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| Act V of 1861 (Police), as modified up to 7th March, 1903 | In Urdu. 2 a. 5 p. (1 a.) |
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| Act V of 1859 (Indian Articles of War), as modified up to 1st January, 1905 | In Urdu. 1 a. (1 a.) |
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| Act VII of 1870 (Court-seats), as modified up to 1st December, 1896 | In Urdu. 8 a. 3 p. (2 a. 6 p.) |
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| Act I of 1871 (Cattle-trespass), as modified up to 1st December, 1903 | In Urdu 1 a. 9 p. (1 a.) |
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| Act IV of 1872 (Vindubian Laws), as modified up to 1st November, 1904 | In Urdu. 2 a. 6 p. (1 a.) |
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| Act X of 1873 (Oudh), as modified up to 1st February, 1903 | In Nagri. 1 a (1 a.) |
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Act XVIII of 1851 (Central Provinces Land Revenue), as modified up to
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Act VI of 1852 (Companies), as modified up to 1st August 1893
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Act XIX of 1852 (Land Improvement Loans), as modified up to 1st Sep-
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Act IV of 1853 (Explosives), as modified up to 1st May, 1896
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Act VI of 1857 (Companies Amendment)
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Act IX of 1857 (Provincial Small Cause Courts), as modified up to 1st
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Act X of 1857 (Native Passenger Ships)
Act XII of 1857 (Bengal, North-West Provinces and Assam Civil Courts)
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Act XIV of 1857 (Indian Marine), as modified up to 15th February, 1890
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Act V of 1858 (Inventions and Designs)
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| Act II of 1890 (Measures of Length) | In Urdu 6 p. (1 a.) |
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| Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment) | In Urdu 3 p. (1 a.) |
| Act XII of 1895 (Company Memorandum of Association) | In Urdu 3 a (1 a.) |</p>
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<td>of 1880 (Excise), as modified up to 1st August, 1903</td>
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<td>II</td>
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### V. MISCELLANEOUS PUBLICATIONS.

Table showing effect of legislation in the Governor General’s Council during 1883 to 1909

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<td>ditto</td>
<td>In Urdu, 1 a, 9 p (1 a)</td>
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<td>Regulation VIII of 1890 (British Baluchistan Criminal Justice)</td>
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K.C. [On leave from the 23rd
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from the 23rd April to
the 12th August.]

" P. C. Banerji.

" R. S. Aikman [Retired on the 22nd April.]

" H. G. Richards, K.C.

" Syed Karamat Husain.

" H. D. Griffin [On deputation from the
30th October.]

" W. Tudeball [Took his seat on the 23rd
April]

" C. Ross Alston [Officiated from the 23rd
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ACTS—1856—XV (Hindu Widows Remarriage ACT) See Hindu widow 161

1860—IV (Indian Divorce Act) Sections 12 and 17—Decree nisi—Duty of the Court passing that decree—Confirmation.] The High Court, held, no order could be made on the reference for confirmation of such decree unless a motion was made to the Court for that purpose. Held further that under section 12 of the Act the duties of a court in the investigation of a suit for a divorce are that upon any petition for a dissolution of marriage being presented, the court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged but also whether or not petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and shall enquire into any counter-charge which may be made against the petitioner. Culley v. Culley, I L. R., 10 All., 559, followed.

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SECTION 302—Murder—Poisoning by dhatura—Intention—Knowledge.] Dhatura was administered with the usual object of facilitating robbery, but in such quantity that the person to whom it was given died in the course of a few hours.

Held that the person so administering dhatura was rightly convicted under section 302 of the Indian Penal Code.

Emperor v. Gutahi 118

SECTION 501A—Administering poison believing it to be a charm—Rash and negligent act—Liability.] Where the accused received a powder from an enemy of her relations. She is not responsible.
Bhakhan, P. R., 1887, Cr. 2., 60, followed

Emperor v. Jamna

ACTS—1800—XLIV (INDIAN PENAL CODE), SECTIONS 361 AND 363—Kidnapping—Notice—Punishment.] For a conviction under section 363, Indian Penal Code, it was sufficient to prove that the minor was taken away from the custody of a lawful guardian without his consent. Notice had nothing to say to the offence of kidnapping though it might have much to say to the punishment. Consent given by the guardian after the commission of the offence would not cure it.

Emperor v. Ganesh

Marriage between Christian and Muhammadan performed according to Muhammadan rites.] Thomas Skinner, domiciled in the North-Western Province, and the owner of considerable landed property, died in 1855, leaving a will, made on the 22nd of October 1844, &c., before the passing of the Indian Succession Act by which, amongst other dispositions, it was provided that—my private zamindari, lawful male children according to the law of inheritance. In the

Since that a marriage ceremony performed according to Muhammadan rites between a Christian man and a Muhammadan woman can create no valid marriage between the parties.

Richard Ross Skinner v. Durga Prasad

—1836—XXVI (QUDB SUB-SETTLEMENT ACT).—

... laws in the schedule
attached to it show that the object and purpose with which it was passed were to revise and correct what had been hastily and imperfectly or loosely done and to secure that no person should enjoy under-proprietary rights who could not establish his claim in the manner prescribed by those rules.

"Claims which have been disposed of otherwise than in accordance with these rules," in rule 13, mean claims which have not been supported by the proofs prescribed by, amongst other provisions, rules 2 and 3, that is, proof that the claimant possesses an under-proprietary right in the lands of which sub-settlement is claimed, that such right has been kept alive over the whole area claimed within the period of limitation, and that he has by virtue only of his under-proprietary right held the lands under contract with some degree of continuousness since they came into the taluk.

follows:—"The provisions of the Sub-Settlement Act have not been complied with. As the original proprietary title has not been proved, the plaintiff is in no way entitled to sub-settlement, which actually restores him under our rules to proprietary possession, and makes the talukdar who has been half a century in possession, the mere recipient of malikan. I decree a farming lease to plaintiff, he paying the Government demand plus 25 per cent. to the talukdar for a period of 30 years."

Held that the Financial Commissioner had jurisdiction under section 13 of the rules under Act XXVI of 1860 to make the decree of 6th January 1869, and that it was a valid and binding decree.

Held also that, on the construction of the decree the lease was one for a term of 30 years from the date of the decree, and on the expiration of that period the lessee was liable to ejectment in a suit in the Revenue Court under the Oudh Rent Act (XXII of 1868).

Makhsar Parsad v Muhammad Enwaz Ali Khan

ACTS—1869—I (Oudh Estates Act), Sections 22 and 23—Evidence—Custom, proof of—Custom excluding daughters—Wazib-ul-azr—Evidence of custom of succession to impartible estate whether admissible in proving custom of succession to partible estate—Concurrent findings as to custom being established, effect of—Declarations by

appellant's father, set up a custom by which daughters were excluded from inheritance and both Courts in India found on evidence that the custom was proved.

Held, by the Judicial Committee, that if and so far as it was a conclusion of fact the concurrent finding was though not absolutely binding on the committee, entitled to the greatest weight.
Technical objections to declarations made by kanungos, to entries in the waibul-azees by the officer charged by Government with that duty, and to answers given to official inquiries made under Government direction as to the rules of succession prevailing in particular families, were considered by the Lordships to be material rather to the weight than to the admissibility of the particular evidence which was pressed as admissible as purporting to be made by the proper officer in performance of a special duty, and presumably with due regard to the rules laid down for his guidance.


It was contended that evidence of a custom regulating the succession to imparitable estates where the rule of genderism prevailed was inadmissible on a question as to the custom of succession to a paritable estate governed by the ordinary Hindu law applicable to estates in Hindu Law (Act I of 1860).


Waiibul-azees, therefore relating to the succession to imparitable estates were held to have not been admitted as evidence of the custom set up in the present case.

**Zakir Husain v. Makpat Singh. I. L. R., 5 Calc., 711; L. R. 7, I. A., 43, and two unreported cases referred to in the judgment of the Judicature Commission are followed.**

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ACTS—1870—VII (Court Fees Act), Section 7, Clause IX, See Act No. VII of 1837, section 8...

Schedule I, section 5, articles 4, 5—Court fees—Application for review affecting only portion of decree. Held that the proper fee leviable on an application for review of judgment when it refers only to a portion of the decree is the fee leviable on such review.

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In the matter of Sheikh Maqbul Ahmad...

1871—XIII (Pensions Act), section 11—Immovable property granted in lieu of pension—Not a pension—Liability to attachment—Civil Procedure Code, 1852, section 283 (f) Where certain immovable property was granted in lieu of a pension and the sanad provided that upon the death of the original grantee the estate would be continued in perpetuity in the manner of an hereditary holding (zamindari mutwos) and at the desire of the grantee revenue was assessed and the members of the family had treated it as ordinary zamindari property, subject simply to the payment of Government revenue, held that the zamindari so granted was not a pension within the meaning of section 11 of the Pensions Act, and was liable to attachment and sale in execution. Lachhu Narain v. Makund Singh, I. L. R., 26 All., 617, and Secretary of State for India v. Khemchand Jaychand, I. L. R., 4 Born., 432, followed.

Amna Bibi v. Najmunissa...

1872—1 (Indian Evidence Act), sections 8, 24, 25, 26, 27—Accused induced to point out the hiding place of stolen property—Conduct—Admissibility of evidence—Criminal Procedure Code, section 163—Confession]. M was charged with the murder of a girl. In the hope of pardon being given to her, she took the police to a certain place and pointed out and produced certain ornaments, which the deceased was wearing at the time of her death. Held that evidence was admissible to show that the accused did go to a certain place and there produced certain ornaments.

Such evidence was admissible under section 8 of the Indian Evidence Act irrespective of whether the conduct of the accused was or was not the result of inducement offered by the police.

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...ACT... XVII. Of 1877—Suits to enforce Agreement immoral or opposed to public policy—Lease of house to a prostitute. Held that knowingly letting a house to a prostitute with the...
object of her carrying on therein prostitution is immoral and contrary to public policy; and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law.

Choga Lal v. Pyari

ACTS—1872—IX (INDIAN CONTRACT ACT), sections 55, 56, See Act No. XV of 1877, schedule II, article 97

SECTION 129, See Act no. V of 1881, section 73

—1876—XVII (OUDH LAND REVENUE ACT), section 17—See Act No I of 1899, sections 22 and 23

SECTION 74—Compromise

Document signed by claimants in mutation proceedings—Acquiescence in partition proceedings—Suit to dispute title and recover possession of shares to which plaintiff was entitled by Hindu law—Estoppel—Suit in Civil Court on title after partition] The plaintiff and defendants were claimants to the estate, consisting of 90 villages, of a deceased Hindu, and though by the ordinary Hindu law the plaintiff, as brother of the deceased, was entitled to the whole property as against the defendants, who were nephews (sons of deceased brother) the three claimants in the mutation proceedings signed in 1896 a document which stated that the property was held, one moiety by the plaintiff and the other moiety by the defendants, and that "there is no other legal heir except the deponents; the mutation in respect of the deceased’s share in all the villages should be allowed and nobody has any objection thereto." and the revenue authorities effected mutation of names in that way. In 1903 partition which left the parties in the same state as to possession was effected in accordance with the provisions of the Oudh Land Revenue Act (XVII of 1876). In a suit brought in 1904 to recover possession as heir of the deceased of the half share held by the defendants, the latter pleaded (inter alia) that their possession was the result of a compromise come to between the parties in the mutation proceedings which was evidenced by the document of 1896, and that the plaintiff was estopped by such mutual arrangements from asserting his present claim.

was ever made.

question of the defendant’s title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition.
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Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no

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ACTS—1873—IX (INDIAN OATHS ACT), SECTIONS 9 AND 11—Defendant taking oath proposed by plaintiff—Oath conclusive. The plaintiff in a suit stated that he would accept whatever evidence the defendant would give the Ganges water in his hand and on his honour. The defendant swore with Ganges water in his hand that the claim was false inasmuch as the amount due to the plaintiff had been set off against a large sum due to the defendant. Held that the suit must be dismissed, the defendant having sworn in the manner prescribed.

Chud Lal v. Jwala Prasad... 315

—XIX (N.-W. P. LAND REVENUE ACT), SECTIONS 132, 211—Act (Local) V. III (Regulation) Act—(Glossary)—1. Section

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—1877—I (SPECIFIC RELIEF ACT), SECTION 41—Suit for possession before expiry of lease—Declaratory decree—No alteration in the nature of the suit. During the subsistence of a tenancy a third party dispossessed the plaintiff's tenants. The plaintiff sued the third party for possession. Held that the suit for immediate possession

Ghulam Husain v. Muhammad Husain... 271

—III (REGISTRATION ACT) SECTIONS 21, 22 AND 76—Refusal to register—Suit to enforce registration—"Sufficient to identify the same."—Jadad—Scope of section 21—Letters relating to immovable property. Where a letter purporting to transfer immovable property and was presented as a non-testamentary document for registration which was refused on the ground that it contained no description of the property "sufficient to identify the same," held that the refusal was under the circumstances proper.

The provisions of section 21, Registration Act, are positive and imperative, and not merely directory.

Sayid Mahmud v. Muhammad Zubair... 523

—XV (INDIAN LIMITATION ACT), SECTION 8—Joint Hindu family—Sale of joint property by guardian of minors—Suit to avoid sale—Limitation. The certificate guardian of two Hindu minors sold certain property of the minors without the sanction of the District
Judge. Within three years of his attaining majority the younger of the two minors, who were brothers, sued to avoid the sale. The elder, however, had come of age several years earlier and had taken no steps to repudiate the transaction. Held that the suit was not barred by limitation. _Perinaiya v. Krishna Ayyan_, I. L. R., 25 Mad., 431, and _Vigneshwar v. Rapayya_, I. L. R., 16 Mad., 438, referred to.

Ganga Dayal v. Mani Ram

**ACTS—1877—XV (INDIAN LIMITATION ACT). SECTION 20—Appropriation of payment—Payment of interest as such—Appropriation of payment by creditor towards interest without specification by debtor does not save limitation—Act No IX of 1872 (Indian Contract Act), section 25 (3)—Fresh cause of action—Limitation.** Under section 20 of the Limitation Act, the payment of interest will save limitation when the payment is made as such, that is, to say, the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditor of these payments to interest is not such an indication.

A letter containing a promise to pay a time-barred debt within one month is an agreement such as is contemplated by section 25, clause (3), Contract Act, and gives a fresh cause of action.

Muhammad Abdullah Khan v. Bank Installment Co Limited in Liquidation

**SECTION 20 Execution of decree—Sale of judgment-debtors' property—Such sale not part payment so as to save limitation?** In order that the provisions of section 20 of the Indian Limitation Act, Oudh Bihari Pandey v. Mahabir Sahai

**SCHEDULE II, ARTICLES**

It in the chest of his own estate, doing so up to the day of his death, and there was no adjustment or settlement of accounts, held in a suit brought by the principal against the sons and grandsons of the agent, after his death, to recover the money so withdrawn, that the

Rao Guraj Singh v. Rani Raghubir Kunwar
ACTS -1877— XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 97—Agreement to sell—Pecuniary of contract—Act No IX of 1878 (INDIAN CONTRACT ACT), sections 55, 56—Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of money paid—Account of causes of action.] The defendants against whom a decree for foreclosure was obtained agreed to sell certain immovable property to the plaintiff, and the plaintiff paid into court as a part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. On 10th December 1899 the plaintiff instituted a suit against the defendants for a refund of the money so paid by him alleging that the defendants had failed to fulfill their part of the contract, which was to execute a conveyance of the property within one month. The defendants denied this, and the first Court, while holding that the period of one month had been fixed by the parties for the execution of the deed of sale, held on the evidence that time was not of the essence of the contract, and that the plaintiff could not (as he claimed) rescind the contract under section 10 of the Contract Act and recover the money he had paid and the decision was on appeal affirmed by the High Court on 18th January 1900. On 10th April 1900 the plaintiff sued the defendants claiming specific performance of the agreement to sell or in the alternative for a refund of the money paid by him as part of the consideration for the sale agreed upon. The first Court gave the plaintiff a decree for specific performance. On appeal by the defendants it was held by the High Court on 10th April 1905, (1) that the terms of the agreement to sell not being being satisfactorily proved, no decree for specific performance could be made, (2) that the plaintiff was therefore entitled to recover the money which he had paid under the agreement, and (3) that, following the case of Bass Kaur v. Bhup Singh, I L. R. 11 All. 49; I. R. 15 1 A. 211, the plaintiff's alternative claim for a refund on failure of consideration was governed as to limitation by article 97 of schedule II of the Limitation Act, 1877, and was not barred by lapsed of time, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. The plaintiff appealed from the decision of the High Court of 18th January 1900, and the defendants from that of 10th April 1903 to His Majesty in Council and both appeals were dismissed by their Lordships of the Judicial Committee, who upheld the decision of the High Court.

Amara Behari v. Udai Narain Misra.

SCHEDULE II, ARTICLE 130—Suit for declaration of title—Cause of action—Limitation.] The plaintiffs sued in 1904 asking for a declaration that they were entitled to certain property mentioned in the plaint. Their cause of action was that the name of the defendant had in the year 1895 been entered in the revenue papers in respect of the property in suit. Held that the suit was barred by limitation, and that the fact that the defendant had in 1903 resisted the plaintiffs in an attempt to obtain correction of the khasat did not give the plaintiffs a fresh cause of action. Lach v. Ram Ratan Singh, I. L. R. 20 All. 35, followed. Rati Bakht v. Nirmal Singh, Weekly Notes, 1896, p. 215, distinguished.

Ahmar Khan v. Tsunban, I. L. R., 31 All.

ARTICLES 183, 184, SEE Muhammadan Law.
ACTS—1877—XX (Indian Limitation Act), Sch., Rule II, Article 128, See Civil Procedure Code, sections 211, 318, 319 ...

—— Article 179. Landlord and tenant. Adverse possession. Lease for a term of years. Tenant holding over after expiration of term. Tenant by sufferer. Where a tenant holds over after the expiry of the lease, the right to recover the property must be held to be the landlord, 

6 A. L. J. R., 239, followed.

Pusa Mal v. Mahdum Bakhsh
—— Article 139. See Act No. IV of 1891, sections 167, 111, 110 ...

—— Article 179, Ex. 1. Decree executed against minor judgment-debtor. Saving of limitation against other judgment-debtors. Where a decree was passed against two persons who were minors and others who were majors, but the decree against the minors was subsequently declared to be ineffectual, and the decree-holder never took out execution within three years from the date of his decree against his judgment-debtors other than those who were

Iatla Prasad v. Suraj Kumar
—— 1879—XVIII (Legal Practitioners Act), Section 14, See Civil Procedure Code, section 623 ...


The District Judge of Meerut held an inquiry under section 86 of the Legal Practitioners Act, 1879, as the result of which he ordered certain persons to be proclaimed to be touts and excluded from the parties affected under section 15 application being

Per Karamat Husain, J., that the disciplinary powers of the High Court under section 15 of the Statute being exercisable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application, neither had a single Judge jurisdiction to admit it.

R., 9 All., 104, referred to.

In the matter of the petition of Kedar Nath


When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, this is not a
continuing guarantee with the meaning of Section 12 of the Indian
Contract Act 1872. See also v. c. of I. . . . for N. [. . .
V. M. . . .
H.], Jent's, and W. F. Shree N. C. Chetty v. C. T. N. R. J.,
Mad., 1911, following. Ceylon. See Further, B. N. M. v. F. K. N. D.,
I. L. R. 27, Cal., 1912, followed. I. N. N. M. v. G. M. D.,
I. L. R. 27, C. I. N. D., 1912, followed.

Kashya Lal v. Munki

ACTS—1861—XII (N. W. P. RENT ACT), SECTION 2—Act (Local) No. II
of 1861 (Agra Tenancy Act).sections 22, 33 (i)—Occupancy holding
—succession—suit for declaration of right to a share in an
occupancy holding—Civil and Revenue Courts—Jurisdiction. Held
that a suit in a Civil Court for a declaration of the plaintiff's
right to a share in an occupancy holding is not precluded by section
84 (2) of the Agra Tenancy Act.

Held also that there was nothing in the Rent Act of 1861 to
prevent a woman becoming an occupancy tenant, and if she did
so, in her death the tenancy would pass to her heirs and not the heirs
of her husband.


1892—IV (TRANSFER OF PROPERTY ACT), SECTION 6—Hindu law—
Transfer by a Hindu reverterion of his reversionary interest. Held
that it is not competent to a Hindu reverterion to transfer his
reversionary interest expectant on the death of a Hindu widow. Sham

Jagat Nath v. Dubho

SECTION 53—Transfer with
intention to defeat or delay creditors—Muhammadan law—Transfer by
Muhammadan to one of his wives with intent to defeat claim of the
other for dowry. A few days after the institution of a suit against
him by his first wife for recovery of her dowry, a Muhammadan, who
had two wives, transferred the bulk of his property to his second wife
in satisfaction of her claim for dowry. Held, on suit by the first wife
of the转让 above mentioned set aside, that such transfer was not
necessarily impeachable, but that it was necessary to find,
First, that the transaction, and,
her husband
the improper path.

Hamid-um-massa v. Nazir-um-massa

1892, section 4

SECTION 54, See Act No. V of

SECTION 55 (4) (b) See Vendor's

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SECTION 60—Inheritance of
mortgagors' rights by mortgagors—Intersity of mortgagors' rights.
Where the his mort-
property
age was broken up. J. N. N. M. v. M. M. T., I. L.
17 All, 61, distinguished. S. S. v. I. J., I. L. R.,
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Hamada Bibi v. Ahmad Husain

**ACTS—1882—VI (Transfer of Property Act). Section 67, 111, 116—Lease by mortgagee in favour of mortgagee—Mortgagee holding over without payment of rent—Lease when determined—Act No. IV of 1877 (Indian Limitation Act), schedule II, Art. 132—Suit by mortgagee for possession.] A usufructuary mortgagee executed a lease of the mortgaged property in favour of his mortgagees for five years, but after the expiry of the term of the lease neither claimed nor received rent from his mortgagees for more than 12 years and then sued them for possession of the property, held that the suit was barred by limitation. Held also that the lease determined on the expiration of five years and a tenancy from year to year did not come into existence as there was nothing to show that the landlord assented to the tenant's continuing in possession. Prem Sukh v. Dhupia, I. L. R., 2 All., 517, distinguished.

Held also that no suit for sale could be brought upon the mortgage, as the mere fact that it provided for redemption upon payment of the principal did not make it a simple mortgage.

Khandu Lal v. Madan Mohan Lal

**Sections 62 and 100—Mortgage—Effect of satisfaction of entire mortgage debt by one co-mortgagee—Charge—Subrogation.] Held (1) that a mortgager

referred to.

Har Prasad v. Raghunandan Prasad

**Section 85—Mortgage—Suit for sale on a mortgage—Parties.] In a suit for sale on a mortgage the ordinary rule is that a plaintiff mortgagee cannot be

referred to.

