of the Code an order of liquidation is a decree and cited—*In the matter of the West Hopetown Tea Company, Limited*, (1) in which it was held that Section 25 read with Section 647 of the Code of Civil Procedure, empowered the High Court to transfer to itself proceedings in the winding up of a Company under the Companies Act. *Than Singh* v. *Kazim Ali* (2), in which it was held that the auction purchaser's title vested in him on the date of confirmation of sale, and that delay in obtaining a certificate of sale did not affect the vesting of title.

Bura v. *Mailia Shah* (3), in which it was held that interest should not be awarded as damages in a suit for the amount due on a balance struck where no express or implied agreement to pay interest and no usage of such payment had been established and no written notice that interest would be claimed had been served on the debtor. *Situl Pershad* v. *Monohur Das* (4), in which it was held that an agent retaining his principal's money, which he had not been required to pay, should not ordinarily be required to pay interest, but that, if his conduct had been fraudulent, he should be charged with interest. *Kisara Rau* v. *Oripati Dikshatulu* (5), in which it was held that, in the absence of a demand in writing interest up to date of suit cannot be awarded upon success, not payable under a written instrument of which payment has been illegally delayed.

Counsel for the respondents cited pages 2, 3, 4, 10 and 11 of the paper book in F. A. 423 of 1902; the proceedings of an extraordinary general meeting of the appellant Company's shareholders of the 27th April 1902; a notice, dated June 16th,

(1) *I. L. R., IX All.*, 180. (2) 104 *P. R.*, 1901.
(3) 92 *P. R.*, 1893. (4) 23 *W. R.*, 325.
(5) 1 *Mad. H. C. R.*, 369.

1907, from counsel for Dial and Company to the Liquidator. Section 55 (4) (*b*) and Section 57 (*a*) of the Transfer of Property Act, and *Kanye Lall Das* v. *Shama C. Dawn* (1), in which it was held that the practice on the original side of the Court was that a purchaser of property at a Registrar's sale should pay interest as a matter of course, if out of time in paying into Court the balance of the purchase-money.

The conditions of sale (page 2 of the paper book in F. A. 439 of 1902) provide that Rs. 10,000 will be paid to the Liquidator, as earnest-money, at the fall of the hammer; that the balance will be paid to the Liquidator within one month of sanction of sale by the District Judge; and that, on failure so to pay the balance, the earnest-money will be forfeited.

On the 28th March 1901 (page 3 of the paper book) the Directors of Saran and Company wrote to the Liquidator asking him to sanction an arrangement entered into between the purchasers and the lien-holders, allowing the purchasers to pay by receipts from the lien-holders, the purchase-money being likely to come to a large amount and the purchasers not possessing the amount in ready cash.

On the 1st April 1901 (page 4 of the paper book) the Directors asked the Liquidator to extend the time for payment for filing the receipts by two months, *i. e.*, until the 18th June 1901, the matter having to be referred to the Court, which might possibly not decide it till the 18th April, and the amount being large and not easy to arrange for.

On the 11th April 1901 (page 10 of paper book) the District Judge passed an order stating that the purchase-money was due on the 19th April, the sale having been sanctioned on the 19th March, declining to accept receipts of mortgagees as payment and to defer payment until the decision of this Court on the question of the sale, ordering deposit of the purchase-money in a Bank by the 19th April, any interest to be credited to the purchasers, and ordering that the earnest-money be kept intact until delivery of judgment by this Court.

On the 12th April (page 11 of the paper book) the Court modified its order of the 11th by extending the period for payment to fifteen days after the decision of this Court. At the extraordinary general meeting of Saran and Company of the 27th April 1902, it was resolved that Rs. 7½ per cent. per

(1) *I. L. R.*, *XXI Calc.*, 586.

annum be paid to the lien-holders on the unpaid purchase-money.

The notice of the 16th June 1907 is from the legal adviser of some of the lien-holders, Dial and Company, to the Liquidator, intimating that his clients had given Saran and Company notice of suit for recovery of interest, relying, among other matters, on the resolution of the meeting of Saran and Company above cited.

Section 55 (4) (*b*) of the Transfer of Property Act provides that where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, the seller is entitled to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof, remaining unpaid and for interest thereon.

Section 57 (*a*) of the Act was cited as indicating that, in all cases of sale of encumbered immovable property by a Court, interest may be awarded on purchase-money remaining unpaid after the date fixed for payment.

The authorities cited for the appellants on the question of payment of interest do not help them, inasmuch as they do not deal with sales of immovable property. The evidence on the record indicates that the delay in payment of the purchase money was caused in the first instance by the appellants' applications for postponement and by indulgence granted to them in consequence of the possibility that the sale to them would be cancelled. Although the Transfer of Property Act does not apply to this Province the rules cited from it are equitable. The fact that a purchaser's title has vested is no excuse for delay in payment of purchase-money, and in Than Singh's case (1) the purchase-money appears to have been paid.

As remarked by the Court below the appellants have had the use of money due to others for more than five years and some, at any rate, of those entitled to the money have raised money, for which they have to pay interest, on their liens. The Interest Act does not affect the point under consideration and was not cited for the respondent, but under the order of the 12th April 1901, which has not been shown to have been set aside, speedy payment was contemplated and it cannot be contended that the mere failure to enforce payment cancels the liability to pay

(1) 92 *P. R.*, 1898.

interest, and, as already stated, the failure to enforce payment was the result of indulgence shown to the appellants to avoid hardships in the event of the sale to them being set aside. No equitable ground for allowing them the use of the property without payment of interest for the period during which the purchase-money was unpaid has been established.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 149.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

BEHARI LAL AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

APPELLATE SIDE.

RAM CHAND AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 825 of 1902.

Parties—Joint Hindu family—Suit by the managing member for debt due to the family—Objection as to non-joinder—Joinder of other members after period of limitation—Civil Procedure Code, 1882, Section 27.

A suit was brought by the managing members of a joint Hindu family in the name of their firm for a debt due to the ancestral business. Objection being taken on the ground of non-joinder of other members of the family, several of whom were minors, the plaintiffs at once admitted their mistake and the members so omitted applied at once to be joined as plaintiffs.

Held, that all the members being comprised in the designation of the firm, the omission should have been regarded as due to a *bonâ fide* mistake and that under such circumstances the Court was bound to add, under Section 27 of the Civil Procedure Code, the other members of the family as plaintiffs.

In cases where action is taken under Section 27 the period of limitation counts from the date when the plaint is first presented to the Court.

Kastur Chand Bhiravdas v. *Sagarmal Shriram* (1) and *Subodini Debi* v. *Cumar Ganoda Kant Roy* (2) cited.

First appeal from the decree of T. P. Ellis, Esquire, District Judge, Delhi, dated 15th July 1902.

Muhammad Shafi, Shadi Lal, and Lajpat Rai, for appellants.

Gurcharan Singh, for respondents.

The judgment of the Court was delivered by

26th October 1906. ROBERTSON, J.—The facts are fully given in the judgment of the first Court.

The case was instituted on 19th October by Behari Lal and Sheodit Ram, sons of Pali Ram, and Kadar Bakhsh, son of

(1) *I. L. R., XVII Bom.*, 418. (2) *I. L. R., XIV Calc.*, 400.

Ghansham Das, proprietors of the firm of Pali Ram and Behari Lal, against Ram Chand, Gopal Sahai, son of Ram Chand, Munshi Lal, minor, son of Ram Chand, Narain Das, Narsingh Das and Radhe Mohan. Narain Das and his 2 sons, defendants 5 and 6, appeared at a hearing on 15th November 1899, but Ram Chand and Gopal Sahai did not appear and *ex-parte* proceedings were taken against them and Ram Chand's minor son. Narain Das put in certain pleas but took no objection on the ground of non-joinder.

Various issues were framed, and there were many hearings. Ram Chand was summoned as a witness and was so examined on 23rd November 1900, and he then applied to have the *ex-parte* proceedings against him set aside; counsel for plaintiffs agreed to this on payment of costs. Ram Chand then put in a plea that the plaintiffs were only some members of a joint Hindu family and could not sue without joining the other members of the family. The plaintiffs at once admitted this fact and the other members of the family applied on 6th April 1901 to be joined as plaintiffs. This was an application which should obviously have been granted at once leaving the effect of such addition to be decided thereafter. But the Lower Court, for reasons which we confess ourselves quite unable to even understand, refused this petition and dismissed the suit remarking in his judgment—

"I am asked to proceed under Section 32, but it appears "to me that the meaning of that section is to allow the Court "to implead fresh plaintiffs only when it is necessary to enable "the Court to decide necessary questions common to the parties "and to third parties, and not merely questions between the "parties to the suit. It is not intended to cover a case where "the plaintiffs knowing that they were the only co-promissors "have failed to add other promissors."

No authority is quoted for the proposition and the words of Section 32 are "to enable the Court effectually to adjudicate "and settle all the questions involved *in the suit* ....."

But we do not propose to discuss this question or the other questions raised or discussed any further as we consider that the case comes within the purview of Section 27, Civil Procedure Code.

The suit in this case was clearly a suit by the firm of Pali Ram and Behari Lal, and it is not seriously contended that any other member of the family except those named in the plaint have any share in its management. The suit was finally launched, the defendants knew exactly what they

had to meet, and all that can be said is that the description of the members of the firm given in the plaint was incomplete. There is no doubt that the omission of the names of the other members of the family, several of them minors, was due to a *bonâ fide* mistake in the belief that such addition was not necessary. Of the various rulings quoted to us, *viz.*, *Guruvayya* v. *Dattatraya* (1), *Shirekuli Timapa Hegade* v. *Ajjibal Narashino Hegade* (2), *Pragi Lal* v. *Maxwell* (3), *Kastur Chand Bhiravdas* v. *Sagarmal Shriram* (4), *Labhu Ram* v. *Kanshi Ram* (5), *Moti* v. *Sayad Ahmad Shafi* (6), *Rattan Chand* v. *Ram Parshad* (7), *Motan Mal* v. *Kirpa Mal* (8), *Badri Das* v. *Jawala Pershad* (9), *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (10), *Rumsebuk* v. *Ram Lal Koondoo* (11) and *Gopal Dass Agrawallah* v. *Budree Dass Sureka* (12), which we have consulted, that in *Kastur Chand Bhiravdas* v. *Sagarmal Shriram* (4) is most in point and supports the view taken above. No question of limitation arises in regard to names added under Section 27, Civil Procedure Code; the period of limitation counts from the date when the suit was originally instituted—*Subodini Debi* v. *Cumar Ganoda Kant Roy* (13), and *Kastur Chand Bhiravdas* v. *Sagarmal Shriram* (4). There are other points upon which much might be said for the appellants' contentions, but as we are clear that Section 27 covers the case we accept the appeal and remand the case under Section 562, Civil Procedure Code, with the direction that the remaining members of the plaintiffs' joint family be added as plaintiffs under Section 27, Civil Procedure Code, and that the case be now heard on its merits. Stamp on appeal will be refunded. Costs to be costs in the cause.

Appeal allowed.

No. 150.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

APPELLATE SIDE. SOHAN LAL AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

LABHU RAM,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 540 of 1907.

Hindu Law—Alienation—Competency of father over self-acquisition—Joint property—Validity of a testamentary disposition of his share by a member of joint Hindu family—Effect of partition by testator before death.

Held, that a Hindu father is competent to dispose of all his self-acquired property at pleasure and his sons cannot dispute the disposition even though it be in favour of a stranger.

(1) *I. L. R., XXVIII Bom.*, 11.
(2) *I. L. R., XV Bom.*, 297.
(3) *I. L. R., VII All.*, 284.
(4) *I. L. R., XVII Bom.*, 413.
(5) 57 *P. R.*, 1905.
(6) 29 *P. R.*, 1896.
(7) 69 *P. R.*, 1906.
(8) 79 *P. R.*, 1906.
(9) 86 *P. R.*, 1891.
(10) *I. L. R., XVII Calc.*, 160.
(11) *I. L. R., VI Calc.*, 815.
(12) *I. L. R., XXIII Calc.*, 657.
(13) *I. L. R., XIV Calc.*, 400.

Held, also, that a testamentary disposition of his share of the joint property by a member of an undivided family would not be invalid if the interest of the testator had been separated off by means of a partition before his death.

Balwant Singh v. *Rani Kishori* (1) and *Banke Rai* v. *Madho Ram* (2) cited.

Nanak Chand v. *Mussammat Dayan* (3) and *Madho Parshad* v. *Mehrban Singh* (4) distinguished.

Further appeal from the decree of Captain A. A. Irvine, Divisional Judge, Amritsar Division, dated 14th February 1907.

Shelverton, for appellants.

The judgment of the Court was delivered by

SHAH DIN, J.—Labhu Ram, respondent, is absent but he has been served, and the case can therefore proceed. *11th July* 1907.

The facts are stated in sufficient detail in the judgments of the Lower Courts and need not be recapitulated. The first point raised by Mr. Shelverton in support of his appeal was that, as the jurisdictional value of the suit was over Rs. 5,000, the Lower Appellate Court had no jurisdiction to hear the appeal. In the Lower Appellate Court, however, the present appellants themselves stated the value of the suit to be Rs. 5,000, and it was the plaintiff-respondent who, it seems, raised the objection that that value was incorrect, and that the Lower Appellate Court had no jurisdiction to hear the appeal. The Divisional Judge found that in the plaint the value of the suit had originally been entered as Rs. 5,000, and th t that figure had subsequently been tampered with, so as to alter the value to Rs. 5,100. Be that however, as it may, Mr. Shelverton's clients themselves appealed to the Divisional Court, and as the under-valuation of the appeal has not prejudicially affected the decision of the case on the merits, Section 11 of the Suits Valuation Act would seem to apply to the objection raised before us, and we, therefore, overrule it.

The second point pressed upon us by the appellants' counsel, and really the most material point which arises in the case, was that the will in dispute which was executed by the plaintiff's father on 31st May 1901, and which the plaintiff seeks to have declared invalid and ineffectual, so far as his rights in his father's property are concerned, was not invalid under Hindu Law, and that the plaintiff's suit has been decreed on erroneous grounds. After hearing Mr. Shelverton in support of his contention and consulting the authorities on which the concurrent decision of the Courts below on this point is based we think that this appeal must succeed.

(1) *I. L. R., XX All.*, 287 (*P. C.*).
(2) 153 *P. R.*, 1883.
(3) 103 *P. R.*, 1894.
(4) *I. L. R., XVIII Calc.*, 157.

The first question which requires determination and which has a very material bearing upon the question of the validity or invalidity of the will in dispute is, whether the property covered by the will was or was not the ancestral property of plaintiff's father, Bura. On this part of the case the District Judge has found against the plaintiff, and all that the Lower Appellate Court says in this connection is that, "it is very "doubtful whether the property did not accrue out of a "nucleus of ancestral funds"—a finding very far from being definitely and explicitly in plaintiff's favour on the first issue as framed by the District Judge on the pleadings of the parties. We have looked into the evidence on this point, and we think that upon the materials before us, we have no option but to concur with the District Judge in holding that the property dealt with by the will is not proved to be Bura's ancestral property. The plaintiff's cousin Ganesh Das himself has been examined as a witness, and even he is unable to state with reasonable certainty whether any, and if so what, property was left by Radha Kishen. We are constrained, therefore, to find against the plaintiff on this point.

If then the property in question was not the ancestral property of Bura, the latter was *primâ facie* perfectly competent to alienate it in any way he chose to the prejudice of the plaintiff's right of succession, and the plaintiff is not entitled under Hindu Law to control his father's power of disposition. (See the decision of their Lordships of the Privy Council in *Balwant Singh* v. *Rani Koshori* (1)). That being so, the plaintiff cannot impugn the will in question unless he can show that he has acquired the right to do so by reason of some special circumstances disclosed in this case. The Courts below think that he has, because at the time when Bura made the will complained of, he (the testator) was a co-parcener with his nephew Ganesh Das as a member of a joint Hindu family, and was, therefore, (it is said) incompetent to bequeath his own share of the joint property. In support of this view reliance has been placed upon the following passage in Mayne's *Hindu Law and Usage* (6th edition), Section 417 (page 537) :—"A member of an "undivided family cannot bequeath even his own share of the "joint property, because at the moment of death the right of "survivorship is at conflict with the right by devise. Then "the title by survivorship, being the prior title, takes pre-"cedence to the exclusion of that by devise." In applying the principle embodied in the above passage to the present case,

(1) *I. L. R., XX All*, 267, *P. C.*

however, the Courts below have overlooked the fact, which is mentioned in both the judgments, that in March 1902 before the death of Bura a partition of the joint property had been effected between him and Ganesh Das, from which it follows that *at the time of his death* the property willed away by Bura (though at the time of the execution of the will it had been held by him jointly with his nephew) was his ***separate property***, and could not, and did not, vest in Ganesha by right of survivorship, which right comes into operation only at the moment o a co-parcener's demise and not before. As soon as the decision of the joint property was made in March 1902, the co-parcenery as regards the family property ceased to exist, and thereafter each of the co-parceners became owner of his share as separate property, capable of dealing with it as such unfettered by the prospective operation of the principle of survivorship. When, therefore, Bura died (in October 1902) Ganesha had as regards the deceased's property "no title by survivorship" which could "take precedence to the exclusion of that by devise," and the devise, therefore, took effect, not being defeasible by any title which the plaintiff as Bura's son could set up in his own right. It must also be borne in mind that the will in question was not an alienation *inter vivos*, such as a sale or gift, which is intended to operate from the moment it is made, but that it was a testamentary disposition which takes effect from the date of the testator's death; and therefore though at the time of the execution of the will, Bura was incompetent to dispose of his own share of the joint family property, the bequest would not be invalid if at the time of the testator's death, when it came into operation, the property dealt with was his separate property and as such completely under his control.

The Courts below have also relied upon *Nanak Chand* v. *Mussammat Dayan* (1) (page 386) in support of their conclusion, but that decision, following the ruling of the Judicial Committee in *Macho Parshad* v. *Mehrban Singh* (2), lays down the general principle that so long as joint family property has not been partitioned, "a member of the joint family cannot dispose "of his own interest at his own hand and for his own purposes." This principle is in no way contravened in a case where the disposition takes effect after the interest of the alienor is defined and is separated off by means of a partition, which interest he can dispose of "as if it had been his acquired property" (see page 387).

(1) 103 *P. R.* 1894. (2) *I. L. R., XVIII Calc.*, 157, *P. C.*

The ruling of this Court in *Banke Rai* v. *Madho Ram* (1) which is relied on by the defendants is, in our opinion, in point as showing that the will in dispute was not in any case void, but was simply voidable at the option of Ganesh Das, and as the latter did not exercise that option at the time the will was made, and could not exercise it at the time when the will came into operation (having separated off from Bura before his death), the bequest was perfectly valid and effectual so far as the plaintiff's rights of succession in his father's property were concerned.

For the above reasons, we accept the appeal and dismiss the plaintiff's suit with costs. The decree against the respondent is *ex-parte*.

Appeal dismissed.

(1) 153 *P. R.*, 1883.

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No.

ARBITRATION—(concld.).

Query.—Whether in a case in which there has been an order of reference to arbitration under Section 508, Civil Procedure Code, and an award has been delivered by the arbitrators but has been set aside by the Court under Section 521, and a decree is passed on the merits, it is open to an Appellate Court on an appeal against that decree to consider the question of the legality of the order setting aside the award? 66

5. *Arbitration—Application to file a private award—Award effecting portion of immoveable property—Registration Act*, 1877, *Section* 17, *clause* (*b*) (*i*)—*Court not competent to remit private award when defective and indefinite—Civil Procedure Code*, 1882, *Section* 520, 525, 526—*Court-fee—Court-fee on appeal from an order rejecting an application to file an award in Court—Court-Fees Act*, 1870, *Schedule I, Articles* 1, 17.—*Held*, that the Court-fee payable upon the memorandum of appeal against an order rejecting an application under Section 525 to file an award is Rs. 10 under the sixth clause of Article 17 and not an *ad valorem* fee in accordance with Article 1 of the Court-Fee Act, 1870.

Held, also, that when an award made without the intervention of the Court is on the face of it defective, determines matters not referred to arbitration, and is so indefinite as to be incapable of execution, the Court has no power under Sections 525 and 526 to amend it or to remit it for reconsideration but must refuse to file and enforce it.

Semble: for the purposes of Section 525 of the Code of Civil Procedure an award of arbitrators privately appointed by the parties even if it effects partition of joint immoveable property of over Rs. 100 in value and is signed by the parties to signify their acceptance of the same does not require registration and can be filed and made a rule of Court 84

6. *Arbitration—Award—Delivery of, within the period allowed by the Court—Civil Procedure Code*, 1882, *Sections* 508, 521.—*Held*, that an award made and signed within the period fixed by the Court even when filed in Court after the expiry of that period is valid under Sections 508 and 521 of the Code of Civil Procedure.

The expression "delivery" in Section 508 means "making" and not "filing in Court" 89

ASSIGNMENT.

Assignment—Conditional assignment by way of security—Right of assignee to sue in his own name.—Where the payee of a promissory note not negotiable assigned it to the plaintiff as a security for a debt owing from him to the latter until its repayment in full, *held* that it being merely a conditional assignment the plaintiff was not entitled to maintain an action in his own name alone against the maker of the promissory note for the recovery of amount due thereunder.

Burham Brothers v. *Robertson* (*L. R.*, 1. *Q. B.* (1898), 765) followed 9

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No.