Jot Prasad v. Azz Khan

**Sections 88 and 90—**

amounts of both the decrees

Behari Bharthi v. Bhagwan Gir

**Section 69, See Code of Civil Procedure, section 310A,**
ACTS—1882—IV (Transfer of Property Act) sections 60 and 90—Two separate suits on two mortgages held by same person—Sale under decree on the first mortgage—Paid off first mortgage and part of second mortgage—Application under section 90—Application absolute—A person held two mortgages over the same property, brought two separate suits on those mortgages and obtained two decrees. The first decree was made absolute and in execution thereof the decree-holder himself purchased the property. The sale-proceeds discharged the decree on the first mortgage in full and the second decree in part. He then applied for a decree under section 90, Transfer of Property Act. Muhammad Akbar v. Munshi Ram, Weekly Notes, 1909, p. 209, and Radri Das v. Inayat Khan, I. L. R., 22 All, 401, followed.

Kamta Prasad v. Sayyed Ahmad

SECTION 90—Mortgage—Sub mortgage—Purchaser from mortgagor—Mortgage money

and the personal representative of A.

Held that by retaining in his hands parts of the purchase money and expressly or impliedly agreeing to pay the amount to B, C did not become personally liable, and a decree under section 90, Transfer of Property Act, could not be made against him.

Jamma Das v. Ram Autar Pande

SECTIONS 92, 93—Application for enlargement of time—Application to be made to court of first instance, not to an appellate court. An application under section 93, Transfer of Property Act, 1882.

Ram Dham Sahu v. Lalit Singh

ref. ent. not to second

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1907—VIII—Y. v. Y. —section 8—Act No. VII of 1865.—Valuation of sui...eld that the value for purposes of mortgage is the amount of the principal mortgage money and not the value of the property mortgaged. Kuber Singh v. Atma Ram, I.L.R., 5 All., 332, and Aminat Begam v. Bhajan Lal, I.L.R., 8 All., 439, followed. The law as laid down in these cases has not been affected by the passing of Act No. VII of 1897, section 8.

Kedar Singh v. Matadadul Singh...

1900—VII (C Personal Communications) section 1, clause (4), f certificate law.] The...s succession application an alleged will of the deceased was set up, and it was proved that the deceased, being of sufficient testamentary capacity, had, shortly before his death, caused a draft will to be prepared, that he had had the draft read to him twice and explained to him, that he made it over to a person appointed a trustee under the will telling him to have the certificate...have is the alleged for a certificate was rightly dismissed.

Janki v. Kallu Mal...

1890—VIII (Guardians and Wards Act), section 29—Mortgage of minor judgment-debtor’s property—Sanction of District Judge.] The guardian of a minor judgment-debtor, appointed under the District property, with the even 305 of the...

Sarju v. District Judge of Benares...

section 53, See Code of Civil Procedure, section 244..

1896—XII (Excise Act), section 21—Sale—Not for profit.] P. who held no license under the Excise Act, obtained some methylated...Jhansi Club, sent it from the transaction: Held that within the meaning of...

Emperor v. Panna Lal...

1899—II (Indian Stamp Act), Schedule I, Article 53 (c)—Stamp—Receipt for rent—Receipt for money paid out of Court in satisfaction of a decree for rent. Held that, although a receipt for rent of an agricultural holding is exempt from payment of stamp duty under article 63 (c) of the first schedule to the Indian Stamp...
Act, 1899, a receipt for payment out of Court of money due under a
decree for such rent is not so exempt.

Emperor v. Dungar Singh 28

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 20—Appropriation
by creditor of payment towards interest—Interest not paid as such—Money
paid found by Court to be paid as interest.] Under the
terms of a mortgage bond executed in 1884 any payments made
thereunder was to be applied first in payment of interest and next
in payment of principal. The debtor paid several sums from time
to time from 1887 to 1893. A suit for sale was instituted in 1903
and decreed. The mortgaged property being insufficient to discharge
the mortgage an application was filed by the decree-holder for a
decree under section 90 of the Transfer of Property Act. Held that
having regard to the terms of the bond and the finding of the court
of interest, it might
amount of interest
under section 90, Act

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(LOCAL)—1900—I (MUNICIPALITIES ACT), SECTION 183—Jurisdiction
of Civil Courts] A Municipal Board granted permission to B to
build a temple. The District Magistrate acting under section 183
of the Municipalities Act made an order cancelling the permission
given by the Municipal Board and the Local Government confirmed
this order of the District Magistrate. B brought a suit for a declaration
that he had a right to build the temple.

Held that the suit was not maintainable, held further that the
Civil Court had no power to disturb the order of the District Magis-
trate who acted within his jurisdiction and whose order had been
only confirmed by the Local Government. Abdul Aziz v. Municipal
Board of Pilibhit, 2 A. L. J., 222, followed.

Buli Khan Das v. Secretary of State for India 371

(LOCAL)—1901—I (AGRA TENANCY ACT), SECTION 4—Tenant—
License to cut grass from embankment of a Railway line—Profit
a premium—Jurisdiction of Civil Court] A person authorized by a
Railway Company to cut grass from the Railway embankments is

N. & N. W Railway v. Ramahn Singh 342

Rent free
Ine grant the means
Ram Sahib,

Sagar Mal v. Mathan Lal 49

SECTION 7—Applicability
that S was joint with his father at the time of the mortgage and became an exproprietary tenant and was not liable to pay a higher rent than such tenants were liable to pay. Held that the mortgage having been made in 1894, the provisions of the Agra Tenancy Act of 1901 did not apply, and the mortgagee acquired no exproprietary rights in respect of the sit. S was therefore liable to pay rent at the rate mentioned in the kabeelat. Madho Bharti v. Harbi Singh, I.L.R., 16 All., 937, followed.

Shoes Lal Singh v. Sukhdeo Singh ... ... 308

ACTS (LOCAL)—1901—I Agra Tenancy (Act), Sections 22, 32 (2). See Act No. XII of 1851, section 9 ... ... 51

S. 199—Suit by remainder for ejectment of tenant and sub-lessee—Appeal—Jurisdiction.] A remainderer sued to eject one of his occupancy tenants and also certain sub-lessees to whom the occupancy tenant had sub-let part of his holding for building purposes. Held that this was a suit falling within section 31 (2) of the Agra Tenancy Act, 1901, and an appeal from the decree therein lay to the Commissioner and not to the District Judge.

Lochman Das v. Nabi Baksh ... ... 109

... SECTION 22—Division of occupancy holding—Suit for declaration of right—Suit maintained in an agricultural proceeding. See v. Asghar Jams Prasad.

Najib-ul-lah v. Gulsher Khan ... ... 248

... Procedure Code, 1882, 310A...

... SECTIONS 167, 177—Execution of decree—Appeal—Revision—Jurisdiction.] A suit was dismissed by the Revenue Court as not cognizable by it and the District Judge, upon appeal, having dealt with it under section 196 was classed as non-cognizable.

Damber Singh v. Srikrishen Dass ... ... 415

... SECTION 199—Suit for appearance at headquarter civil court.

Lal Singh v. Khaliq Singh ... ... 323

... SECTION 201 (3)—Presumption—Suit for profits in Revenue Court—Question of title decided by Civil Court.] In a suit for profits the defendants pleaded that the plaintiff had no title to certain plots. The Assistant Collector partially decreed the claim. The defendant thereafter and when an appeal was pending before the District Judge obtained a declaration of title to the plots from the Civil Courts. The lower Appellate
Court held that without correction of the mistake the Civil Court's decree could not be given effect to in the Revenue Court.

 Held that when as between parties to a revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. *Durga Shankar v. Gur Charan*, Weekly Notes, 1906, p. 1, referred to.

Bhawan Singh v. Dilawer Khan

**ACTS—(LOCAL) No. II of 1901 (Agra Tenancy Act) sections 201 (31)

Presumption—

**Act for profit

..."..."

been followed by a wrong entry in the revenue papers, held that in a subsequent suit for profits the claim must be in proportion to the share obtained under the Civil Court decree and no presumption arises under section 201 of the Agra Tenancy Act.

Geobind v. Sahib Ram

**SECTIONS 20, 210, 211, See Code of Civil Procedure, 1882, section 310A**

**ACTS—(LOCAL) —1901—III (United Provinces Land Revenue Act), Sections 147, 195 and 199, See Act No. XLI of 1860, section 173.**

**SECTION 223 (k), See Act No. XIX of 1873, sections 132, 231.**

Narain Das v. Bhup Narain

**CIVIL AND REVENUE**

a Dera standing Plaintiff in a partition of a land on which on 233 (k), Land

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**ADMINISTRATION, See Act No. V of 1891, section 78**

**ADOPTION, See Evidence**

**ADVERSE POSSESSION, See Act No. XV of 1877, schedule II, article 139**

**AGENT—Liability of sons and grandsons of—See Act No. XV of 1877, schedule II, article 57.**
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<td>SECTION 202—Procedure—Court not competent to alter judgment after delivery. Where a District Judge wrote and delivered a judgment in a civil appeal, but suspended the issue of his decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment already delivered and to pronounce a second judgment inconsistent therewith. Kishan Kunwar v. Ganga Prasad</td>
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CIVIL PROCEDURE CODE, SECTION 223—Execution of decree—Decree of Court of Small Causes transferred for execution to a High Court on appeal. A decree of a Court of Small Causes was transferred for execution under section 223 of the Code of Civil Procedure to the High Court because the decree-holder sought in execution to bring to sale immovable property of the judgment-debtor. Held that an order in execution of such decree passed by the High Court was appealable to the District Judge.

Atwari v. Maku Lal

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SECTION 244—Execution of decree—Jurisdiction of Court executing a decree—Suit by representative of mortgagor judgment-debtor for declaration of invalidity of mortgage

Held that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representative of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been made. A separate suit therefore, on the part of such persons, seeking a declaration that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of section 244 of the Code of Civil Procedure. Lalubhar v. Chaterbhuy, I.L.R. 21 All., 277, followed.

Jagir Nath Singh v. Sheo Ghulam

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SECTION 245—Execution of decree—Party to suit—Minor representation of, in suit—Appointment of "married woman" to be guardian ad litem contrary to section 457 of Civil Procedure Code—Suit by minor to set aside decree and sales in execution—Separate suit—Guardians and Wards Act (VIII of 1870) section 63. The words "parties to the suit" in section 245 of the Civil Procedure Code (Act XIV of 1852) mean persons who have been properly made parties in accordance with the provisions of the Code.

Where contrary to the provisions of section 457 of the Code a minor had been represented throughout certain litigation by a married woman, her sister and guardian of her person, who was appointed her guardian ad litem.

Held that the minor had not been properly represented in the litigation, and that a suit by her to set aside decree and sales which had taken place in execution of them, and as to which she alleged fraud and breach of trust, was not barred by section 245.

Section 53 of the Guardians and Wards Act (VIII of 1870) does not give a married woman who is guardian of the person of a minor a preference to the appointment of guardian ad litem of such minor. That section leaves section 457 of the Civil Procedure Code untouched, the effect of the two sections read together being that a proper guardian of the person of the minor may, if properly qualified, be preferred as the guardian ad litem.

Rashid-un-nisa v. Muhammad Ismail Khan

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SECTIONS 244, 319, 319—Execution of decree—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder, auction purchaser—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 183.] A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction.
sale held in execution of a decree. Sukhraj v. Sri Gopal, I. L. R., 17 All., 222, and Makubh Pershad Singh v. Macnaghten, I. L. R., 16 Cal., 632, referred to.


STANLEY, C. J., contra (Knox J., concurring).

of C.

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referred to.


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CIVIL PROCEDURE CODE (1882) SECTIONS 211, 383—Decree ex parte—Sale under—Decree set aside—Second decree satisfied—Suit for
possession by judgment-deputy not barred.] X, obtained an ex parte decree for sale on a mortgage and in execution thereof caused the mortgaged property to be sold and purchased it himself. The ex parte decree was subsequently set aside and another decree was obtained after contest. That decree was satisfied before the property could be sold a second time. As X continued in possession on a suit was brought against him to recover possession. Held that the suit was not barred by the provisions of section 214 or section 583 of the Code of Civil Procedure, 1882.

Girdhar Lal v. Khusalia Ram

CIVIL PROCEDURE CODE (1882), sections 214, 583—Sale in execution of a decree—Possession given to purchaser who was the decree-holder—Setting aside sale for irregularity—Satisfaction of decree and... 364

default of payment and purchased by the decree-holder who had obtained leave to bid. The purchase money was not paid but was set off by the applicant against the amount due under the decree, which gave no future interest. Possession was given to the applicant in December 1901. In September 1903 the sale was set aside for irregularity and in March 1904 the respondents paid to the applicant the amount due under the decree and possession of the property was restored to them.

Held (affirming the decisions of the Courts in India) that the Code of Civil Procedure does not permit a separate Lordship disposed to permit

Held also that the applicant was not entitled to interest on his purchase money which had not been actually paid, but was set off against what was due on the decree. The sale was set aside for his fault and it was out of the question that he should be allowed to make a profit at the expense of the respondents out of his own error, and so in effect recover interest not allowed him by the decree.

Proa Narain v. Kamalchandra Singh

SECTION 186—Powers of decree—Attaching a decree-holder out of the judgment-months, the payment of a private servant in whose errand he was not liable to attachment in advance. Holman v. Hoddin, 1 Q B, 337, and Aggerwar v. Gurnani, I L R, 31 All, 343, referred to and followed. Harshadhar v. Brij Sah, I L R, 23 All, 184, distinguished.

Dev Prasad v. Law.

Act No XXIII of 1871, section 11

SECTION 260(a)—See... 304

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Ali Ahmad Khan v. Bansidhar ...

CIVIL PROCEDURE CODE, SECTIONS 255 AND 400—Attachment before judgment—Execution of decree—Sale by Munisif under Small Cause Court decree pending attachment by Subordinate Judge—Sale a nullity—Jurisdiction. Certain immovable property had been attached before judgment by the Subordinate Judge, and a decree was passed thereafter. The same property was sold in execution of a Small Cause decree by the Munisif to whom that decree had been transferred for execution. Held that a re-attachment by the Subordinate Judge was unnecessary and that the Munisif had no jurisdiction to sell the property while under attachment by a higher court and the sale was a nullity. *Har Prasad v. Jagan Lal*, I. L. R., 27 All. 56, followed.

Durbani Bibi v. Ram Nath Pal ...

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**SECTION 310A—Act (Local) No III of 1899**

both of them. The judgment-debtor applied to the Assistant Collector, offering to pay the sum decreed under section 310A of the Code of Civil Procedure, 1892. The application was rejected by the Assistant Collector, a payment of Revenue rejected the application for revision made by the auction-purchaser, who thereupon brought a suit for confirmation of the sale in the Civil Court.

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Ghakauri Khan v. Mir Baksh Khan ...

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**SECTION 310A—Act No. IV of 1892**

(*Transfer of Property Act*), section 89—Sale held in pursuance of a decree under section 89. Under section 89 of the Transfer to be sold and purchased it application under section 314 setting aside the sale. Held that in the absence of special rules framed by the High Court for carrying out orders under chapter IV of Act IV of 1892, the provisions of the Code of Civil Procedure applied and the application by the judgment-debtor could be entertained under section 310A.

Than Chand v. Jaggannath ...
CIVIL PROCEDURE CODE (1852), SECTION 317—When applicable,—Plea that purchase was made on behalf of family.] When properly is purchased at a Court sale in the name of one of the members of a Hindu family which is alleged to be a joint family and it is alleged that the purchase was made on behalf of the family, held that section 317 of the Code of Civil Procedure, 1852, has no application to such a case. The object of section 317 is to check lomeni purchases.

Hari Singh v. Sher Singh

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SECTION 373, See Act XV of 1877, (Indian Limitation Act), Schedule II, Article 67

** 429

SECTION 410—Minor suing through next friend other than certificated guardian—Permission of Court presumed—Procedure.] A minor whose had a certificated guardian living instituted a suit through a next friend other than the guardian. On the application of the next friend notice was sent to the certificated guardian, but he showed no cause, and the suit continued. Held that under the circumstances, although no formal order had been recorded permitting the next friend to act on the minor’s behalf, it must be presumed that the intention of the Court had been to grant such permission, and the suit ought not to be defeated solely upon the ground that no formal permission had been recorded.

Sudhir Nig v. Hame Lal

** **

SECTION 502—Arbitration—Insufficiency of reference and award—Appeal from decree passed in accordance with such award.] Where there is no valid reference to arbitration and no valid award the decree passed in accordance thereon cannot be maintained, and an appeal lies against such decree.


Shub Lal v. Chaturbhuj

** **

SECTION 625—Criminal Procedure Code, sections 195, 430—Act No. XVIII of 1879 (Legal Practitioners Act), section 14—Jurisdiction.] A complaint made by letter by a barrister to the Subordinate Judge charging a pleader with professional misconduct was “filed” by the Subordinate Judge, but on a similar complaint being sent to the District Judge, the District Judge having inquired into its authenticity, sent it to the Subordinate Judge for inquiry and report. The Subordinate Judge thereupon instituted an inquiry under section 14 of the Legal Practitioners Act, as a result of which he granted sanction to the pleader to prosecute for petty one of the witnesses who had appeared before him in the course of the inquiry, and this order was confirmed by the District Judge.

Held that the High Court had no jurisdiction to interfere with the order of the Subordinate Judge under either section 195 of the Code of Criminal Procedure, nor could it interfere under section 622 of the Code of Civil Procedure, as such as the Subordinate Judge, though he possibly mistook the meaning of the District Judge’s order addressed to him, had jurisdiction to require into the truth of the charge made against the pleader.

Madan Hasan v. Sayed Hasan

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SECTION 626, 628—Review of judgment—Rejection of application for return upon the ground of want of jurisdiction—Revision.] Section 623 of the Code of Civil Procedure, 1852, must be read with section 626. Where the Court does
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not consider whether or not there are sufficient grounds for review.

Akbar Khan v. Muhammad Al Khan 610

CIVIL PROCEDURE CODE (1908), section 2, 109—Order XLV

Rule 1—Practice—Appeal to the King in Council—Order of remand—Order—Final and interlocutory. An order of remand which determines only a part of the case and leaves other matters still to be determined is not a 'final order,' within the meaning of section 109, Code of Civil Procedure. Sanyal Muzhar Mosin v. Bodha Babi, I.L.R. 17 All., 112; Standard Discount Co. v. La Grange, L.R., 3 C. 1. D. 67 and Salman v. Warner, I Q. B. D., 734, referred to.

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CONSTRUCTION OF DOCUMENT—Will—'Persona designata'] By

I.A., 253, followed.

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—See Act No. X of 1855, section 84 239

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—See Hindu law 339

—See Preemption 533, 539

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CO-SHARED, See Pro-emption 274
COURT FEE—See Act No. VII of 1870 262, 265, 294

CRIMINAL PROCEDURE CODE, SECTIONS 133 AND 137—Order to show cause—Accused appearing—Starting proceedings]. Where a person ordered to show cause under section 133, Criminal Procedure Code, appears and shows cause, the Magistrate is bound to take evidence as in a summons case, i.e., the complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence, if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. Armath Roy v. Asaduddin Hulder, I. L. R., 24 Cal., 805, followed.

King-Emperor v. Hinga 453

Sect. 145 and 435—Statute 21 and 25

Vict., Cap. CIV., section 15—Order under section 145, Criminal Procedure Code—Revision—Power of High Court.] Where proceedings are in intention, in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly power vested section necessary R., 24, 2 A., L., I. L. R.,

Jhinga Singh v. Ram Parshad 160

and 24—27

section 163, See Act No. I of 1872, sections 8

section 172—Compromise—Assault in the course of which one of the persons assaulted was the father of the other. Power vested T. of the F. to thespect of the injuries caused to the person deceased.

Emperor v. Sultan Singh 603

section 195—Sanction to prosecute—Appeal.] Held that when sanction to prosecute has been granted by a Court under the provisions of section 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. Surya Ram v. Ranji Lal, I. L. R., 28 All., 553, Emperor v. Sirk Mal, Weekly Notes, 1903, p. 120, and Kuthunamani v. Madan v. Pratap Chetti, I. L. R., 80 Mad., 332, referred to.

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section 105, 433, See Civil Procedure 38

section 403 (1)—No complaint—Order of acquittal—Whether bar to new trial.] A soldier from Burma sent
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have been notoriety in the neighbourhood where it took place, the
respondent had failed to discharge the burden of proof which lay
upon him, and had not established his claim.

The provisions under Section 186 of the Indian Evidence Act,
1872, state that a witness who has a duty to produce the
evidence he is under a duty so to produce, and the courts have
given effect to this provision, especially in cases where the
witness has a duty to produce the evidence, and has failed to
produce it. The courts have held that the provision is mandatory
and that a witness who has a duty to produce evidence is
compelled to produce it, and that failure to produce it is
considered as evidence of concealing it.

Krishna Lal v. Chandra Pal

EVIDENCE—See Act No. 1 of 1872, sections 21 and 27

See Regulation No. VIII of 1872

EXCHANGE, See Pre-emption

EXECUTION OF DEEDS—Conditional deeds—Smaller sum payable
of the amount due on the bond with interest at 20 per cent. per
year, and the decree of the court of first instance directed that if the
defendant deposited the money within three months from the date of
the decree, he would be liable to pay interest at the rate of 12 per
cent. per annum, and would be exempted from further liability. This
deed was affirmed by the High Court and finally by the Privy
Council, but the time for payment was not extended.

Held that the defendant having made a default in the payment of the money
within the time allowed by the first court, he could not claim exemption
from further liability and could not be allowed to pay the principal
with interest at the rate of 12 per cent. from the date of the Privy
Council decree.

Ganeshchandra Lal v. Ram Narain

GUARDIAN AD LITEM, See Civil Procedure Code, section 440

GUARDIAN AND MINOR, See Act No. XV of 1877, section 155

HIGH COURT, Powers of—See Criminal Procedure Code, sections 145
and 146
HINDU LAW

allegation of
daurers

of the sole surviving daughter of a Hindu widow in possession of her husband’s estate who had in 1857 executed, in favour of the plaintiffs’ paternal grandfather, a bond for money advanced to the widow for family purposes, including the cost of litigation which was eventually successful in procuring the estate of her husband. The defendants were purchasers from the same creditor to whom, in 1860, the mother of the plaintiffs, in satisfaction of a decree obtained against her on the bond, representing her father’s estate, transferred the property in suit. In her petition to the court for permission to settle the claim in this way, she stated that the property to be assigned was “owned and possessed” by her, and that the judgment creditor was to enter into possession as a proprietor like the petitioner.”

Held by the Judicial Committee that on the construction of the transfer it was intended to convey an absolute estate.

Disputes which arose as to the succession to the property in suit, which originally belonged to the maternal great-grandfather of the plaintiffs, were settled by a compromise made on 21st July 1830, between the claimants, namely, his daughter’s son, and

Held on the construction of the compromise that the granddaughters acquired under it only a life-interest in the property, their right to which must be taken to have been derived through their father notwithstanding that his own father survived him, his title, in whatsoever way it was defective, being pro tanto cured by the agreement of compromise.

Karimuddin v. Govind Krishna Narain... 497

Construction of will—Request to a female on her death to her adopted son—Interpretation of the word, ‘Malik’—Request not conditional on adoption. A testator bequeathed all his property to S and on her death to her adopted son K. K being the daughter’s adoption. Tanandra Deb v Rajeswar, I. L. R., 12 I. A., 71, referred to.

Muriad Lal v. Kundan Lal... 837
have been notorious in the neighbourhood where it took place, the respondent had failed to discharge the burden of proof which lay upon him, and had not established his claim.

The practice common in litigation in the United Provinces in India for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client, disapproved of by their Lordships of the Judicial Committee as resulting in the embarrassment of litigation, and is being a practice which judicial tribunals ought to set themselves to render as abortive as it is objectionable

Kishori Lal v Chunn I 4

EVIDENCE—See Act No I of 1859, sections 22 and 23

--- See Act No I of 1872, sections 22 and 24—27

--- of custom of succession to unpartitioned estate, whether admissible in proving succession to partitioned estate, See Act No I of 1859, sections 22 and 23

--- Admissibility—See Regulation No VII of 1922

EXCHANGE, See Pre-emption

EXECUTION OF DEGREE—Conditional decree—Smaller sum payable if payment made within a time fixed by court—Deeere of first court and first Court and sum of minimum of defendant date of its per cent. lity. Thus decree was affirmed by the High Court and finally by the Privy Council, but the time for payment was not extended Held that the defendant having made default in the payment of the money within the time allowed by the first court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 14 per cent from the date of the Privy Council decree.

Ghanshyam Lal v Ram Naram

--- See Act No XV of 1877, section 20

--- See Act No IV of 1852, sections 98 and 99

--- See Act (Local) No 11 of 1901, section 167

--- See Civil Procedure Code, section 223

--- section 244

--- sections 241, 313, 313, 62

--- section 361

--- section 257

--- section 285

GUARDIAN AD LITEM, See Civil Procedure Code, section 410

GUARDIAN AND MINOR, See Act No XV of 1877, section 8

HIGH COURT. Powers of—See Criminal Procedure Code, sections 145 and 435
HINDU LAW — Alienation by Hindu widow — Debt justifying alienation — Legal necessity — Transfer to satisfy decree — Construction of Preservation of family estate — Nature of estate taken by daughters through father with imperfect title. The plaintiffs were the sons of the sole surviving daughter of a Hindu widow in possession of her husband's estate who had in 1857 executed, in favour of the plain-

mutter of the plaintiffs, in satisfaction of a decree obtained against him on the bond as representing her father's estate, transferred the property in suit. In her petition to the court for permission to settle the claim in that way, she stated that the property to be assigned was 'owned and possessed' by her, and that the judgment creditor was 'in enter into possession as a proprietor like the petitioner.'

Held by the Judicial Committee that on the construction of the transfer it was intended to convey an absolute estate.

Held also that the debt was one for which she was justified in alienating the family property. The preservation of the estate of her husband and the costs of litigation for that purpose were objects especially applicable in a case like the present, where, but for the debt, the estate would have been lost to the plaintiffs.

Disputes which arose as to the succession to the property in suit, which originally belonged to the maternal great-grandfather of the plaintiffs, were settled by a compromise made on 21st July 1830, between the claimants, namely, his daughter's son, and the two daughters of a son, who predeceased him, whereby certain shares of the estate were allotted to each of them; and on the death of her sister in 1830, the surviving daughter (the mother of the plaintiff) succeeded to her share by survivorship.

Held on the construction of the compromise that the granddaughters acquired under it only a life-interest in the property, their right to which must be taken to have been derived through the father notwithstanding that his own father survived him, his title, in whatsoever way it was defective, being pro tanto cured by the agreement of compromise.

Karimuddin v Govinda Krishna Narain

Construction of will — Bequest to a female on her death to her adopted son — Interpretation of the word, 'Matik' — Bequest not conditional on adoption. A testator bequeathed all his property to S and on her death to her adopted son K. K being the daughter's son of S could not be adopted under the Hindu Law. The testator further directed under the will that his daughter and his predeceased son's daughters were to be excluded. Held that it was the intention of the testator to make K the object of his bounty irrespective of adoption. Fanindra Deb v Rajessar, I. L. R., 12 I. A., 73, referred to.

Munshi Lal v Kundan Lal

HINDU LAW — Alienation of property — Aliens. A Hindu Law which had migrated into another Province is presumed
HINDU LAW—Hindu Widow—Maintenance—Remarriage of widow—Act No. XI of 1856.] During the lifetime of her husband the wife of a Hindu obtained a decree for maintenance against him, and the decree was impugned on the ground that the husband had made a charge on the estate (Heleew). Married again.

Held that the fact of the widow having married again did not disentitle her to maintenance of her first husband.

Cala., 289, E.

Gajudhar v. Kauruilla 161

--- Mitakshara—Daughter's daughter's son—Bhima gaura Sayada—Bundhu—Alienation by Hindu widow—Legal necessity—Brod of grain] A daughter's daughter's son is a bundhu, and in the absence of any other heir he is entitled to succeed to the estate of the last owner.

A mere written in a mortgage-deed executed by a Hindu widow with a qualified interest as to the evidence of necessities is not enough. It is for the creditor to show either that there was legal necessity or at least that he was left on reasonable grounds to believe that there was necessity for the alienation.

Ajuhan v. Ram Sumer Singh 454

--- Mitakshara—Joint Hindu Family—Addition of joint family property by father—Liability of son in suit to enforce 

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage was actually made for some purpose the same.
mortgage was tainted with immorality.

_Held by Stanley, C J., and Knox and Arkan, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property._

Per Bannister, J., (Richards, J., concurring):—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father in the arrears at prior to enforce the debt son to not his

pious duty to discharge it.


Chandradeo Singh v. Mata Prasad
ancestral property neither for a lawful necessity nor for an antecedent reason.

Kah Shankar v. Nawab Singh

Partition—Property gifted away to one son to the detriment of another—Share in the property gifted. When a Hindu father governed by the Mitakshara makes a gift of his movable property to one son to the detriment of the other, not on account of affection for that son, but to punish and disinherit the other son, debt that the alienation is bad and that in a suit for partition the son can claim a share in the property gifted to the other son.

Nand Ram v. Mangal Sen

Partition—Requisite for partition—Agreement amongst members of joint family to hold the property in defined shares—Agreement embodied in petition to Collector—Entry of names in village papers in accordance with petition—Mode of considering documents.

 Held by the Judicial Committee (considering the decision of the High Court) that on the facts of the case, partition of the property by mutual consent and conduct of the members in management of the property in separate shares from that time, the property was held jointly. In Appeal v. Surendra Mohan, 11 Mar. 1, 1910, and Balkrishna Dey v. Ram Narain Singh, 1, 10, 12, etc., 1911, 1, 10, 12, etc.
The High Court had proceeded on an erroneous method in considering whether each document was by itself sufficient to rebut the prima facie presumption that as the family wasjoint before 1861 it continued to be joint and wanting to take into account the cumulative effect of all the documents, which taken together showed that all the transactions of the 38 years from 1861 to 1899 could only be reconciled and made consistent on one hypothesis, namely, that the petition of 1831 was a genuine document, and the agreement it embodied a real agreement.

Pachali Nandadad Singh

**HINDU LAW**, *See Act No. XVII of 1876*, section 74

**—** *See Act No. IV of 1882*, section 6

**—** *See Act No. VII of 1889*, section 1, cl. (4)

**—** *See Evidence*

**—** *See Will*

**HINDU WIDOW, See Hindu law*

**—** *See Will*

**“HOLDING,” See Act (Local) No. II of 1901, sections 1 (5), 82 (2)**

**INHERITANCE, See Muhammadan Law**

**INTEREST not paid as such—See Act No. IX of 1893, section 20**

**INTERLOCUTORY ORDER, See Code of Civil Procedure (1908), section 2**

**JOINT HINDU FAMILY, See Act No. XV of 1877, section 8**

**—** Agreement among members of—*to hold property in defined shares, See Hindu Law*

**—** Property gifted by father to one son to the detriment of another, *See Hindu Law*

**—** Purchase made on behalf of—*See Civil Procedure Code, 1852*, section 317

**—** *See Hindu law*

**—** *176, 477, 589*

**JUDGMENT, See Civil Procedure Code, section 209**

**JURISDICTION, See Act No. XIX of 1873, sections 132, 211**

**—** *See Act No. XVIII of 1872, section 36*

**—** *See Act (Local) No. I of 1900, section 163*

**—** *See Act (Local) No. II of 1901, section 35, 57, 170, 109*

**—** *See Act (Local) No. II of 1901, section 167*

**—** *See Act (Local) No. III of 1901, section 233 k*

**—** *See Civil Procedure Code (1882), section 214*

**—** section 285

**—** section 2101

**—** section 632

**—** section 105 (7) (c)

**—** of Civil Court—*See Act (Local) No. II of 1901, section 4*

**—** of Provincial Commissioner—*See Act No. XXVI of 1863*

**—**

**—**

**KABBULIAT without a lease, See Landlord and Tenant**

**—**

**KIDNAPPING, See Act No. XIX of 1860 (Indian Penal Code), sections 361 and 362**

**—**

**—**

**LANDLORD AND TENANT—Possession without a lease—Kabbuliat—Suit for rent—Liability for compensation for use and occupation—Denial of liability—Exemption.** When certain persons entered into possession of property executing a registered *Kabbuliat* and paid rent for
some time, but in a suit for rent pleaded that in the absence of a lease there was no contract of tenancy and rent could not be recovered. By suit, held that the suit might be treated as one for use and occupation, and in view of the fact that the defendants entered into and continued in possession, they could not be heard to say that they were not liable for use and occupation.

Sree Kuran Singh v. Mahanaki Pahlu Nara Singh ... 276

LANDLORD AND TENANT—See Act No. XV of 1877, schedule II, article 139 ... 514

LEASE by mortgagee in favour of mortgagor, See Act I.c. XIV of 1882, sections 67, 111, 116 ... 318

LEASE for a term of years, See Act No XV of 1877, schedule II, article 139 ... 514

LEGAL NECESSITY, See Hindu Law ... 454, 497

LIABILITY, Personal—of purchaser from mortgagor, See Act No IV of 1882, section 59 ... 332

LICENSE to cut grass, See Act (Local) No II of 1901, section 4 ... 342

LIMITATION, See Act No. XV of 1877, section 20 ... 495, 519

———See Act No. XV of 1877, schedule II, article 50 ... 422

———See Act No. XV of 1877, schedule II, article 132 ... 9

———See Act No XV of 1877, schedule II, article 139 ... 514

———See Mortgage by conditional sale ... 300

MAINTENANCE, See INdru widow ... 161

MALICIOUS PROSECUTION, See Torts ... 383

... 444

... Act No. X of 1865, ... 239

MARRIAGE brought about by fraud, See Muhammadan Law ... 243

MENSES—PROFITS, Remedy for recovery of—See Code of Civil Procedure, section 214 ... 551

MINOR, See Act No. IX of 1872, sect on 11 ... 21

MINORS, Representation of—a suit, See Code of Civil Procedure, section 214 ... 272

MITAKSHARA, See INdru Law ... 454, 507, 590

MORTGAGE—Compromise in course of mutation proceedings purporting to vary the terms of a registered deed dwon to ... 1

Court of B ... 1

pre-existent could not terms of ... 1

Woolly N ... 1

Mahal ... 1

Ann. I. R. 22 Jan 103, referred to by Banerje and Richards ... 13

Sala-ud-din Ahmad v. Chauj ... 13
have been satisfied by sale of mortgaged property it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. *Ibn Husain v. Ram Das*, 1 I. L. R., 12 All., 110, and *Ibn Hasun v. Brijbhavan Saran*, 1 I. L. R., 26 All., 407, referred to.

**Muhammad Yahya v. Razi-ul-din**... 63

on be redemption the mortgages set up five other later bonds and claimed that before redemption of the original mortgage could be effected those bonds should also be redeemed, held that as the bonds created charges on the property and there was a special stipulation that they should be paid off before the mortgage was redeemed, the claim was a good one.


**Ranjit Khan v. Ramdhan Singh**...

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**Sale of mortgaged property - Purchasers - Sale subject to prior encumbrances - Purchase by decree-holder - Suit to recover from purchaser the amount due on prior encumbrances when they have been after the purchase, declared invalid**. Certain villages were put up for sale in execution of a decree under Section 88 of the Transfer of Property Act (IV of 1882), and it was notified in the proclamation of sale that the property was to be sold subject to two prior mortgages of 25th May, and 2nd December, 1877. The decree-holder (the predecessor in title of defendants) obtained leave to bid and became the purchaser. The suit to enforce the Privy invalid. In a suits to enforce the auction purchaser to recover the amount due on the two mortgages of 1877, as 'unpaid vendors' purchase money.'

**Heled (reversing the decision of the High Court)** that the suit was not maintainable. On the sale of property subject to encumbrances or supposed encumbrances has led to a diminution of the price, and liable therefore to account to the vendor for anything.
that remains of that amount after the circumstances are satisfied or disposed of, is without foundation. After the purchase is completed the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase.


_Izat-un-nisa Begum v. Partab Singh_...

**MORTGAGE**—_Regulation for redemption within seven years—Suit for redemption—Limitation._[Section 157, Rent Act]. The plaintiffs' ancestor executed a mortgage of certain property in favour of the defendant's ancestor who simultaneously executed an agreement to reconvey. The latter did not provide that if within a period of seven years _finder must set sail_ the vendee paid to the vendor Rs. 300, which was the consideration for the sale, the vendee would reconvey the property. Held that the transaction amounted to a mortgage by conditional sale, that the mortgagee had no right to redeem the mortgage before the expiry of seven years from the date of the mortgage, and that time did not begin to run until after seven years from the execution of the mortgage.

_Rahul Prasad v. Phuyan Din_...

--- See Act No. IV of 1882, sections 82 and 100...
--- See Act No. IV of 1882, section 85...
--- See Civil Procedure Code, section 13...
--- of ancestral property by one member, _See Hindu Law_...
--- of joint family property by father, _See Hindu law_...
--- of son, _See Act (Local) No. II of 1903, section 7_...
--- integrity of—broken up, _See Act No. IV of 1882, section 100_...

**MUHAMMADAN LAW**—_Inheritance—Distribution of Muhammadan's estate—Custom excluding females—Concurrent findings of fact as to existence of custom—Practice of Privy Council—Limitation Act (XIV of 1877) schedule II, articles 123, 144—Share of sister where daughters are excluded—Compromise of former suit—Effect of compromise as estoppel—Rejection of claim—Omission to make claim in a former suit—Civil Procedure Code (XIV of 1882), section 42._ In a suit brought in 1809 for a share of her sister's immovable property, the distribution of which the plaintiff contended was governed by the Muhammadan Law, the defendant set up a family custom, excluding female heirs, as governing the rights of the parties. Both the Courts in India held on the evidence that the custom alleged by the defendant to exist was not established.

_Held by the Judicial Committee_ that the existence of the custom was a question of fact, and that their usual practice of accepting concurrent findings of fact should be followed.

_A Muhammadan died in 1803 possessed of immovable property_...
from his father, the plaintiff claimed the latter as sole heir on the
ground that the widow and daughters were excluded by custom from
inheriting, and that the defendants' fathers had predeceased the
brother whose estate she was claiming.

Held in respect of the former property that the cause of action
arose at the earliest from the death of junior widow, and the suit hav-
ing been brought within 12 years from that date was not barred by
limitation.

The Court of the Judicial Commissioners held that the daughters
but not the widow were excluded by custom, and calculated the share
of the plaintiff on the principle that as the custom by which daughters
were excluded was founded on the notion that property should not be
allowed to pass into another family, the exclusion should operate for
the benefit of the persons who became heirs in default of daughters
who should therefore be treated as non-existent so as to let in the
defendants, the nephews, and their Lordships of the Judicial Commit-
tee affirmed that view.

In 1895 the plaintiff had brought a suit for maintenance against
her brothers who were in possession of their father's property, and
in that suit she made a compromise with them on 10th September
1896 on the terms that they would pay her an allowance of Rs. 60
per annum for life; and objection was taken in the suit brought in
1903 that by her statements and conduct she had relinquished any
right to her father's property, being estopped by the compromise made
in the suit of 1895, and by her omission to make her present claim
in either of the former suits.

Held for the reasons given by the Court of the Judicial Commissio-
er, that under the circumstances no remuneration could be implied
in to

The

and
to do so.

Muhammad Kamil v. Imtiaz Fatima

Pre-emption—Shaft khali—Easement.] In a suit
for pre-emption it was found that the house of the pre-emptor dis-

Held also, that the Muhammadan Law does not prescribe any
period which would give a person the right to enjoy an immunity such
as that of discharging water or a right of way.

Baldeo v. Badri Nath

consummation—
of wife.] The

fraud—No

usurp is

not liable to pay the dower of the deceased wife to her heirs.

Abdul Latif Khan v. Nas Ahmad Khan

Summa—Waqf—Incursion for celebration of
anniversary of birth of Ali Murtaza, expenses of the Muharram and
the death anniversaries of members of the family of the wakfs, also for
repairs of imambargh—Waqf held to be valid.] A Muhammadan
lady belonging to the Swami sect purported to make a waqf of all her
property and provided that a sum
of keeping taws in the month
of the deaths of members of the
repairs of an inambara which
the waqf has made, and declared
that the property had been dedi-
cated to God and charitable and religious purposes.

there was an inten-
d charitable purposes,
were valid.

Bibi Jan. v. Kafi Husain

MUHAMMADAN LAW. See Act No. IV of 1892, section 53

MUTATION OF NAMES, See mortgage

not be maintained in respect of a public nuisance save by a person
who suffers particular damage beyond what is suffered by him in
common with all other persons affected by the nuisance.

Bhawan Singh v. Narottam Singh

OCCUPANCY HOLDING, See Act No. XII of 1891, section 9

PARTIES, See Act No. IV of 1892, section 86

PARTITION—Compromise—Right of co-owners to partition—Effect of
agreement to remain joint.] By a compromise entered into in the
course of proceedings for partition, it was agreed that the share of
partitioned, that of the
although such compro-
a obtaining partition in
it was entered into, it
sequently making a fresh

application for partition enter se.

Chandar Shekhar v. Rundan Lal

—See Act No. XIX of 1873, sections 132, 211

—See Act No. XVII of 1873, section 74

—See Hindu Law

—Mode of—See Act (Local) No. III of 1901, section 238 (2)

PRE-EMPTION—Village divided into several small—Rights of pre-
emption given to co-sharers in the village—Right among co-
sharers the land to be shared equally among the co-
sharers

PRE-EMPTION, See Act No. XVIII of 1873, section 36

of Privy Council, See Muhammadan Law

See Code of Civil Procedure (1908) section 9

PRE-EMPTION—Village divided into several small—Rights of pre-
emption given to co-sharers in the village—Right among co-
sharers the land to be shared equally among the co-
sharers

One of the co-sharers, etc., was subsequently sub-divided into
several small lands, and under the new arrangement the lands were
divided among the co-sharers.

Held that

A co-sharer

Held that
the vendee being a co-sharer in the village the plaintiff had no preferential right of pre-emption inasmuch as the old patti and thoka had been done away with. Dalgangan Singh v. Kalha Singh, I. L. R., 21 All., 1, distinguished.

Daria v. Harbhalal

PRE-EMPTION—Wajib-ul-az—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption Held that in the case of a suit for pre-emption based upon a contract embedded in the wajib-ul-az the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit. Janak Prasad v. Ishar Das, I. L. R., 21 All. 371, and Ram Gopal v. Pares Lal, I. L. R., 21 All., 411, distinguished.

Gopal Prasad v. Badal Singh

Vendee stranger at date of sale—Subsequent acquisition of share by vendee—Cause of action Let pendens Where a suit for pre-emption was dismissed for deficiency of court fees in both the Courts below, which decree was subsequently reversed by the High Court and the case remanded, and the vendee in the meantime acquired the status of a co-sharer, held that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. Held further that even if the date of decree can be looked to, that date must be the date on which the decree ought to have been made in the plaintiff's favour and not a later date.

Rohan Singh v. Bhan Lal

Wajib-ul-az—Construction—Custom or contract—Silence as to right of pre-emption in wajib-ul-az of last settlement—Duties of Settlement Officer when preparing record of rights. Where in a suit for pre-emption, the wajib-ul-az of 1833 made no mention of the right and subsequent wajib-ul-az of 1863 referred to the right of pre-emption in the following terms:—"In future every one would be entitled to transfer etc., but the wajib-ul-az prepared

sent for,

Harmand v. Kallu

Wajib-ul-az—Custom of contract—Interpretation of document—Exchange—Variation in terms of wajib-ul-az. An exchange gives rise to a right of pre-emption when such right arises on a sale. Where there has been a variation in the terms of the

Daryao Singh v. Jahan Singh

Wajib-ul-az—Devolution of pre-emptor's interest before suit brought—Right of heir to maintain suit—Plaintiff pre-emptor joining as co-plaintiff the heir of a deceased co-sharer Where a right of pre-emption exists by custom as recorded in the
to decidedly the larger party should be applied to, the celebration of the

of Muharram, the anniversaries of the deaths of members of the

the waqf’s family and the expenses for repairs of an imambara which

the waqf had built, and declared that the property had been dedi-

cated to God and charitable and religious purposes.

Held that the dedication was not illusory, there was an inten-

tion of creating a substantial waqf for pious and charitable pur-

puses, and the objects for which the waqf was created were valid.

Biba Jan v. Kalb Husam

MUHAMMADAN LAW. See Act No. IV of 1832, section 53

MUTATION OF NAMES. See mortgage

Nuisance. See nuisance (Mandatory

action ex-

a person

who suffers particular damage beyond what is suffered by him in

common with all other persons affected by the nuisance.

Bhawan Singh v. Narottam Singh

OCCUPANCY HOLDING. See Act No. XII of 1861, section 9

PARTIES. See Act No. IV of 1892, section 65

Effect of

into in the

the share of

a be partitioned, that of the

that although such compro-

from obtaining partition in

which it was entered into, it

subsequently making a fresh

Chandar Shekhar v. Kundan Lal

——— See Act No. XIX of 1873, sections 132, 211

——— See Act No. XVII of 1876, section 74

——— See Hindu Law

——— Mode of — See Act (Local) No. III of 1901, section 283 (b)

——— requisites for — See Hindu Law

POLITICAL PENSION — See Act No. XXII of 1871, section 11

POSSESSION, without lease — See Landlord and Tenant

PRE-EMPTION — Village divided into several mahals — Rights of

pre-

emption given to co-shares in the village — Right among co-

sharers of thoks.