ASSIGNMENT OF CHOSE IN ACTION.

Alienation of reversionary rights—Power of a reversioner out of possession to assign his interest after devolution of inheritance—Right of assignee to sue for possession.—Held, that a reversioner out of possession of a childless male proprietor can transfer his interests to a stranger after devolution of inheritance and the assignee is entitled to recover possession of the property and contest the validity of the title of the person in possession subject to the same rules which could have been enforced by the assignor.

Jhoki Ram v. *Malik Kadir Bakhsh* (12 *P. R.*, 1894), *Achal Ram* v. *Kazim Husain Khan* (*I. L. R., XXVII All.*, 271, *P. C.*), *Tota* v. *Abdulla Khan* (66 *P. R.*, 1897), and *Mouladad* v. *Ram Gopal* (22 *P. R.*, 1900), referred to 11

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1. Liability of assignment of Land Revenue to attachment in execution of decree.

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2. *Jurisdiction of Small Cause Court to award compensation under Section* 491, *Civil Procedure Code, for an erroneous attachment of immoveable property before judgment.*

See *Small Cause Court* 77

3. *Attachment—Fodder, liability of, to attachment in execution of decree —Civil Procedure Code*, 1882, *Section* 266 (*n*)—*Punjab Land Revenue Act*, 1877, *Section* 70.—*Held*, that fodder required for the owner's cattle is exempt under clause (*n*) of Section 266 of the Civil Procedure Code, read with Section 70 of the Punjab Land Revenue Act, 1887, from attachment in execution of a decree against an agriculturist.

A Civil Court can only attach so much as will leave in the opinion of the Collector of the District a sufficiency for the owner's cattle.

Wasil v. *Muhammad Din* (93 *P. R.*, 1904) superseded 82

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Payment to be made contingent on succes—Illegal and improper contract—Public policy.

See *Legal Practitioners* ... ...61 *F.B.*

BURDEN OF PROOF.

See *Custom—Alienation* 33, 115

1. Even in a locality where the right of pre-emption by reason of vicinage is admitted or is found to prevail, the burden of proof that an owner of a house opposite to the house sold but separated from it by a road or lane has a right to claim pre-emption against a vendee who may be a mere stranger lies on the party asserting the existence of such a custom 47

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No.

CIVIL PROCEDURE CODE, 1882—(contd.).

SECTION 244.

1. *Suit against a member of joint Hindu family—Death of defendant pending suit—Decree against son as legal representative—Right of son to question the legality of the debt covered by the decree in execution proceedings.*

2. *Right of suit—Decree for possession of equity of redemption—Pre-emptor obtaining possession of property instead of equity of redemption - Suit for restitution of property wrongfully taken—Question relating to the execution, discharge or satisfaction of decree—Discretion of Court to treat plaint as an application for restitution—Civil Procedure Code*, 1882, *Section* 244.—'A' purchased from 'B' the equity of redemption in a certain property which was previously mortgaged with possession to 'C' and then redeemed the mortgage of 'C.' 'D' sued 'A' to enforce his right of pre-emption and got a decree for delivery of possession of equity of redemption, but in execution of his decree he some how obtained possession of the property in lieu of its equity of redemption. 'A' then filed a regular suit to recover possession of the property as a mortgagee on the ground that 'D' had taken unlawful possession in execution proceedings. Thereupon the defence contended that the suit was barred by the provisions of Section 244 of the Civil Procedure Code.

Held, that the suit was not barred under Section 244 of the Code of Civil Procedure. The question to be decided in this suit did not relate to the execution, discharge or satisfaction of the original decree within the meaning of that Section because the decree in the pre-emption suit has and had no concern with it.

Held also that even assuming that no regular suit lay the plaint should be regarded under the circumstances of the case as an application for execution of decree for claiming restitution of property wrongfully taken by 'D.' 5

SECTION 266 (*n*).

Fodder required for the owner's cattle is exempt under this clause, read with Section 70 of the Punjab Land Revenue Act, 1887, from attachment in execution of a decree against an agriculturist 82

SECTION 305.

Where immovable property has once been sold in execution of a money decree, the executing Court has no authority to allow time to the judgment-debtor to enable him to raise the amount of the decree by a private transfer of the property or otherwise as provided by this section 92

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No.

CUSTOM—ALIENATION—(contd.).

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No.

ESTOPPEL—(concld.).

lieu of her mother's dower. Z married B, and being childless adopted a boy M, defendant in this case, by a registered deed which was executed in 1887 and soon after settled the property, which had come to her from her father 'S', on her adopted son by a deed of gift, dated 4th May 1888, mutation of which was duly effected in the course of the same year in favour of M as the adopted son of Z. In 1895 a private partition was made, the parties appearing before the revenue authorities and requesting that the arrangement be recorded and entries made in accordance thereof and allowing defendant in connection with this land to be described as the adopted son of Z. This arrangement was sanctioned on 11th June 1896 with full consent of all persons concerned, and the parties then took possession of their respective shares in pursuance thereof.

On the death of Z, which occurred on 4th May 1899, the plaintiffs instituted the present claim for possession on the allegation that they being the nearest collaterals were the rightful heirs to the property held by him, and that defendant had no title thereto, the deed of gift and his alleged adoption being both fictitious and invalid by law and custom. The defence *inter alia* pleaded estoppel by conduct and acquiescence.

Held, that the plaintiffs were precluded from making the present claim, the facts noted above shewing acquiescence in the adoption and alienations 1

3. *Estoppel—Decree in favour of plaintiff for a part of his claim—Execution of such decree by plaintiff—Subsequent appeal for remainder.* —*Held*, that a plaintiff who has obtained a decree for a part of his claim and has executed the same is not by the mere fact of his having taken out execution of that decree debarred from prosecuting the appeal as regards the remainder of his claim which had been disallowed by the first Court.

Mahomed v. *Fida Mahomed*, 82 *P. R.*, 1868, over-ruled ... 31

4. *Custom—Alienation—Suit reversioner by to enforce his right in respect to land on the ground that the alienation had been without necessity which alienation had already been challenged by his father on the ground of pre-emption only*—Locus standi—*Estoppel by acquiescence.*—*Held*, that the fact that at the mutation of a sale of ancestral immovable property by a childless male proprietor the nearest reversioner expressed his readiness to take it over on payment of the sale price, but abstained from taking any action whatsoever in respect to it during his life-time, is evidence to prove that it had been acquiesced in as a valid sale, and consequently the son of such reversioner is debarred from suing to impeach the sale as invalid for want of necessity 35

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No.

MORTGAGE.

1. *Mortgage—Separate covenants for the payment of principal and interest—Distinct causes of action—Competency of mortgagee to institute separate suits for principal and interest when both have fallen due—All claims on same cause to be included.*

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3. *Mortgagee obtaining money decree against his mortgagor not allowed to purchase equity of redemption in the property mortgaged to him—Effect of prohibited purchase.*

4. *Conditional sale—Reference by Chief Court under sub-section* 3 *of Section* 9 *of Punjab Alienation of Land Act*, 1907.—*Refusal of Deputy Commissioner to take action after the non-acceptance of his proposal by the mortgagor—Procedure for mortgagee—Regulation XVII of* 1806.

5. *Duty of Court to refer mortgage by deed of conditional sale to Deputy Commissioner if made by a member of an agricultural tribe—Punjab Alienation of Land Act*, 1900, *Section* 9—*Refusal of Court to recognize a party as a member of such tribe who failed to prove his assertion no ground for revision—Punjab Courts Act* 1884, *Section* 70 (1) (*a*).

6. *Mortgage—Mortgage for a fixed period—Representative of the mortgagor not allowed to redeem before the expiry of the term—Long term alone does not amount to clogging the equity of redemption.—Held* that a period fixed for redemption by the parties in a mortgage bond cannot be regarded as one fixed without legal necessity and as such inequitable and unenforceable on the mere ground of its being unusually long, and the representative of the mortgagor cannot be allowed to redeem before the term fixed on that behalf especially where it is shown to have been fixed by the mortgagor in good faith and with due regard to his best interests 39

7. *Mortgage by conditional sale—Foreclosure—Regulation XVII of* 1806—*Notice under Section* 8—*Non-existence of such notice on foreclosure file—Presumption as to its regularity.*—In a case for redemption the defendant pleaded that the alleged mortgage had been foreclosed so far back as 1881. The plaintiff denied this allegation and urged that no prescribed notice had ever been issued or served on him. The file of the foreclosure proceedings having been brought up, it was discovered that *nathi* B, including the notice in question had been destroyed, but from the document in *nathi A*, it appeared

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No.

MORTGAGE—(contd.).

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No.

PRE-EMPTION—(contd.).

12. *Custom—Pre-emption—Pre-emption on sale of house property—* Mohalla *Parachian in the city of Rawalpindi - Relevancy of instances decided on admission alone.—Found,* that the custom of pre-emption in respect of sales of house property based on vicinage exists in *mohalla* Parachian otherwise known as *mohalla* Matta or Waris Khan in the city of Rawalpindi.

The cases in which the right is claimed and decreed on admission alone are instances of the right being exercised within the meaning of the Evidence Act and are therefore relevant as to the existence of the custom 26

13. *Custom—Pre-emption—Pre-emption on sale of agricultural land on ground of vicinage—Civil Station of Amritsar.—Held,* that the custom of pre-emption in respect of sale of agricultural land by reason of vicinage in the Civil Station of Amritsar had not been established ... 27

14. *Custom—Pre-emption—Value of* wajib-ul-arz chakwar—*Conflict between earlier and later* wajib-ul-arz.—*Held,* that the *wajib-ul-arz chakwar* of Pindi Gheb *tahsil,* District Rawalpindi, is not a part of the record of rights and so has attaching to it no presumption of correctness under Section 44, Punjab Land Revenue Act, and that its evidential value is small, inasmuch as it states the custom of pre-emption which is always a *local* custom, *by tribes.*

Held, also, that the value even of a genuine *wajib-ul-arz* favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom, followed by a latter *wajib-ul-arz* in which the "law" or Act IV of 1872 is stated to contain the rule of pre-emption, is so small that even negative indications the other way are sufficient to reduce its value to nothing 44

15. *Custom—Pre-emption—Right of pre-emption claimed by virtue of ownership of house opposite but separate from that sold—*Katra *Kanhayan, Amritsar City—Burden of proof—Punjab Laws Act,* 1872, *Section* 11.—*Held,* that although the custom of pre-emption in respect of sales of house property by reason of vicinage has been established to prevail in *Katra* Kanhayan of the city of Amritsar, the plaintiff has failed to prove the special incident whereby he as owner of a house opposite to the house sold but separated from it by a road or land had a right to claim pre-emption against the vendee who was a mere stranger.

Ali Muhammad v. *Kadir Bakhsh* (107 *P. R.,* 1900)—not followed. *Mela Ram* v. *Prema* (109 *P. R.,* 1900), and *Ilahi Bakhsh* v. *Miran Bakhsh* (68 *P. R.,* 1906) followed 47

16. *Pre-emption—Purchaser with right of pre-emption equal to plaintiff's associating in the purchase persons with inferior right—Right of such purchaser to defeat plaintiff's claim.—Held,* that if a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase.

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No.

PRE-EMPTION—(contd.).

23. *Pre-emption—Sale of share of joint agricultural land to co-sharer —Suit by another co-sharer of the* khata—*Punjab Pre-emption Act*, 1905, *Section* 14.—*Held*, that under the provisions of the Punjab Pre-emption Act, 1905, a co-sharer in joint undivided agricultural land has no right of pre-emption in respect to a sale of a share of such land made to any of the several co-sharers in the estate.

Section 14 deals with several pre-emptors claiming in respect of the same property but does not provide for the case of a pre-emptor claiming against a vendee who has equal rights with him 83

24. *Custom—Pre-emption—Pre-emption of existence of right in respect to area converted into building sites*—Killa *Gujar Singh—Suburbs of Lahore—Punjab Laws Act*, 1872, *Sections* 10, 11, 12.—A certain area of land was originally comprised within the village of *Killa* Gujar Singh, a suburb of Lahore city and had been in years past agricultural land. For some time past, however, it had been used as a site for building purposes and had been gradually absorbed within the limits of Lahore city.

Held, under these circumstances that the land must be regarded as land situate in a town and that there was therefore no presumption that the custom of pre-emption existed in respect of sale of such land.

Found upon the evidence that the plaintiff had failed to prove that the custom of pre-emption existed in respect of a sale of such land ... 90

25. *Custom—Pre-emption—Sale of agricultural land to an agriculturist—Suit by a member of the alienors' tribe—Superior right—Punjab Pre-emption Act*, 1905, *Section* 11.—*Held*, that by virtue of Section 11 of the Punjab Pre-emption Act, 1905, a member of the alienors' tribe has a preferential right of pre-emption in respect to a sale of agricultural land by a member of an agricultural tribe to that of a vendee who was an agriculturist within the meaning of Section 2 of the Punjab Land Alienation Act, 1900 101

26. *Pre-emption—Assignment of property by vendee—Suit by pre-emptor against vendee alone subsequent to the said assignment—Parties—Pre-emptor bound to implead transferee or to institute fresh suit against him—Limitation for such action—Limitation Act*, 1877, *Schedule II*, *Article* 10.—*Held*, that where the subject matter of a pre-emption suit has been assigned by the original vendee before the pre-emptor had instituted his suit the latter is not entitled to recover the property from the transferee on the strength of a decree he obtains against the vendee alone. In order to obtain the property from the transferee he is bound either to implead the latter as a party to his original pre-emption suit or to institute a fresh suit within the period of limitation prescribed in Article 10 of the Second Schedule of the Limitation Act, 1877 106

27. *Pre-emption—Sale of two houses adjoining one another—Vendee and pre-emptor each having priority over one house by reason of vicinage —Pre-emptor not bound to acquire the whole bargain.—Held*, that in a case of sale of two houses adjoining one another a vendee whose right

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No.

PUNJAB LIMITATION ACT, 1900—(concld.).

Jawala v. *Hira Singh* (55 *P. R.*, 1903), and *Ganpat* v. *Dhani Ram* (76 *P. R.*, 1906) referred to.

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A suit on the death of the widow of the last male proprietor by a reversioner for possession of ancestral land alienated by the husband of the widow is governed by Article 141 of the Indian Limitation Act, 1877, and not by this article 145

PUNJAB MUNICIPAL ACT, 1891.

SECTION 92.

And Section 95—Erection of a new building—Application for, including projections on a street—Omission of Municipal Committee to pass orders thereon within six weeks—Applicant not entitled to presume tacit sanction provided for in sub-section 5 of Section 92 as to projection or encroachment. —*Held*, that where sanction for the erection of a projection or structure overhanging into or encroaching upon any street which requires a written permission under Section 95 of the Punjab Municipal Act, 1891, is applied for and included in an application for the erection or re-erection of a building provided for in Section 92, and the Municipal Committee fails to pass any order within six weeks after the receipt of a valid notice under sub-section 1 of Section 92, the person interested in such application is not warranted under sub-section 5 of that section to erect such projection and cannot be deemed to have obtained the necessary sanction in respect thereto. The tacit sanction provided by sub-section 5 covers only erections or re-erections of buildings, but does not also cover a projection or structure overhanging into or encroaching upon any street or road 62

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PUNJAB PRE-EMPTION ACT, 1905.

Punjab Pre-emption Act, 1905—*Application of, to rights accrued before that Act came into force—Retrospective enactment.*—*Held*, that the Punjab Pre-emption Act, II of 1905, is a retrospective enactment, and as such affects causes of action which accrued or were acquired before it came into operation 30

SECTION 4.

And Section 3 (5)—*Pre-emption—Agreement creating right of occupancy—Sale—Perpetual lease—Held*, that an agreement by which a landowner created a right of occupancy in another person in consideration of money payment plus annual rent and services and

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No.

R

RAILWAYS ACT, 1890.

SECTION 75 (1).

Passenger's luggage booked by luggage van—Liability of a Railway Company as carrier of articles of special value.—Held, that a Railway Company is not liable for the loss of a box containing gold and silver ornaments and Government Currency Notes of the value of over Rs. 100 which had been entrusted to it for conveyance in the luggage van by a passenger who had not made the declaration prescribed by Section 75 (1) of the Indian Railways Act, 1890.

The terms "parcel" or "package" in Section 75 (1) included a passenger's luggage 73

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SECTION 17 (*b*) (*i*).

For the purposes of Section 525 of the Code of Civil Procedure an award of arbitrators privately appointed by the parties even if it effects partition of joint immovable property of over Rs. 100 in value and is signed by the parties to signify their acceptance of the same does not require registration and can be filed and made a rule of Court 84

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RELIGIOUS INSTITUTION.

Religious institution—Mahant—*Suit relating to appointment and removal of—Right to sue without obtaining sanction—Civil Procedure Code*, 1882, *Section* 539.—*Held*, that a suit for the removal of the incumbent *mahant* of *a dharmsala* who has misbehaved as *mahant* and misused the funds of the institution and for the appointment of the plaintiff in his place falls within the scope of Section 539 of the Code of Civil Procedure and is not maintainable without obtaining previous sanction of the Collector to the institution of such suit ... 78

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No.

REVISION.

1. *Civil Procedure Code*, 1882, *Sections* 462, 506—*Arbitration—Award—Decree on judgment in accordance with an award—Reference by guardian ad litem of a minor without leave of Court—Admissibility of objection denying validity of reference on revision—Mortgage—Conditional sale—Duty of Court to refer to Deputy Commissioner if made by a member of an agricultural tribe—Punjab Alienation of Land Act*, 1900, *Section* 9—*Refusal of Court to recognize a party as a member of such tribe who failed to prove his assertion no ground for revision—Punjab Courts Act*, 1884, *Section* 70 (1) (*a*).—*Held*, that a decree passed in accordance with an award made under Chapter XXXVII of the Code of Civil Procedure, 1882, on a reference to arbitration in the course of a suit cannot be set aside on revision on the ground that some of the defendants being minors reference could not be made by their guardians *ad litem* without obtaining express sanction of the Court under Section 462, especially where the objection was neither raised in the Court below nor entered in the objections filed against the award within the period prescribed under Article 158 of the Limitation Act.

Lakshmana Chetti v. *Chrinathambi Chetti* (*I. L. R., XXIV Mad.*, 326), *Hira* v. *Dina* (37 *P. R.*, 1895), *Malak Sorab* v. *Anokh Rai* (18 *P. R.*, 1891, *F. B.*) and *Hardeo Sahai* v. *Gouri Shankar* (*I. L. R., XXVIII All.*, 35) referred to.

Although it is the duty of a Court to refer a mortgage of land by way of conditional sale to the Deputy Commissioner under Section 9 of the Punjab Alienation of Land Act if it was made by a member of an agricultural tribe, but it is for the party desiring to obtain benefit of that enactment to allege and prove that he is a member of an agricultural tribe. The mere assertion by a party that he is so and the refusal of the Court to recognize him as such does not amount to material irregularity and is not open to revision by the Chief Court under Section 70 (1) (*a*) of the Punjab Courts Act, 1884 4

2. *Power of Chief Court to revise findings on facts relating to question of jurisdiction.—Held, also*, that the Chief Court is fully competent to consider on the revision side the correctness of an Appellate Court's findings on the facts relative to the question of jurisdiction of that Court to entertain the appeal.

Roebuck v. *Henderson* (54 *P. R.*, 1896), referred to 12

3. *Revision—Competency of appellant to question finding of fact—Punjab Courts Act*, 1884, *Section* 70 (2) (*b*) (*iv*).—When an application has been admitted under Section 70 (2) (*b*) (*iv*) of the Punjab Courts Act, 1884, it is not open to the appellant to question either the validity or the soundness of the findings of facts arrived at by the Lower Appellate Court.

The question that whether a deed of transfer which on the face of it purported to be one of mortgage was in reality what it purported to be or a sale is a question of fact and not of law 16

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No.

W

WAJIB-UL-ARZ.

Value of chakwar wajib-ul-arz—*Conflict between earlier and later* wajib-ul-arz.

WILL.

Will—Bequest to trustees with a direction that it should be used for charitable purposes—Uncertainty of the objects—Bequest void.—**Held** that a bequest of property by a Muhammadan testator for such charitable objects as the trustees should think proper or for some such purpose as that the testator should obtain eternal bliss therefrom does not create a trust as the subject matter is not clearly or definitely indicated and the trust is therefore void by reason of uncertainty of its object 75

CRIMINAL JUDGMENTS,
1907.

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(Criminal).

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Mr. Justice Reid, Chief Judge, and Mr. Justice Robertson.

KING-EMPEROR,—APPELLANT,

Versus

FAZAL DIN,—RESPONDENT.

} APPELLATE SIDE

Criminal Appeal No. 95 of 1905.

Indian Penal Code, Sections 415, 463—Attempt to cheat and forgery—False representation in application for employment.

The prisoner, a fireman, applied for employment to the Locomotive and Carriage Superintendent of Burma Railways. He forwarded with his application a copy of a certificate purporting to have been granted to him by the North-Western Railway authorities to the effect that the accused had been employed as an engine-driver on that Railway for a considerable period and was of good conduct, when in fact no such certificate had ever issued to him, nor had he ever worked as an engine-driver on that Railway.

Held, that he was guilty of an attempt to cheat and not of forgery.

Appeal from the order of A. E. Martineau, Esquire, Sessions Judge, Lahore Division, dated 19th November 1904.

Government Advocate, for appellant.