The mahal-owners of a village gave a right of pre-emption to

share-holders in a patti, then to those in a mahal and lastly,

to those in a village. The village was divided into several thoks.

One of the thoks, viz., Jachal, was subsequently sub-divided into

several mahals and under the new arrangement the thoks were

done away with. A share was sold in the thok so sub-divided

and was purchased by a co-sharer in one of the old thoks. A co-

sharer

in one of the mahals of that Jachal sued for pre-emption. Held that

PRE-EMPTION — Village divided into several mahals — Rights of

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and was purchased by a co-sharer in one of the old thoks. A co-

sharer

in one of the mahals of that Jachal sued for pre-emption. Held that
had no pro-
and thoma
Singh, I. L.

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PRE-EMPTION—Wajib-ul-ars—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption Held that in the contract embodied in the sale unaltered by the fact that it expired during the period, it was necessary to look to the subsequent execution to determine the pre-emption, and the suit for pre-emption. Iraasu v. Ishter Das, L.R. 21 All, 374, and Ram Gopal v. Dhire Lal, I. L. R. 21 All, 411, distinguished.

Gopal Prasad v. Badal Singh .................................. 111

Finds a stranger at time of sale—Subsec.

Rohan Singh v. Dhan Lal .................................... 530

Wajib-ul-ars—Waiver

Silence

Duty

Where a subsequent contract made no mention of the right and subsequent wajib-ul-ars of 1863 referred to the right of pre-emption in the following terms, "In future every one would be entitled to transfer etc., but the wajib-ul-ars prepared at the settlement of 1890 was silent as to any right of pre-emption."

It would be assumed, as the rules framed for the settlement of the district under section 257 of Act No. XIX of 1853 did not require the settlement officer to put on record any custom of pre-emption. Tota v. Sheo Narain, F. A. P. O. No. 135 of 1893 decided on June 15, 1899, dissented for.

Harmand v. Kallu ............................................. 533

Wajib-ul-ars—Custom of contract—Interpretation of document—Exchange—Variation in terms of—exchange gives r

on a sale. Wh

Wajib-ul-ars

previous wajib-ul-ar

terms of the late

Gulab Singh v.

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village majub-ullaz, the right having once accrued does not of necessity lapse by the death of the pre-emptor before making a claim, but descends along with the property in virtue of which it subsists to the heir of the pre-emptor.

Soma if the pre-emptor sells such property to a stranger.

The heir of a pre-emptor cannot be considered to be a "stranger" as that term is generally understood in connection with a customary right of pre-emption, nor will his joinder with a co-sharer in a suit for pre-emption have the effect of defeating the right of his co-

plaintiff.

So held by Richards and Tubbll, JJ., (dissentient Banerji, J.) Muhammad Yusof Ali Khan v. Dal-Kumar, I. L. R. 20 All., 148
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January 1907, unreported, Fida Ali v. Muhammad Ali, I. L. R. 5
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v. Mohan Singh, I. L. R., 19 All., 324, and Chotu v. Husain Baksh
Weekly Notes, 1893, p. 23, referred to.

Per Banerji, J. — The right of pre-emption being a right of substi-

tution, the heir of pre-emptor, not having himself a right of pre-

emption on his own account, is not entitled to avails of the pre-

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** Held that the High Court had no jurisdiction to interfere with the order of the Subordinate Judge under either section 192 or section 439 of the Code of Criminal Procedure; nor could it interfere under section 622 of the Code of Civil Procedure inasmuch as the Subordinate Judge, though he possibly mistook the meaning of the District**
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A decree of a Court of Small Causes was transferred for execution under section 223 of the Code of Civil Procedure to the Munsif's Court because the decree-holder sought in execution to bring to sale immovable property of the judgment-debtor. Held that an order in execution of such decree passed by the Munsif was appealable to the District Judge.

In this case a decree was passed by a Court of Small Causes in a suit cognizable by such Court. The decree-holder sought in execution to attach and bring to sale immovable property of his judgment-debtor, and, inasmuch as the Court of Small Causes had no jurisdiction to sell immovable property, the decree was sent for execution to the Court of the Munsif. There certain objections were raised by the judgment-debtor. The objections were overruled, and the judgment-debtor appealed to the District Judge. Before the District Judge the question was raised whether any appeal lay to his Court, and on this point the District Judge referred the case to the High Court under the provisions of section 617 of the Code of Civil Procedure.

The parties were not represented.

STANLEY, C. J., and BANERJI, J.—This is a reference by the learned District Judge of Farrukhabad under section 617 of the Code of Civil Procedure. The facts are these:—A decree was made by a Court of Small Causes in a suit cognizable by that Court. As the decree-holder sought to realize the amount of the decree by attachment and sale of immovable property, the
Court of Small Causes sent the decree to the Munsiff's Court for execution under the provisions of section 223 of the Code of Civil Procedure. An application for execution was accordingly made in the Munsiff's Court. Objections were raised on behalf of the judgment-debtor. Those objections having been overruled, the judgment-debtor appealed to the District Judge. In his Court the question was raised whether an appeal lay from the order of the Mun-sif. It was contended before him that as the suit was of the nature cognizable in a Court of Small Causes the proceedings in execution taken in the Munsiff's Court should be deemed to be proceedings in a Small Cause Court suit and were therefore final. The fallacy which underlies this contention is that in the present case the suit was not transferred to the Munsiff's Court, nor were execution proceedings pending in the Small Cause Court transferred to the Munsiff's Court, but the decree was sent under section 223 of the Code, as immovable property was sought to be sold. Had the suit or the execution proceedings been transferred to the Munsiff's Court under section 25 of the Code of Civil Procedure, or had the execution proceedings been instituted in the Munsiff's Court under section 35 of the Provincial Small Cause Court's Act, the proceedings in the Mun-sif's Court might be regarded as proceedings held by a Court of Small Causes. But this was not so. The Court of Small Causes had no jurisdiction to sell immovable property, and for this reason the decree was sent to the Munsiff's Court in order that execution proceedings might be held in that Court. The order passed by the Munsif was an order which he might have passed in a suit instituted in his Court. From such an order an appeal ordinarily lay to the District Judge, and therefore in the present case the appeal preferred in the Court of the District Judge could in our judgment be entertained. Section 27 of the Small Cause Court's Act has no application to a case of this kind. This is our answer to the reference.
APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHANDAR SHEKHAR (PETITIONER) v. KUNDAN LAL AND ANOTHER
(Opposite Parties).

Partition—Compromise—Right of co-owners to partition—Effect of agreement to remain joint.

By a compromise entered into in the course of proceedings for partition it was agreed that the share of the applicant for partition alone should be partitioned, but of the non-applicants remaining joint. Held that although such compromise might prevent the non-applicants from obtaining partition in the course of the proceedings during which it was entered into, it could not prevent either of them from subsequently making a fresh application for partition inter se.

The facts of this case are as follows:—

Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram were four brothers jointly entitled to certain property. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar, the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1908, the plaintiff Chandar Shekhar made an application for partition of his share, which application was rejected on the ground that it was barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that inasmuch as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it was not open to him to institute proceedings for partition. Against this decision the applicant for partition appealed to the High Court.

Munshi Gokul Prasad, for the appellant.

The respondents were not represented.

STANLEY, C.J., and BANERJI, J.—This appeal is against an order of an Assistant Collector whereby he rejected the application.
Court of Small Causes sent the decree to the Munsif's Court for execution under the provisions of section 223 of the Code of Civil Procedure. An application for execution was accordingly made in the Munsif's Court. Objections were raised on behalf of the judgment-debtor. Those objections having been overruled, the judgment-debtor appealed to the District Judge. In his Court the question was raised whether an appeal lay from the order of the Munsif. It was contended before him that as the suit was of the nature cognizable in a Court of Small Causes the proceedings in execution taken in the Munsif's Court should be deemed to be proceedings in a Small Cause Court suit and were therefore final. The fallacy which underlies this contention is that in the present case the suit was not transferred to the Munsif's Court, nor were execution proceedings pending in the Small Cause Court transferred to the Munsif's Court, but the decree was sent under section 223 of the Code, as immovable property was sought to be sold. Had the suit or the execution proceedings been transferred to the Munsif's Court under section 25 of the Code of Civil Procedure, or had the execution proceedings been instituted in the Munsif's Court under section 35 of the Provincial Small Cause Court's Act, the proceedings in the Munsif's Court might be regarded as proceedings held by a Court of Small Causes. But this was not so. The Court of Small Causes had no jurisdiction to sell immovable property, and for this reason the decree was sent to the Munsif's Court in order that execution proceedings might be held in that Court. The order passed by the Munsif was an order which he might have passed in a suit instituted in his Court. From such an order an appeal ordinarily lay to the District Judge, and therefore in the present case the appeal preferred in the Court of the District Judge could in our judgment be entertained. Section 27 of the Small Cause Court's Act has no application to a case of this kind. This is our answer to the reference.
APPELLATE CIVIL

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Danorshi.

CHANDAR SHEKHAR (Petitioner) v. KUNDAN LAL AND ANOTHER (OPPOSITE PARTIES).

Partition—Compromise—Right of co-owners to partition—Effect of agreement to remain joint.

By a compromise entered into in the course of proceedings for partition it was agreed that the share of the applicant for partition alone should be partitioned, that of the non-applicants remaining joint. Held that although such compromise might prevent the non-applicants from obtaining partition in the course of the proceedings during which it was entered into, it could not prevent either of them from subsequently making a fresh application for partition inter se.

The facts of this case are as follows:

Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram were four brothers jointly entitled to certain property. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shokhar, the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1906, the plaintiff Chandar Shekhbar made an application for partition of his share, which application was rejected on the ground that it was barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that incomprehensible as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it was not open to him to institute proceedings for partition. Against this decision the applicant for partition appealed to the High Court.

Munshi Gokul Prasad, for the appellant.

The respondents were not represented.

STANLEY, C.J., and BANERJI, J.—This appeal is against an order of an Assistant Collector whereby he rejected the application.

* First Appeal No. 233 of 1906, from a decree of Aghar Ali, Assistant Collector of Meerut, dated the 24th of July 1906.
of the plaintiff for partition of certain property. There were
four brothers jointly entitled to certain property. They were
Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram. Sheo
Shankar died childless, and upon his death the three surviving
brothers became entitled equally to the property in question.
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the son of Sewak Ram. It was agreed in that suit that Kesho
Ram’s one-third share should alone be partitioned, and that the
shares of the defendants should remain joint. On the 2nd of March
1906, the plaintiff made the application out of which this appeal
has arisen for partition of his share, and his application has been
rejected on the ground that it is barred by the terms of the
compromise entered into in the previous suit. It was held by
the Assistant Collector that, inasmuch as the plaintiff, or his
guardian on his behalf, agreed on the former application that his
share should remain joint, it is not open to him to institute pro-
cceedings for partition. We may mention that the plaintiff in the
previous proceedings applied for partition of his share under
section 110 of Act III of 1901, but his application was rejected
on the ground that it had not been brought within 60 days, the
period allowed for such application. So far as regards the former
proceedings, no doubt, the plaintiff could not take advantage of
the order for partition and obtain partition of his share, but this
only applied to the proceedings then pending. It in no way pre-
vented him from instituting a fresh application for the separation
of his share, and the partition of the property remaining joint.
The right of a co-owner to have partition of his share is incident
to the right of ownership, and an agreement not to partition for
an indefinite period would be contrary to that right and therefore
not enforceable. In the present case there was no agreement
not to claim partition. Therefore in our opinion the learned
Assistant Collector was wrong in rejecting the plaintiff’s claim.
As he disposed of the case upon a preliminary point, we set
aside his order and remand the case to him under the provisions
of section 502 of the Code of Civil Procedure, with directions
that it be reinstated in the file of pending applications and be disposed of according to law. The plaintiff appellant will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

LALTA PRASAD (Plaintiff) v. SALIG RAM AND ANOTHER (Defendants). *

Will—Construction of document—Persona designata.

By the terms of a will the testator gave all his property to his wife for her life, and then declared that after her death Lalta Prasad, his adopted son, should be owner of the property. The testator’s wife predeceased him. Held that after the death of the testator Lalta Prasad took as a persona designata, whether in fact his adoption was valid or not. Nishoomon Debua v. Saroda Pershad Mukerjee (1) followed.

The facts out of which this appeal arose are as follows:—

One Kedar Nath died on the 3rd of September 1904 leaving a will, dated the 22nd of June 1888. By this will the testator gave all his property to his wife for her life, and then declared that after her death Lalta Prasad, his adopted son, should be the owner (malik) of the property. The testator’s wife predeceased him, and upon the death of the testator his sister’s sons took possession of the property. Lalta Prasad then brought the present suit to recover the estate of Kedar Nath as sole legatee thereof. The Court of first instance (Munsif of Pilibhit) held that the plaintiff was entitled as persona designata, whether he was or was not in fact the adopted son of Kedar Nath, and accordingly decreed the claim. This decree was, however, reversed by the Subordinate Judge of Bareilly upon the ground that the gift to the plaintiff was made to him as adopted son and that he had failed to prove his adoption. The plaintiff thereupon appealed to the High Court.

Dr. Sutish Chandra Banerji, for the appellant.

Munshi Gulzar Lal, for the respondents.

STANLEY, C. J., and BANERJI, J.—The meaning of a gift in the will of one Kedar Nath is the only question in this appeal. Kedar Nath made a will on the 22nd of June 1888.

*Second Appeal No. 971 of 1907 from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 4th of July 1907, reversing a decree of Raman Das, Munsif of Pilibhit, dated the 8th of September 1906.

(1) (1876) L. R., 3 L. A., 253.
The will is very simple in its character. By it he gave to his wife all his property for her life, and after her death he declared that Lalita Prasad, his adopted son, should be the mulik, or owner, of the property. The testator's wife predeceased him. He died on the 3rd of September 1901, and upon his death the defendants, who are his sister's sons, took possession of his property. Thereupon the suit out of which this appeal has arisen was instituted by Lalita Prasad. He claimed the property under the gift contained in the will of Kedarnath. The Court of first instance held that he was entitled to it as designata persona under the will, and that it was immaterial to find whether or not he was the adopted son of Kedarnath. It did, however, consider that question and came to the conclusion that the adoption was proved. On appeal the lower appellate Court held that the will was genuine, but the adoption of the plaintiff was not proved, and it reversed the decision of the Court below, on the ground that the gift made to the plaintiff was so made to him not as a persona designata but as an adopted son, and that inasmuch as he had failed to prove his adoption, the gift failed, and it therefore dismissed the plaintiff's suit. The construction of the will appears to us to be extremely simple. After the death of the widow, the testator gave his property to Lalita Prasad by name and then described him as an adopted son. There is absolutely nothing in the will to show that the fact of the adoption of the plaintiff was the motive or reason for the gift, and, in the absence of anything of the kind, it appears to us that, interpreting the language of the gift in its ordinary meaning, we must treat it as a gift to Lalita Prasad as a persona designata, and that therefore the gift is valid. This case appears to resemble the case of Nidhoomont Debya v. Sarada Pershad Mookerjee (1) and to be governed by the decision in that case. We therefore allow the appeal. We set aside the decree of the lower appeal Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

(1) (1878) L.R., 3 I.A., 273.
Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji, 
Sridhar Rao (plaintiff) v. Ram Lal (defendant). * 

Civil Procedure Code, section 440—Minor suing through next friend other than 
certified guardian—Permission of Court presumed—Procedure.

A minor who had a certified guardian living instituted a suit through a 
next friend other than the guardian. On the application of the next friend 
otice was sent to the certified guardian, but he showed no cause, and the 
suit continued. Held that under the circumstances, although no formal order 
had been recorded permitting the next friend to act on the minor’s behalf, it 
must be presumed that the intention of the Court had been to grant such 
permission, and the suit ought not to be defeated solely upon the ground that 
no formal permission had been recorded.

In this case a suit was instituted by a minor through one 
Sada Sheo Rao as his next friend. At the time of the institution 
of the suit there was in existence a certified guardian of the 
minor appointed under Act No. VIII of 1890, one Mantha Rao. 
On the application of the next friend the Court (Subordinate 
Judge of Jhansi) issued notice to the certified guardian to show 
cause why the person nominated as next friend of the minor 
should not be permitted to carry on the suit in that capacity. 
The suit was one in which the minor sought to set aside the sale 
of a mortgage deed standing in the minor’s name by his certified 
guardian to one Ram Lal and a subsequent decree obtained 
by Ram Lal on the mortgage. No cause was shown by the certified 
guardian in answer to the notice served upon him, and the 
suit proceeded with Sada Sheo Rao as next friend although no 
formal order was made by the Court permitting him to act as 
such. The suit was transferred to the Court of the District Judge, 
where, after all the evidence had been recorded, the defendant 
took an objection that the suit must fail for want of compliance 
with the provisions of section 440 of the Code of Civil Procedure. 
The District Judge sustained this objection and dismissed the 
suit. The plaintiff thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri and Babu Harendra Krishna 
Mukerji, for the appellant.

The Hon’ble Pandit Sundar Lal and Dr. Sitish Chandra 
Banerji, for the respondent.

STANLEY, C.J., and BANERJI, J.—The suit which has given 
rise to this appeal was brought on behalf of a minor for the
avoidance of a sale-deed executed by his certificated guardian. The plaintiff in the suit was filed by a person who described himself as the next friend of the plaintiff. As he was not the certificated guardian, the Court ordered notice to issue to the certificated guardian as required by section 440. This order was passed on an application made by the next friend who instituted the suit on behalf of the minor. Notice was served on the certificated guardian, but he showed no cause. The Court then proceeded to settle issues, and recorded some evidence, but no formal order was recorded granting leave to the new next friend to institute the suit. The case was transferred to the Court of the learned District Judge, and before him an objection was taken to the effect that no leave had been granted under section 440, the suit was not maintainable. This objection prevailed in the Court below, and the suit has been dismissed. The learned Judge was of opinion that leave to institute the suit ought to have been formally granted and recorded. Section 440 requires that if a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian, except with the leave of the Court granted after notice to such guardian. As we have said above, notice was issued to the certificated guardian as required by the section; it was served on him, but he did not appear and show cause. It is true that no formal order granting leave was recorded by the Court, but, as the Court framed issues and examined witnesses, it must be presumed that the Court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf. The Court below was therefore wrong in dismissing the suit. As the suit was dismissed upon a preliminary ground, and in our opinion that ground cannot be supported, we set aside the decree of the Court below, and remand the case to that Court under section 592 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register, and dispose of it on the merits. The appellant will have the costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.
Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

AKBAR KHAN AND ANOTHER (PLAINTIFFS) V. TURAHAN (DEFENDANT).

Act No. XVI of 1877 (Indian Limitation Act), schedule II, article 120—Suit for declaration of title—Cause of action—Limitation.

The plaintiffs sued in 1903 asking for a declaration that they were entitled to certain property mentioned in the plaint. Their cause of action was that the name of the defendant had in the year 1895 been entered in the revenue papers in respect of the property in suit. Held that the suit was barred by limitation, and that the fact that the defendant had in 1903 resisted the plaintiffs' attempt to obtain correction of the khowat did not give the plaintiffs' a fresh cause of action. Legge v. Ram Baran Singh (1) followed. Kahai Qabish v. Naran Singh (2) distinguished.

This was a suit, instituted in 1901, for a declaration that the plaintiffs were entitled to certain property mentioned in the plaint. Their cause of action was that in 1895 the name of the defendant had been entered in respect of the property in suit in the revenue papers and the plaintiffs' title was denied. The Court of first instance (Additional Munsif of Meerut) decreed the claim; but on appeal the Additional District Judge reversed this decision and dismissed the suit as barred by limitation. The plaintiffs appealed to the High Court urging that in 1903 the plaintiffs had applied for correction of the khowat and in such application were opposed by the defendant, and that this gave rise to a fresh cause of action in favour of the plaintiffs.

Maulvi Ghulam Mujtaba, for the appellants.

Mr. Abdul Raoof, for the respondent.

STANLEY C.J., and BANERJI, J.—The question in this appeal is whether the plaintiffs' claim is barred by limitation. The suit is one for a declaratory decree. The plaintiffs asked for a declaration that they were entitled to the property mentioned in the plaint. In 1895 the name of the defendant was entered in the revenue papers in respect of this property and the title of the plaintiffs was denied. The lower appellate Court has held that the plaintiffs' cause of action for a declaratory suit accrued when this entry was made in 1895, and, as held, by the Full Bench in Legge v. Ram Baran Singh (1) six years'
limitation applies to the suit and must be computed from the year 1895. We think this view of the Court below is right. According to the Full Bench ruling referred to above, where the plaintiff is in possession and asks for a declaratory decree, the limitation applicable to the suit is that prescribed by article 120 of schedule II to the Limitation Act, and should be computed from the date on which his cause of action arose. In the present case the plaintiffs’ cause of action is the entry of the defendant’s name in the revenue papers in respect of the property in suit in 1895. As the suit was brought after the expiry of six years from that year, it is time-barred. It is contended on behalf of the appellants that a fresh cause of action accrued to them in 1903 when the defendant objected to the correction of the khetwa. That in our opinion was not a fresh cause of action. The refusal to have the entry corrected was a continuation of the original cause of action, namely, the entry of the defendant’s name in the revenue papers in 1895. In the case of Nahi Bakhsh v. Har-num Singh (1) and S. A. No. 263 of 1907 (unreported), Robert Skinner v. Shanker Lal, decided by a Bench of this Court on the 27th of May 1903*, there was a fresh invasion of the plaintiffs’ right, and that was held to have given him a fresh cause of

(1) Weekly Notes, 1893, p. 216.
action. As in the present case there was no fresh invasion of the right of the plaintiffs, the rulings referred to are inapplicable. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Griffin.

JOTI PRASAD (Plaintiff) v. AZIZ KHAN AND OTHERS (Defendants).

Act No. IV of 1852 (Transfer of Property Act), section 85—Mortgage—Suit for sale on mortgage—Parties.

In a suit for sale on a mortgage the ordinary rule is that a plaintiff mortgagee cannot be allowed to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. Jagannath Dutta v. Bhaban Mohan Mitra (1), Mon Mohini Ghose v. Parvati Nath Ghose (2) and Kaiser Ali v. Banu Begum (3) referred to.