Moti Lal, for respondent.

The judgment of the Court was delivered by

REID, C. J.—This is an appeal under Section 417 of the Code of Criminal Procedure from an acquittal by the Sessions Judge, Lahore, on appeal. The respondent was convicted by a Magistrate under Sections 468-109 or Sections 417-511 and sentenced to rigorous imprisonment for six months, on the finding that he sent an application for employment on the Burma Railways to the Locomotive and Carriage

26th June 1906.

Superintendent of those Railways, and that on the paper on which the application was written appeared the following words :—

"Copies of certificates.

"North-Western Railway.

"Certificate of character (Form A).

No. 21. 20th April 1903.

"Certified that Fazal Din was employed as driver from "the 1st July 1900 to the 15th April 1903 when he "resigned.

"Character good.

(Sd.) F. T. MILLARD,

"*District Loco. Superintendent, Multan.*"

The whole document is in the same writing, and we are satisfied that the respondent induced some one to write the document and sent it to the Loco Superintendent, Burma Railways, intending to induce the latter to employ him as an engine-driver, and that he was a fireman not a certificated or passed engine-driver, although he may frequently have driven an engine.

The charge of abetment of forgery can be disposed of very briefly :—

The document in question did not purport to have been written by any one other than the writer of the application, and the respondent did not make "a false document" within the terms of Section 464 of the Penal Code, or abet such making.

There was no intention of causing it to be believed that the document made by the respondent, or any other person was made or signed by or by the authority of a person, by whom or by whose authority he knew that it was not made or signed, and the respondent did not either himself, or through any one else, alter a document after it had been made or executed by himself or by any other person, and he did not cause any person of unsound mind or in a state of intoxication to execute, sign, seal or alter a document. The case is so clear that it is unnecessary to criticise and distinguish at any length authorities cited by counsel for the Crown. Authorities relating to forged certificates are not in point. In *Essan Chunder Dutt*

v. *Babu Prannath Chowdhry* (1), the forged documents purported to be true copies of original documents filed with the Kàzi of Calcutta. The Full Bench said: "We regard the "forgery of a copy clearly to come within the purview of the "section (Section 463). Forgery of a copy, which was no "true copy, would be the offence there rendered penal and the "criminal intention to make a false document serve the "purpose of a true one would be clear by such act of forgery." The report is incomplete, but it is obvious that the forged copy must have purported to be made or signed by some one having authority to make or sign who had not made or signed, or must have been altered.

We decline to interfere with the acquittal on the charge of abetment of forgery. The charge of attempting to cheat presents greater difficulties.

In *Hayeraft* v. *Creasy* (2), reported at 6 Revised Reports, 380, the Court approved the rule that one who affirms that to be true within his own knowledge which he has not reasonable grounds to believe to be true is liable in damages for fraud if loss accrues to a person who acted on his affirmation, and it was held that fraud meant an intention to deceive whether from expectation of advantage to the party himself or from ill-will towards the other. In *Kedar Nath Chatterji* v. *King-Emperor* (3), it was held that the production by a party of a forged document in a suit, with intent to make the Court believe that he was entitled to recover money upon the basis of a particular document produced, may be fraudulent within the meaning of Section 471 of the Penal Code, though possibly not dishonest within the meaning of Section 24, the intent being to commit a fraud upon the Court and to deceive it into holding what it would not have held but for the deception. In *Emperor* v. *Dhunum Kasee* (4) it was held that the use of a forged document in support of a defendant's title to the property in suit was fraudulent, although there might be no necessity for the use.

In *Mojoy* v. *Queen-Empress* (5) it was held that under Section 415 of the Penal Code the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation or property must be the necessary consequence of

(1) *W. R., F. B. R.* 71. (3) 5 *Calc., W. N.*, 897,
(2) 2 *East.*, 92. (4) *I. L. R., IX Calc.*, 58.
(5) *I. L. R., XVII Calc.*, 606.

the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom, and that the possibility of harm being caused to a Registrar in mind and reputation by registering a false divorce, and of the loss of fees in future through persons being less likely to avail themselves of his services, was too remote for the requirements of Section 419 of the Penal Code. In *Empress* v. *Dwarka Prasad* (1), it was held that a candidate for enlistment in the police who falsely described himself to the enlisting officer had not attempted to cheat.

In *Queen-Empress* v. *Soshi Bhushan* (2), the intention of the prisoner was to cause wrongful loss to a Professor of Law or to some College authority, and wrongful gain to himself by evading payment of fees for attending law-lectures, such fees being held to be property within the meaning of Section 23 of the Penal Code. It was further held that the intention of the prisoner was to support a claim within the meaning of Section 463 and to obtain a certificate, which was held to be property under that section of the Penal Code.

In *Queen-Empress* v. *Appasami* (3), it was held that a person who, by falsely pretending to be one D, induced an officer of the Madras University to deliver to him certain property, *i. e.*, a ticket entitling him to enter the examination room and be there examined for matriculation, which ticket would not have been given had the officer not been deceived, the intention being to make it appear that D had passed the examination, was guilty of cheating within the terms of Section 415 of the Code. In this case, it will be seen the Court held that there was a delivery of property, *viz.*, a ticket.

In *Abdul Razak* v. *Queen-Empress* (4) it was held that the making of a false certificate with intention to procure on the strength thereof employment in a public department was fraudulent, inasmuch as the immediate object was to deceive a public officer into believing that the person holding the certificate possessed a guarantee of efficiency which he did not really possess and so induce him to grant employment which he might otherwise have withheld, and that the certificate was a forged document intended to be used fraudulently within the meaning of Section 47 of the Code. One distinction between the definition of forgery in Section 463 and of cheating in Section 415 is that in

(1) *I. L. R., VI All.*, 97. (3) *I. L. R., XII Mad.*, 151.
(2) *I. L. R., XV All.*, 210. (4) *2 P. R., 1895, Cr.*

Section 463 the intention may be merely to support a claim or title, or to cause any person to enter into a contract, or to commit fraud, or that fraud may be committed; while in Section 415 the offender must fraudulently or dishonestly induce the person deceived to deliver property, or to consent to the retention of property or must intentionally induce the person so deceived to do, or omit to do, anything which he would not do, or omit, if he were not so deceived, *and which act or omission causes, or is likely to cause damage or harm to that person in body, mind, reputation or property.*

The intention of the respondent was doubtless fraudulent. He intended to deceive the Locomotive Superintendent and thereby obtain employment in a capacity in which he would probably not have been employed, but for the deception, *Queen-Empress* v. *Muhammad Saeed Khan.* (1)

Can it be held that the employment of the respondent as an engine-driver would, under the circumstances, have caused or been likely to cause damage, or harm to the Superintendent or to the Railway authorities in body, mind, reputation or property within the terms of Section 415?

In Kotamraju Venkatrayadu v. Empress (2) the prisoner had made a false document, and the question for consideration was whether the act was forgery within the terms of Section 463 of the Code. For the purposes of this case the report is useful by reason of its reference to English cases.

Referring to *Regina* v. *Toshack* (3) Subhramania Ayyar, J., who held that the prisoner's act was not forgery, said: "For the risk of injury to life and property resulting from a person not possessing sufficient "skill, training, etc., for exercising the calling of a "master-mariner, or of an engineer, being in charge of "a ship or dangerous machinery, is so manifest and "serious that no reasonable man can question its reality or "gravity."

In Toshack's case the prisoner was convicted of the forgery of a certificate qualifying him to go up for an examination as a master-mariner and the indictments alleged, not that the act was done with intent to obtain employment as a master-mariner, but that it was done with intent to deceive, injure, prejudice

(1) *I. L. R., XXI All.*, 118. (2) *I. L. R., XXVIII Mad.*, 90.
(3) *4 Cox., Cr. Cas.*, 88.

and defraud the corporation of Trinity House, the examining body. Alderson, B., who delivered judgment said: "It is a very "important duty which the Trinity House have to discharge, "important to owners of property of this description and import- "ant to the circumstances of those entrusted to their "care, and, if insufficient seaman or persons otherwise than "of good character and conduct are appointed, the unfortunate "subordinates of the ship are often subjected to harsh and "improper treatment." It was held that the indictments were sufficient to found a judgment upon, and it was held that forgery had been committed. Having regard to the technicality of indictment and pleadings in 1849, when this judgment was delivered, must be held that the Court found that the Trinity House Corporation were injured or were likely to be injured by the false representation and false document. Each item of the indictment had to be established.

As remarked by Davies, J., in *Kotamraju Vinkatrayadu's* case, to convict a person of a crime it must be strictly proved that it has been committed in law. It is not enough to show that he has been guilty of immoral or sinful conduct, and in *Janson* v. *Driefontein Consolidated Mines, Limited*, the Earl of Halsbury, L. C., approved the rule that public policy is not a safe or trustworthy ground for legal decision.

The deception which the respondent attempted might possibly have been harmless had it not been discovered and had he been appointed engine-driver in consequence of the deception, but this consideration does not justify his acquittal, and the decision in Toshack's case is authority for holding that the deception was likely to cause damage or harm to the person on whom it was practised or to the Railway authorities whose agent he was in the matter of appointments.

The "injury" specified in Section 415 of the Penal Code is as comprehensive as words can make it, and we hold that the respondent attempted to cheat.

We allow the appeal to the extent of restoring the conviction under Section 415 of the Penal Code, but having regard to the lapse of time since the offence was committed and to the difficulty of the question of law involved, we remit the unexpired portion of the sentence of imprisonment.

Appeal allowed.

No. 2.

Before Mr. Justice Chatterji, C.I.E.

CHIRAGH-UD-DIN,—PETITIONER,

Versus

KING-EMPEROR,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 728 of 1906.

Sanction for prosecution—Complaint—Dismissal of, under Section 203 of the Code of Criminal Procedure—Competency of Magistrate to grant sanction for prosecution for making false charge—Criminal Procedure Code, 1898, Sections 195, 202, 203.

Held, that a Magistrate dismissing a complaint under Section 203 of the Code of Criminal Procedure after examining the complainant and considering the result of the investigation made under Section 202 on the ground that the allegations contained therein were false is competent to grant sanction for the prosecution of the complainant for making a false charge.

Surya Hariani and others v. *King-Emperor* (1) followed.

Queen-Empress v. *Ganga Ram* (2) dissented from.

Petition for revision of the order of W. Ohevis, Esquire, Sessions Judge, Sialkot Division, dated 19th April 1906.

Roshan Lal, for petitioner.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—I have gone through the record and find that on a complaint filed on 23rd February 1906 against Zahur-ud-din, Sub-Inspector, and Khan Dauran Zaildar charging them with adultery with Mussammat Bhagan, the complainant's wife, the District Magistrate after examining the complainant sent the case to the District Superintendent of Police for inquiry and report under Section 202, Criminal Procedure Code. The District Superintendent of Police after inquiry reported the charge to be false and unfounded and suggested the prosecution of the complainant. The District Magistrate thereupon after dismissing the complaint sanctioned the prosecution of the complainant under Section 211 of the Indian Penal Code. *21st July* 1906.

It is argued on the authority of *Queen-Empress* v. *Ganga Ram* (2) that the complainant not having had an opportunity to substantiate his case, sanction should not have been given. In my opinion this is going beyond the Code for Section 203

(1) 6 *Calc. W. N.* 295. (2) *I. L. R., VIII All.*, 38.

allows a criminal complaint to be disposed of after examination of the complainant and an inquiry under Section 202, and the proposition laid down broadly by the authority cited appears to involve the consequence that in no case disposed of under Section 203 can sanction be given. But under the Code a proceeding under that section is a sufficient disposal of the case and I cannot see why, when a complaint disposed of under that section is found or believed to be false, the Magistrate should, as a matter of law, be incompetent to grant sanction under Section 195, Criminal Procedure Code. I am supported in this view by a recent Calcutta case *Surya Haviani and others* v. *King-Emperor* (1) Following that ruling I hold that there was no legal bar to the sanction.

As regards the propriety of the sanction I think after reading the proceedings of the inquiry made by the District Superintendent of Police that there are some *primâ facie* grounds for proceedings against the complainant, though this is not to be treated as any definite opinion, and I am not prepared to interfere on the revision side with the discretion of the two lower Courts by revoking the sanction.

I reject the application.

Application dismissed.

No. 3.

Before Mr. Justice Lal Chand.

GOPAL SAHAI,—PETITIONER,

Versus

REVISION SIDE. KING-EMPEROR OF INDIA,—RESPONDENT.

Criminal Revision No. 779 of 1906.

Cantonment Code, 1899, Sections 94, 104, 291—Notice—Validity of notice under Section 94 issued by a Cantonment Magistrate on his own authority—Material defect.

Held, that a notice purported to be under Section 94 of the Cantonment Code, 1899, and issued by a Cantonment Magistrate on his own authority and not in pursuance of any order or resolution of the Cantonment Committee being altogether illegal a person cannot be convicted under Section 104 for non-compliance therewith.

The authority to issue notices under Section 94 being vested by the Code in a constituted committee or sub-committee the defect was not merely one of form curable by Section 291 but an illegality.

(1) 6 *Calc. W. N.*, 295.

Petition for revision of the order of Captain B. O. Roe, Sessions Judge, Jullundur Division, dated 11th April 1906.

Dwarka Das, for petitioner.

The judgment of the learned Judge was as follows:—

LAL CHAND, J.—This is an application for revising the *3rd August* 1906. order of the Cantonment Magistrate of Jullundur who has convicted the petitioner under Rule 104 of the Cantonment Code for his failure to comply with a notice issued under Rule 94 of the Code. The notice issued on 6th July 1905 required the petitioner, among other matters, to build quite new, within fifteen days, eastern wall of a hut in bungalow No. 92 and he has been convicted for his failure to comply with this order. It was contended before the Cantonment Magistrate and the same contention repeated in revision in this Court that the notice purporting to be issued under Rule 94 of the Code was altogether *ultra vires*. Rule 94 prescribes that when any wall in the opinion of the Cantonment authority, is in a ruinous state or in any way dangerous, the Cantonment authority may by notice in writing require the owner thereof forthwith either to remove the same or to cause such repairs to be made as it may think necessary for the public safety. The rule further directs that if there is in the opinion of the Cantonment authority imminent danger it shall forthwith take such steps to avert the danger as it may think necessary. It is thus clear that under Rule 94 the authority to issue notice or to take proper steps in case of imminent danger is vested in the Cantonment authority which is defined by the Cantonment Act to mean Cantonment Committee. The constitution of Cantonment Committee is defined by Rule 3 of the Code, and by Rule 5 it is provided that the Cantonment Committee (if any) shall discharge the functions of the Cantonment authority under the Code.

By Rule 248 it is further provided that the Cantonment Committee may by order in writing delegate any of its functions to a Sub-Committee consisting of any two or more of the members of the Cantonment Committee. It is found by the lower Court in this case that by resolution No. 29, dated 15th December 1900, the power under Rule 94 were delegated to a Sub-Committee consisting of the Officer Commanding the Station and the Cantonment Magistrate. It is also found that as a matter of fact the notice in question was not issued with the authority or direction of the Sub-Committee so constituted but by the Cantonment Magistrate

on his own sirgle authority without any reference to or direction or consideration by the Sub-Committee. The notice on the face of it is therefore *ultra vires* and illegal and the petitioner could not lawfully be convicted and punished under Rule 104 for not complying with such notice. The Cantonment Magistrate has, however, held that the error in issuing the notice is merely a formal defect and as such condoned by Rule 291 and that at any rate he regarded the matter as urgent and therefore was competent to issue the notice on his own authority. I am unable to accept either of these views. The defect in authority to issue the notice is not a defect or irregularity not affecting the merits of the case as prescribed by Rule 291. It is a matter which goes to the very root of the power to issue notice and not a formal defect or irregularity. The authority to issue notice under Rule 94 is vested by the Code in a constituted Committee or Sub-Committee. The Cantonment Magistrate, who did not and could not form the Committee or Sub-Committee as the least number required is of two members, by issuing the notice in question performed therefore a function which he had no legal authority to perform. The case is thus not one of formal defect or irregularity but analogous to the case found in *Subrahmoni Ayyar* v. *King-Emperor* (1), where a Court not empowered by the Criminal Procedure Code to join certain charges misjoined them, and it was held that its action would be not merely irregular but altogether illegal. As regards emergency there appears to be the same confusion of conception underlying the argument. No rule is quoted which, in case of emergency, empowers a Cantonment Magistrate as such to issue the notice prescribed by Rule 94.

On the other hand the latter part of the rule which has apparently been overlooked distinctly gives the power in case of imminent danger to the Cantonment authority to take such steps to avert the danger as it may think necessary. It is clear from a plain reading of the rule and eminently stands by itself to reason that in case of emergency the procedure by issuing notice would defeat the very object aimed at, and therefore in such cases the rule empowers the Cantonment authority to take necessary steps to avert the danger. The notice issued in this case allowed fifteen days to rebuild the wall which in itself is cogent evidence that the matter

(1) *I. L. R., XXV Mad.*, 61, P. C.

could not be looked upon as emergent or of imminent danger. The Cantonment Magistrate in support of emergency has referred to the evidence of the Sub-Conductor. His evidence seems to me to be directly contradicted by the deposition of Lieutenant Dyce, who occupied the bungalow, and of Mr. Bayley, Executive Engineer, Public Works Department. But, moreover, the Sub-Conductor in his statement referred to the result of his examination on 11th April preceding the notice and on 21st July a fortnight after the issue of the notice. There is absolutely no evidence to indicate the condition of the wall at or about the time when the notice was issued on 6th July. It is true that according to the rule the question whether there is imminent danger is left primarily to the opinion of the Cantonment authority, but I cannot agree with the view expressed by the Cantonment Magistrate that in using the discretion he represented a part of the Sub-Committee and that under the circumstances his user of discretion or taking action is protected by Rule 291 as an irregularity not affecting the merits of the case. The authority relied upon by the Cantonment Magistrate *Puran Mal* v. *King-Emperor* (1) directly supports the opposite view.

I therefore hold that the notice issued in this case was wholly *ultra vires* and the conviction under Rule 104 is illegal. It is unnecessary under the circumstances to notice the remaining two contentions urged on behalf of the petitioner in this Court and the lower Court, *viz.*, that no notice could be issued under the rule "to build the wall quite new", the matter required by the rule being to remove or repair, and that, secondly, the hut was inside the premises 25 feet distant from the public road and therefore no question of danger to public safety could possibly arise. The second contention is supported by *Wazirullah* v. *Crown* (2) which is a similar case and is exactly applicable and by the language of the rule itself. It is, however, unnecessary to pursue this matter any further or to discuss the reasons given by the Cantonment Magistrate for overruling these contentions. As for the reasons already given I am clearly of opinion that the notice issued was illegal and *ultra vires*, and the conviction under Rule 104 is consequently unsustainable. I therefore accept the application for revision, quash the conviction and direct the fine, if realised, to be repaid to the petitioner

Application allowed.

(1) 26 *P. R.*, 1905, *Cr.* (2) *P. R.*, 1906, *Cr.*

No. 4.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

REVISION SIDE.

KHOTA RAM AND OTHERS,—PETITIONERS,

Versus

KING-EMPEROR OF INDIA,—RESPONDENT.

Criminal Revision No. 66 of 1906.

Non-attendance in obedience to an order from a Tahsildar—Munsif for distributing revenue on waste land—Penal Code, Section 174.

Held, that a Tahsildar has no authority to summon a person who has agreed to prepare lists of cattle in order to enable the Revenue authorities make a proper assessment of revenue over waste lands, and consequently failure to attend in obedience to such an order is not punishable under Section 174 of the Indian Penal Code.

Petition for revision of the order of M. H. Harrison, Esquire, District Magistrate, Mianwali, dated 23rd September 1906.

Nanak Chand, for petitioners.

The judgment of the Court was delivered by

8th Jany. 1907. CLARK, C. J.—It appears that in the Mianwali District in distributing the revenue over waste lands, assessed at Rs. 3-8-0 per hundred acres, the procedure is, as described by the Deputy Commissioner,

"A body of respectable persons including the lambardars, "but never consisting entirely of lambardars, prepare and "attest a list of cattle. As a special safeguard for the people "the lambardars alone are not allowed to do this work. No "man of course need serve on this committee, but if he does "serve and if he does attest the list of cattle, the Revenue "authorities must satisfy themselves in the interests of the "Revenue papers that he and the other members of this com- "mittee known as munsifs have done their work honestly."

In pursuance of this procedure certain respectable persons called for the purpose of the lists 'munsifs', prepared the lists.

Three of these munsifs were summoned by the Tahsildar to appear before him in connection with the lists they had prepared and they failed to attend and have been convicted for their non-attendance under Section 174, Indian Penal Code.

The question is whether the Tahsildar was legally competent to issue such summons.

The Deputy Commissioner, after reference to him, has not been able to quote any authority for the issue of such summons.

There is nothing in the Revenue Act authorising the issue of such summons. Section 149 of that Act only provides for the attendance of persons within the limits of the estate within which they reside.

Queen-Empress v. *Subanna* (1) shows that in the Madras Presidency there is an Act III of 1869, giving power to issue summons for attendance of persons for purposes connected with the Revenue administration, but there is no such Act in the Punjab.

Crown v. *Kashi Ram* (2) and *Crown* v. *Kuria* (3), show that arbitrators cannot as such be required to attend Court, and *Ghulam Khan* v. *Empress* (4) decided that it had not been shown that the attendance of a lambardar for the purpose of appointing a village chaukidar could be legally enforced.

We are of opinion that the Tahsildar was not legally competent to issue summons for the attendance in Court of these munsifs, and we set aside the convictions and sentences. The fines, if paid, will be refunded.

Application allowed.

No. 5.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

KING-EMPEROR,—COMPLAINANT,

Versus

ARTHUR MERCER,—RESPONDENT.

Criminal Miscellaneous No. 2 of 1907.

MISCELLANEOUS SIDE.

European British subjects—Competency of Courts of Session in British Belochistan to exercise jurisdiction over European British subjects—Regulation VIII of 1896, Sections 3, 21—Criminal Procedure Code, 1898, Section 9.

Held that Courts of Session in British Belochistan have jurisdiction to try European British subjects committed to them by competent Courts. Such Courts having been established by the Governor-General in Council by Regulation VIII of 1896, it is immaterial that the Local Government has established no such Courts under Section 9 of the Code of Criminal Procedure.

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(1) *I. L. R., VII Mad.*, 197.
(2) 2 *P. R.*, 1875, *Cr.*
(3) 18 *P. R.*, 1875, *Cr.*
(4) 14 *P. R.*, 1887.

Application under Section 215, *Criminal Procedure Code, to quash the commitment of the respondent to the Court of Session at Quetta.*

Government Advocate, for petitioner.

The judgment of the Court was delivered by

4th Feby. 1907. CLARK, C. J.—One Arthur Mercer, a European British subject, was committed by Mr. Anscomb, Extra Assistant Commissioner, Quetta, Magistrate, 1st class, and Justice of the Peace, to the Court of Sessions, Quetta, on a charge under Section 324, Indian Penal Code.

The Local Government, Belochistan, represented to this Court that the Court of Sessions in Belochistan had no jurisdiction to try European British subjects, and the Government Advocate has applied to have the committal of Mercer to the Court of Sessions quashed and to have him committed for trial to this Court.

The question which we have to determine is whether the Courts of Session in Belochistan have jurisdiction to try European British subjects.

Under Section 3 of Regulation VIII of 1896 the Code of Criminal Procedure is extended to British Belochistan subject to the modification set forth in the schedule attached to the Regulation.

Section 3 (1) of that Schedule provides that—"Each "District shall be a Sessions Division, the Court of the District "Magistrate shall be the Court of Session for that Division, "and the District Magistrate shall be the Judge of that "Court."

Courts of Session are by this Regulation appointed for Belochistan, and no distinction is made between their powers over European British subjects and their powers over natives of Belochistan.

The powers of Sessions Courts over European British subjects are given in Sections 444—447—449, Criminal Procedure Code, and we can see no reason for holding that those powers are not vested in the Belochistan Courts of Sessions in virtue of the above-noted enactment.

Section 21 of the Schedule no doubt provides that "nothing in the Schedule with respect to procedure, in

"inquiries or trials or with respect to sentences or appeals "therefrom, or the enhancement or execution thereof, shall be "construed to affect the code in its application to European "British subjects."

This does not touch the jurisdiction of the Sessions Courts, that is conferred by Section 3 of the Regulation.

The creation of Courts of Session cannot be considered to be something in "this Schedule with respect to procedure "in inquiries, etc." and the powers given to Courts of Sessions by the Code of Criminal Procedure are not taken away by this section.

Procedure in inquiries may possibly include the provision of Section 3 (2) (3) of the Schedule and bar the Court of Sessions from hearing cases of European British subjects that have not been committed to them, or trying them without a jury.

Restrictions on appeal and enhancement of punishment on appeal are specially provided for in Sections 14 and 15 of the Schedule and these provisions are barred by Section 21 from being applied to European British subjects.

We are therefore of opinion that the Courts of Sessions in Belochistan have jurisdiction to try European British subjects, committed to them by competent Courts.

We wish to notice some of the arguments used against this view.

The fact that no Courts of Sessions have been appointed by the Local Government under Section 9 of the Criminal Procedure Code is not material; these Courts have been appointed by the authority superior to the Local Government, namely, the Governor-General in Council by the Regulation. It would be meaningless and irrelevant for the Local Government to proceed to make such appointment after it had been done by the authority to which the Local Government is subordinate.

It is the Governor-General in Council who has appointed the Justices of the Peace, they have not been appointed by the Local Government under the Criminal Procedure Code, and it would be as forcible to argue that they had no powers over European British subjects because not appointed under the Criminal Procedure Code, as that Courts of Session had no such powers, because they were not appointed under the Criminal Procedure Code.

Another contention against our view is that under Section 6 of the Foreign Jurisdiction and Extradition Act, 1879, and the notifications thereunder, Justices of the Peace were directed to commit European British subjects to the Chief Court.

In Notification No. 813 E, dated 19th April 1890, *Gazette of India* for 1890, page 247, Political Agents in Belochistan were appointed Justices of the Peace with directions that the Chief Court was the Court to which they were to commit.

This order was confirmed by Notification No. 3706 F. B. of October 1903, *Gazette of India* for 1903, page 917. However, Notification No. 1799, dated 9th September 1891, *Gazette of India* 1891, page 537, appointed the Assistant Political Agent, Quetta, and the Extra Assistant Commissioner, Quetta, to be Justices of the Peace, and no direction was given as to the Court to which they should commit.

Though the Foreign Jurisdiction Act was repealed by Act X of 1903, all the powers which had been conferred under that Act were confirmed by the order of His Majesty the King in Council, No. 3917 I. A., dated 13th June 1902, published in *Gazette of India* for 1902, page 667.

There being no direction in the Notification of 1891 as to the Court to which the Assistant Political Agent, Quetta, and the Extra Assistant Commissioner, Quetta, shall commit European British subjects, they will commit in the way provided by the Criminal Procedure Code, that is, to the Court of Sessions.

The result is that Political Agents and the Cantonment Magistrate Quetta (the latter under Notification No. 814 E, dated 19th April 1890, *Gazette of India*, 1890, page 248) commit to the Chief Court while the Extra Assistant Commissioner and Assistant Political Agent, Quetta, commit to the Sessions Court.

This may be anomalous and it may not have been the intention of the authorities, but this is what we understand to be the law on the subject, and as a commitment can only be quashed on a point of law (Section 215, Criminal Procedure Code) we are unable to quash the commitment.

Any deficiencies that there may be in Belochistan as regards the existence of a jury list, and as to a direction under

Section 274, Criminal Procedure Code, as to the number of the jury can be provided now.

We therefore refuse to quash the commitment of the accused who should be tried by the Court of Session to which he has been committed.

No. 6.

Before Mr. Justice Chatterji, C.I.E.

RADHA SINGH AND ANOTHER,—PETITIONERS,

Versus

KING-EMPEROR OF INDIA,—RESPONDENT. } REVISION SIDE.

Criminal Revision No. 1310 of 1906

Security for keeping the peace on conviction—Appellate Court not competent to demand where Magistrate not empowered by law—Criminal Procedure Code, 1898, *Sections* 106, 530.

Held, that a court of appeal cannot pass an order under Section 106 of the Code of Criminal Procedure when the Magistrate who passed the original order convicting the accused was not empowered by law to do so.

Muthiah Chetti v. *Emperor* (1) followed.

Case reported by Major G. O. Beadon, Sessions Judge, Hoshiarpur Division, on 6th October 1906.

The facts of this case are as follows :—

The accused were charged with assaulting complainant in connection with a dispute in respect of *shamilat* land. They denied the offence, but it was established by the evidence of reliable witnesses.

The accused, on conviction by Munshi Ali Bakhsh, Tahsildar, exercising the powers of a Magistrate of the 3rd class in the Hoshiarpur District, were sentenced, by order, dated 30th June 1906, under Section 352 of the Indian Penal Code, to a fine of Rs. 10 each, and the District Magistrate of Hoshiarpur upheld their conviction on appeal under Section 352, Indian Penal Code, though by clerical error Section 323 was referred to, and in dismissing the appeal on 13th August 1906, ordered them each to furnish security under Section 106, Criminal Procedure Code, to keep the peace.

The proceedings were forwarded for revision on the following grounds :—

An assault is a breach of the peace and though a Magistrate of the 3rd class cannot pass an order under Section 106, Criminal Procedure Code,

(1) *I. L. R., XXIX Mad.*, 190.

there are no express words in Section 106, Criminal Procedure Code, which restrict the powers of an Appellate Court under Section 106, Criminal Procedure Code, to appeals from Criminal Courts other than the Courts of Magistrates of the 2nd and 3rd class.

Muthiah Chetti v. *Emperor* (1), however, is an authority for the contention that the powers of an Appellate Court are restricted, and that in the present case the District Magistrate had no power to pass an order under Section 106, Criminal Procedure Code.

Under these circumstances it seems necessary that the case should come before the Chief Court for orders on the Revision Side, and I accordingly report the case for orders of the Chief Court.

The judgment of the Chief Court was delivered by

8th Dec. 1906. CHATTERJI, J.—I am of opinion that the construction put on the section by the Madras High Court in *Muthiah Chetti* v. *Emperor* (1), that the Court of appeal cannot pass an order under Section 106, Criminal Procedure, when the Magistrate who passed the original order convicting the accused was incompetent to do so is correct. The Magistrate here was one with third class powers and he could not pass an order on conviction requiring security from the accused to keep the peace in future. It follows that the District Magistrate's order is without jurisdiction.

I accept the application so far as to cancel the order for security.

Appeal allowed.

No. 7.

Before Mr. Justice Rattigan.

REVISION SIDE, ABDULLA KHAN AND OTHERS,—PETITIONERS,

Versus

GUNDA AND OTHERS,—RESPONDENTS.

Criminal Revision No. 495 of 1906.

Possession—Order of Criminal Court as to—Non-observance of procedure—Illegality—Criminal Procedure Code, 1898, *Section* 145.

Proceedings under Section 145 of the Code of Criminal Procedure are without jurisdiction unless the procedure prescribed therefor is strictly adhered to. Where therefore the copy of the initiatory order was neither served on the parties nor affixed at or near the subject of dispute and all the parties interested were not heard or evidence taken: *held*, that the proceedings must be set aside.

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(1) *I. L. R.*, *XXIX Mad.*, 190.

Queen-Empress v. *Gobind Chandra Das* (1) *Laldhari Singh* v. *Sukhdeo Narain Singh* ( ), *Mohesh Sowar* v. *Narain Beg* (2), *Jagomohun Pal* v. *Ram Kumar Gope* (4), *Mangal Haldar* v. *Naimuddi Fakir* (5), and *Dewan Chand* v. *Queen-Empress* (6) referred to.

Petition for revision of the order of R. Sykes, Esquire, District Magistrate, Sialkot, dated 8th March 1906.

Nabi Bakhsh, for petitioners.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—Complainants preferred a complaint against three persons, Abdulla Khan, Zaildar, Hassu and Dula, charging the latter with offences under Sections 352 and 504, Indian Penal Code. The Magistrate, 3rd class, acquitted the accused persons of the alleged offence under Section 352 and discharged them as regards the alleged offence under Section 504. The complainants thereupon applied to the District Magistrate for revision of this order. The District Magistrate recorded the following order on this application:—"The land is said by "appellants to have been ploughed up by the *zaildar* last *Asuj*, "to have been unoccupied before that; it is said to be the "place just in front of their houses which is used for their "places of meeting and religious service. This is borne out by "Mr. Anderson, the Missionary. It appears that the land has "been in the occupation of the low-caste Christians for the pur- "pose above mentioned, and that the *zaildar* for the purpose of "annoying them has now unnecessarily ploughed up the land. "This land is recorded as *abadi-deh* and should not have been "encroached upon. The *zaildar* will be summoned." This order is dated the 26th February 1906. The *zaildar* was accordingly summoned and both he and Mr. Anderson were examined on the 8th March 1906. As a result of this examination the District Magistrate on the same date recorded the following order :— "I find that there is a dispute about the land likely to lead to "a breach of the peace and that the land is in possession, for "the purposes of assembly and storage of manure, of the Native "Christians of the village; that this possession was wrongfully "disturbed by Abdulla, the *surbara* of the *zaildar*. I now order "under Section 145, Criminal Procedure Code, that this land, "which is recorded as *abadi-deh* and which is shown in the plan "attached to the proceedings of the *Naib Tahsildar* as Min. 1616, "be replaced in the possession of the Native Christians."

5th *Jany.* 1907.

(1) *I. L. R., XX Calc.*, 520.
(2) *I. L. R., XXVII Calc.*, 892.
(3) *I. L. R., XXVII Calc.*, 981.
(4) *I. L. R., XXVIII Calc.*, 416.
(5) 6 *Calc., W. R.*, 101.
(6) 2 *P. R.*, 1899, *Cr., F. B.*

Abdulla (who has died meantime), Hassu and Dula applied to this Court for revision of this order as made without jurisdiction, and the grounds urged in support of this application are (1) that there was no preliminary order of the kind specified in Section 145 (1) of the Code; (2) that the copy of the said order was not served upon any one or affixed to some conspicuous place at or near the subject of dispute, as prescribed by clause (3) of the said section; and (3) that with the exception of Abdulla none of the parties interested in the land was heard, or evidence taken in accordance with the provisions of clause (4) of the section.

I do not consider the first objection to be well-founded. The District Magistrate distinctly finds on grounds stated by him in his first order that the *zaildar* was ploughing up the land for the purpose of annoying the complainants and that the said land was used by them for their religious "services." Obviously the meaning of the District Magistrate was that under these circumstances a dispute existed likely to cause a breach of the peace. The other objections, however, seem to me to be fatal to the validity of the proceedings and to go to the very root of the matter. The land in dispute is the *abadi-deh* and Abdulla was certainly not the only person interested in the dispute. The copy of the order of the 26th February 1906 was not served even upon Abdulla, nor was any copy of it affixed to any part of the subject of the dispute. Nor again, was any person, save Abdulla, given an opportunity to be heard regarding the subject of the dispute, though numerous persons, including the two petitioners, Hassu and Dula, were interested in the land in question. Under these circumstances the decisions of the Calcutta High Court in *Queen-Empress* v. *Gobind Chaadra Das* (1), *Laldhari Singh* v. *Sukhdeo Narain Singh* (2), *Mohesh Sowar* v. *Narain Beg* (3), *Jagomohan Pal* v. *Ram Kumar Gope* (4), *Mangal Haldar* v. *Naimuddi Fakir* (5), are sufficient authority for holding that the proceedings of the District Magistrate were without jurisdiction and must be set aside—See *Dewan Chand* v. *Queen-Empress* (6).

I must accordingly set aside the District Magistrate's order of the 8th March 1906.

Application allowed.

(1) *I. L. R., XX Calc.*, 520.
(2) *I. L. R., XXVII Calc.*, 892.
(3) *I. L. R., XXVII Calc.*, 981.
(4) *I. L. R., XXVIII Calc.*, 416.
(5) 6 *Calc., W. N.*, 101.
(6) 2 *P. R.*, 1899, *Cr., F. B.*

No. 8.

Before Mr. Justice Reid and Mr. Justice Shah Din.

BHOLA,—APPELLANT,

Versus

KING-EMPEROR,—RESPONDENT.

APPELLATE SIDE.

Criminal Appeal No. 224 of 1907.

Confession—Confession made to a Magistrate of a Native State—Admissibility of, as evidence in a trial in British India—Evidence Act, 1872, Section 26.

Held, that a confession made by a prisoner to a Magistrate of a Native State is admissible in evidence in a trial in British India if it is duly recorded in proceedings under, and in the manner required by, the Code of Criminal Procedure.

Queen-Empress v. *Sundar Singh* (1) and *Patel Pand Chand* v. *Ahmadabad Municipality* (2) followed.

Appeal from the order af H. P. Tollinton, Esquire, Sessions Judge, Lahore Division, dated 8th January 1907.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by

REID, J.— * * * * *4th June* 1907.

* * * * *

On the 26th January the appellant, who escaped after wounding Alla Din and was arrested in Jammu territory on or after the 24th January, confessed to a Jammu Magistrate of the 2nd class that he had killed Alla Din and had intended to kill him.

This confession was retracted in the Court of the Committing Magistrate and of Session, but we see no reason for holding that it was not made voluntarily and does not accurately represent the facts.

It was recorded under Section 164 of the Code of Criminal Procedure and duly certified. *Queen-Empress* v. *Sundar Singh and others* (1) and *Patel Pand Chand* v. *Ahmadabad Municipality* (2) are authority for holding that a confession duly recorded by a Magistrate in Native Territory in proceedings under the provisions of the Code of Criminal Procedure, is admissible in a trial in British India.

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(1) *I. L. R., XII All.*, 595. (2) *I. L. R., XXII Bom.*, 235.

No. 9.

Before Mr. Justice Reid and Mr. Justice Shah Din.

REVISION SIDE.

SUNDAR AND OTHERS,—PETITIONERS,

Versus

KING-EMPEROR,—RESPONDENT.

Criminal Revision No. 230 of 1907.

Revision—Order made under Section 45 of the Punjab Laws Act, 1872, requiring foreign vagrants to leave District—Judicial proceedings—Power of revision by Chief Court.

Held that the proceedings of a District Magistrate requiring foreign vagrants to leave his district under Section 45 of the Punjab Laws Act, 1872, are not judicial proceedings and are therefore, even if illegal, not open to revision by the Chief Court.

Petition for revision of the order of H. A. Rose, Esquire, Sessions Judge, Multan Division, dated 8th January 1907.

Fazal Ilahi, for petitioners.

Turner, Government Advocate, for respondent.

The judgment of the Court was delivered by

5th June 1907. REID, J.—The District Magistrate of Montgomery issued an order purporting to be under Section 45 of the Punjab Laws Act to the petitioners to leave the district within fifteen days.

The petitioners obeyed the order and have filed this application for revision.

On the materials before us the order complained of appears to be illegal, the petitioners apparently not forming part or the whole of a band of foreign vagrants but being cultivators or owners of land in the Montgomery District.

The section is applicable to a band of foreign vagrants only.

The question for consideration is whether the order complained of is open to revision by this Court. The District Magistrate was in our opinion acting in an executive, not in a judicial capacity. The section empowers the District Magistrate, *es nomine*, to act, and the District Magistrate therefore described himself as such, not as Deputy Commissioner.

No penalty is provided for disobedience to an order under the section. The District Magistrate's means of enforcing the order is by report to the Local Government under Section 46.

Had fine or imprisonment been prescribed for disobedience revision might lie, and no appeal to this Court is provided as in Section 42. Having regard to the terms of Sections 45 and 46, to the absence of any penalty and to the absence of any special provision for interference by this Court, it has, in our opinion, no power to interfere. The petitioners' remedy is by appeal to the Local Government. If they return to the Montgomery District, the District Magistrate can proceed under Section 46 of the Act.

Application dismissed.

No. 10.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

JASWANT RAI,—PETITIONER,

Versus

KING-EMPEROR,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 401 of 1907.

Enmity—Promoting, between different classes of His Majesty's subjects—Europeans and Indians—Penal Code, Section 153 A.

Held, that a person who publishes as true a detailed account of a brutal murder of an Indian by a European based in fact on a mere rumour which had died out years before the publication, and to the revival of which he himself had largely contributed, is not protected from criminal liability by the explanation to Section 153 A. of the Indian Penal Code. Such a publication must be held to be likely to promote enmity between different classes of His Majesty's subjects, and is an offence under Section 153 A. inasmuch as the publisher must be held to have attempted to promote feelings of enmity and hatred between the two classes, the only reasonable inference deducible from his acts being that he was conscious of what the effect of them would be and intended to cause that effect by the publication.

For the purposes of Section 153 A. Europeans and Indians constituted different classes of His Majesty's subjects.

Petition for revision of the order of H. P. Tollinton, Esquire, Sessions Judge, Lahore Division, dated 18th March 1907.

Grey and Shadi Lal, for petitioner.

Assistant Legal Remembrancer, for respondent.

The judgments delivered by the learned Judges were as follows :—

14*th April* 1907. CLARK, C. J.—The facts of the case are sufficiently given in the following judgment of the learned District Magistrate :—

The accused have been prosecuted under the orders of the Government for an offence under Section 153 A of the Indian Penal Code. The first accused, Jaswant Rai, is the Proprietor, Printer and Publisher, and the other accused, K. K. Athavale, is the Editor of the newspaper, *Panjabee*, which is published at Lahore. The issue of that newspaper, dated 11th April 1906, contained two paragraphs, headed respectively "How Misunderstandings Occur" and "A Deliberate Murder," and it is alleged for the prosecution that the accused by publishing these paragraphs promoted, or attempted to promote, feelings of enmity and hatred between two classes of His Majesty's subjects, *viz.*, between Europeans and Natives. The paragraph headed "How Misunderstandings Occur" refers to two cases of "oppression," which are alleged to have occurred at Rawalpindi, and observes that a newspaper called the *Telegraph* wants the Viceroy to order an enquiry into these cases. The paragraph then proceeds :— "Has the *Telegraph* then such a great confidence in the panacea of enquiry? And are instances of manslaughter, yea ! even of deliberate murder of Indians at the hands of European Officers so rare in India that our contemporary should be ready to pin his trust to the impartiality of an enquiry? How many poor Indians have been mercilessly launched into eternity in the past, for being mistaken for bears and monkeys, or for having so-called enlarged spleens?" The next paragraph, which follows immediately on the above is headed "A Deliberate Murder" and runs as follows :—"As to deliberate murders, unpremeditated, of course, of Indians by irate, irascible officers, instances though rare are not wanting. Only the other day, two European Officers, of a district not very far from Lahore, went out shooting on horse back, with a mounted orderly. Amongst other denizens of the forest which fell to their joint shots was a boar, a full-grown fat porker, which the pair of worthies laid much store by to furnish them with the *piece de resistance* of two or three "heavenly" feasts. As soon as the animal was despatched they asked their mounted orderly to carry the carcase secured to his saddle. The man, who was a follower of the Prophet, however, instead of complying with the orders of the Hazoors, refused point blank to do their bidding, or even to touch the unclean animal. For a second they stood aghast, petrified at his temerity but for a second only. The next moment the Sahib recovered his wits, and saw that it was insubordination or even worse, downright mutiny, and what is the reward of mutiny? Why a short shrift and a swing into eternity. No sooner thought of than this brilliant idea of the imperial hunter was put into practice. He aimed at the poor Indian (who cared more for the faith that was in him, his *deen*, than even the favour of his official chief) and shot him dead without compunction or remorse. If any body was ever guilty of murder that identical Sahib surely was. The British Indian Penal Code might, perhaps, call it culpable homicide not amounting to murder. But it was nothing but murder

in cold blood. That murderer is at large to-day enjoying the privileges of the dominant race, and the sweets of life like any innocent man. And yet we have reason to believe that the matter had soon reached the ears of the higher authorities. The only thing done in the case, however, was to get the *gentleman* transferred from the district and a new man put in his place with strict injunctions not to allow the skeleton in the official cupboard to see the light of day. And up to this time it has not seen the light of day."