This was a suit for sale upon a mortgage executed on the 10th August 1888 by one Karam Khan. The defendants were the sons, daughters and widow of Karam Khan, who had died before suit. The mortgage deed described the property mortgaged as the mortgagor’s personal share in his possession. Its execution was admitted by the defendants; but they alleged that the property mortgaged originally belonged to one Salahi, the father of Karam Khan, and that there were other heirs of Salahi besides the mortgagor. In paragraph 2 of the additional plea in the written statement it appeared that the mortgage was a mortgage of the entire property and that the mortgagees had been realizing the profits from the tenants. The Court of first instance (Subordinate Judge of Saharanpur), finding that Karam Khan was entitled to a two-fifths share only in the property mortgaged, gave the plaintiff a decree for sale to that extent only. The plaintiff appealed and his appeal was dismissed by the District Judge. The plaintiff thereupon appealed to the High Court.

Dr. Satish Chandra Banerji and Lal Girdhari Lal Agarwala, for the appellants.

Babu Jogindro Nath Chaudhri (for whom Babu Sarat Chandra Chaudhri), for the respondents.

(1) (1905) I. L. R. 83 Calc., 425  (2) (1905) I. L. R. 82 Calc., 746.
(3) Weekly Notes, 1908, p. 100.
RICHARDS and GRIFFIN, JJ.—The plaintiff sued on a mortgage executed on the 10th of August 1888 by one Karam Khan. The deed specified the property mortgaged, which was described in the body of the document as the mortgagor's personal share in his possession. This mortgage was set out in paragraph 1 of the plaint, which was admitted in the written statement filed by the defendants, who are the sons, daughters and widow of Karam Khan, the executant. In the last paragraph of the written statement it is alleged that the property mortgaged originally belonged to one Salai, father of Karam Khan, and that there were other persons besides Karam Khan who were heirs to Salai. On the other hand in paragraph 2 of the additional pleas of the written statement it appears that the mortgage was a mortgage of the entire property and that the mortgagees had been realizing the profits from the tenants. The Court of first instance finding that Karam Khan was entitled to a two-fifths share only in the property mortgaged gave the plaintiffs a decree for sale of a two-fifths share of the property mortgaged. The plaintiff appealed, and his appeal was dismissed by the lower appellate Court. The sisters and another person said to be interested in the property were not joined as parties. The plaintiff appeals to this Court, and it is contended that on a true construction of the mortgage deed he was entitled to a decree for the sale of the entire property mortgaged, and that the defendants who stand in the shoes of Karam Khan cannot be allowed to say that Karam Khan had no power to mortgage the entire property. We think that this latter contention is well founded. If Karam Khan were alive, he would not be permitted to plead that he had no authority to mortgage the property which he purported to mortgage. The defendants, who are his representatives, cannot stand in a better position. The sisters of Karam Khan may or may not have rights in the property in suit, and we do not know whether they lay claim to any such rights. As they are not parties to this suit, their rights are not affected by the decree in this case. It is contended that having regard to the provisions of section 85 of the Transfer of Property Act, it was obligatory on the plaintiff to join them as parties. According to the deed of mortgage the sisters of Karam Khan had no interest in the mortgaged property. The defendants, as said
above, cannot be allowed to set up a defence which Karam Khan could not have pleaded. In this connection we would refer to the ruling in Jaggeswar Dut v. Bhutan Mohan Mitra (1) in which Mookerjee, J., held "that the ordinary rule is that the plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee." Much to the same effect is the ruling in Mon Mohini Ghose v. Parvati Nath Ghose (2). The same principle was followed in Khurant v. Banni Begum (3). We think that in this case the plaintiff was entitled to a decree for sale of the entire property. We allow the appeal, and, setting aside the decrees of the Courts below in so far as they dismissed the plaintiff's claim in respect of a three-fifths share of the property mortgaged, decree the plaintiff's claim against the entire property mortgaged. The appellant will get his costs from the respondents.

Appeal decreed.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Richards.

SADAR-UD-DIN AHMAD AND OTHERS (PLAINTIFFS) v. CHAJJU AND OTHERS (DEFENDANTS).

Mortgage—Compromise in course of mutation proceedings purporting to vary the terms of a registered deed.

Held that a compromise entered into between the parties in mutation proceedings before a Court of Revenue which purported to modify the conditions of a pre-existing mortgage, upon the basis of which mutation was sought, could not be allowed to take effect in opposition to the distinct terms of the registered instrument of mortgage. Nur Ali v. Imaman (4) distinguished. Raghubans Mani Singh v. Mahabir Singh (5) and Pranai Amn v. Lakhiani Anni (6) referred to by Banerji and Richards, J.J.

One Chajju executed a mortgage of certain property in favour of Hussain Baksh and Nathu to secure a principal sum of

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* Second Appeal No. 1333 of 1907, from a decree of Soti Raghubans Lvl, Additional Judge of Mecrat, dated the 12th of July 1907 reversing a decree of Rama Din, Munsif of Mozammarsagar, dated the 14th of March 1907.

1. (1906) I. L. R. 33 Cal., 425.
2. (1905) I. L. R. 33 Cal., 746.
5. (1895) I. L. R., 23 All., 78.
Rs. 1,000, the mortgage being expressed to be made for a term of 25 years. In the mortgage there was a provision to the effect that on payment of the amount due in the month of Jeth after the expiry of the term of 25 years the mortgage might be redeemed. The mortgagors refused to register the mortgage, and thereupon an application was made by the mortgagees for compulsory registration, and compulsory registration was effected. Subsequently the mortgagees applied for mutation of names in the mutation department. To this, not merely Chajju, but another person named Abdulla objected. Abdulla was no party to the mortgage, but claimed to be entitled to a share in the mortgaged property, and hence he objected to mutation of names so far as regarded his share. The dispute was compromised, the terms of the compromise being that the whole of the property should be recorded as subject to the mortgage and that the names of the mortgagees should be entered as mortgagees in respect of it and the names of Chajju and Abdulla as mortgagors. It further provided that the mortgagors should have power in any Jeth to pay the mortgage debt and have the mortgage redeemed. The mortgagors sought redemption in pursuance of the terms of this compromise within the period of 25 years, and this was refused. They then filed the present suit for redemption. The defence to the suit was that it was premature, having been brought within the term of 25 years. The first Court (Munsif of Muzaffarnagar) gave a decree for redemption, but upon appeal the lower appellate Court (Additional Judge of Meerut) reversed the decree of the Court of first instance on the ground that the terms of the compromise in the Revenue Court varied the terms of the mortgage, and the agreement not having been registered was not admissible in evidence and could not be treated as giving the mortgagor a power to redeem contrary to the express provision of the mortgage deed. From that decision the plaintiffs appealed to the High Court.

Mr. Abdul Reof, for the appellants, contended that the compromise was binding on the parties. The objection to mutation was withdrawn only upon the ground that the mortgage could be redeemed within 25 years. The Revenue Court had power
to go into the question of title, and it gave effect to the compromise. It was not necessary to register a compromise put in before a court in a judicial proceeding. He referred to Nur Ali v. Imaman (1), Raghubans Mani Singh v. Mahabir Singh (2) and Pranab Annu v. Lakshmi Annu (3).

Babu Jogindro Nath Chaudhri (with whom Pandit Moti Lal Nehrut), for the respondents, contended that under the terms of the original deed the mortgage could not be redeemed before the expiry of 25 years. The compromise purporting to remove that restriction should have been registered. As it was the compromise could not be admitted in evidence for the purpose of varying the terms of the mortgage. This compromise was an "instrument" (Whatton's Law Lexicon referred to) being a petition embodying the terms of an agreement. Its registration was compulsory under the Indian Registration Act 1877. Mutation proceedings could not be called judicial proceedings. A judicial proceeding was one in which contested questions of right, title, or liability were determined. In this case the Revenue Court simply effected mutation of names according to the compromise. It had no power to give effect to any of the conditions of the compromise affecting right, title, interest or liability. In other words, the Revenue Court as such could not take judicial notice of the several terms of the compromise; it could only order mutation of names.

S renders, C. J.—The facts of this case are these. One Chajju executed a mortgage of certain property in favour of Husain Bakhsh and Nathu to secure a principal sum of Rs. 1,000, the mortgage being expressed to be made for a term of 25 years. In the mortgage there is a provision for redemption. The redemption clause provides that on payment of the amount due in the month of Jeth after the expiry of the term of 25 years the mortgage might be redeemed. The mortgagors refused to register the mortgage, and thereupon an application was made by the mortgagees for compulsory registration and compulsory registration was effected. Subsequently the mortgagees applied for mutation of names in the mutation department. To this, not

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(1) Weekly Notes, 1894, p. 49.  (2) (1905) I. L. R., 23 All., 78.  (3) (1899) I. L. R., 22 Mad., 598.
merely Chajju, but another person named Abdulla objected. Abdulla, it will be noted, was no party to the mortgage. He claimed to be entitled to a share in the mortgaged property, and hence he objected to mutation of names so far as regarded his share. The dispute was compromised, the terms of the compromise being that the whole of the property should be recorded as subject to the mortgage and that the names of the mortgagors should be entered as mortgagees in respect of it and the names of Chajju and Abdulla as mortgagors. It further provided that the mortgagors should have power in any Jeth to pay the mortgage debt and have the mortgage redeemed. The mortgagors sought redemption in pursuance of the terms of this compromise within the period of 25 years, and this was refused, and hence the suit for redemption out of which this appeal has arisen.

The defence to the suit was that it was premature having been brought within the term of 25 years.

The first Court gave a decree for redemption, but upon appeal the lower appellate Court reversed the decree of the Court of first instance on the ground that the terms of the compromise in the Revenue Court varied the terms of the mortgage and the agreement not having been registered was not admissible in evidence and could not be treated as giving the mortgagor a power to redeem contrary to the express provision of the mortgage deed. From that decision the present appeal has been preferred, and it was laid before a Bench of three Judges in view of the decision in the case of Nur Ali v. Imam Ali (1) the correctness of which the Court before whom the appeal came was disposed to doubt.

It appears to me that the decision of the learned Additional Judge is correct. The compromise entered into in the mutation proceedings could not in my opinion have the effect of modifying or altering in any way the terms of the registered mortgage. The Revenue Court was concerned with the entry of names only and had no concern with the conditions upon which the objectors withdrew their opposition to the granting of the application for mutation. The compromise was not in fact submitted to the

(1) Weekly Notes, 1884, p 40.
Revenue Court further than as showing the withdrawal of opposition to the mutation of names. The language of the order of the Court shows this. The Revenue Court in view of the withdrawal of opposition simply ordered that mutation should have effect. The words are "the parties have compromised and mutation will take place accordingly." The case appears to me to be unlike that of Nur Ali v. Imamun (1). It would be fraught with danger to the security afforded to titles by the Registration Act if a compromise of parties in proceedings taken before a Revenue Officer for mutation of names could be regarded as having the effect which is contended for here of creating a charge and modifying the provisions of a registered document. I would therefore dismiss the appeal.

BANERJI, J.—I am of the same opinion. It is obvious from the terms of the mortgage of the 8th of August 1903 that it cannot be redeemed before the expiry of 25 years from the date of it. Those terms could not be varied except by a registered instrument. By the application presented in the mutation case the Revenue Court holding mutation proceedings was merely informed of an oral contract entered into by the parties. The application itself cannot be treated as creating a fresh mortgage. Can it be taken into consideration as evidencing an alteration in the terms of the original mortgage? I agree with the learned Chief Justice for the reasons stated by him that it cannot be admitted in evidence. I think the case of Nur Ali v. Imamun Ali (1) is distinguishable. We were pressed with the decision in Raghubans Mani Singh v. Mahabir Singh (2), to which I was a party. That was a case to which in our judgment the observations of their Lordships of the Privy Council in Pranai Anni v. Lakshmi Anni (3), as contained in page 514 of the report, fully applied. In the present case the terms of the compromise were not referred to or narrated in the order of the Revenue Court, and indeed for purposes of mutation it was not necessary to refer to the terms of the mortgage or the conditions under which redemption could take place. This case therefore is not governed by the rulings to which I have referred. I also would dismiss the appeal.

(1) Weekly Notes, 1884, p. 40. (2) (1906) I. L. R., 23 All. 70. (3) (1909) I. L. R., 23 Mad., 509.
RICHARDS, J.—This was a suit for redemption of a mortgage, dated the 8th August 1903. The mortgage was a mortgage with possession, and it is quite clear that according to the terms of the deed the mortgage could not be redeemed until after the expiration of 25 years. It is contended on behalf of the plaintiff that the terms of the mortgage deed were subsequently varied by agreement between Chajju, the mortgagee, and Abdullah on the one side and the mortgagees on the other side, whereby it was arranged that Abdullah should be bound by the mortgage, but that the mortgage should be redeemable by payment of the mortgage debt in any year in the month of Jeth. The defendants objected that such an arrangement could only be proved by a duly registered document. No such document exists, but the plaintiffs contend that the petition to and the order of the Revenue Court referred to by the Chief Justice operate to vary the terms of the mortgage deed and that a registered document was not necessary. I quite agree in the judgment of the learned Chief Justice and I should not deem it necessary to add anything to what he has said save for the fact that reliance was placed on the ruling in Raghubans Mani Singh v. Mahabir Singh (1) to which I was a party. In that case certain lands were claimed on the basis of an agreement of compromise in prior litigation, whereby the title to the lands in question had been expressly admitted. The Judge had received and acted on the compromise and incorporated it into his decree. My learned colleague and I held that the plaintiffs could rely on the decree incorporating the steps of the instrument was not necessary. The facts of the present case are very different. They amount to no more than this, namely, that the Revenue Court ordered the defendant’s names to be recorded as mortgagees in possession, all opposition to the application being withdrawn. The facts in the present case much more nearly approach the facts in the case of Pranai Anni v. Lakshmi Anni (2), in which their Lordships of the Privy Council held the unregistered deed of compromise inadmissible.

In the present case the plaintiffs in effect ask the Court to hold that the petition to the Revenue Court and its order

(1) (1902) I. L. R., 23 All., 78.  
(2) (1923) I. L. R., 23 Mad., 509.
operated to create a fresh mortgage. To entertain such a contention would be a very serious extension of the ruling of this Court in Raghubans Mani Singh v. Mahabir Singh (1). I also would dismiss the appeal.

BY THE COURT:

The order of the Court is that the appeal be dismissed, but under the circumstances without costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
PIARI LAL (Plaintiff) v. NAND RAM AND OTHERS (Defendants).

Civil Procedure Code, section 13—Res judicata—Suit for sale on a mortgage—Comromise by which mortgages accepted a simple money decree—Second suit for sale barred.

A suit for sale on a mortgage was compromised on the terms that the mortgages should accept a simple money decree for the amount of the mortgage debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgages again sued for sale of the mortgaged property. Held that the suit was barred. Shibu Nara v. Chandra Mohan Jana (2) followed. Dhola Nath v. Muhammad Sadiq (3) and Madho Prasad v. Bay Nath (4) distinguished.

The facts of this case are as follows:

In the year 1880 the predecessors in title of some of the defendants and the other defendants executed a mortgage in favour of the predecessor of the plaintiff. A suit was brought upon this mortgage on the 21st of September 1882, in which a sale of the mortgaged property was claimed. The suit was compromised on the terms that a simple money decree only should be passed in favour of the plaintiff and such a decree was passed on the 27th of November 1882. The amount due to the plaintiff on foot of the compromise was, however, not satisfied, or at least not fully satisfied. Thereupon the plaintiff instituted a second suit for sale of the mortgaged property. The first

* Second Appeal No. 488 of 1907 from a decree of J. H. Cumming, Additional Judge of Aligarh, dated the 21st of January 1907 reversing a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 16th of July 1906.

Court (Subordinate Judge of Aligarh) decreed the claim, but upon appeal the lower appellate Court (Additional Judge of Aligarh) dismissed it, on the ground that it was barred by section 13 (explanation III) of the Code of Civil Procedure.

The plaintiff thereupon appealed to the High Court.

Mr. B. E. O'Conor, for the appellant,

Mr. M. L. Agarwala and Babu Durga Charan Banerji, for the respondents.

STANLEY, C.J., and BANERJI, J.—This appeal arises out of a suit for sale of mortgaged property. It was dismissed under the following circumstances as barred by section 13 of the Code of Civil Procedure. It appears that in the year 1880 the predecessors in title of some of the defendants and the other defendants executed a mortgage in favour of the predecessor of the plaintiff. A suit was brought upon this mortgage on the 21st of September 1882, in which a sale of the mortgaged property was claimed. The suit was compromised on the terms that a simple money decree only should be passed in favour of the plaintiff and such a decree was passed on the 27th of November 1882. The events which happened subsequent to the date of this compromise it is unnecessary for the purposes of the decision of this appeal to detail, suffice it to say that the amount due to the plaintiff on foot of the compromise was not satisfied, or at least fully satisfied. Thereupon the suit out of which this appeal has arisen was instituted for sale of the mortgaged property. The first Court decreed the claim, but upon appeal the lower appellate Court dismissed it, on the ground that it was barred by section 13 (explanation III) of the Code of Civil Procedure. In that explanation it is laid down that any relief claimed in a plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. In view of this section the claim of the plaintiff in the first suit for sale of the mortgaged property must be deemed to have been refused, and therefore his right as mortgagee to have a sale of the mortgaged property became barred as a matter res judicata. In view of this section it is impossible to hold that a fresh suit for sale can be maintained, and therefore we think that the lower appellate Court rightly dismissed the plaintiff's suit. This view is supported by the decision of the
Calcutta High Court in the case of Shibu Bera v. Chandra Mohan Jana (1), the facts of which are admittedly on all fours with the facts of the present case. Our decision is in no way in conflict with the decision of Benches of this Court in the cases of Bhola Nath v. Muhammad Sadiq (2) and Madho Prasad v. Baij Nath (3). In both of these cases it will be found that in the suits originally instituted by the plaintiffs no claim was put forward for sale of the mortgaged property; the plaintiffs contented themselves with applying for simple money decrees. Section 13 therefore had no application. We therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Richards.

JAGAR NATI SINGH AND OTHERS (DEFENDANTS) v. LALTA PRASAD AND ANOTHER (PLAINTIFFS) AND DWARKA PRASAD (DEFENDANT)*


Whether or not the doctrine of estoppel applies to a contract entered into by a minor, where persons who are in fact under age by false and fraudulent misrepresentations as to their age induce others to purchase property from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold. So held by Banerji, J., Mohors Bires v. Dharmadas Ghose (4), Brohno Dutt v. Dharmadas Ghose (5), Ganesh Lala v. Bipu (6) and Shikshman v. Dawson (7) referred to.

Richards, J., differed on the question of fact as to whether the plaintiffs had been induced by any misrepresentations of the defendants as to their ages to enter into the contract sought to be set aside.

The plaintiffs in the suit out of which this and the connected appeal, No. 118, arose (Lalta Prasad and Bhuvaneshri Prasad) were the sons of one Madho Prasad, whose paternal uncle was the plaintiff's guardian Dwarka Prasad. After the death of Madho Prasad in 1882, Dwarka Prasad applied for, and obtained in 1888, a certificate of guardianship of the persons and property of the plaintiffs, who were minors at the date of their father's

* First Appeal No. 167 of 1890, from a decree of Shish Chander Bose, Registrar Subordinate Judge of Ukhappur, dated the 17th of April 1890.

death. Madho Prasad and Dwarka Prasad jointly owned an 8 anna share in the village Kharau, out of which Madho Prasad in his life time sold 2 annas 9 pies and Dwarka Prasad sold 2 annas 6 pies after Madho Prasad's death. The remaining 2 annas 9 pies was sold by the plaintiffs and Dwarka Prasad on the 23th of June 1899 to Jagar Nath Singh defendant and the predecessors in title of defendants Nos. 2 to 11. The present suit was brought to set aside this sale. The plaintiffs stated that they were minors at the date of the sale; that they were persons of weak intellect and inexperienced; that they executed the sale-deed under the influence of Dwarka Prasad, who is an extravagant man of dissolute habits; that they did not derive any benefit from the sale; that the sale was effected without any necessity and that they did not receive any part of the consideration for it. On these grounds they sought to set aside the sale and recover possession of the portion of the property sold of which the purchasers had obtained possession.

The defendants denied that the plaintiffs were minors at the date of the sale and asserted that the plaintiffs represented themselves to be of full age and thus induced them to purchase the property. They contended that the plaintiffs were estopped from maintaining the suit, and that in any case they were bound to make restitution of the amount of consideration for the sale. The Court of first instance (officiating Subordinate Judge of Ghazipur) found that the age of the plaintiffs was below 21 years on the date of the execution of the sale deed and that they were minors and incompetent to make the contract of sale. The Court accordingly, following the ruling of their lordships of the Privy Council in Mohori Bibee v. Dharma Das Ghose (1), held the sale to be void. It, however, was of opinion that the plaintiffs had made fraudulent misrepresentations to the purchasers as to their age and that they benefited by the sale. It accordingly made a decree for possession on condition that the plaintiffs should refund so much of the consideration for the sale as represented the value of the share decreed to them.

Against this decree the defendants purchasers appealed to the High Court and the plaintiffs also appealed. The defendants

(1) (1903) I. L. R. 30 Calc, 533.
repeated the pleas advanced by them in the Court below. The plaintiffs contended that they were not liable to make any restitution.

Dr. Tej Bahadur Sircu (with whom Babu Duraj Charan Banerji), for the defendants appellants, contended in the first instance that the evidence did not prove that the plaintiffs were in fact minors at the date of the sale. He next argued that if they were minors at the date of the sale they were estopped by their own conduct from setting up that plea in the present suit. There was no warrant for holding that the rule of estoppel contained in section 115 of the Evidence Act did not apply to minors, and in principle there was no reason why a minor should be treated as on a different footing from an adult so far as this section was concerned. A distinction should be made between a contract which rested upon an act of two parties, and an estoppel which was merely a rule of evidence and created no substantive right. He next urged that there was a fraudulent misrepresentation of their age made by the plaintiffs, and if they wished to have the sale set aside, they must refund the money which they had received. He submitted that whilst fraud was not necessarily a part of estoppel it always arose where, as here, an action for deceit would be maintainable. The following authorities were referred to:—Bigelow on Estoppel, pp. 609, 606 and 607; Taylor on Evidence, Vol. I, p. 439; Pollock on Contract, pp. 73, 505 and 587; Trevelyan on Minors, p. 14; Surul Chand Miller v. Mohun Bibi (1), Brohmo Dutt v. Dharmudas Ghose (2), Dhammull v. Ram Chunder Ghose (3), Ram Nathun Singh v. Shew Kundan Singh (4), Mohori Bibi v. Dharmudas Ghose (5), Ganesh Lal v. Bapu (6), Stikeman v. Dawson (7), Mills v. Fos (8) and Thurston v. Nottingham Permanent Building Society (9).