For the defence it is admitted that the second of the two paragraphs cited above relates to the death of a police constable, named Rafat Ali, which occurred in the Gujranwala District in the year 1899. The gentleman who was alleged to have murdered Rafat Ali is Mr. R. D. Spencer, who was at the time District Superintendent of Police at Gujranwala. Both the accused admit responsibility for the paragraphs referred to. They state that the paragraph headed "A Deliberate Murder," was published on information supplied by a reliable correspondent and corroborated by a volume of written and oral evidence. They further state that they had never known Mr. Spencer before and could not possibly have had any malicious intention against him or against anybody. Both have been charged with an offence under Section 153 A. of the Indian Penal Code, and both plead not guilty. Some 40 witnesses have been examined in the case, many of them at great length, almost all of them deposing to facts or rumours connected with the death of Rafat Ali. The question whether the account given of the occurrence in the *Panjabee* is true or not is not strictly relevant to the question whether the paragraphs complained of have promoted, or constitute an attempt to promote feelings of enmity and hatred between Europeans and Natives. But the truth or untruth of this account has an important bearing on the motives of the accused and on the question whether they can rightly claim the benefit of the explanation appended to Section 153 A. I will, therefore, clear the ground by stating my conclusion as to the manner in which Rafat Ali met his death. The story told by the prosecution witnesses may be summarized as follows :—On the 8th December 1899, Mr. Spencer who was on tour at Wazirabad went out to see Mr. Donald, an employee of Messrs. Spedding and Company, who was living in a bungalow about-one-and-a half miles from Wazirabad in the Gujrat direction, *i. e.*, towards the north. The bungalow is close to the Grand Trunk Road. Messrs. Spencer and Donald had arranged to go shooting that afternoon in a jungle beyond this bungalow. Mr. Spencer rode out on a horse belonging to Ram Narain, Deputy Inspector of Wazirabad City Thana. He states that Ram Narain, who is now dead, was rather afraid of this horse, and he (Mr. Spencer) wished to show him that beyond being restive and pulling slightly the animal was quite harmless. On arrival at the bungalow at some time fairly early in the afternoon Mr. Spencer was invited by Mr. Donald to stay to dinner. He, therefore, made over Ram Narain's horse to a constable, named Rafat Ali, with instructions to

take it back to Wazirabad and to tell Mr. Spencer's servants that he would not be back to dinner. Messrs. Spencer and Donald then went out with their guns, and strolled through the jungle. They shot nothing: neither of them in fact fired a shot. After dinner Mr. Spencer walked back to Wazirabad. He found that his servants had not received his message, and he heard next morning from Ram Narain, just as he was leaving by train, that the horse had returned without Rafat Ali. On the evening of the 8th December Ram Narain sent word to the Wazirabad Sadar Thana that Rafat Ali was missing, and on receipt of this information at 7 A. M., the next morning, Nawab Khan, a sergeant of that Thana, sent out constables to search for him. Nothing was found on the 9th December, but at 8 P. M., on the 10th, one Bhola, an Arain cultivator, reported at the Sadar Thana that he had seen a dead body lying in the reeds near the Sarinwala well. This well is situate between Mr. Donald's bungalow and Wazirabad. The Deputy Inspector, Karam Chand, being absent prosecuting another enquiry, Nawab Khan went to the spot indicated by Bhola, accompanied by several constables and zemindars. The body was found lying in the reeds about 40 paces from the Grand Trunk Road. The ground there is low-lying and there are pits among the reeds from which earth has been excavated for making or repairing the road. There were hoof marks leading past the spot where the body was found, and a few drops of blood, which had apparently oozed from the mouth or nostrils of the deceased. The body was taken to the Wazirabad dispensary, where it arrived about dusk, and was made over to the Assistant Surgeon Lachhman Das. The latter held a *post mortem* at 10-30 A. M. the next morning in the presence of Farhat Ali, the brother of the deceased, who identified the corpse. The deceased was found to have died from laceration of the brain and hæmorrhage caused by a violent blow on the back of the head. There was no mark of any bullet or shot wound, but there were a number of bruises on the body, which might have been caused by the deceased being dragged along with his foot caught in the stirrup. The clothes were torn and dusty. All the injuries pointed to the conclusion that the deceased constable had fallen from the horse on to the back of his head, and had been dragged along for some distance with his foot in the stirrup. Death may have been instantaneous or the unfortunate man may have lain unconscious in the reeds for some hours. It is improbable that he recovered consciousness before death. On receiving Nawab Khan's report of the above facts Mr. Spencer ordered Karam Chand, the Deputy Inspector, himself to attest the enquiry: the latter did this, visiting the spot where the body was found, in company with Ram Narain, the other Deputy Inspector, Hayat Muhammad *sufedposh* and two lambardars. The result of the further enquiry was to confirm the conclusions arrived at by Nawab Khan.

The prosecution story is supported at every step by the strongest possible evidence: Mr. Donald is an impartial witness and beyond the fact that he and Mr. Spencer were at the same school, he had no particular intimacy with the latter. He has given his evidence

in a perfectly straightforward and convincing way and has stated on oath that there is absolutely no truth in the allegations that either he or Mr. Spencer shot a pig, that the latter asked his orderly or any native to pick up a pig, or that on his refusal to do so Mr. Spencer shot him. He distinctly remembers Mr. Spencer sending away a horse with a man who looked like a policeman. The evidence of Karm Chand, Nawab Khan, and the various other policemen who were employed in the investigation is also clear and consistent. It is supported by the independent evidence of Hayat Muhammad, Zaildar, Sardul Singh and Karam Din Lambardars, Amar Singh, Forest guard, Pir Bakhsh, contractor, Bhola, the cultivator, who found the body and Budha, another Arain cultivator, who was impressed to carry it to the hospital. It is further confirmed by the evidence of Lachhman Das, Assistant Surgeon, who conducted the *post mortem*. Even admitting the argument that the police officials were prejudiced by the fact that the head of their Department was indirectly concerned in the death of Rafat Ali, there is no reason whatever for doubting the impartiality of the other witnessess, and the truth of their statements is confirmed by the fact that their signatures were appended to the police reports prepared at the time and (in the case of the Assistant Surgeon) by the *post mortem* report. The most searching cross-examination has served to confirm rather than to impugn their veracity, and has only succeeded in eliciting such unimportant discrepancies as might reasonably be expected to arise in oral evidence tendered about seven years after the event. Beyond protracting this cross-examination to an unusual length the defence has made no serious attempt to refute the story told by the witnesses for the prosecution. Excepting Farhat Ali, the brother of the deceased, whose evidence I will discuss presently, no eye-witness has been produced, to depose to any of the circumstances in which Rafat Ali met his death. Some of the defence witnesses have stated that the reeds in the locality in which the body was found are always cut before the month of December. They admit that reeds grow there and that contracts are given out for grazing and cutting them. Although the road at this point is raised to a considerable height above the surrounding country, it is perfectly clear that a corpse might well have lain hidden for a couple of days in a clump of reeds among the pits by the side of the road.

I have observed above that the statements of many of the prosecution witnesses were confirmed by the police diaries and the *post mortem* report. Counsel for the defence objected to Karm Chand and Lachhman Das being allowed to refresh their memories from these papers on the ground that the papers produced were only copies and not original documents. It was, however, deposed that the papers produced were really duplicates, one copy being kept in the Thana or hospital registers, and the other sent to head-quarters. It has, moreover, been proved that the copies sent to head-quarters have been lost, so that the entries recorded in the local registers are the only documentary evidence available.

It has been contended before me in the arguments for the defence that the disappearance of these documents is a suspicious circumstance and the truth of this contention must be admitted, but I feel bound to draw a different inference from that put forward on behalf of the accused. These papers were sent up to the Inspector-General of Police in connection with a petition addressed to the Lieutenant-Governor by Zerafat-ul-Nisa, the widow of Rafat

Ali, on the 28th February 1900. It was alleged in the petition that Rafat Ali had been shot by Mr. Spencer, and the Inspector-General asked the Deputy Inspector General, Western Circle, for a report on the case. On receipt of this report the widow was informed that the Inspector-General was satisfied that the deceased met his death from a fall from a horse and that there was no foundation for the allegation that he had been shot. The papers were returned to the office of the District Superintendent, Police, Gujranwala, and appear from the register of correspondence to have been received back there on the 11th of May 1900. When a search was made for them after the publication of the articles in the *Panjabee* referred to in this case, they could not be found. It is hinted by the defence that these papers were abstracted in the interests of Mr. Spencer. Now it is perfectly clear that Mr. Spencer would have nothing to gain from the disappearance of the documents. He must have known, while his detractors very possibly did not know, that duplicates were to be found in the local registers Moreover, the documents had already been submitted to the higher authorities and he had thereby been officially cleared of the imputation cast upon him. He had, therefore, no reasonable motive for removing the papers. On the other hand, the brother of the deceased, Farhat Ali, may well have thought that the papers would furnish him with grounds for pressing the claim (to which I will refer below) for a pension for his brother's widow, or an alternative which is at least equally probable—the accused, Jaswant Rai, when collecting materials for his version of the case in the *Panjabee* may well have thought that he would embarrass the Government or obtain evidence incriminating Mr. Spencer by getting possession of the documents in question. If, therefore, it is to be inferred that the disappearance of the documents was not accidental, the inference will not be favourable to the defence.

It has further been argued for the defence that no proper enquiry was held as to the cause of the death of Rafat Ali. I am quite unable to follow this argument. The enquiry appears to have been conducted in a perfectly regular way by the police and the Tahsildar also was present at the most important stage of it. It is stated by Nawab Khan, and the statement is confirmed by the police register, that the Tahsildar, Muhammad Nakki (who is now dead) saw the body of Rafat Ali at the hospital. It is further proved by a letter written by Farhat Ali (Exhibit D-VII) on 2nd February 1900 that the Deputy Commissioner, Dewan Tek Chand, went to the locality, apparently in consequence of an anonymous letter sent to him at the instance of Farhat Ali, but no one came forward to give evidence before him. It is most probable that if there had been any suspicious circumstance connected with the death of Rafat Ali it would have been brought to the notice of one or other of these responsible officials. Lastly, I come to the evidence of Farhat Ali, who, though hostile to the prosecution and not altogether trustworthy, has on the whole corroborated the story told by the Crown witnesses. He admits that he saw Rafat Ali's body at the dispensary and identified it. He states, probably incorrectly, that he had previously heard a rumour to the effect that Rafat Ali had been shot by the District Superintendent, Police, and he also says that the skull of the deceased had been dissected before he got to the dispensary. He admits, however, that the skull was put together again, that the body was made over to him, that he actually buried it and that he saw no trace of a bullet wound. Now if this story is true, it offers the very strongest corroboration of the evidence for the prosecution. For if Farhat

Ali really suspected that his brother had been shot, he would undoubtedly have made the most careful examination of the body and would have called all present to witness that there had been foul play. He made no protest at the time, and when cross-examined on the subject he takes refuge in the usual evasion "*behosh ho gia.*" For the reasons indicated below I do not believe that Farhat Ali heard any rumour of Rafat Ali having been shot before he saw the body ; but I think that the facts that he was present at the dispensary while the *post mortem* was being conducted, that the body was made over to him for burial, and that he has never alleged that it bore any suspicious marks, are practically conclusive proof that the charge brought against Mr. Spencer is unfounded. My conclusions on this part of the case are that the *Panjabee's* account of the death of Rafat Ali is utterly false, that it is proved clearly and conclusively that Rafat Ali was not shot by Mr. Spencer, and that it is practically certain that he died from injuries received from a fall from a horse. These conclusions are, as already observed, immaterial to the question whether the accused have committed the offence with which they are charged except in so far as they bear on the question of the *bonâ fides* of the articles in the *Panjabee* ; and in order to decide this latter question it is necessary to consider not merely hat the facts were but in what light they were presented to the accused. I, therefore ; proceed to discuss the information which the witnesses for the defence have shown to have been in the possession of the accused. It has been proved that shortly after the death of Rafat Ali a rumour was prevalent that he had been shot by Mr. Spencer. In considering the evidence as to the cause of his death I have, as far as possible, put this rumour absolutely on one side. It is clearly irrelevant in this connection, and I have only admitted the evidence to the record in view of its possible bearing on the *bonâ fides* of the accused. The origin of the rumour can be traced without difficulty in a number of letters, put in by the defence, which were written by Farhat Ali to his nephew Abdul Hassan. These letters afford the chief reason for the view which I have taken above that Farhat Ali did not hear any rumour that Rafat Ali was murdered before he saw the corpse, and it is noteworthy that in the letter, dated 5th March 1900 (Exhibit D. IX), he merely stated that he was told that his brother was missing. From the first letter, dated 24th December 1899 (Exhibit D. III), it appears that some application had been submitted to Mr. Spencer ; what it was is not clear, but it seems probable from the next letter (Exhibit D. IV), dated 31st December 1899, that it contained a request for a pension or gratuity for Rafat Ali's widow or heirs on the ground that he died on duty. In neither of these letters is there any hint that Rafat Ali's death was other than accidental, and it is not till the 6th of February 1900 that we find any allegation that he had been shot (*vide* Exhibit D. VI). This allegation was further elaborated in the letter, dated 5th March 1900 (Exhibit D. IX). It was clearly at the instance of Farhat Ali as shown in the letters that Rafat Ali's widow sent a petition to the Lieutenant-Governor, dated 28th February 1900, with the result above referred to. Farhat Ali admits that the widow was dependent on him, and it is fairly obvious that his object was to induce the Government to grant her a pension. It is from this small sordid seed that the scandal appears to have sprung. The accused heard the rumour and obtained possession of the letters Abul Hassan, who gave them the letters, and Nazir Ali, the father of the widow, told their emissary that they did not know

whether the rumour was true or false. This emissary, who is called Rama by one witness and Varma by another, and who has not been produced before me, obtained from Nazir Ali a statement of the facts of the case as alleged by Zarafat-ul-Nissa, and atteseted by her thumb mark. This document has been put in evidence. It bears no date, but is stated to have been written 8 or 9 months ago. It seems probable from the tone of the document that it was either dictated or put into shape by the *Panjabee's* representative, and it is noteworthy that in this document we find the first mention of the pig which looms so large in the newspaper articles. A few other witnesses have deposed that the pig had a place in the rumour which they heard in 1899. The chief of these are two Gujranwala pleaders, Lala Hakim Rai and Lala Sardari Mal. Without questioning the veracity of these gentlemen it seems open to doubt whether their recollection of the vague rumour which they heard more than six years ago has not been coloured by the revised version of it promulgated in the *Panjabee*. It is at any rate significant that neither in Farhat Ali's letters nor in Zarafat-ul-Nisa's petition to the Lieutenant-Governor, is there any mention of a pig having been shot. In fact, the widow states in her petition that Rafat Ali was shot either intentionally or accidentally. If the incident of the pig had formed a part of the story which was then being circulated it would almost certainly have been mentioned in the petition, and the alternative of an accident would certainly have been excluded. It is difficult to avoid the conclusion that the story of the pig was invented by the accused or their servant.

The above are my conclusions as to the events to which the paragraphs in the *Panjabee* relate and as to the information which the accused possessed regarding these events. I now turn to the question whether in publishing these paragraphs the accused have committed the offence with which they are charged. Section 153 A of the Indian Penal Code consists of two parts, first a general clause, containing a definition of the offence, and then an explanation. The object of the explanation is to exclude from the definition certain acts which might otherwise be regarded as falling within it. It is, therefore, necessary to consider firstly whether the acts done by the accused constitute an offence under the general clause and, secondly, whether they are not saved by the explanation. The general clause runs :—" Whoever by words, either spoken or written or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of His Majesty's subjects shall be punished, etc."

Counsel for the defence contends that it has not been proved that the publication of the articles in the *Panjabee* has actually promoted any class enmity or hatred. It is difficult to prove that an effect of this kind has actually occurred though I am not sure that it might not be assumed that an article in a newspaper has produced the effect which it may reasonably be expected to produce in the minds of its readers. But it is unnecessary to pursue this point because the law makes the attempt to produce the effect equally punishable with the production of the effect itself. I will, therefore, consider only whether the accused have attempted to produce enmity or hatred between different classes of His Majesty's subjects. Counsel for accused No. 1 has raised two points as to the meaning of the words used in the section. He first pointed out that there was possibly a distinction in the minds of the legislature between " promoting " and " causing " an effect,

though he did not indicate what deduction was to be drawn from the distinction; and he further contended that the enmity or hatred referred to in the section must be reciprocal, in order to constitute the offence, *i. e*, that it is not an offence to cause class A to hate class B if you do not make class B hate class A. With regard to the first point I think that a slight distinction may be drawn between promoting and causing: the word promote, derived from Latin *promovere*, conveys the idea of moving forward, and has wider application than the word cause. A man could not cause enmity without promoting it, but he might promote, or give an impulse to, enmity which was already existent and of which it might, therefore, be contended that he was not the original cause. I hold, therefore, that any man who does any thing to stir up or excite enmity or hatred, whether latent or active, between class and class, promotes the effect referred to in section 153 A. The second point taken by counsel is I think a superfine dictinction. I do not think that the words "enmity or hatred between different classes" necessarily imply that these feelings must be felt on both sides, and even if they do, it is reasonable to hold that hatred on one side tends to produce enmity on the other. One class cannot hate another for long without estranging the feelings of the latter, and if a man is shown to have caused hatred or enmity on one side he must, in my opinion, be held to have "promoted" similar feelings on the other. I hold, therefore, that if the accused have attempted to produce or encourage feelings of enmity or hatred in the minds of one class with regard to another class of His Majesty's subjects their Act comes within the definition of the offence given in Section 153 A. Counsel for defence further contends that no attempt to produce an effect can be held to be proved until it is shown that the effect was intended. This contention is, I think, reasonable, but it is also reasonable to hold that when a man does an act deliberately he intends to produce the effect which may be expected, in the natural course of things, to ensue from his act. In the case for a newspaper article the best evidence of the intention of the writer is to be found in the article itself. It is part of the case for the defence that the paragraph "How Misunderstandings Occur" was published deliberately after careful enquiry and I must, therefore, assume that the accused intended and attempted to produce the effect which might reasonably be expected to ensue from the publication of the paragraph. The general argument in this and the preceding paragraph when read together may be summarized briefly as follows:—

Murders of unoffending natives at the hands of European Officers are of common occurrence. The murderers are not brought to justice, and no Government enquiry into these cases can be trusted. The following deliberate murder, which occurred recently, is a case in point.

Here we have a general statement and a particular instance. The general statement would be comparatively innocuous, were it not for the instance put forward in support of it. You may tell people that they are being oppressed, and that their fellows are being murdered with impunity, but you will not carry conviction unless you

can give them specific instances of oppression and murder. The concrete fact appeals more to the imagination and creates a more vivid impression on the mind than any number of general statements. In the case now under consideration the picture was painted in flaming colours. It was brought nearer to the public by representing the occurrence as taking place "only the other day" instead of more than six years previously. An appeal was made to the religious prejudices of Mohammadans, and Europeans were held up to contempt as eaters of pig's flesh. The dead man, Rafat Ali, was as it were dragged from his grave, and set up as a martyr to his religion. His murderer was represented as enjoying the sweets of life and "the privileges of the dominant race." A picture like this put before an uncritical Mohammadan youth would naturally make his blood boil with indignation, and it would appeal also to Hindu fellow subjects. It would tend to excite all the racial and religious passions which are one of the chief obstacles to the public peace and to the well-being of the community. I cannot believe that the accused did not intend or attempt to excite these passions; I hold it to be absolutely clear from the language of the paragraphs that the accused attempted to promote enmity and hatred in the minds of the Indian subjects of His Majesty. I am here met by an objection raised by counsel for the defence that the objects of this enmity would not be the Europeans in India, but rather the Government, or the European Officers of the Government, and that Section 153 A. does not apply because the feelings promoted, or attempted to be promoted, were not between different classes of the community. It is true that the Government is attacked in these paragraphs, it being alleged that enquiries into charges of murdering natives brought against Europeans are simply burked. The logical outcome of this line of defence would be that the offence falls more properly under Section 124 A. a much more serious crime. The Government has not, however, prosecuted the accused under the section relating to sedition, and I have, therefore, to decide, not whether the section applies, but whether an offence has been made out under the section specified in the complaint, *viz.*, Section 153 A. Admitting for the moment that the attack is directed mainly against European Officers, it might, I think, be maintained that these officers are sufficiently numerous, and their characteristics sufficiently well defined, to constitute a definite class. But I do not think that the two paragraphs in the *Panjabee* refer only to this class. In the mind of the ordinary reader little distinction would be drawn between the official and the non-official. The great majority of the people of the country know the European only through the official, and it is only in a comparatively small number of trading centres or industrial areas that they are brought into close contact with non-official Europeans. Moreover the feelings appealed to are essentially religious and racial prejudices, and the expression "the dominant race" used in the second paragraph makes the point sufficiently clear. I hold, therefore, that the accused attempted to promote feelings of enmity and hatred against the European subjects of His Majesty. I have thus shown that their action falls under the general clause in Section 153 A. and I have now to consider whether it is saved by the explanation. The explanation runs as follows:— "It does not amount to an offence within

the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters, which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of His Majesty's subjects." It will be apparent from what I have written above that the accused have no claim to the benefit of this explanation. It is proved that they deliberately misrepresented the facts connected with Rafat Ali's death. They knew that it had occurred more than six years before they wrote about it, and yet they described it as having occurred "only the other day." They knew that there was no proof that he was murdered; the deceased's own relations told them that they did not know whether the rumour was true or false; they had possession of Farhat Ali's letters and probably of a copy of Zarafat-ul-Nisa's petition; and they knew that the case had been enquired into both at the time of the occurrence and afterwards at the instance of the Inspetor-General of Police. In spite of this knowledge they stated the rumour to be a fact and they added details which were not justified by the information before them. They in all probability invented the story of the pig, and they gave their version of the facts in the most virulent and unseemly language, the terms of which the counsel for the principal accused has not even attempted to defend. I find malice on the part of the accused proved up to the hilt. It is further not proved that the articles were written with any honest view to the removal of the evils complained of. The defence has argued on the one hand that the Government was attacked, and on the other that an honest appeal was made to Government to have an impartial enquiry made into the case. The two arguments are rather inconsistent and the former is evidently more correct than the latter. I can find in the paragraphs themselves no trace of any honest appeal to the Government. I, therefore, hold that the explanation does not apply to the present case, and, finding on the grounds detailed above, that both the accused have, by the publication in the *Panjabee*, of the two paragraphs cited above, attempted to promote feelings of enmity and hatred between the native and European classes of His Majesty's subjects, I convict them both of an offence under Section 153 A of the Indian Penal Code. With regard to the punishment to be awarded counsel for the prosecution has asked me to consider whether the offence has not been aggravated by the conduct of the accused, subsequent to the commission of it, and he has referred me to the Civil Law of Libel and to the criminal law of seditious libel in England. No case of a prosecution under Section 153 A. has been cited and the present case is, so far as I am aware, the first of its kind. It is, therefore, difficult to speak with any authority on this matter of aggravation. But I think that there is a sound analogy between the law of libel and this section of the Indian Penal Code. The principle which appears to me to underlie the English Law of Libel, whether civil or seditious, is that, where a man by making a certain statement, has damaged a person's reputation or excited seditious feelings against the State, he can mitigate the harm done by withdrawing or retracting the statement, and he can aggravate that harm by persisting in it. Similarly, in the case of an offence under Section 153 A. a man can often undo much of the harm that he has done by prompt and public withdrawal of the statements which have stirred up ill-feeling. In the present case the accused have attempted to do harm to the community

mainly by means of the publication of a false and malicious account of the death of Rafat Ali. It has been in their power to reduce or magnify that harm by their subsequent conduct, and I think that it is reasonable to hold that in so far as they have done the one or the other, their offence has been mitigated or aggravated. Viewing the conduct of the defence from this standpoint, there can be no doubt that it has seriously aggravated the offence. Throughout this long prosecution the defence has endeavoured in its cross-examination of the Crown witnesses to show that there are still grounds for suspecting that Rafat Ali was murdered. The accused's advisers persisted in this course long after the production of the *post mortem* report had proved that the story was a lie, and they went so far as to call witnesses to state that the reeds in the place where the body was found are cut before December. Their object throughout the trial has undoubtedly been to induce people to believe that there were grounds for the aspertions cast on Mr. Spencer, and through him on the European community. This view is confirmed by the astounding statement made by counsel for accused No. II that the proceedings in the present trial have left the circumstances of the death of Rafat Ali shrouded in deeper mystery than before. I can only conclude that the accused have no regret for the evil which they have done and that, on the contrary, they have striven by every means in their power to increase and perpetuate it. Not content with their original attempt to promote enmity and hatred between class and class they have obstinately persisted in the attempt, and have neither in the Court nor in their newspaper made any qualification of the malicious and untrue statements which they have published. Their conduct in this respect constitutes, in my opinion, a serious aggravation of the very serious offence which it is my duty as a Magistrate to punish. Jaswant Rai, the accused No. I, is the Proprietor, Printer and Publisher of the *Panjabee*, and has evidently been the prime mover both in the publication of the offending paragraphs, and in the subsequent conduct of the defence. I feel that nothing short of the maximum penalty will meet the ends of justice in his case, and I, therefore, sentence him to two years' rigorous imprisonment and to a fine of one thousand rupees, and in default of payment of the fine to a further term of six months' rigorous imprisonment. Athavale, the accused No. II, is the Editor of the paper and has presumably acted under the influence of Jaswant Rai. Although this does not excuse him from responsibility, a less severe punishment will, I think, be sufficient in his case. I sentence him to six months' rigorous imprisonment and to a fine of two hundred rupees, and in default of payment of the fine to a further term of three months' rigorous imprisonment.

The learned Sessions Judge maintained the conviction but reduced the sentence in the case of Jaswant Rai to six months' rigorous imprisonment.

The case has now come before us on Revision and has been argued before us at considerable length.

The first point with which I have to deal is the meaning of Section 153 A, Indian Penal Code.

The section itself is extremely wide, it is however controlled by the explanation and by provision of Section 196, Criminal

Procedure Code, which render the sanction of Government necessary for a prosecution under this section.

The words used are "promotes or attempts to promote "feelings of enmity or hatred between different classes."

The word "promote" in Webster's Dictionary is said to mean (1) to contribute to the growth, enlargement or prosperity of any process or thing that is in course; to forward; to further; to encourage; to advance; to excite, and also "to urge on or incite another as to strife". A man may promote a thing without intending to do so, as a matter of fact it often happens that a man intending to promote one thing actually promotes the opposite, *ex. gr.*, measures intended to prevent drunkenness often increase it. Free trade intended to promote the prosperity of the country may injure the country. It would therefore appear that apart from "intention" not being mentioned in the section it forms no essential part of the meaning of the word "promotion."

However from the conjunction of the words "attempt to promote" with "promote", I am disposed to think that it was intended by the framer of the section that intention should be an element in the offence, and will act on this view. It is not essential to the meaning of "promotion" that the object arrived at should be effected. That I take to be one of the differences between "promoting" and "causing". Cause implies effect. Promotion does not. The promotion may fail of its object, in this respect it may be a synonym for "foment." It is also not essential that promotion should be with reference to something already in existence. It would be possible to promote hatred where amity had previously existed.

It is also obvious that enmity may be promoted as strongly, or more strongly, by stories that are true than by stories that are false.

The proved fact that a man is cruel is more likely to promote enmity than a false allegation that a man is cruel.

Though the literal meaning of the section may be very wide as I have indicated above, yet the section must be construed with those limitations which govern generally the construction of penal enactments. It will save much writing if I concede at once that unless I were satisfied that the accused had a conscious intention of promoting, causing, or exciting (or whatever word may be used) enmity and hatred, I would not maintain the conviction.

I have studied carefully the case *Queen* v. *Burns* (1). That was a case under the common law of England, and this is a case under the Indian Penal Code, and it is only the spirit that pervades that judgment that is helpful in deciding this case. I feel nothing but admiration for the spirit pervading that judgment and would wish to follow it entirely. It must be kept in mind, however, that the law of England is different from the law of India, and what is safe and legitimate in England may not be so in India. Mr. Justice Cove there advised the jury. "If from any "sinister motive, as, for instance, notoriety, or for the purpose of "personal gain, they desired to bring the people into conflict with "the authorities, or to incite them tumultuously and disorderly to "damage the property of any unoffending citizens, you ought "undoubtedly to find them guilty. On the other hand, if you "come to the conclusion that they were actuated by an honest "desire to alleviate the misery of the unemployed, if they had a "real and *bonâ fide* desire to bring that misery before the public "by constitutional and legal means, you should not be too swift "to mark any hasty or ill-considered expression which they might "utter in the excitement of the moment."

This brings me now to a consideration of the articles with a view to determine whether there is in them any conscious intention to promote feelings of enmity and hatred.

Sir Arthur Strachey in *Queen-Empress* v. *Bal Gangadhar Tilak* (2), at pages 139 to 142, gives very useful guidance as to how this is to be done. He says "It may not be easy to express "the difference in words; but the difference in tone and spirit "and general drift between a writer who is trying to stir "up ill-will and one who is not, is generally unmis-"takeable." I have carefully studied the articles and can come to no other conclusion than that there is in them apparent a deliberate intention to promote feelings of enmity and hatred. The argument for accused is that their intention was only to secure that these cases in which the death of an Indian has occurred should be properly enquired into and dealt with by Government, and that though their language may have been too violent, it was only so to secure this object. I am unable to accept this argument, it is unnecessary for me to go over the ground which has been covered by the Lower Court. The Sessions Judge deals with this question as follows :—

"To return to the language of the paragraphs. I note that the classes opposed are "Indians" and "European officers."

(1) 16 *Cox Cr. Cas.* 355. (2) *I. L. R., XXII Bom.*, 112.

It is not a question of officials and non-officials, it is not alleged that members of the governing class, whether Assistant Commissioners or Tahsildars are hard on the people committed to their charge. The Europeans and Indians are contrasted. Counsel for the defence have referred me to the paragraphs in the issue of 4th April. They were appealed to as showing an honest purpose running throughout.

I need only refer to the last sentence of the article headed "Another Story." The article deals with the accidental shooting of a *shikari* by a European District Officer, and the death of two natives, employed to carry the baggage of the Deputy Commissioner of Rawalpindi, from exposure. The last sentence runs: "We cannot help observing that had there been Indian gentlemen "of even the highest standing and position concerned in similar "affairs, they would long since have been deprived of their liberty". Here we have the same contrast intensified. The European as opposed to the native. To proceed: The paragraph headed "How Misunderstandings Occur" mentions instances "of manslaughter; yea even of deliberate murder of Indians "at the hands of European officers". The whole tone of the paragraph is most inflammatory: note the words "mercilessly "launched into eternity." A hit is made at the manner in which *post-mortem* examinations are conducted in the expression "for having so-called enlarged spleens." Then follows the individual instance adduced to prove the general rule. The expression "European Officers" again occurs. Then follows the story of the pig, given as a fact, when there is not one iota of evidence to prove it, or any attempt made to allege it by the people best qualified to know of it till 6 years after it was alleged to have occurred. Capital is made out of the unclean habits of the Europeans in the eyes of the Muhammadan in making a "heavenly feast" off a full-grown fat porker. A contrast is drawn between this picture and the simple faith of the poor Muhammadan. It is then alleged that the *sahib* was guilty of murder, but the British Indian Penal Code might perhaps call it culpable homicide. The article concludes with an allusion to the *dominant race* and to the fact that the higher authorities were shortly afterwards apprized of what had occurred, but took no steps except to hush the matter up.

In all this there is no trace of *bonâ fide* criticism of the Government. There is no honest abuse of the Government. A picture is presented in the most lurid colours of the habitual recklessness of the European with regard to native life.

The general statements therein made are supported by a specific story, given as true fact, of the murder of a native by a European under the most brutal circumstances. The story which is given out as true is now shown to have been based on one of the flimsiest of rumours, the growth of which can very easily be traced, and which the Proprietor and Editor of the *Panjabee* must have known to be a rumour and nothing but a rumour. To the colouring of this rumour they themselves contributed no small part.

The theory of the defence that the accused intended merely to criticize Government, and published the story of the murder as a reported incident that they believed to be true, absolutely falls to the ground.

This seems to me a fair criticism of the articles, and I may note in addition to this that the articles put as happening only the other day what happened in fact in 1899.

A good deal of argument has been addressed to us to show that the accused had, as a matter of fact, good ground for supposing Rafat Ali had been shot, and that there has been no proper enquiry. I do not think that this contention had been established, granting that there had been a rumour, it appears to have died out, or was only kept up by Rafat Ali's family, who had an obvious motive for maintaining such a position, and an old rumour is no ground for a deliberate charge of murder.

The death of Rafat Ali was due to a fall from a horse. There do not appear to have been any suspicious circumstances connected with his death, and the enquiry made appears to have been the usual one made on the occurrence of an accidental death.

It was further argued that European and Indian are not classes within the meaning of the Section.

In the general acceptance of the readers of a paper like the *Panjabee*, Europeans represent the governing class, and Indians the governed class. This may be gathered from the articles themselves where the Europeans are spoken of as the dominant race.

The relations between the governors and governed must in the nature of things always be of a delicate nature and have a tendency to be opposed. It is only necessary to look back to the mutiny to realize this, and I have no doubt that European and Indian are classes within the meaning of the section.

I have no doubt in my mind that the accused consciously intended to promote enmity and hatred on the part of Indians towards Europeans, and that they are not saved by the explanation to the Section, and have been rightly convicted of an offence under Section 153A., Indian Penal Code.

The conviction is for attempting to promote, not for promoting, and there remains one argument of Mr. Grey to notice. He drew a distinction between an intention and attempt which no doubt exists, but as accused had a conscious intention of promoting enmity, and published an article in pursuance of that intention, they clearly made an attempt.

The question of punishment is a very difficult one. It is perfectly legitimate for a paper to say that even justice is not done between Europeans and Indians, and that proper enquiries are not made into cases in which Indians meet their death at the hands of Europeans, and to press these points by strong language with the object of effecting improvement in the matter. The contention may also be supported by instances, or even supposed instances, if suppositions are not exaggerated into facts. There is, however, a line which must not be overstepped, and writings must not be couched in such a way as to have no influence on Government, but only to excite enmity against Europeans, and the contention must not be supported by the invention of instances or by representing idle rumours as being established facts.

The articles now under consideration are, as I have pointed out above, very flagrant violations of the law in these respects. As a punishment for defamation the sentence inflicted would not be too severe. To charge an innocent man with deliberate murder on totally insufficient ground is a very serious offence, and the gravity of this conduct may be taken into account in awarding punishment for the offence, of which the accused have been convicted.

One of the accused, Jaswant Rai, is a young man of 25 and an M. A., the other the Editor, age 45, must be a man of some education, and it is extremely painful to send such men to jail. I would gladly take into consideration that this is the first prosecution under this Section, and that great license has hitherto been enjoyed with impunity by the Press, and that a lighter punishment might have the desired effect of keeping the Press within the law.

Also, that a sense of responsibility, essential in the conduct of a paper, is not yet generally felt by the Indian Press as it is

by the English Press, and that this sense of responsibility may be produced without violent means.

If I had seen on the part of accused any recognition of the wrongfulness of their conduct, or any sense of penitence or prospect of improvement, I would have given effect to these views.

I have, however, been able to see no sign of such an attitude on the part of the accused.

Making allowance for the exigencies of this defence in this case, their attitude has been a justification of their conduct. The violence of the language has no doubt been deprecated by their counsel, but this does not meet the case. What was desirable was some retraction or apology in the paper to reach the readers of the original articles.

With a view to satisfy myself as to what was the attitude of the paper since this prosecution of the paper has been started, I invited counsel to file the issues of the paper since that time for perusal of the Court. Counsel said he would consult his clients on the subject, but the accused have not availed themselves of the opportunity thus offered to them.

I see no sufficient reason for interfering with the sentence, except that I would alter the imprisonment from rigorous to simple.

16th April 1907. REID, J.—The petitioners, who are the Proprietor and Publisher and the Editor of a newspaper published bi-weekly in English at Lahore, under the name of "*The Panjabee*," have been sentenced to rigorous imprisonment for six months and a fine of Rs. 1,000 and to rigorous imprisonment for six months and a fine of Rs. 200, respectively, under Section 153 A. of the Penal Code in respect of an article published in their paper on the 11th April 1906.

At the trial before the District Magistrate both petitioners accepted full responsibility for the publication. Although no appeal lay to this Court, and the application was filed on the revisional side, counsel for the petitioners was heard on the evidence, so far as it affected the question of good faith, and of absence of intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects, and of sentence.

The question of the truth or falsehood of the account of Rafat Ali's death contained in the article was not directly before us, having been disposed of by the Courts below, but counsel

for the petitioners contended that his clients had been prejudiced by the action of the Magistrate in erroneously holding that two questions put to the witness Jeremy were irrelevant. The object of the questions was to elicit from the witness, statements contradicting a denial by the witness Hayat Muhammad of having told Jeremy "last summer" (of 1906) "that the *Paniabee's* account of the case was correct". It was not contended that the point was specifically taken in the Appellate Court and a perusal of the judgments below and of the evidence of Hayat Muhammad satisfied us that the findings on the facts would not have been affected by any answers which Jeremy might have given to the questions. Hayat Muhammad's evidence, in examination in chief was merely that he remembered the investigation into the death of Rafat Ali, 6 or 7 years before; that the Thanedar Karam Chand called him; that Ram Narain, Sub-Inspector, was there; that the witness went to the spot, and that it was found on investigation that Rafat Ali had died from a fall from a horse; that there were hoofmarks and drops of blood on the spot; that Karam Chand wrote a report and that the witness signed it.

Hayat Muhammad was Zaildar of the village in which the body was found and was summoned to the investigation in his official capacity. Had the whole of his evidence been excluded as the result of Jeremy's evidence, it is extremely improbable that the result of the trial would have been affected. For these reasons the re-examination of Jeremy was not ordered.

The first argument to be dealt with is that the Court must consider what view the public would take of the language complained of. This is correct, with the modification that the word "public" must be understood to refer specially to the class or classes to which the readers of the newspaper presumably belong. The next argument was that the truth of the statements in the article is immaterial. This is incorrect in so far as the intention is concerned. An obviously false statement of date or material fact necessitates a consideration of the motive for the statement, and the absence of any motive except that charged may lead to the conclusion that the publication was with the intention or motive charged.

The next argument was that the petitioners, though charged under Section 153 A., were convicted under Section 124 A. This is incorrect. The reasons recorded for the convictions are reasons justifying convictions under Section 153 A. and the convictions were specifically under that Section.

The next argument was that Section 153 A. is ancillary to Section 153, and that language which does not tend or is not intended to cause a riot does not justify a conviction under Section 153 A. This is incorrect. Sections 124 A., 153 A. and 505 were enacted by Act IV of 1898. Section 124 A. was inserted in Chapter VI, which deals with offences against the State; Section 153 A. was inserted in Chapter VIII, which deals with offences against public tranquillity, which may be of mind or body; Section 505, instead of being inserted in Chapter VII, which deals with offences relating to the army and navy, appears in Chapter XXII, apparently because the then existing Section 505 contained some of the provisions contained in the new Section, and the Section was not limited to offences relating to the army and navy. Section 153 A. is no more ancillary to Section 153 than Section 124 A. to Section 124.

As laid down in Maxwell on the Interpretation of the Statutes, Edition 4, page 394-5, the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. It is true that, in cases of doubt, Courts may be guided by the position in an Act of a particular Section, but here there is no room for doubt. The offence made punishable is the promotion of, or attempt to promote certain feelings between different classes, and the question whether the actual or anticipated result of the promotion or attempt was a riot or other breach of the peace is immaterial to the conviction.

The next arguments were that recklessness and intention differ, and that every intention except that charged must be excluded before the convictions could be maintained.

Reckless use of language might possibly result in the feelings specified in the Section being promoted, and the question whether there was mere recklessness or intention might have to be considered, but the convictions with which we are dealing were of attempts and intention is a necessary element. This intention may be presumed from the language used if all reasonable alternatives are excluded.

The next argument was that it is impossible to prove an attempt to promote. Where there is an intention and something is done with the object of effecting the result intended, there is an attempt.

The next argument was that the existence of the feelings specified must be established before any question of attempt to promote them can arise. This is, in my opinion, incorrect.

Whether the feelings which exist are of indifference or of friendship or of enmity or hatred, anything which tends to convert the two former into enmity or hatred or to increase the enmity or hatred promotes feelings of enmity or hatred.

Feelings of some sort necessarily exist between the English subjects of His Majesty and His Indian subjects for whose perusal the article in question was published. No Indian reader of a newspaper can possibly be ignorant of the existence of English fellow-subjects, and there cannot be an absolute absence of all the feelings above specified.

The next argument was that the word "classes" in the Section does not mean "races" and that Englishmen and Indians are not members of different classes. I concur in the reasons recorded by the learned Chief Judge for holding that this argument is unsound, and that for the purposes of the Section Englishmen and Indians constitute separate classes. The article in question itself divided the members of the two races into dominant and servient, though the word "race" was used.