The Hon’ble Pandit Sundar Lal (with whom Munshi Jung Bahadur Lal), for the respondents, first argued the case on the facts and then contended that the defendants had failed to show that there was any fraudulent misrepresentation on the part of

(1) (1898) I. L. R., 25 Cal., 371. (5) (1900) I. L. R., 20 Cal., 266.
(2) (1899) I. L. R., 20 Cal., 266. (6) (1847) 1 De Gey and Sm., 401 10
(3) (1901) I. L. R., 22 Cal., 126. (7) (1847) 1 De Gey and Sm., 401 10
(5) [1903] I Ch., 1; [1903] A. C., 0.
the plaintiffs, and that no estoppel could under the circumstances arise. He submitted that, the contract of a minor being void, the practical effect of allowing a plea of estoppel against him would be to validate a void contract. He referred to *Stikeman v. Dawson* (1). He next proceeded to comment on the cases cited on behalf of the appellants.

Dr. Tej Bahadur Sapru replied.

BANERJEE, J.—This and the connected First Appeal No. 118 of 1906 arise out of a suit brought by the respondents Lalita Prasad and Bhuneshwari Prasad for possession of a 2 anna 6 pie share of zamindari and for a declaration that a sale-deed, dated the 28th of June 1899, executed by them jointly with one Dwarka Prasad in respect of the said share, is null and void.

The plaintiffs are the sons of Lala Madho Prasad, whose paternal uncle is the aforesaid Dwarka Prasad. After the death of Madho Prasad in 1882, Dwarka Prasad applied for and obtained in 1888 a certificate of guardianship of the persons and property of the plaintiffs who were minors at the date of their father’s death. Madho Prasad and Dwarka Prasad jointly owned an 8 anna share in the village Khaman, out of which Madho Prasad in his life-time sold 2 annas 9 pies and Dwarka Prasad sold 2 annas 6 pies after Madho Prasad’s death. The remaining 2 annas 9 pies was sold by the plaintiffs and Dwarka Prasad on the 28th of June 1899 to Jagar Nath Singh defendant and the predecessors in title of defendant, Nos. 2 to 11. The plaintiffs state that they were minors at the date of the sale; that they are persons of weak intellect and inexperienced; that they executed the sale-deed under the influence of Dwarka Prasad, who is an extravagant man of dissolute habits; that they did not derive any benefit from the sale; that the sale was effected without any necessity, and that they did not receive any part of the consideration for it. On these grounds they seek to set aside the sale and recover possession of the portion of the property sold of which the purchasers have taken possession.

The defendants deny that the plaintiffs were minors at the date of the sale and assert that the plaintiffs represented themselves to be of full age and thus induced them to purchase the

(1) (1847) I Deoe & Em., 20; 18 L.J., Ch., 205.
property. They contend that the plaintiffs are estopped from maintaining the suit, and that in any case they are bound to make restitution of the amount of consideration for the sale. The Court below found that the age of the plaintiffs was below 21 years on the date of the execution of the sale-deed and that they were minors and incompetent to make the contract of sale. Following the ruling of their lordships of the Privy Council in Mohori Bibee v. Dharmodas Ghose (1), the learned Subordinate Judge held the sale to be void. He, however, was of opinion that the plaintiffs had made fraudulent misrepresentations to the purchasers as to their age and that they benefited by the sale. He accordingly made a decree for possession on condition that the plaintiffs should refund so much of the consideration for the sale as represented the value of the share decreed to them.

Against this decree the defendants purchasers have preferred this appeal and the plaintiffs have preferred appeal No. 118. The defendants repeat the pleas advanced by them in the Court below. The plaintiffs contend that they are not liable to make any restitution.

After arguments were heard in both the appeals the learned advocates for the parties informed us that there was some likelihood of a compromise. We accordingly deferred judgment. The parties, however, have not come to any terms and we must decide the appeals.

The first question is that of the age of the two plaintiffs. It was conceded at the hearing that as a guardian of the plaintiffs was appointed by the Court they must be deemed to have been minors until they attained the age of 21. It is alleged on behalf of the plaintiffs that Lalita Prasad was born on the 24th of November 1880 and Bhuneshvari Prasad on the 17th April 1882. If this allegation is true, the former attained majority in 1901 and the latter in 1903. So that both of them were under age when they executed the sale-deed. At the time of the registration of the sale deed, however, the former stated his age to be 24 and the latter 22. As has been stated above, the learned Subordinate Judge has found that both the plaintiffs were under the age of 21 years when they executed the sale-deed. After-

(1) (1903) I. L. R., 80 Cal., 539.
carefully considering the evidence I find it impossible to come
to a different conclusion. It has been abundantly proved that
Madho Prasad, the father of the plaintiffs, died in 1882. The
witnesses for the plaintiff, who are men of position and respon-
sibility, swear that at that time Bhuanaeshri was about six months
old and Lalita Prasad about 18 months. There is no reason to
disbelieve the witnesses, and it is most unlikely that they have
made a mistake. The most important evidence on the point is
afforded by the fact that when on the 3rd of April 1888 Dwarka
Prasad applied for a certificate of guardianship he stated in his
application that the age of Lalita Prasad was 7 and that of Bhu-
aaesri 6 years. Dwarka Prasad has been examined in this case
and has supported his former allegation. He had no motive
in 1888 for under-stating the age of each of his grand-nephews,
and I see no reason to assume that he did so. According to the
evidence of Lieutenant-Colonel Emerson, the Civil Surgeon,
the plaintiffs were not of full age in 1899. On this point I fully
agree with the finding of the Court below.

As the plaintiffs were minors at the date of the sale-deed they
were incompetent to make a contract of sale, and according to
the ruling of the Privy Council in Mohori Bibee v. Dharmodas
Ghose (1) referred to above, the sale must be held to be absolutely
void.

It is contended that as the plaintiffs falsely represented to
the appellants that they were of full age and thereby induced the
appellants to purchase their property and pay them the price of
it, they are estopped from proving their true age and denying the
validity of the date made by them. Reliance is placed on the
provisions of section 115 of the Evidence Act, which, it is urged, applies to minors also. The authorities on the question
whether that section applies to minors are divergent. Whilst it
was held by some of the Judges of the Calcutta High Court in
Brockmo Dutt v. Dharmodas Ghose (2) that the section applies
only to persons of full age, the contrary view was held by the
Bombay High Court in Ganesh Lala v. Biju (3). I do not,
however, deem it necessary to express any opinion on the point
although it seems to me to be difficult to hold that in no case

(1) (1903) I. L. R. 20 Calcutta 522.
(2) (1895) I. L. R. 16 Calcutta, 351.
(3) (1896) I. L. R. 21 Bomma, 199.
would the doctrine of estoppel be applicable to infants (see Bigelow on Estoppel, pp. 599 et seqq). In my opinion the law of estoppel can only be applied subject to other provisions of law, and therefore when, as held by the Privy Council, a contract by a minor is void under the provisions of the Contract Act, the law of estoppel cannot be invoked in aid to validate that which is void under the law. The law on the subject is thus stated in Pollock on Contracts, 6 edn., p. 73:—"When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity which, however, in the case of a contract is not an obligation to perform the contract and must be carefully distinguished from it." Indeed it is not a contractual obligation at all. It is limited to this extent "that the infant is liable to restore any advantage he has obtained by such representation to the person from whom he has obtained it." (p. 52). This was held in Stikeman v. Dawson (1) and other cases to which it is needless to refer. In that case Vice-Chancellor Knight Bruce observed that for false representation or a fraudulent suppression or concealment the minor was answerable in equity after his majority, notwithstanding his minority at the time. This liability attaches to a minor, not on the ground of estoppel, but, as Sir Frederick Pollock points out, on the ground that "an infant shall not take advantage of his own fraud." If, however, the fact of minority was known and there was no deception, restitution cannot be ordered. No question of estoppel therefore arises in this case, and what we have to consider is whether the plaintiffs made any fraudulent misrepresentation as to their age which deceived the appellants and induced them to purchase the property in question.

The circumstances which led up to the sale of the 23rd of June 1899 are these. On the 26th of August 1898 Dwarka Prasad borrowed Rs. 400 from some of the appellants and hypothecated a 4½ pe share. In lieu of that sum and interest due thereon and a further advance of Rs. 665 in cash for the expenses of the marriage of Lalita Prasad, plaintiff, a mortgage bond for Rs. 1,200 was executed by Dwarka Prasad and Lalita Prasad on the 9th of June 1897. On that occasion Lalita Prasad stated

(1) (1847) 10 L. J. Ch. 205.
his age to be 22 years. On the 11th of April 1895 Lalita Prasad alone borrowed Rs. 799-12-0 from Shubhbaran Singh and others and executed a mortgage of a 1 anna 3 pie share. On this occasion also he stated his age to be about 22 years. On the 7th of February 1899 Bhumanesri borrowed Rs. 800 from Baba Karan Singh and executed a mortgage of a 1 anna 3 pie 15 kant share. He stated before the Sub-Registrar that his age was about 22 years and received the money in the presence of that officer. So that long before the execution of the sala-deed in suit the two brothers executed three documents and represented themselves to be persons of full age. In respect of the last two mortgages the appellants brought suits for pre-emption and these suits were defended by the plaintiffs as persons of full age and they filed written statements in that character on the 17th of February 1899. Before that date, that is on the 16th of February 1899, the two plaintiffs and Dwarka Prasad sent a notice to the appellants informing them that they were desirous of selling a 3 anna share in the village Kharaun and that the price had been settled with Shubhbaran Singh and others at Rs 8,000, and they asked the appellants if they would purchase that share for the aforesaid price. They further stated in the notice that the sale should be completed within ten days, otherwise the property would be sold to Shubhbaran Singh and others. An answer to this notice was sent on the 23rd of February 1899 expressing readiness to purchase for a reasonable price. After this the pre-emption suits were compromised and petitions of compromise were filed on 15th March 1899, in which Lalita Prasad and Bhumanesri said that it had been agreed with the present appellants, the plaintiffs in those suits, that each of the two brothers would sell to the appellants a 1 anna 3 pie 15 kant share for a consideration of Rs. 2,800. In the written statements, the notice and the petitions of compromise mentioned above, the plaintiffs professed to act as persons of full age. Decrees were passed in the pre-emption suits against the plaintiffs in accordance with the compromise, and in the decrees their names appear as those of persons of full age. It was in pursuance of the terms of the compromise that the sala-deed of 28th June 1899 was executed. The property sold was a
2 anna 9 pie share, and the consideration was Rs. 5,058-5-0, which was made up of Rs. 1,674-8-0 due to Shubaran Singh and others on the mortgages of 11th April 1893, and the 6th of January 1899; Rs. 1,420-8-0 due on account of the mortgage of 9th June 1897, and Rs. 2,863-5-0 paid in cash before the Sub-Registrar. At the time of registration of this document Lalita Prasad stated his age to be about 21 and Bhuaneshri's about 22 years. It is thus manifest that not only at the date of the execution of the sale-deed in question did the plaintiffs represent themselves to be of full age, but in 1897, 1898 and 1899 they executed documents in favour of the appellants and other persons in which they made similar representations, and at no time was it ever hinted that they were minors. As in fact they were minors, these representations were falsely made and they were clearly made with a view to induce the appellants to advance them money and purchase their property on the faith of these representations. If the appellants or any of them was aware of their true age they had no object in obtaining documents from them without the intervention of a guardian. I fully agree with the following observations of the learned Subordinate Judge:—

"There is no satisfactory evidence on the record to show that the defendants knew the true age of the plaintiffs and were not misled by their untrue statements. The defendants are residents of Ghazipur, while the plaintiffs are residents of Jamunpur. There is no reason to believe that the defendants knowingly entered into a contract with minors. Had they known the plaintiffs to be minors they would not have entered into the sale-deeds in the pre-emption suits nor into this sale transaction. The facts are all against the supposition that the defendants knew the plaintiffs to be minors." It is true Sita Ram appellant stated that he had known Bhuaneshri for thirteen years, but Sita Ram was not one of the purchasers under the sale-deed, and it does not appear that any of the purchasers had ever seen the plaintiffs before they entered into the transactions of 1897 and 1898. The Sub-Registrar who registered the deeds mentioned above has given evidence in this case and has stated that he considered the plaintiffs to be men of full age, and it is not surprising that the appellants also considered them to be of full age and were as
much deceived on the point as the Sub-Registrar. In my judgment the plaintiffs made false representations as to their age with a view to induce the purchasers at first to lend them money and afterwards to purchase their property and that these representations were fraudulently made. The plaintiffs are therefore liable in equity to make restitution for the benefit they obtained.

The learned Subordinate Judge has ordered the plaintiffs to refund Rs. 5,416-10-5 out of the consideration for the sale. He is of opinion that the whole of this money was received by the plaintiffs and this finding is, in my opinion, justified by the evidence. The endorsement of the Sub-Registrar on the sale-deed shows that Rs. 2,863-5-0 was received by Lalita Prasad in his presence. Lalita Prasad has not repudiated the correctness of this entry, and he has not by his own deposition or by any other evidence proved that he returned the money or gave it to Dwarka Prasad. He borrowed Rs. 793-12-0 from Shubaran Singh and others, and Bhuanshri borrowed Rs. 800 from them. These amounts, together with interest, were due by them, and the total sum due was Rs. 1,674-3-0. It has been proved that this sum was paid by the appellants to the creditors Shubaran Singh and others. Of the amount of the bond of 9th June 1897 Lalita Prasad took Rs. 665 for the expenses of his marriage. This amount together with interest was clearly due by him alone, and as it was set off against the consideration for the sale deed he has benefited to the extent of the amount due by him. It has thus been abundantly proved that the two plaintiffs, who are admitted to be joint, received and benefited by the amount which the Court below has directed to be restored by them. As pointed out by that Court, although they were minors in the eye of the law, they were grown-up young men when they received the money. Lalita Prasad was on his own showing about 19 years old and Bhuanshri over 17. They were old enough to understand and know their own interests, and it is most unlikely that they were entirely under the influence of Dwarka Prasad. They are therefore liable to make restitution of the amounts by which they have benefited. In the case of Mohori Bibee v. Dharmodas Ghose (1) restitution was not ordered, but that was apparently

(1) (1899) I. L. R. 59 Cal. 632.
on the ground that the mortgagee in that case had advanced the money with full knowledge of the age of the plaintiff and was not deceived. In the present case I am of opinion that the purchasers were ignorant of the true age of the plaintiffs and were deceived by their misrepresentation. I would therefore dismiss both the appeals with costs.

RICHARDS, J.—These appeals arise out of a suit for a declaration of the plaintiffs' title to certain property and for a declaration that a certain sale-deed dated the 28th of June 1899 was void as against the plaintiffs. The plaintiffs are the sons of one Lala Madho Prasad. Lala Madho Prasad was the son of Lala Mahabir Prasad. Lala Mahabir Prasad was a brother of the defendant Lala Dwarka Prasad. These persons were all members of a joint Hindu family and the property in question was part of the joint family estate. Mahabir Prasad died in 1870, leaving Madho Prasad, his son, a minor, him surviving. The share of the family was an eight anna zamindari share. After the death of Mahabir Prasad, Dwarka and Madho sold a 2½ share out of the eight anna share. Madho died on the 25th September 1882 leaving the plaintiffs' infant children him surviving. In 1891, Dwarka Prasad sold a 2 anna 3 pie share and also a 2 anna 7½ pie share to certain persons now represented by the defendants 1 to 11.

The plaintiffs did not join in this sale.

On the 28th of June 1899, Dwarka Prasad and the plaintiffs sold a 3 pie share to one Beni Koon and others, and the remaining 2 anna 9 pie share to persons represented by the defendants 1 to 11.

It is in effect to set aside the deed transferring this 2 anna 9 pie share that the present suit is brought. The plaintiffs allege that the plaintiff No. 1, Lalita Prasad, was born on the 24th of November 1880, and that the plaintiff No. 2, Lala Bhuaneshri Prasad, was born on the 17th April 1882, and that they attained majority on the 24th of November 1901 and the 17th of April 1903, respectively; that they received no consideration, and that the sale was a fraud upon them. The defendants 1 to 11 allege that the plaintiffs were of full age when they executed the sale-deed, and that even if they were not, they represented themselves
as being of full age, and that therefore they ought not to be allowed to set up the minority.

A certificate of guardianship of the person and property of the plaintiff was granted in the year 1883 to Dwarka Prasad, and accordingly, under the provisions of Art No. XL of 1858, the plaintiffs did not attain majority until they reached the age of 21 years respectively. The Court below has found that the plaintiffs were minors at the time the sale-deed of the 23rd June, 1899, was executed. The learned Subordinate Judge says—"The fact of the plaintiffs being minors is established beyond any reasonable doubt." I entirely agree with that finding. Dwarka Prasad, the guardian of the minors, was examined and proved that they were minors. Perhaps not much reliance should be placed on his uncorroborated evidence, but on the 10th of March, 1888, he made an application to the District Judge to be appointed guardian of the minors (he was subsequently appointed guardian). He then gave the ages of the plaintiffs as seven years and six years, respectively. In the year 1888 Dwarka had no object or motive for under-stating the ages of his nephews, and it is impossible not to give great weight to this corroboration of his evidence. The Civil Surgeon examined the plaintiffs on the 25th of November, 1905, and he stated the age of the elder plaintiff to be then twenty-four years and the younger plaintiff twenty-two years. This was six years after the execution of the deed in question, and unless the Civil Surgeon was very much in error, the plaintiffs must have been under twenty-one years in June, 1899. There was a lot of other evidence which is not perhaps very definite, but the age of the plaintiffs, particularly of the plaintiff Bhuaneshri Prasad is fixed by the death of their father Madho Prasad, which unquestionably happened not earlier than 1832. Bhuaneshri Prasad was then an infant in arms. In 1899 the plaintiffs were recorded as minors. On the last day of the hearing of the appeal the last-mentioned plaintiff was in Court and he appears even now to be a very young man. I think it is pretty clear from the evidence that Dwarka was at least an extravagant man. He very soon dissipated almost his entire interest in the family property. It was quite unnecessary for him to have applied for a certificate of guardianship to his nephews, as the family
was joint, and I have no doubt that his object in getting himself appointed was to enable him the more effectually to dispose of the minors’ property. I also think that there is a good deal in the case to suggest that the interests of the plaintiffs were not very well looked after. The defendants or the persons whom they represent had become co-sharers in 1891, and I think it hard to believe that they were unaware of the plaintiffs’ real age. In fact one of the defendants, Sita Ram, admits that he had seen the second plaintiff visiting the village “for the last 12 or 13 years.” I shall now proceed to consider the evidence as to the alleged representation by the plaintiffs that they were of full age. The plaintiffs went before the Registrar in 1897, 1898 and in 1899 in connection with the registration of certain mortgages. It is not very clear what occurred before the Registrar, but they apparently did give their ages as being over 21 years. Possibly the Registrar was deceived, but the Registrar was not the purchaser. They also defended a suit or suits as adults. There is, however, no evidence that in the negotiations for the sale of the 28th of June 1899, or at any time up to the execution of the deed the plaintiffs ever represented themselves to the defendants (or to the persons now represented by the defendants) as being of full age. None of the defendants have come forward to say that they were in fact misled by the representation of the plaintiff, or that they ever made any inquiry about their ages. The defendant Sita Ram says that the sale-deed sued on was executed under his superintendence, and in cross-examination he admitted that he had been seeing Bhuannesri Prasad for 12 or 13 years. I am quite satisfied that Sita Ram knew that plaintiff No. 2 at least was under 21 years. I believe the truth to be that the defendants, who had already acquired the greater part of Dwarka’s share, were naturally very anxious to acquire the remaining shares and were prepared to take the risk of purchasing from minors. I think it quite impossible to hold that the plaintiffs were guilty of fraudulent misrepresentation of their ages committed for the purpose of deceiving the defendants or their representatives and inducing them to buy the property. The learned Subordinate Judge did not frame any express issue as to whether or not there had been fraudulent misrepresentation by the plaintiffs as to their
ages. At pages 20 and 21 of the judgment, however, he refers to two pre-emption suits brought by the defendants against the plaintiffs and their uncle Dwarka. These suits were defended by the plaintiffs as adults, and the learned Judge says that the plaintiffs ought to have brought to the notice of the Court that they were minors, and later on, at page 21, he says,— "If ever a fraud was committed upon a Court deliberately and with the object of injuring the other party this is such a case." On the strength of this supposed fraud, the learned Judge has ordered the plaintiffs to refund the sale consideration as a condition precedent to setting aside the sale deed. Surely this is a strange ground for holding minors guilty of fraud. I think the evidence goes to show that the whole litigation was managed by Dwarka, and that the plaintiffs were under his influence and ready to do whatever he told them to do, and I think it quite impossible to hold that the plaintiffs were guilty of fraudulent misrepresentation merely because when sued as adults they neglected to inform the Court of their minority. In my opinion the ordinary law as to estoppel does not apply to infants and this was practically admitted in the argument. It is said, however, that an infant is liable for fraudulent misrepresentation in an action for deceit and that the fraud of an infant may therefore be set up as a defence when the infant seeks to set aside a transaction induced by his fraud. Assuming this for the purpose of argument to be so, I think it a fair test in this case to consider whether the defendants on the evidence could succeed if they were suing as plaintiffs in a suit for damages for fraudulent misrepresentation I certainly hold they could not. In such a suit the plaintiffs should prove that they were induced to enter into the contract of sale by the fraudulent misrepresentation of the defendant and that the plaintiff (purchaser) was in fact deceived and really did not know the true state of the facts. They (the defendants) have never come forward to say that they were in fact misled or deceived. The evidence is altogether consistent with the plaintiffs acting under the influence of their uncle, and the defendant's agent, Sita Ram, I believe, knew well that the plaintiffs were minors. One question further remains, namely, should the Court direct the plaintiffs to make any compensation to the defendants, and if so, to what extent? The Court
below directed that Rs. 5,416-10-5 should be paid by the plaintiffs before getting possession. It seems to me that the policy of the law is to protect infants against themselves as well as against others. In the case of Mohori Bibee v. Dharmodas Ghose (1) their Lordships of the Privy Council held that a minor was wholly incapable of making contracts. Section 64 of the Contract Act therefore does not apply. In the case cited the minor was within a few months of being 21 years when he executed the mortgage, and yet the latter was set aside without any compensation. Dealing with the question of compensation their Lordships quote the following passage from the judgment of Lord Justice Romer in the case of Thurston v. Nottingham Permanent Building Society (2):—"The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any money in respect of a transaction which, as against that person the Legislature has declared to be void." In the case of Thurston v. Nottingham Permanent Building Society, the infant was allowed to keep the entire advance made to her by the Society for the purpose of completing buildings on her property. I can see no reason for directing the plaintiffs to refund the entire purchase money. Furthermore the cases of both the plaintiffs are not quite identical. Lalita Prasad was not only the elder of the two, but he seems to have received a larger amount of money. Lalita Prasad as sole mortgagor mortgaged a 1 anna, 3 pie share on the 11th of April 1898. Bhuanaeshri Prasad in like manner, on the 7th of January 1899, mortgaged a 1 anna, 3 pie, 15 kant share. The defendants or their representatives brought suits for pre-emption against Lalita and Bhuanaeshri in respect of these mortgages. (These are the suits the plaintiffs defended as adults.) The suits were compromised and decrees made in the terms of the compromise. By these compromises the defendants in the present suit were to pay Rs. 829 with interest to the mortgagees in respect of Lalita's mortgage and Rs. 52-8-0 costs. They were also to pay Rs. 811 with interest and Rs. 52-8-0 costs in respect of Bhuanaeshri Prasad's mortgage. In the sale-deed of the 11th of April 1899, it is recited that Rs. 1,674-8-0 was paid to the mortgagees on foot of these mortgages. The shares of the plaintiffs—

(1) [1890] I. L. R., 39 Cal., 673. (2) [1892] 1 Ch., 1: [1892] A. C., 6.
in respect of this sum of Rs. 1,674-8-0 were practically equal in amount and I treat them as equal. Lalita had had a further advance of Rs. 665 on foot of the mortgage made by him and his uncle on 9th June 1897, and under the terms of the sale-deed, this mortgage was also paid off. It may therefore be said that on the sale of the 28th of June 1899, debts of Lalita’s to third parties were discharged as follows. Rs. 665, Rs. 837-4-0 (half of Rs. 1,674-8-0) and Rs. 52-8-0 costs, total Rs. 1,554-12-0. In the case of Bhuaneeshri, debts were in like manner discharged: Rs. 837-4-0 (half of Rs. 1,674-8-0) and Rs. 52-8-0 costs, total Rs. 889-12-0. Lalita was married in 1897 and the Rs. 665 were paid for his marriage expenses. I think that it would be reasonable under the provisions of section 41 of the Specific Relief Act to direct that plaintiff Lalita should pay to the defendants the sum of Rs. 1,554-12-0 as a condition to getting possession, and that the plaintiff Bhuaneshri should in like manner pay the sum of Rs. 889-12-0, and I would to this extent modify the decree of the lower Court. These sums represent mortgage debts paid to third parties. The mortgages have never been set aside, and I think that these mortgage debts stand on a different basis from the other moneys which the Court below has directed the plaintiffs to pay as a condition precedent to getting possession. I would dismiss the defendants’ appeal, and allow the appeal of the plaintiffs to the extent mentioned above.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Richards and Mr. Justice Karamat Husain,
EMPEROR V. DUNGAR SINGH*

Act No. II of 1899 (Indian Stamp Act), schedule I, article 63 (c)—Stamp—
Receipt for rent—Receipt for money paid out of Court in satisfaction of a decree for rent.