The next argument was that the petitioners did not intend to promote the feelings specified in the Section, but intended only to urge the authorities to deal with a case which had not been properly dealt with.

It was contended that the article of the 11th April must be read with articles of the 4th April 1906, to which it referred; that those articles commented on two other cases of oppression and ill-treatment, which had not been properly dealt with; that if the persons concerned in those cases had been Indians, the action of the police would have been different and the persons concerned would have been arrested and punished, and that the results of the article of the 11th April have been a searching investigation. The first point to be noted with reference to these contentions is that, although the petitioners were fully aware that the death of the mounted orderly, Rafat Ali, occurred in 1900, it was stated in the article in question, published in April 1906, to have occurred only the other day. The contention that this mis-statement was due to ignorance of the English language is hopeless. The publisher and proprietor is a Master of Arts of an Indian University and the Editor is about 45 years of age and has not attempted to establish ignorance of that language. It is idle to contend that a person ignorant of a language would have been selected for or could conduct the editorship of a paper published bi-weekly in it. If a newspaper intended for circulation among Englishmen in Natal were to contain

an article describing harrowing incidents of the mutiny of 1857 and stating that they occurred " only the other day", the only reasonable inference, in the absence of evidence or a reasonable presumption of ignorance would be that the publication was intended to hold Indians up to hatred, and the same inference must, in my opinion, be drawn in this case.

The *dicta* of Cave, J., in *Regina* v. *Burns and others* cited at the Bar and in the judgment of the learned Chief Judge, and the *dicta* of Fitzgerald, J., in *Regina* v. *Sullivan* (1), cited by Cave, J. are directly in point. A belief that Englishmen are habitually cruel and unjust, and that equal justice is not meted out to Englishmen and Indians, must necessarily inspire the race which suffers by the cruelty and injustice with hatred of, and enmity to the favoured race, and, although the allegations of cruelty and injustice may not be believed, a man cannot, as laid down by Cave, J., escape from the consequence of uttering words, with intent to promote such feelings, solely because the persons to whom they are addressed may be too wise or too temperate to be influenced by them. It is therefore unnecessary to establish the success of the attempt.

Fitzgerald, J., in charging the Jury in *Regina* v. *Sullivan*, said: " In dealing with the articles you should not pause upon an " objectionable sentence here or a strong word there. It is not " mere strong language, ...or tall language or turgid langu- " age that should influence you.....If, on the other hand, " on the whole spirit and import of these articles, you are obliged " to come to the conclusion that they are seditious libels, and that " their necessary consequences are to excite contempt of Her " Majesty's Government or to bring the administration of the " law into contempt and impair its functions—if you come to " that conclusion, either as to the articles or prints, or any of " them, then it becomes your duty honestly and fearlessly to " find a verdict of conviction upon such counts as you believe " are proved".

Applying these rules to the article of the 11th April, the only conclusion which can, in my opinion, be arrived at is that the petitioners were not betrayed by a desire to obtain justice and to move the authorities to institute a proper investigation into the use of strong language, but that the language used was intended to promote feelings of enmity and hatred towards the race alleged to be cruel and unjust and favoured.

(1) 11 *Cox cr. cas.* 44.

Reference to the articles of the 4th April does not, in my opinion, help the petitioners, and it is idle to contend that the language used was used inadvertently or recklessly. The words "are instances of manslaughter, yea even of deliberate murder "of Indians at the hands of European officers so rare in India "that our contemporary should be ready to pin his trust to the "impartiality of an enquiry..... ?"

"No sooner thought of than the idea of the Imperial hunter "was put into practise. He aimed at the poor Indian (who cared "more for the faith that was in him, his *deen*, than even the "favour of his official chief) and shot him dead, without com- "punction or remorse.....

"That murderer is at large today, enjoying the privileges of "the dominant race," cannot, in my opinion, possibly be held to have been published with the intention of rousing the authorities to action in the direction of doing justice. The article in question was, in my opinion, published with the intention of promoting feelings of hatred or enmity between the English and Indian subjects of His Majesty, and the publication constituted an attempt punishable under Section 153 A.

Whether the petitioners were also inspired by any desire to increase the circulation of the paper or by any desire for notoriety or by any ill will to the persons against whom the article was in general or in particular directed need not be considered for the purposes of this case. The offence punishable is the attempt, and, that being established, the only remaining question is of sentence.

I concur in the reasons recorded by the learned Chief Judge that sentences of simple imprisonment are necessary, and I concur with him in the conclusion that the term of the sentence of imprisonment passed on each of the petitioners should be six months, and that the sentences of fine should be maintained.

Application dismissed.

No. 11.

Before Sir William Clark, Kt, Chief Judge, and Mr. Justice Shah Din.

APPELLATE SIDE.

KING-EMPEROR,—APPELLANT,

Versus

HIRA SINGH AND OTHERS,—RESPONDENTS.

Criminal Appeal No. 93 of 1907.

Compounding offence—Penal Code, Section 147—Rioting—Incompetency of Magistrate to allow compromise in non-compoundable offences.

Held, that the offence of rioting under Section 147 of the Penal Code cannot under any circumstances be lawfully compounded.

It is *ultra vires* of a Magistrate to allow a non-compoundable offence to be compromised on the grounds that the offence committed might probably in the end turn out to be a compoundable one or that the consequence of his action might probably, in his view, be better for the complainant.

Appeal from the order of Sardar Ragbir Singh, Magistrate, 1st class, Jullundur, dated 20th October 1906.

Government Advocate, for appellant.

Shah Nawaz, for respondents.

The judgment of the Court was delivered by

8th May 1907. SHAH DIN, J.—After hearing the learned Government Advocate and the counsel for the respondents, we think that this appeal must succeed. The respondents were *challaned* to stand their trial for the offence of rioting under Section 147, Indian Penal Code. The Magistrate examined the complainant Kirpa Ram at some length at the first hearing and then adjourned the case to another date. On that date no evidence for the prosecution was taken, and as the complainant expressed a desire to compound the offence with which the accused persons were charged, the Magistrate allowed him to do so and acquitted the accused under Section 345, Criminal Procedure Code. Now, it is clear that under Section 345 the Magistrate had no power to allow the offence of rioting to be compounded, as the said offence is not mentioned either in sub-section (1) or sub-scetion (2) of Section 345, and the order of the Magistrate acquitting the accused persons was, therefore, *ultra vires*. The reasons given by the Magistrate for permitting the complainant to compound the offence in question are, so far as his power to act under Section 345 is concerned, wholly unsound. He says "it is probably better for the complainant to be on "good terms with the accused who also wish for the

"compromise. It is quite probable that the case might in "the end turn out to be a case under either Section 323, "324, or 325, Indian Penal Code. I think that the case "is really one under Section 324, Indian Penal Code, * * * * "I therefore declare this case to be one under Section 324 or "325, Indian Penal Code, and allow the case to be compromised."

Now, the Magistrate did not take the evidence for the prosecution at all as he was bound to do under Section 252, Criminal Procedure Code, and his finding that the case was really one under Section 324 or Section 325, and not one under Section 147, Indian Penal Code, was based upon a surmise. Counsel for the respondents relied upon sub-section (2) of Section 253, Criminal Procedure Code, in support of the Magistrate's action, but the latter did not proceed under the provisions of the above sub-section, inasmuch as the accused persons were not *discharged* by the Magistrate, nor did he record any reasons for discharging them so far as an offence under Section 147, Indian Penal Code was concerned. The composition of an offence under Section 345, Criminal Procedure Code, has the effect of an *acquittal* and not of a discharge, and therefore Section 253 (2) has no bearing upon the case at all.

Moreover, the offence of rioting under Section 147, Indian Penal Code, being an offence against the public tranquillity, primarily concerns the State more than the individual, and that is probably one reason why that offence is not included by the legislature in the category of the offences which can be compounded by the person immediately affected even with the permission of the Court by which the trial is held.

For the above reasons, we hold that the order of the Magistrate acquitting the accused persons under Section 345, Criminal Procedure Code, was one passed without jurisdiction. We therefore set aside the order, and direct the Magistrate to proceed with the trial in accordance with law.

Appeal allowed.

No. 12.

Before Mr. Justice Shah Din.

REVISION SIDE.

AMIN CHAND AND OTHERS,—PETITIONERS,

Versus

KING-EMPEROR,—RESPONDENT.

Criminal Revision No. 572 of 1907.

Witness—Recalling witnesses for cross-examination after charge—Expense—Criminal Procedure Code, 1898, *Section* 256.

Held, that under Section 256 of the Code of Criminal Procedure it is the duty of a Magistrate to recall prosecution witnesses for cross-examination if the accused so demands after the charge is framed and has no authority to refuse to do so on the ground that the accused has not deposited the necessary expenses.

Case reported by S. W. Gracey, Esquire, Additional Sessions Judge, Ferozepore, on 25th April 1907.

Jawala Pershad, for petitioners.

Duni Chand, for complainant.

The facts of this case are as follows :—

One Ismail purchased *gur* from the accused at rate of 6 seers per rupee. The complainant offered to sell to him at rate of 7 seers per rupee and Ismail returned the accused's *gur*. The accused 1 to 3 then insulted and abused the complainant and were joined by accused 4.

The accused on conviction by Lala Jagan Nath, exercising the powers of a Magistrate of the 1st class in the Ferozepore District, were sentenced by order, dated 19th February 1907, under Sections 504 and 352 of the Indian Penal Code, Amin Chand to a fine of Rs. 15 or one month's rigorous imprisonment ; Nandu and Chuhar to a fine of Rs. 7 each or two weeks' rigorous imprisonment ; and Maghi Mal to a fine of Rs. 5 or two weeks' rigorous imprisonment in default.

The proceedings were forwarded for revision on the following grounds :—

The accused applied to the Magistrate that the prosecution witnesses should be recalled for cross-examination after the charge had been framed. The Magistrate did not recall them on the ground that the accused had not put in the necessary expenses. This order was wrong. The accused were not bound to put in their expenses and it was the duty of the Court to recall them. The defect seems to vitiate the trial and either the conviction must be quashed or the accused given an opportunity of cross-examination.

The procedure contemplated in the Criminal Procedure Code is that the prosecution witnesses should be heard, the charge framed and the accused called upon to cross-examine the prosecution witnesses at one consecutive hearing, continued if necessary from day to day, and the prosecution witnesses should not be discharged till the accused have been

questioned whether they wish to cross-examine after the charge. Where, however, the hearing is not consecutive, as in the present case, and the prosecution witnesses are allowed to leave before the charge is framed, it is the duty of the Magistrate to recall them, presumably at the public expense, if the accused so demands after the charge is framed.

The judgment of the Chief Court was delivered by

SHAH DIN, J.—For the reasons recorded by the learned Additional Sessions Judge in which I fully concur, I quash the convictions and sentences, which under the circumstances were illegal and direct the Magistrate to resume the proceedings at the stage they had reached when he improperly refused to recall the witnesses for the prosecution for the purpose of being cross-examined by the accused. The defect does not vitiate the whole trial *ab initio*, and the proceedings as far as the framing of the charges appear to have been quite regular. 12*th June* 1907.

Application allowed.

No. 13.

Before Sir William Clark, Kt., Chief Judge.

BASANT RAM,—PETITIONER,

Versus

KING-EMPEROR,—RESPONDENT. } REVISION SIDE.

Criminal Revision No. 573 of 1907.

Punjab Municipal Act, 1891, *Sections* 92, 94—*Partition wall over a tharra—Authority to erect without the permission of the Committee—Erection of a building.*

Held that building a new partition wall over a *tharra* amounts to "erecting a building" within the meaning of Section 94 of the Punjab Municipal Act, 1891, and as such requires sanction of the Committee as provided by Section 92 of the Act.

Case reported by H. P. Tollinton, Esquire, Sessions Judge, Lahore Division, on 20th April 1907.

Oertel and Hari Chand, for petitioner.

Sangam Lal, for respondent.

The facts of this case are as follows :—

On 1st November 1906, the petitioner Basant Ram submitted certain plans to the Municipal Committee of Lahore requesting sanction to certain alterations, repairs and additions to his house. A few days after the residents of the *muhalla* wrote protesting that the petitioner had carried out certain alterations in his house without the sanction of the Committee.

The accused on summary conviction by E. R. Anderson, Esquire, exercising the powers of a Magistrate of the 1st class in the Lahore District, was sentenced, by order, dated 19th February 1907, under Sections 92 and 164 of the Municipal Act to a fine of Rs. 50 or, in default, to one month's simple imprisonment.

The proceedings were forwarded for revision on the following grounds : —

The facts of this case are that on 1st November 1906 the petitioner submitted certain plans to the Municipal Committee of Lahore requesting sanction to certain alterations, repairs, and additions to his house. The application for sanction contains the following words : –

The places marked A and B are to be newly built : and the yellow colour shows the petty repairs and alterations (*vide* plan on Municipal file).

A few days after the application the residents of the *muhalla* wrote protesting that the petitioner had carried out certain alterations in his house without the sanction of the Committee.

The principal objection urged was against the alleged enclosure of what the *mohalladars* described as a public well.

I may say at once that there is no evidence as far as the present prosecution is concerned, whether the well is public or private. A prosecution was ordered under Section 92 of the Municipal Act—(*vide* also the Lahore Building Rules published under Notification No. 207, dated the 9th May 1898).

On a summary trial the petitioner was convicted and sentenced to a fine of Rs. 50 or, in default, to one month's simple imprisonment.

It is admitted by the Magistrate that the new construction marked in the plan as A and B being a *sabat* or shed on the top of the roof has *not* been carried out.

Petitioner alleges that this is all he meant to obtain sanction for, though he showed in the plan the petty repairs and alterations for the information of the Committee.

As the *sabat* has admittedly not been constructed, it remains to consider whether the alterations and repairs do amount to *re-erection* within the meaning of Section 94 of the Municipal Act or not.

The allegations against the petitioner are (1) that he has constructed an additional wall ; (2) that he has widened the door of the house ; (3) that he has constructed a roof over the balcony ; (4) that he has built a *tharra*. As regards (1) Mr. Stubbs, Assistant Engineer, has filed an affidavit with the appeal in which he states that the wall is 2 feet 10 inches deep and has been put up to support an old beam which had sagged. He further alleges that this support adjoins the wall and is on the original foundation. I am of opinion that this support does not come within the purview of Section 94 of the Municipal Act.

As regards (2) the Note to Section 94 in Fenton's Manual states that "*the "opening of a new door in a wall would not apparently be erecting a building.*" Much less then would Section 94 apply to the widening of an existing door.

As regards (3) the Magistrate says "there were no indications of a roof "having been in existence before."

The Assistant Engineer on the contrary finds that there were distinct indications of an old roof, the zinc roof simply replacing a former *chajja* roof.

With regard to (4) the Assistant Engineer states "the wall indicated as a "*tharra* is not new but part of the original building."

I forward the file to the Chief Court under Section 438, Criminal Procedure Code, with the recommendation that the conviction and sentence may be set aside for the following reasons :—

(1). It was largely a question of expert opinion as to how far the building had been altered.

(2). The Magistrate relied too much on his own observations.

(3). Considering the intricacy of the case the Magistrate was wrong in not applying Section 260 (2) of the Criminal Procedure Code,

(4). Taking the affidavit into consideration it would appear that no "erection" or "re-erection" within the meaning of Sections 88 of the Municipal Act has taken place

The judgment of the Chief Court was delivered by

CLARK, C. J.—It was on 1st November 1906 that Basant Ram applied to the Municipal Committee for sanction (1) to build certain erections ; (2) to make certain alterations, repairs and additions, marked yellow on the plan filed by him. *6th June* 1907.

Without waiting for any orders he proceeded to make the alterations, this was found out on 18th November and his application was refused on 29th November 1906.

He appears therefore to have acted in an arbitrary and high-handed way. One of the additions made by him is admittedly of a new partition wall from the floor to the roof of his *tharra*. This divides off the part of the *tharra* in front of his shop from the part in front of the well, it stops access to the well by the steps formerly used for this purpose. To meet this difficulty Basant Ram built a *tharra* or step in front of the *tharra* in front of the well, intending access to the well to be had in this way. The Municipality however have made him remove this *tharra* as erected without sanction.

The question I have to determine is whether this building of this partition wall was erecting a building within the meaning of Section 94 of the Municipal Act. It seems to me to be clearly a material alteration. The affidavit of Mr. Stubbs as regards this wall is irrelevant, it is immaterial whether it was useful to support as agged beam, the important point is that it blocks access to the well, and admittedly there was no wall there before and when he says it is on its original foundation, I suppose he means

that it is on the existing *tharra*. Though a *tharra* may be a private property, yet the space over the *tharra* really forms part of the street, as far as regards light and ventilation, and a *tharra* could not be enclosed, and a partition wall is only a minor form of enclosure.

The erection of this partition wall was in my opinion an act which involved important interests of the public, and effected a material alteration of Basant Ram's house as far as the public and Municipality were concerned and required sanction of the Committee. The order of the Sessions Judge was *ex parte* without hearing the Municipal Committee, and the affidavit of Mr. Stubbs was subsequent to the decision of the case.

On the admitted facts it seems to me that the building has been materially altered, this does away with any alleged irregularity of the Magistrate.

The revision is dismissed and the order of the Magistrate maintained.

No. 14.

Before Mr. Justice Robertson.

SHER SINGH,—PETITIONER,

Versus

KING EMPEROR,—RESPONDENT.

REVISION SIDE.

Criminal Revision No. 886 of 1907.

Excise Act, 1896, *Sections* 30, 31, 46 (c)—*Illegally importing foreign liquor into the territory to which this Act extends.*

Held, that the introduction of any quantity of foreign liquor, however small, and for whatever purpose it may have been imported into any of the territories to which the Excise Act, 1896, extends, is illegal and punishable under Section 46 (c) of the Act.

Case reported by C. H. Atkins, Esquire, Sessions Judge, Ferozepore Division, on 6th July 1907.

The facts of this case are as follows :—

The accused Sher Singh, a Jat of *Mauza* Chak Munianwala in the Ferozepore District, had gone on some business to Kotkapura (Native State) where he purchased one bottle of liquor from the liquor vendor there. He drank about one-third of the bottle and returned to his house. On his way home he was searched on suspicion by the Railway Police at the Muktsar Railway Station, and two-thirds of the bottle of liquor was found in his possession.

The accused pleaded guilty to the charge, and if his statement is to be believed, he had purchased the liquor for his use with a view to escape from the plague epidemic then prevailing at Kotkapura.

The accused on conviction by Lala Lathu Ram, M A., exercising the powers of a Magistrate of the 1st class in the Ferozepore District, was sentenced, by order, dated 12th May 1907, under Section 46 to Rs. 12-8 fine or one month's simple imprisonment in default.

The proceedings were forwarded for revision on the following grounds :—

This is a case reported by the District Magistrate, Ferozepore, whose note accompanies this order.

With regard to opium the rule is clear. Rule 38 (1) allows any person to import opium in such form and quantity as he may lawfully possess, and it is laid down by executive order that this is to be interpreted as referring not only to opium manufactured, imported, or purchased in a manner authorised by rules under the Act, but to all opium.

No clear directions have been issued regarding spirit, but I should certainly read Section 31 of the Act along with Section 30, and hold that so long as the quantity does not exceed that which a person is permitted to possess, he has committed no offence punishable under Section 46 (1) (c).

In the present case, as the District Magistrate points out, the quantity imported was less than the quantity which a person is permitted to possess.

I submit the case to the Chief Court for order as no appeal lies against the conviction.

The judgment of the Chief Court was delivered by

3rd August 1907. ROBERTSON, J.—I am afraid I am unable to concur in the view taken by the learned Sessions Judge. I think Section 46 (1) (*c*) makes the introduction of any quantity of foreign spirits illegal, however small. The necessity or advisability of a prosecution in any particular case is another matter, but I think, after consulting a brother Judge on this point, that the offence has clearly been committed. In deference to the opinion of the local officers, while maintaining the conviction, I reduce the fine to one of Rs. 2-8 only.

No. 15.

Before Mr. Justice Johnstone and Mr. Justice Lal Chand.

REVISION SIDE.

WALIDAD *alias* WALYA,—PETITIONER,

Versus

KING EMPEROR,—RESPONDENT.

Criminal Revision No. 562 of 1907.

Entry on the roof of a building with a stick and sandheva—*Attempt to commit house-breaking by night—Criminal trespass—Penal Code, Sections* 442, 447, 457, 511.

The accused, who had mounted upon the roof of the complainant's house armed with a stick and a *sandheva*, was convicted of an attempt at house-breaking by night under Sections 457/511 of the Penal Code.

Held, that he was not guilty of the offence charged as mere presence on the roof of the house could not be construed into an attempt to commit an offence under Section 511, but that he was guilty of criminal trespass punishable under Section 447 of the Penal Code.

Alla Bakhsh v. *Empress* (1) referred to.

Petition for revision of the order of W. Chevis, Esquire, Sessions Judge, Sialkot Division, dated 9th March 1907.

Jowala Parshad, for petitioner.

This was a reference to a Division Bench made by Chatterji, J., to determine whether entry upon the roof of a house with a stick and *sandheva* amounts to an attempt to commit house-breaking by night.

The order of reference by the learned Judge was as follows:—

20th June 1907. CHATTERJI, J.—In this case the accused was found on the roof, understand, of the complainant, and after striking at him with

(1) 9 P. R., 1887, Cr.

a stick had a struggle with him and jumped into the yard of a neighbouring house. He dropped the stick and a *sandhewa* or house-breaking implement in the course of the struggle.