Held that, although a receipt for rent of an agricultural holding is exempt from payment of stamp duty under article 63 (c) of the first schedule to the Indian Stamp Act, 1899, a receipt for payment out of Court of money due under a decree for such rent is not so exempt.

* Criminal Revision No. 654 of 1866 from an order of H. J. Dalal, Sessions Judge of Aga, dated the 14th of August 1866.
ONE Dungar Singh, as agent for a zamindar, obtained a decree for rent against a tenant. On account of that decree the judgment-debtor paid certain monies to Dungar Singh, who granted a receipt therefor, but omitted to stamp it. For this Dungar Singh was tried by a magistrate of the first class for an offence under section 62 of the Indian Stamp Act, 1899; was convicted, and was sentenced to a fine of Rs. 40 or in default to forty days' simple imprisonment. Against his conviction and sentence Dungar Singh applied in revision to the Sessions Judge of Agra, who being of opinion that article 53 (c) of the first schedule to the Stamp Act applied, and that no stamp was required for such a receipt, submitted the case to the High Court under the provisions of section 438 of the Code of Criminal Procedure with the recommendation that the conviction and sentence should be set aside.

The Assistant Government Advocate (Mr. W. K. Porter) for the Crown.

RICHARDS and KARAMAT HUSAIN, JJ.—Dungar Singh was convicted under section 62, of the Indian Stamp Act (II of 1899) and sentenced to a fine of Rs. 40 or to suffer simple imprisonment for 40 days. It appears that the accused held a decree for rent against a certain tenant and gave a receipt for the amount of the decree to the tenant without any stamp denoting payment of duty. The accused Dungar Singh was himself merely an agent of a zamindar. Generally speaking, receipts must be stamped, but an exemption is made by article 53 (c), schedule I, of the Stamp Act in favour of receipts for payment of rent by cultivators on account of land assessed to Government revenue. The learned Sessions Judge has referred the matter to this Court under section 438, Criminal Procedure Code, suggesting that the conviction is wrong and should be set aside, inasmuch as a receipt for money paid under a decree for rent must be treated as a receipt for rent. A learned Judge of this Court considering the matter of general importance has referred the case to a Bench of two Judges. In our judgment the conviction was correct. The debt of rent merged in the decree, and it is admitted that a receipt for money payable under a decree must bear a stamp. We do not think that there was any intention to defraud the revenue. Absence of such intention though not sufficient to make a
conviction bad, may be taken into consideration in awarding punishment. We alter the sentence from a fine of Rs. 40 to a fine of Rs. 5, or in default imprisonment for 40 days. If the fine has already been paid Rs. 35 will be refunded. Let the record be returned.

REVISIONAL CIVIL.

1903

November 20.

Before Mr. Justice Richards and Mr. Justice Griffin.

MAZHAR HASAN (APPLICANT) v. SAIID HASAN (OPPOSITE PARTY).*

Civil Procedure Code, section 622—Criminal Procedure Code, sections 195, 439
—Act No. XVIII of 1879 (Legal Practitioners Act), section 14 — Jurisdiction.

A complaint made by letter by a litigant to the Subordinate Judge charging a pleader with professional misconduct was "filed" by the Subordinate Judge; but on a similar complaint being sent to the District Judge, the District Judge, having inquired into its authenticity, sent it to the Subordinate Judge for inquiry and report. The Subordinate Judge thereupon instituted an inquiry under section 14 of the Legal Practitioners Act, as a result of which he granted sanction to the pleader to prosecute for perjury one of the witnesses who had appeared before him in the course of the inquiry, and this order was confirmed by the District Judge.

Held that the High Court had no jurisdiction to interfere with the order of the Subordinate Judge under either section 195 or section 439 of the Code of Criminal Procedure; nor could it interfere under section 622 of the Code of Civil Procedure, inasmuch as the Subordinate Judge, though he possibly mistook the meaning of the District Judge’s order addressed to him, had jurisdiction to inquire into the truth of the charge made against the pleader.

This was a case arising out of a suit brought by a Muhammadan lady to recover her dower. The plaintiff obtained a decree from the Court of the Subordinate Judge of Moradabad, but in the course of execution proceedings a compromise was filed by the plaintiff’s vakil. After this the plaintiff sent letters to the Subordinate Judge, the District Judge and the High Court, complaining that the compromise had been filed contrary to her interests and in collusion with the other side. Neither the Subordinate Judge nor the District Judge took any notice of these communications, but the High Court sent the letter which it had received to the District Judge. The District Judge having ascertained that it was really the letter of the plaintiff sent it on to the

*Civil Revision No 21 of 1903, from an order of W. P. Kirtley, District Judge of Moradabad, dated the 16th April 1903.
Subordinate Judge for inquiry. The Subordinate Judge, possibly misunderstanding the wording of the District Judge’s order, proceeded to hold an inquiry into the conduct of the vakil concerned under the provisions of the Legal Practitioners Act, 1879.

In the course of this inquiry one Mazhar Hasan the plaintiff’s agent appeared as a witness and stated on oath that he had never instructed the vakil to file the compromise. On the application by the vakil the Subordinate Judge subsequently granted sanction for the prosecution of Mazhar Hasan. Mazhar Hasan thereupon filed three applications in the High Court. The present was an application in revision on the Civil side. The other two were applications under section 195 and section 429 of the Code of Criminal Procedure respectively. All three applications are dealt with by the judgment printed below.

Mr. G. P. Boys, for the applicant.
Mr. B. E. O’Conor, for the opposite party.

Richards and Griffin, JJ.—This application is connected with Criminal Revisions Nos. 220 and 221 of 1908.

The facts are shortly as follows:—

Certain civil proceedings were proceeding in the Court of the Subordinate Judge. The suit was one by a Muhammadan lady for dower. In the course of the execution of a decree in that suit a compromise was filed on behalf of the lady by her vakil. The lady sent a complaint to the High Court, District Judge and the Subordinate Judge, alleging that the compromise had been filed contrary to her interest by her vakil in collusion with the other side. The Subordinate Judge apparently did not consider it necessary to take any steps as the result of the lady’s communication. Her letter was unverified, and apparently not produced by a person duly authorized to produce it. The High Court sent the communication it received to the District Judge. The District Judge had the communication verified and sent it on to the Subordinate Judge for inquiry. It is quite possible that the District Judge did not intend that the Subordinate Judge should go to the length of holding an inquiry under the Legal Practitioners Act as the result of his direction. The Subordinate Judge, however, did hold an inquiry under the Legal Practitioners Act. In the course of this inquiry the applicant was
examined as a witness, and he is alleged to have stated, amongst other things, that he never instructed the pleader to file the compromise. The Subordinate Judge on the application of the pleader granted leave to prosecute Mazhar Hasan the present applicant. There was an appeal to the District Judge, who refused to interfere with the order of the Subordinate Judge. The present applications are made to this Court. Criminal Revision No. 220 is brought under section 115 of the Code of Criminal Procedure. In our judgment an application under section 195 does not lie to this Court under the circumstances of the present case. The Subordinate Judge sanctioned the prosecution and the District Judge merely confirmed the order of the Subordinate Judge. The case is in our opinion governed by the case of Salig Ram v. Ramji Lal (1). As to Criminal Revision No. 221 it is brought under the provisions of section 439 of the Code of Criminal Procedure. It is quite clear under the authority of the last mentioned case that this Court cannot entertain the application under the provisions of section 439. This application is made under the provisions of section 622 of the Code of Civil Procedure, and accordingly it is necessary for the applicant to show that the orders of the Subordinate Judge and of the District Judge were made without jurisdiction. The learned counsel for the applicant contends that before an inquiry could be held under the Legal Practitioners Act, it was necessary that a pleader should "be charged in his Court" with some offence mentioned in section 14 of the Act, and he contends that the only charge in the Subordinate Judge's Court was the letter of the lady to him, and that the Subordinate Judge himself "shelved," that is to say, refused to hold any inquiry on that charge. We cannot agree with this contention. The Subordinate Judge had before him first the lady's complaint. Subsequently he got from the District Judge a repetition of that complaint duly verified, and he then proceeded to hold the inquiry. We do not think that the shelving of the first letter was a refusal to entertain the charge, and we think that the first letter followed by the communication from the District Judge amounted to a "charging of the pleader in the Court of the

(1) (1906) I. L. N., 24 All., 554.
Subordinate Judge * within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure, and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

Application dismissed.
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Per Karamat Husain, J., that the disciplinary powers of
the High Court under section 15 of the Statute being exercis-
able only by the full Court, a bench of two Judges had no jurisdic-
tion to adjudicate upon the application neither had a single
Judge jurisdiction to admit it.

Per Aikman, J., that the Court had an inherent power to de-
legate to one or more of its members the power to deal with
applications such as the present, and rule 1 (xii) of the Rules of
Court of the 18th January 1898 effected such a delegation. But
the powers of the Court under section 15 of the Statute were
limited, and in this instance no case for their exercise had been
shown. Tej Ram v. Har Sukh, I. L. R., 1 All., 101, and Muhammad
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SUCCESSION, See Act No. XII of 1881, section 9 ... 51

SURETY, See Act No. V of 1891, section 78 ... 56

"TENANCY," See Act (Local) No. II of 1901, sections 4 (5), 32 (2) ... 42

VALUATION OF SUIT, See Act No. VII of 1887, section 3 ... 44
Subordinate Judge" within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure, and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkill.

JAGAN NATI (PLAINTIFF) V. TIRBENI SAHAI AND OTHERS (DEFENDANTS).*


A plaintiff came into Court upon the allegation that a certain grove had upon partition been wrongly allotted to the defendants’ mahal whereas it should have been allotted to his (the plaintiff’s) mahal, and he claimed a decree for a declaration of his title or for possession. Held that section 203 (b) of the United Provinces Land Revenue Act, 1901, barred the cognizance of such a suit by a Civil Court. Keshan Prasad v. Kadher Mal (1) distinguished.

This was an appeal under section 10 of the Letters Patent from a judgment of Banerji, J. The facts of the case sufficiently appear from the judgment under appeal which was as follows:

BANERJI, J.—The facts of this case are these—The village Alipur was by an imperfect partition made in 1881 divided into 32 pattis. On the 5th of August 1892, Hira Lal, a co-sharer in the village, applied to the Revenue Court for perfect partition and prayed that certain pattis which belonged to him should be formed into a separate mahal. The defendants Tirbeni Sahai, Gauti Sahai and Musammat Suraj Kunwar, who were named as opposite parties to the application of Hira Lal, made an application on the 15th of December 1892 in which they asked that their pattis

*Appeal No. 82 of 1907 under section 10 of the Letters Patent.

(1) Weekly Notes, 1900, P. 11.
also should be formed into a separate mahal. On the 18th of August 1893 a partition proceeding was drawn up to the effect that 20 pattis should be formed into different mahals and 12 pattis, one of which was patti No. 32, should form a separate mahal to be called the mahal of the non-applicants for partition. Accordingly a partition was effected, which has been confirmed by the Collector. By this partition the village was divided into 26 mahals, the 26th mahal being that of the non-applicants for partition. The pattis of Tirbeni Sahai and others were included in mahal Hira Lal. In patti No. 32, which is the patti of the plaintiff and which was included in the 26th mahal, the mahal of the non-applicants for partition, there is a grove No. 623. This grove was allotted to the mahal in which the defendants are co-sharers. The plaintiff states that he has a half share in the grove, that the defendants have no right to that half share and that the inclusion of the whole of the grove in the defendants' share was improper. The plaintiff accordingly brought the present suit for a declaration of his right to a half share of the grove No. 623 and in the alternative for possession of that share. The court of first instance dismissed the suit as barred by the provisions of section 233, clause (k) of the Land Revenue Act (No. III of 1901). The lower appellate Court has set aside the decree of that Court and has decreed the plaintiff's claim. That Court was of opinion that as under the partition proceeding patti No. 32 was excluded from partition, the revenue authorities had no jurisdiction to include the grove in suit, which appertained to the said patti, in the mahal of the defendants. The learned Judge relies upon the decision of this Court in Kasru Prasad v. Kader Mal (1). That case is clearly distinguishable from the present. What happened in that case was that under a previous partition of the land of the village four mahals had been formed, one of which was called patti shamilat. Subsequently a partition of patti shamilat alone took place and certain land which appertained to one of the other three mahals was partitioned. It was held that this partition did not preclude the Civil Court from determining the plaintiff's right to a plot of land which was not the subject of the partition of the mahal.

(1) Weekly Notes, 1900, p. 11.
shamilat. In the present case the whole of the village was under partition. The revenue authorities directed that the village should be divided into 25 mahals, one of which, the mahal of the non-applicants for partition, was to consist of 12 pattis. If land which appertained to one of these 12 pattis was allotted to another of the mahals under the partition, that was a matter relating to partition and ought to have formed the subject of an appeal under section 132 of Act No. XIX of 1873, which was the Act under which the partition in question was effected. Rightly or wrongly, the revenue authorities allotted to the defendants' mahal what the plaintiff says ought to have been allotted to his mahal, namely, the mahal of the non-applicants for partition. This was clearly a question relating to the partition or union of mahals within the meaning of clause (k), section 233 of Act No. III of 1901 and was therefore not cognizable by a Civil Court. The plaintiff mistook his remedy, and, instead of appealing against the order confirming the partition, he brought the present suit in a Civil Court. Such a suit falls within the prohibition of section 233 (k) and is not maintainable. The Court of first instance was in my judgment right. I accordingly allow the appeal, set aside the decree of the court below and restore that of the Court of first instance with costs in all Courts.

Against this judgment the plaintiff appealed.

Dr. Satish Chandra Banerji (for whom Babu Sarat Chandra Chaudhri), for the appellants.

Babu Sital Prasad Ghosh, for the respondents.

STANLEY, C. J., and BURKITT, J.—We agree in the view taken by the learned Judge of this Court from whom this appeal has been preferred, and dismiss the appeal with costs.
Before Mr. Justice Aikman and Mr. Justice Karvat Husain.

KEDAR SINGH AND OTHERS (PLAINTIFFS) v. MATABADAL SINGH
AND OTHERS (DEFENDANTS) *

Act No. VII of 1887 (Suit Valuation Act), section 8—Act No. VII of 1870
(Court Fees Act), section 7, clause xx—Valuation of suit—suit for re-
demption of mortgage.

Held that the value for purposes of jurisdiction of a suit for redemption
of mortgage is the amount of the principal mortgage money and not the value
of the property mortgaged. Kabair Singh v. Atma Ram (1) and Amanat Beg-
gam v. Bhajan Lal (2) followed. The law as laid down in these cases has not
been affected by the passing of Act No. VII of 1887, section 8.

This was a suit for redemption of mortgage. The amount
secured by the mortgage was Rs. 1,000, but the value of the pro-
erty mortgaged was said to be Rs. 9,000. The suit was filed in
the Court of the Subordinate Judge, who directed the plaint to be
returned for presentation in the proper court upon the ground
that the suit was within the jurisdiction of the Munsif. Against
this order the plaintiff appealed to the High Court. At the
hearing a preliminary objection was taken on behalf of the respon-
dents that the valuation of the suit was rightly decided by
the Subordinate Judge, and, such being the case, an appeal lay
to the District Judge and not to the High Court.

Munshi Gokul Prasad, for the appellants.

Mr. W. Wallach, for the respondents.

Aikman and Karvat Husain, JJ.—This is an appeal
from an order of the learned Subordinate Judge of Jaunpur
returning a plaint to the appellants for presentation in the Court
of the Munsif. The suit was one for redemption of a mortgage,
the amount secured by the mortgage being Rs. 1,000. In the
plaint it is stated that the value of the property is Rs. 9,000. The
learned counsel for the respondents takes a preliminary objection
based on section 589 of the Code of Civil Procedure, viz., that the
appeal does not lie to this Court, but to the Court of the District
Judge. This preliminary objection really raises the issue as to
whether the plaintiffs’ suit was cognizable by the Munsif or by
the Subordinate Judge. If the “value” of the suit is to be
taken to be the amount secured by the mortgage, then, under

*First Appeal No. 34 of 1908, from an order of Tajammul Husain, Subor-
dinate Judge of Jaunpur, dated the 2nd of July 1907.

(1) (1883) I. L. R., 5 All, 552. (2) (1883) I. L. R., 5 All, 535.
section 19 (1) of Act No. XII of 1887, the suit should have been filed in the Court of the Mun-if and the action taken by the Subordinate Judge in returning it is right. In the case of Kubair Singh v. Atma Ram it (1) was held by Stuart, C.I., and Tyrrell, J., that the value of the subject-matter of a suit like the present was not the market value of the land, but the amount of the mortgage money. In the Full Bench case of Amanat Begum v. Bhajan Lal (2) a similar view was taken. The learned vakil for the appellants contends that, having regard to the provisions of section 8 of Act No. VII of 1887, an Act which was passed after the rulings referred to, those rulings are no longer law. That section provides that in suits other than those referred to in the Court Fees Act, section 7, paragraph ix, where court fees are payable ad valorem under the Court Fees Act, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. One of the kinds of suits referred to in paragraph ix of section 7 is a suit against a mortgagee for the property mortgaged. The present suit is one of that nature. But the section of the Suits' Valuation Act relied on by the appellants' learned vakil does not prescribe what is to be taken as the value of a suit for redemption. This being so, we think that the section relied on does not affect the rulings to which we have referred above. We must therefore sustain the preliminary objection. We direct that the memorandum of appeal be returned to the appellants for presentation in the proper Court. The respondents are entitled to their costs in this Court.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
JAGAR NATH SINGH AND ANOTHER (Plaintiffs) v. SHEO GHULAM SINGH (Defendant).

Civil Procedure Code, section 244—Execution of decree—Jurisdiction of Court executing a decree—Suit by representatives of mortgagor judgment-debtor for declaration of invalidity of mortgage.

Held that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings

*Second Appeal No. 1102 of 1907 from a decree of E. F. Oppenheim, District Judge of Gorakhpur, dated the 22nd of May 1907, reversing a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 31st of January 1907.

(1) (1883) I L. R. 5 All. 332. (2) (1889) I L. R. 6 All. 438.
as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been made. A separate suit therefore, on the part of such persons seeking a declaration that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of section 244 of the Code of Civil Procedure. Lalidhar v. Chaturbhuj (1) followed.

The facts of this case are as follows:

One Musammat Raghubansana, a Hindu widow, executed a mortgage in favour of Sheo Ghulam Singh. The mortgagor obtained a decree for sale on that mortgage on the 1st of April 1905. Thereafter the mortgagor died, and Jagar Nath Singh and others were brought upon the record of the execution proceedings as the reversionary heirs of the last full owner the husband of the mortgagor. The reversioners filed an objection to the sale upon the ground that the mortgage was executed by Musammat Raghubansana without legal necessity. Their objection was disallowed, and they then filed a suit for a declaration that the mortgaged property was not liable to be sold in execution of the mortgagor’s decree. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim; but on appeal by the defendants the suit was dismissed by the District Judge as being barred by the provisions of section 244 of the Code of Civil Procedure. The plaintiff thereupon appealed to the High Court.

Munshi Iswar Saran and Babu Jogul Kishor, for the appellants.

The Hon’ble Pandit Sundar Lal and Dr. Tej Bahadur Sapru, for the respondent.

STANLEY, C.J., and BANERJI, J.—This appeal arises out of a suit for a declaration that a share of certain zamindari property was not liable to be sold in execution of a decree obtained against a Hindu widow on foot of a mortgage executed by her. Musammat Raghubansana executed a mortgage in favour of the defendant Sheo Ghulam Singh and on foot of that mortgage Sheo Ghulam Singh obtained a decree for sale on the 1st of April 1905. After this date Musammat Raghubansana died, and thereupon the appellants, who claimed to be the reversioners of the

(1) (1850) I. L. R., 21 All., 277.
deceased owner, the husband of Munammat Raghubansa, were brought upon the record as the representatives of Munammat Raghubansa on an application under section 80 of the Transfer of Property Act for an order absolute. They filed an objection to the sale on the ground that the mortgage was executed by Munammat Raghubansa without legal necessity. Their objection was disallowed, and thereupon the suit out of which this appeal has arisen was filed for a declaration that the property was not liable to be sold in execution of the mortgage decree. The Court of first instance decreed their claim, but upon appeal the lower appellate Court reversed the decision of the Court below and dismissed the plaintiffs' suit, on the ground that it was barred by the provisions of section 214 of the Code of Civil Procedure. The learned advocate for the respondent admits that this section does not apply and that the learned District Judge was wrong in the view taken by him. The case is on all fours with that of Lila- 
dhar v. Chaturbhuj (1). In that case it was held by one of us and by Aikman, J., that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. In view of this decision the learned District Judge was clearly wrong. We therefore allow the appeal, set aside the decree of the lower appellate Court, and, as the appeal was decided upon a preliminary point, we remand the case under section 692 of the Code to that Court, with directions that it be reinstated in the file of pending appeals and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1883) I. L. R., 21 All., 277.
REVISIONAL CRIMINAL.