The accused has been convicted under Sections $\frac{457}{511}$ and sentenced to two years' rigorous imprisonment. It is argued that there was only a preparation and not an attempt of house-breaking, and *Alla Bakhsh* v. *The Empress* (1) is quoted in support of the contention. I am somewhat doubtful whether that ruling is exactly applicable, but I refer the question to a Bench.

Upon the reference to the Division Bench the following judgment was delivered by

LAL CHAND, J.—The facts of this case are stated in the referring order. The question is whether on the facts found the petitioner was rightly convicted of an attempt at house-breaking. The matter is not entirely free from doubt, but on very similar facts the accused in *Alla Bakhsh* v. *The Empress* (1) was found to be guilty and convicted of mere criminal trespass. All that is proved in the present case is that the petitioner accused was found on the roof of the complainant armed with an implement used for the purpose of committing burglary. There is no evidence to show that he had either commenced to dig a hole on the roof for the purpose of effecting his entrance inside the room or had otherwise commenced any act for jumping or getting into any portion of the premises. Under the circumstances his mere presence on the roof of the house cannot be construed into an attempt to commit an offence under Section 511, Indian Penal Code. In order to apply Section 511, Indian Penal Code, it is necessary not merely that there should be an attempt to commit an offence, but likewise that an act was done as such attempt towards the commission of the offence. Mere passing on the roof of the house cannot in any sense be termed an act towards the commission of the burglary. It is an act of approach towards the house for the purpose of stealthily effecting an entrance into the premises, but can hardly be said to exceed the limits of mere preparation. While on the roof the accused had yet time to make up his mind to recede or attempt an entrance according as he found his opportunity or the state of vigilance inside the premises. It cannot be said that by his presence on the roof of the house he had finally committed himself to committing the offence of house-breaking. We, therefore, hold that the petitioner ought to have been convicted of mere

6th August 1907.

(1) 9 P. R. 1887, Cr.

criminal trespass under Section 447, Indian Penal Code, and not of an attempt to commit house-breaking under Sections $\frac{457}{511}$, and we alter the conviction accordingly. The accused has already undergone the maximum amount of imprisonment awardable under Section 447, Indian Penal Code. We, therefore, direct his immediate release from the jail.

No. 16.

Before Mr. Justice Robertson.

LACHHM N DAS,—PETITIONER,

Versus

REVISION SIDE. KING EMPEROR,—RESPONDENT.

Criminal Revision No. 97 of 1907.

Fictitious deed of sale—Execution of, to avoid pre-emption—Dishonestly or Fraudulently—Penal Code, Section 423.

Held, that the execution of a fictitious sale deed in order to defeat the claim of a pre-emptor amounts to a dishonest and fraudulent execution of a deed within the meaning of Section 423 of the Penal Code.

Petition for revision of the order of Maulvi Inam Ali, Sessions Judge, Shahpur Division, dated 3rd January 1907.

Nanak Chand, for petitioner.

Petman, for respondent.

The judgment of the learned Judge was as follows :—

18*th April* 1907. ROBERTSON, J.—This is an application for revision in a somewhat unusual case. The facts which are found and must be accepted are as follows :—

One Lachhman Das, a Sahukar Khatri, purchased certain land from one Sultan Bibi on 24th March 1900. Hearing the suits for pre-emption were pending, Lachhman, on 22nd March 1901, sold the land by registered deed to one Ismail, who had, or was, believed to have a right of pre-emption superior to that of the intending pre-emptors. A suit for pre-emption was actually commenced on 23rd April 1901 and in that Lachhman pleaded the sale to Ismail. That suit failed for various causes, not being tried on the merits, and when Ismail sought mutation of the land in his name, Lachhman urged that the whole transaction of sale to Ismail was fictitious and entered into solely to defeat the pre-emptor's claim. This is an application for revision, and I must

deal with it on the basis that the sale by Lachhman to Ismail was in fact a fictitious sale, executed for the purposes of defeating a suit for pre-emption. It was, therefore, clearly fraudulent an dishonest and constituted an offence under Section 423, Indian Penal Code, for in the first place it is found as a fact that no consideration passed, although Rs. 300 was stated to have passed, and that it was not in fact intended for the benefit of the nominal purchaser Ismail. The general principles to be applied are laid down in *Gurditta Mal* v. *The Emperor of India* (1). No doubt such fraudulent transactions are frequently resorted to to defeat claims for pre-emption, and possibly it is not always realised that they render the perpetrators liable, as they do, to prosecution and punishment under Section 423, Indian Penal Code. A mere nominal punishment will not meet the case, but under the circumstances, I think, it will be sufficient to maintain the conviction, and the sentence will be reduced to one of Rs. 100 five or six weeks' rigorous imprisonment, the sentence of substantive imprisonment being reduced to the amount already undergone. The petitioner may be discharged from bail.

No. 17.

Before Mr. Justice Reid.

HARNAM,—APPELLANT,

Versus

KING EMPEROR,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 291 of 1907.

Criminal Procedure Code, 1898, Section 565—Applicability of to cases of attempts punishable under Section 511 of the Penal Code.

Held, that Section 565 of the Code of Criminal Procedure, 1898, does not apply to persons convicted under Section 511 of the Penal Code.

Appeal from the order of Q. Q. Henriques, Esquire, District Magistrate, Karnal, dated 10th April 1907.

The judgment of the Chief Court so far as is material for the purposes of this report was delivered by

REID, J.— *23rd July* 1907.

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The order under Section 565 of the Code of Criminal Procedure is, however, illegal.

The language of the first few lines of that section and of Section 75 of the Penal Code is practically identical and

(1) 10 *P. R.* 1902, *Cr*

the reason for which it has been invariably held that Section 75 does not apply to attempts equally preclude the application to them of Section 565. An attempt to commit an offence punishable under Section 457 of the Code is punishable under Section 511 not under Chapter XII or Chapter XVII of the Code.

For these reasons I set aside the order under Section 565 of the Code of Criminal Procedure.

To this extent only the appeal is allowed.

Appeal allowed.

No. 18.

Before Mr. Justice Kensington.

RAM SINGH,—PETITIONER,

Versus

KING EMPEROR,—RESPONDENT.

Criminal Revision No. 404 of 1907.

REVISION SIDE.

Appellate Court—Jurisdiction of, to test the legality of a conviction passed against a youthful offender—Reformatory Schools Act, VIII of 1897, Section 16.

Held, that Section 16 of the Reformatory Schools Act, VIII of 1897, does not relieve an Appellate Court of the duty of finding whether a conviction or sentence passed against a youthful offender is legally maintainable.

It only precludes a Court of appeal from altering or revising any order passed by the original Court with respect to the age of such offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

Petition for revision of the order of F. T. Dixon, Esquire, Sessions Judge, Amritsar Division, dated 14th December 1906.

The judgment of the learned Judge was as follows :—

25th *April* 1907. KENSINGTON, J.—The circumstances of this case are as follows :—The Magistrate by whom the petitioner was tried appears to have thought him guilty of an offence under Section 240, Indian Penal Code, but did not formally convict him under that or any other section. He merely referred the case to the District Magistrate under Act VIII of 1897, with reference apparently to Section 31 (4) of the Act.

The District Magistrate treated the case as a reference under Section 9 (1) of the Act and sentenced the petitioner to a year's imprisonment without mentioning the section of the Indian Penal Code under which this sentence was awarded. He then dealt with the petitioner under the Reformatory Act.

The petitioner appealed to the Sessions Judge against the conviction and sentence. Nearly the whole of the very brief order, dated 14th December 1906, of the Sessions Judge merely discusses the question of the propriety of the course taken under Act VIII of 1897, though Section 16 of that Act expressly precludes Courts of either appeal or revision from interfering on the point. He disposed of the appeal in these words at the end of his order.

"I find no reason to interfere and no ground of appeal "requires particular notice. This appeal is dismissed."

I must hold that this judgment does not sufficiently comply with the provisions of Section 424 and Section 367, Criminal Procedure Code. The Sessions Judge has not applied his mind to the real grounds of appeal before him or considered any of the points which obviously have to be dealt with in the case of prosecution of a child under eleven years of age, whether his conviction be taken to be under Section 240 or Section 241, Indian Penal Code. Section 16 of Act VIII of 1897 does not relieve an Appellate Court of the duty of seeing whether a conviction or sentence are maintainable.

A copy of this order will be sent to the Sessions Court with directions to readmit the appeal and dispose of it by a judgment in accordance with law after giving fresh notice.

Application allowed.

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No.

SANCTION FOR PROSECUTION—(concld.).

Code, 1898, *Sections* 195, 202, 203.—*Held* that a Magistrate dismissing a complaint under Section 203 of the Code of Criminal Procedure after examining the complainant and considering the result of the investigation made under Section 202 on the ground that the allegations contained therein were false is competent to grant sanction for the prosecution of the complainant for making a false charge.

Surya Hariani and others v. *King-Emperor* (6 *Calc. W. N.*, 295) followed.

Queen-Empress v. *Ganga Ram* (*I. L. R., VIII All.*, 38) dissented from 2

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WITNESS.

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Chief Court of the Punjab.

REVENUE JUDGMENTS.

No. 1.

Before the Hon'ble Mr. T. Gordon Walker, C.S.I.,
Financial Commissioner.

HIRA,—(PLAINTIFF),—APPELLANT,
Versus
BUDHA AND ANOTHER,—(DEFENDANTS),—RESPONDENTS. } APPELLATE SIDE.

Appeal No. 15 of 1905-06.

Occupancy rights—Acquisition of, by the representatives of one founder against another—Punjab Tenancy Act, 1887, Sections 5 (1) (c), 10.

Held, that the representatives of a member of the original proprietary body who was one of the founders of the village, cannot acquire occupancy rights under clause (c) of Section 5 of the Punjab Tenancy Act, 1887, against another founder.

Appeal from the order of R. E. Younghusband, Esquire, Commissioner, Lahore Division, dated 7th February 1906.

Nabi Bakhsh, for appellant.

Shahab-ud-din, for respondents.

The judgment of the Financial Commissioner was as follows :—

FINANCIAL COMMISSIONER.—These are 16 appeals (15—30) from the decree of the Commissioner, Lahore, dismissing plaintiff's suit for enhancement of rent. The question at issue is the same in all of them, and it is one of some importance. *31st August* 1906.

The defendants are shown in the Settlement papers as having occupancy rights; and the first Court (Assistant Collector), finding on the question of status that they were tenants under Section 6, decreed enhancement accordingly. On appeal the Commissioner has found that defendants have a higher status, *i. e.*, under Section 5 (1) (c), and that they are not, therefore, liable to enhancement of the rent which they now pay.

The defendants are proprietors in the village, and are descended from one of the founders. They own lands in Patti Shamir. They are also shown as occupancy tenants of the land in respect of which the suits are brought. This land is in another Patti (Kaim). In 1855 it was shown as *shamilat patti*. In 1865 it had been partitioned and has since then been the separate property of plaintiff.

The circumstances then are that the defendants are members of the original proprietary body of the village, being descendants of one of the founders.

Section 10 of the Punjab Tenancy Act is no absolute bar to the acquisition of occupancy rights by the defendants, because in 1855, which is as far back as the records go, they were not joint owners of the land in suit. But it appears to me clear (1) that it was not the intention of the Legislature that Section 5 (1) (*c*) should cover such a case as that of defendants, and (2) that the wording of the clause could not be interpreted so as to cover the case.

Defendants are the descendants and respresentatives of one of the founders of the village; and I do not see how a person who was himself a founder could be held to have "settled along with the founder", while the word "as a cultivator" would seem to entirely preclude such an interpretation, the "settling" being in the capacity of proprietor.

There can be no doubt, I think, that the intention of the framers of the clause was to protect persons who, *not being proprietors*, settled with the founders in a subordinate capacity as tenants; and although Section 10 does not cover a case such as the present, it seems to me to show that it was the general intention that one member of a proprietary body should not be allowed to acquire occupancy rights against the others. Defendants are, no doubt, entitled to occupancy rights under Section 6, because Section 10 is in the circumstances inapplicable, there being no joint ownership. I find then that defendants cannot be held to have acquired the higher status under Section 5 (1) (*c*).

The present rate of rent is 6 annas per rupee. I agree with Commissioner that an all-round enhancement to 8 annas is sufficient. The lower Courts have agreed as to compensation; and I see no reason to differ, especially as the enhancement is inconsiderable.

I accept the appeal, and, finding that defendants are occupancy tenants under Section 6, decree enhancement up to 8 annas a rupee of the land revenue subject to the payment of the compensation assessed by the first Court.

This judgment and order will apply to all 16 appeals. I make no order as to costs.

Appeal allowed.

No. 2.

Before the Hon'ble T. Gordon Walker, C. S. I., Financial Commissioner,

SHER SINGH AND OTHERS,—(PLAINTIFFS),—PETITIONERS,

Versus

SAYA RAM DAS,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Revision No. 139 of 1905-06.

Occupancy Rights -Succession to—Right of a head of a religious institution to succeed in his representative capacity--Punjab Tenancy Act, 1887, Section 59.

Held, that where occupancy rights belong to a religious institution, the *chela* of the last incumbent who has become *mahant* of the institution is entitled to succeed to them in his representative capacity as head of such institution.

Petition for revision of the order of R. Sykes, Esquire, Collector, Sialkot, dated 7th November 1905.

Gopal Chand, for petitioner.

Sham Lal, for respondent.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—There is an important question of law or custom involved in this case and I have admitted the application and treat it as an appeal. *8th Oct.* 1906.

The facts of the case are that Madho Das, Sadhu-Bairagi, was shown as occupancy tenant of the land in suit under Section 6 of the Act. He died, and it may be taken (though the matter has been questioned) that the defendant Saya Ram Das, his *chela*, succeeded him as *mahant*. The lower Courts have agreed on this point. The plaintiffs landlords now

sue to eject defendant on the ground that the occupancy rights have ceased. Defendant pleaded that the occupancy rights belonged, not to the deceased, but to the temple of which deceased was the *mahant* or guardian.

In *Punjab Singh* v. *Sant Ram* (1), it was ruled that a *chela* could not succeed under Section 59 to the occupancy rights of his *mahant*, and in that decision I agree. In the judgment in that case however, it was observed that " we have no question before us in the present case of the descent of an occupancy holding *granted to or attached to a religious institution, as such, the incumbent of which for the time being is merely manager and occupant of the land on behalf of the institution.*" That is the case which the defendant here sets up —that the tenancy is attached to the institution, and that the deceased was merely manager. The first Court decided in favour of defendant on the point, holding that the occupancy rights belong to the institution, and passed on to the present *mahant*, defendant, who enjoys them in his representative and not in his personal capacity. The Collector dismissed the appeal on the ground that, as the settlement of the land had been made with the proprietors under Revenue Rule 216, this could only have been done on the condition that defendant should succeed to the occupancy rights. I scarcely follow Collector's argument, and he has left the main question untouched. In the order of reference to the Full Bench in the Chief Court decision quoted above it is observed that " it sometimes happens that a *faqir*, as head of a religious institution is occupancy tenant of land attached to the institution in virtue of his position as *mahant* or *gaddi-nashin*, and a ruling that his *chela* and successor in the headship could not succeed to the occupancy rights recorded in his name, but virtually belonging to the institution of which he was head, might occasion hardship and inconvenience." The decision went no further than this that when a *chela* claims to succeed to a *mahant* merely as the spiritual descendant of the latter, that is in a personal and not in a representative capacity, the claim was not maintainable with reference to Section 59 of the Punjab Tenancy Act.

The first question that arises in the present case is whether an institution such as we are here concerned with (a Thakardwara)

(1) 22 P. R., 1896.

in charge of a college consisting of *mahant* and *chelas*, can be an occupancy tenant. The question is of some importance because there are many institutions throughout the Province which hold occupancy rights.

A *tenant* is defined in the Act as a *person* who "holds land under another person." In Section 2 (40) of the Punjab General Clauses Act I of 1898 a 'person' is defined to include "any body of individuals whether incorporated or not." In accordance with this definition I think that the *mahant* for the time being with his *chelas* must be held to be a "person" and, therefore to be capable of being a "tenant" within the meaning given to the latter term in the Punjab Tenancy Act. The occupancy rights are under Section 6 of the Act. The deceased *mahant* was entered in the Settlement record as an occupancy tenant; but the First Court has held, after framing an issue on the point, that the name of Madho Das was entered merely in his representative capacity, the occupancy rights really belonging to the institution. That decision seems to me to be clearly correct.

I hold, therefore, with the First Court that the occupancy rights belong to the institution (Thakardwara), and that on the death of Madho Das they passed on to his successor in the representation of the institution, by whom they are enjoyed in his representative capacity of *mahant*. I have nothing to do with the question of the succession to the mahantship, that question cannot arise in the present case.

The petition is dismissed with costs.

Application dismissed.

No. 3.

Before the Hon'ble Mr. T. Gordon Walker, C.S.I., Financial Commissioner.

MOHAR SINGH AND OTHERS,—(PLAINTIFFS),—PETITIONERS,

Versus

JHANDA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} REVISION SIDE.

Revision No. 197 of 1906-07.

Occupancy rights—Sale of, without consent of landlord—Acquiescence—Punjab Tenancy Act, 1887, Sections 53, 60.

Held, that acquiescence on the part of a landlord in an alienation of occupancy rights made in contravention of the provisions of the Tenancy

Act cannot be inferred from the mere fact that the landlord omitted to sue for the cancelment of such transfer for fifteen months after the mutation was effected.

Bhaga v. *Karishan Dso* (1), *Jiwan Singh* v. *Maharaja Jaggat Singh* (2), and *Baksha* v. *Fateh Muhammad* (3) referred to.

Petition for revision of the order of C. J. Hallifax, Esquire, Commissioner, Jullundur Division, dated 24th September 1906.

Gouldsbury and Kharak Singh, for petitioners.

Macdonald, for respondents.

The following judgment was delivered by

16th *April* 1907. THE FINANCIAL COMMISSIONER.—I have admitted this as a further appeal on the question of acquiescence.

I think that Commissioner has omitted one important point. In *Bhaga* v. *Karishan Deo* (1), the case was of a sale by registered deed and a suit brought *four years* after mutation was effected. There were other circumstances which also distinguish that ruling from the present case. The ruling quoted was founded on *Jewan Singh* v. *Maharaja Jaggat Singh* (2) and *Bakhsha* v. *Fateh Muhammad* (3).

In the present case I think that the Lower Courts have rather confused two entirely different things, (1) immediate consent and (2) subsequent acquiescence. I observe that the first Court framed its first issue " was the alienation made with the previous consent of the landlords; and, if so, was a notice under Section 53 unnecessary ? " The first Court found that there had been consent and that this took the place of the notice required by law. The Collector, on the other hand, found on the facts that there had been no consent. The Commissioner's conclusion is that the co-proprietors generally knew of the transfer and acquiesced in it ".

As regards the question of actual *consent* it would be impossible to accept the finding of the first Court, and I think Collector was right in not doing so. It could not be inferred from a mere note of the Tahsildar (to which of course no presumption under Section 44 of the Land Revenue Act attaches) to the effect that " the co-proprietors do not object ", that all the co-proprietors were present and consented. If that were so, why should the plaintiffs have brought a suit to have the alienation set aside so soon after ? It seems clear that the co-proprietors were and are in two parties of which one sided with the vendee and consented. These latter are now defendants.

(1) 8 *P. R.*, 1904, *Rev.* (2) 1 *P. R.*, 1898, *Rev.*
(3) 2 *P. R.*, 1898, *Rev.*

The note made by the patwari in his report on the mutation "alabad Mohar Singh lambardar" would, if signed or sealed, have been conclusive on the point. But there is not even a mark below it; and it is therefore if anything against the defendants, as evidence that it was intended to get the consent of Mohar Singh, lambardar, but that this was not found possible.

I have no doubt, then, that there was no *consent*, and it remains to consider the question of *acquiescence* on which Commissioner appears to have decided the case. A perusal of the judgments of 1898 and 1904 will show that the principal point on which the decisions turned in all three was that the objectors had allowed undue delay to occur in asserting their claim. There were, of course, other circumstances which went towards the constitution of *acquiescence*, but this was the main element. In the rulings of 1898 Mr. Thorburn observed that "when a landlord is fully aware that a tenant (with occupancy rights) has transferred his right of occupancy without having previously obtained the consent of that landlord in writing, unless that landlord sues *within a reasonable time* to cancel the voidable transfer, his acquiescence may be inferred as to what constitutes a *reasonable time* must depend on the circumstances of each case; in some it might be two years, in some three or more". Applying this principle to the present case I find—

Deed of sale, dated 9th February 1904,

Mutation, dated 16th November 1904,

Suit instituted, dated 28th February 1906.

The suit was instituted 15 months after mutation was effected: that must be taken as the starting point; and it cannot be said that there was undue delay in bringing the suit. Even if plaintiff had knowledge of the mutation, apart from the question of their consenting to the transfer, it could not well be held that they had slept on their rights or had not asserted them without undue delay. These questions of subsequent acquiescence must always be questions of *degree*, and here I think that acquiescence cannot be inferred from the conduct of the plaintiff in regard to the litigation.

I accept the appeal and restore the order of the Collector. Plaintiff will get a decree cancelling the sale with costs throughout.

Appeal allowed.

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