Before Mr Justice Aikman and Mr Justice Karamat Husain.
KANHAI LAL AND ANOTHER (OPPOSITIVE PARTY) v. CHHADAMMI LAL (APPLICANT).*

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal.
Held that when sanction to prosecute has been granted by a Court under the provisions of section 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. Salig Ram v. Ramji Lal (1), Emperor v. Serb Hal (2) and Mathusanami Mudali v. Teni Chilli (3) referred to.

In this case one Chhadammi Lal applied in the Court of the Munsif of Bareilly for sanction to prosecute Kanhai Lal and another for an offence punishable under section 193 of the Indian Penal Code. Their application was refused, upon which a further application was made to the District Judge who granted the sanction prayed for. The persons against whom the sanction had been granted thereupon applied to the High Court in its revisional criminal jurisdiction against the order of the District Judge.

Babu Satya Chandra Mukerji, for the applicants.
Babu Sital Prasad Ghosh, for the opposite party.

AIKMAN and KARAMAT HUSAIN, JJ.—One Chhadammi Lal applied to the Munsif for sanction to prosecute the present applicants for an offence punishable under section 193, Indian Penal Code. Sanction was refused by the Munsif. Chhadammi Lal then applied to the learned District Judge, who granted the sanction. The applicants have presented a petition which is heard as a "Criminal Revision" against the order of the District Judge. It may be taken as decided by the Full Bench in Salig Ram v. Ramji Lal (1) that this Court has no revisional power, on the criminal side, to interfere with an order passed by a Civil Court granting sanction under the provisions of section 195, Code of Criminal Procedure. We are bound by that ruling, and must therefore hold that we have no power of interference in revision. But it is contended that apart from the revisional powers conferred on this Court by Chapter XXXII of the Code of

* Criminal Revision No. 639 of 1903, from an order of W. H. Webb, Esq., District Judge of Bareilly, dated the 17th of July 1903.

(1) (1903) I. L. R., 23 All., 534. (2) Weekly Notes, 1903, p. 102. (3) (1907) I. L. R., 30 Mad., 352.
Criminal Procedure, we have power under section 195, clause (6) of that Code to revoke the sanction which the learned District Judge has given. In the case of Muthuswami Mudali v. Veeni Chetti (1) Mr. Justice Wallis expressed his opinion that it was never intended by section 195 that there should be more than one appeal in a case like the present. In the case of King Emperor v. Serh Mal (2) we expressed our concurrence with what was said by Wallis, J., in the case referred to. We see no reason to alter our opinion. We therefore hold that we have no power of interference in this case, and reject the application.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji. Sagar Mal (Defendant) v. Makhan Lal and Others (Plaintiffs).* Act (Local) No. II of 1901 (Agra Tenancy Act), sections 4 (5), 32 (2)—Rent free grant—"Holding"—"Tenant."

Held that a rent free grant is not a "holding," nor is the grantee a "tenant" within the meaning of the Agra Tenancy Act, 1901. Abdul Karim v. Ramzan (3) approved.

The plaintiff in this case brought his suit in a Civil Court for partition of a rent-free holding. The Court of first instance (Munsif of Meerut) gave the plaintiff a decree, and this decree was in appeal confirmed by the Additional Judge. One of the defendants, Sagar Mal, appealed from this decree to the High Court, upon the ground that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition.

Pandit M. L. Sandal, for the appellant.
Mr. M. L. Agarwala, for the respondents.

Stanley, C.J. and Banerji, J.—This appeal arises in a suit for partition of a rent free holding. Both the Courts below granted the plaintiff a decree. This appeal has been preferred by one of the defendants, Sagar Mal, and the only ground of appeal pressed.

*Second Appeal No. 1234 of 1907 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 31st of May 1907, confirming a decree of Hari Mohan Banerji, Munsif of Meerut, dated the 12th of January 1907.

(1) I. L. R., 30 Mad., 382. (2) Weekly Notes, 1908, p. 102.
(c) Weekly Notes, 1908, p. 107.
before us is that in the case of a rent free grant, as of any other
tenancy coming under the Agra Tenancy Act, a Civil or a Revo-
nue Court is prohibited by section 32, clause (2), of the Act
from entertaining a suit for partition. We are of opinion that
this section does not apply to a rent free grantee. The section
in question falls within Chapter II, which deals with “the
devolution, transfer and division of tenancies.” A tenant is
defined in section 4, clause (5), and does not include a rent free
grantee. A rent free grantee, as also a mortgagee of proprietary
rights, is by that definition expressly excluded. Consequently a
rent free grant does not appear to us to be a “holding” within
the meaning of section 32. The word “holding” in that section
means, we think, the holding of a tenant as defined by the Act.
We may point out that the heading of section 32 is:—“Division
of tenancies,” that is, the division of the holdings of tenants as
defined in section 4. We may also point out that Chapter X of the
Act deals with the re-umption of rent free grants. A separate
Chapter in the Act is devoted to these grants. This view was
expressed by our brother Richards in the case of Abdul Karim
v. Ramin (1). Our learned brother, after referring at length
to some of the section of the Agra Tenancy Act, held that a suit
for partition of land alleged to be rent free is not excluded from
the jurisdiction of the Civil Court either by section 233 (k) of the
Land Revenue Act or by section 32 of the Agra Tenancy Act.
We therefore agree in the view expressed by both the Courts be-
low and dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1903, p. 197.
Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

AYUB ALI KHAN (DEFENDANT) v. MASHUQ ALI KHAN (PLAINTIFF).*  
Act No. XII of 1881 (North-Western Provinces Rent Act), section 3—Act  
(Local) No. 11 of 1901 (Agra Tenancy Act), sections 22, 32 (2)—Occupancy  
holding—Succession—Suit for right to a share in an occupancy holding—  
Civil and Revenue Courts—Jurisdiction.

Held that a suit in a Civil Court for a declaration of the plaintiff's right  
to a share in an occupancy holding is not precluded by section 32 (2) of the  
Agra Tenancy Act.

Held also that there was nothing in the Rent Act of 1881 to prevent a  
woman becoming an occupancy tenant, and if she did so, on her death the  
tenancy would pass to her heirs and not the heirs of her husband.

The facts out of which this appeal arose were as follows:—

An occupancy holding was held jointly by two brothers,  
Yakub Ali Khan and Muzaffar Ali Khan. On the death of  
Muzaffar Ali Khan, which took place before the present Tenancy  
Act came into operation, the name of his widow, Musammat  
Rasul-un nissa, was recorded in his stead as joint occupancy  
tenant of the land. She died in 1902, after the new Tenancy  
Act came into force. Upon her death her step-brother Mashuq  
Ali Khan endeavoured to get his name entered in the revenue  
records in her stead. The revenue authorities, however, entered  
the entire holding in the name of Ayub Ali Khan, the son of  
Yakub Ali Khan. Thereupon Mashuq Ali Khan brought the  
present suit in the Civil Court for a declaration of his right to a  
moiety of the holding, for joint possession thereof and also for  
damages. The Court of first instance (Munsif of Bulandshahr)  
threw out the suit as not cognizable by a Civil Court. On appeal  
the learned Additional Judge of Aligarh held that it was  
cognizable by the Civil Court and remanded the case for disposal  
on the merits. Against that order of remand the defendant  
Ayub Ali Khan appealed to the High Court.

Babu Surendra Nath Sen, for the appellant.

Maulvi Muhammad Ishaq, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—An occupancy holding  
was held jointly by two brothers, Yakub Ali Khan and Muzaffar  
Ali Khan. On the death of Muzaffar Ali Khan, which took  
place before the present Tenancy Act came into operation, the  

*First Appeal No. 44 of 1903 from an order of Khetar Mohan Ghose, Ad-  
ditional Judge of Aligarh, dated the 8th of January 1903.
name of his widow, Mussammat Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902 after the new Tenancy Act came into force. Upon her death her step-brother Mashaq Ali Khan, plaintiff-respondent, endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the whole holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon the plaintiff Mashaq Ali Khan brought a suit in the Civil Court for declaration of his right to a moiety of the holding, for joint possession thereof, and also for damages. The Court of first instance threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the present appeal has been preferred. Two pleas have been urged before us. One is that the suit is obnoxious to the provisions of section 32 (2) of the Agra Tenancy Act, which prohibits any suit for the division of a holding or distribution of the rent thereof being entertained by a Civil or Revenue Court. In our opinion this plea cannot prevail. If, having got his declaration, the plaintiff attempted to sue for actual division of the holding or distribution of the rent he might be met by this section. We do not think that this section prohibits a suit like the present. It was next urged that, having regard to the provisions of section 22 of the Act which provides for succession to tenancies, the plaintiff does not possess the right which he sets up. The decision of this plea is more difficult. After giving the point our best consideration, we are of opinion that under the circumstances of the case the plaintiff has the right of succession under section 22 of the Act. The plaintiff’s sister succeeded under the former Act No. XII of 1881. Under section 9 of that Act the occupancy right devolved to her “as if it were land.” She being a Muhammadan widow acquired in our opinion an absolute right to be considered an occupancy tenant. Succession to her occupancy right is governed by section 22 of the new Act. It is true that that section is worded as if males alone can be expropriatory occupancy or non-occupancy tenants, but we can find nothing in the other provisions of the Act which would prevent a woman
acquiring such rights. There is nothing to prevent a woman being a tenant of agricultural land, and if she held it continuously for 12 years she would acquire a right of occupancy just as a man would. We cannot therefore attach to the fact that the words in section 22 are words importing only the masculine gender the weight which is sought to be placed upon them. We think that Musammat Rasul-un-nissa having been an occupancy tenant, her half brother, who, it is not denied, was the son of the same father, is entitled to succeed under clause (c) of the section. The same question was very fully considered by the members of the Board of Revenue in Ikramuddin v. Irshad Ali (1). There it was held that a Muhammadan widow who succeeded to an occupancy holding acquired an absolute estate, and that on her death, after the 1st of January 1902, the persons to succeed will be her heirs and not the heirs of her deceased husband. We agree in this view. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Griffin
JAGAN NATH (PLAINTIFF) v. DIBBO AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 6—Hindu Law—Transfer by a Hindu reversioner of his reversionary interest.

Held that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. Sham Sunder Lal v. Achhan Kunwar (2) followed.

On the 6th of September 1884, Tota Ram and Har Sukh, who then had a reversionary interest in certain property expectant on the death of a Hindu widow, Musammat Shitabo, executed a mortgage thereof in favour of one Jagan Nath. Musammat Shitabo was in possession, and her name was recorded in the revenue papers. The mortgage deed was registered and from the registration endorsement it appeared that the mortgagees appeared before the Sub-Registrar, acknowledged the deed and admitted receipt of the mortgage money. Musammat Shitabo died on the 5th October 1888. On the 18th of January 1906

*First Appeal No. 199 of 1906 from a decree of Kamwar Bahadar, Subordinate Judge of Shahjahanpur, dated the 18th April of 1906.

the mortgagee instituted the present suit against various transferees both from Musammat Shitabo and the mortgagors to enforce his mortgage. The Court of first instance (Subordinate Judge of Shahjahanpur) found that no consideration for the mortgage had actually passed, but that the mortgage was executed in order that the mortgagee might carry on litigation on behalf of the mortgagors against the widow. That Court therefore dismissed the suit. The plaintiff appealed to the High Court.

Babu Jogindro Nath Chauhri (for whom Babu Sural Chandra Chauhri), for the appellant.

Maulvi Muhammad Ishaq and Babu Durga Charan Banerji, for the respondents.

RICHARDS AND GRIFFIN, JJ — This was a suit to enforce a mortgage dated the 6th of September 1884. The defence was that the mortgage was without consideration, that the mortgagors had no power to mortgage the property and that the suit was barred by limitation. The admitted facts are that at the date of the mortgage one Musammat Shitabo was in possession as a Hindu widow, having succeeded her husband, one Bhola, who died childless. A number of transfers have since been made. Some of the defendants are the transferees of Musammat Shitabo and some are transferees of Tota Ram and Har Sukh the mortgagors named in the mortgage deed. The mortgage deed bears interest at the rate of 37½ per cent. per annum. Musammat Shitabo died on the 5th of October 1888, and no proceedings were taken until the institution of the present suit on the 18th of January 1906. The Court below has found that the deed was fictitious and that no consideration passed. The mortgage deed was registered, and it appears from the endorsement of the Registrar that the mortgagors appeared before him, acknowledged the deed and admitted receipt of the mortgage money. The money was not paid before the Sub-Registrar, and Jagan Nath, the mortgagee, produces no receipt. The defendants' witnesses depose that Tota Ram and Har Sukh were very poor persons and that they entered into an arrangement with Jagan Nath that Jagan Nath should carry on litigation for them, and in the event of its being successful, the property was to be shared and that as part of this arrangement the mortgage in suit was
executed; that the Rs. 2,000 was never paid, and that Jagan Nath did not carry on the litigation. That there was litigation going on at that time is very clear, and the nature of the litigation appears. It was a suit by Har Sukh and Tota Ram to set aside alienations made by Musammat Shitabo on the ground that she as Hindu widow had no right to alienate the property she had succeeded to as widow of Bholo. It further appears that Shitabo was entered as the owner at this very time in the public khevat. We see no reason to differ from the finding of the learned Subordinate Judge that there was no consideration for the mortgage. Jagan Nath years ago instituted a suit on another bond executed by Har Sukh in favour without any mention of the present bond, though the latter was for a much larger amount. It has been held by the Privy Council in the case of Sham Sunder Lal v. Achham Kunwar (1) that it is not competent for a Hindu sevionary to transfer his severional interests on the death of Hindu widow. See also the case of Nand Kishore Lal v. Kushee Ram Tewary (2). It is, however, contended on behalf of the plaintiff that he can call to his aid the provisions of section 43 of the Transfer of the Property Act, 1882, which provides that "where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." This section, of course, cannot apply if the deed was really without consideration, but even if there was some consideration for the deed, it would be necessary for the plaintiff to show that there was an erroneous representation by Har Sukh and Tota Ram that they were in possession of the property at the date of the mortgage. Jagan Nath when examined did not attempt to show that he did not know that Musammat Shitabo was in possession as a Hindu widow, or that there was any representation to him which made him think that Har Sukh and Tota Ram were in possession of the estate. On the other hand he says that he was told that money was wanted for litigation, and we know from the evidence on the record that the nature of this litigation was to set aside

alienations by Musammam Shitalo, and that Musammam Shitalo was alive and was a party to the litigation. Both t'eo grounds are fatal to the plaintiff’s case. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain,

KANDHYA LAL, (APPELLANT) v. MANKI (OPPOSITE PARTY).

Act No. 7 of 1881 (Probate and Administration Act), section 78 — Act No.
IX of 1872 (Indian Contract Act), section 123 — Administration — Surety
— Continuing guarantee.

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, this is not a continuing guarantee within the meaning of section 123 of the Indian Contract Act, 1872. Such a surety cannot of his own free will withdraw from his suretyship. Subraya Chetty v. Ragammal (1) followed. Raj Nusrain Modherjee v. Pala Kumari Debi (2) dissented from.

In this case letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Musammam Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate. One Kandhya Lal became surety. Less than six months afterwards Kandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Musammam Manki to provide a fresh surety. The District Judge rejected this application. The surety thereupon appealed to the High Court.

Baba Lalit Mohan Banerji, for the appellant.

Babu Sitalk Prasad Ghosh, for the respondent.

Aikman and Karamat Husain, J.J.—The respondent Musammam Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Kandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammam Manki

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*First Appeal No. 61 of 1908 from an order of G. A. Paterson, District Judge of Benares, dated the 30th of March 1908.

(1) (1905) 1 L.R., 28 Mad., 161. (2) (1902) 1 L.R., 29 Calc., 68.
to furnish a fresh surety. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a surety bond given under the circumstances stated can be cancelled—see Raj Narain Mookerjee v. Ful Kumari Debi (1) and Subroto Chetty v. Ragammal (2). The former Court held that a surety bond given under the circumstances stated is a continuing guarantee within the meaning of section 129 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administratrix had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says:—"I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged." If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammat Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) I. L. R., 29 Cal., 63. (2) (1905) I. L. R., 28 Mad., 161.
Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHOGA LAL (Plaintiff) v. PIYARI AND ANOTHER (Defendants).*

Act No. IX of 1872 (Indian Contract Act), section 23—Contract—Agreement immoral or opposed to public policy—Lease of house to a prostitute.

Held that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy; and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a court of law.

A suit for arrears of rent of two huts (Nos. 307 and 309, Sudder Bazar, Jhansi), rented jointly from the plaintiff by two prostitutes, Piyari and Kaila, was brought in the Court of the Cantonment Magistrate of Jhansi exercising powers of a Court of Small Causes. The defendants pleaded that recovery of rent was barred, inasmuch as to the plaintiff's knowledge the huts were rented by the defendants for immoral purposes, and reference was made to the case of Govindnath Mookerjee v. Madhomanec Peshakur (1). The Court referred the case to the High Court under the provisions of section 617 of the Code of Civil Procedure.

Rabu Harendra Krishna Mookerji, for the plaintiff.

Lala Girdhari Lal Agarwala, for the defendants.

STANLEY C. J., and BANERJI, J.—This is a reference made by the learned Cantonment Magistrate of Jhansi exercising the powers of a Judge of a Court of Small Causes, under section 617 of the Code of Civil Procedure. The question which he submits for the opinion of the Court is whether the English law is operative in a suit to recover rent due for a residence or quarters rented to a prostitute, with knowledge that such residence or quarters would be used by her to carry on her immoral trade and profession. It seems to us unnecessary to determine whether the English law is applicable in this country, because we find that there is an express provision of the Indian Contract Act under which a contract for such a purpose would be illegal. Section 23 of that Act provides that the consideration or object of an agreement is lawful, unless,

*Miscellaneous No. 271 of 1908.

(1) (1892) 16 W. B. 415.
amongst other things, the Court regards it as immoral or opposed to public policy. If the object of an agreement is immoral or opposed to public policy, clearly the agreement cannot be enforced. It cannot be denied that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and, contrary to public policy, and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. This is the answer which we give to the reference.

REVISIONAL CIVIL.

Before Mr. Justice Aikman, and Mr Justice Karamat Husain.

IN THE MATTER OF THE PETITION OF KEDAR NATH.

Act No. XVIII of 1879 (Legal Practitioners Act), section 36—Order declaring certain persons to be touts—Revision—Jurisdiction—Practice—Statute 24 and 25 Vict., Cap. CIV., section 15—Rules of High Court of the 18th January, 1893, rules 1 (xiii) and 4.

The District Judge of Meerut held an inquiry under section 36 of the Legal Practitioners Act, 1879, as the result of which he ordered certain persons to be proclaimed to be touts and excluded from the precincts of the courts in the judicial division. The parties affected applied to the High Court against the Judge’s order under section 15 of Statute 24 and 25 Vict., Cap CIV. On this application being laid before a division Bench for disposal it was held:

Per KARAMAT HUSAIN, J., that the disciplinary powers of the High Court under section 15 of the Statute being exercisable only by the full Court, a Bench of two Judges had no jurisdiction to adjudge upon the application neither had a single Judge jurisdiction to admit it.

Per Aikman, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, and rule 1 (xiii) of the Rules of Court of the 18th January 1893 effected such a delegation. But the powers of the Court under section 15 of the Statute were limited, and in this instance no case for their exercise had been shown. 

Taj Ram v. Har Sahā (1) and Muhammad Saleh Khan v. Fatima (2) referred to.

In this case the District Judge of Meerut had taken proceedings under section 36 of the Legal Practitioners’ Act against certain persons alleged to be touts, and by an order dated the 15th

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*Civil Revision No. 50 of 1908, from an order of L. Stuart, Esq., District Judge, Meerut, dated the 16th of June 1908.

(1) (1873) I. L. R., 1 All., 101.
(2) (1895) I. L. R., 5 All., 101.
June 1908 had directed that a list should be prepared of the names of eleven persons who were found to be touts and hung up in his own Court and in all Courts subordinate to his, including the rent courts. Against this order Kedar Nath, one of the persons affected thereby, applied to the High Court under section 15 of the Charter Act.

Mr. E. A. Howard, (with whom Mr. R. K. Sorabji and Babu Parbati Charan Chatterji) for the applicant, argued that the procedure of the District Judge was defective in that the evidence against the alleged touts was taken behind their backs. It was not sufficient that the evidence was shown to the persons affected thereby; they should have been allowed to cross-examine the witnesses against them.

It was also argued that under the Charter Act the powers given by section 15 were exerciseable only by the whole Court and not by a bench of two Judges, and the cases of In the matter of Kuwar Bahadur (1) and Lal Singh v. Ghansham Singh (2) were referred to as to the practice of the Court.

It was further contended that at any rate the order could have no application to Revenue Courts, which were not subordinate to the District Judge.

The Government Advocate (Mr. W. Wallach), in support of the Judge's order pointed out that the Judge's procedure had been in accordance with that adopted by the High Court in the case of Kuwar Bahadur (1). He had acted in a regular manner and made an exhaustive enquiry and the applicant had been given an opportunity to cross-examine the witnesses.

As to the question of the jurisdiction of the Bench, that he submitted, was covered by the rules of Court, rules 1 (xiii) and 4 of which gave power to a Division Bench to hear cases of the nature of the present. If, however, it was necessary that the powers given by section 15 of the Charter Act must be exercised by the whole Court, then the application was not yet before the Court at all, a single Judge having no power to admit it.

As to whether the District Judge's order could apply to Rent Courts, it was argued that in several matters the Collector was subordinate to the District Judge, though in others he was (1) Weekly Notes, 1896, p. 107. (2) Weekly Notes, 1897, p. 173.
not; but the language of section 36 of the Legal Practitioners' Act was wide enough to include the Rent Courts. In any case the Collector and District Magistrate were the same, and it made no practical difference whether the applicant was excluded from a particular place as the District Magistrate's Court or as the Collector's.

**Karamat Husain, J.—** The learned District Judge of Meerut acting under section 36 of the Legal Practitioners' Act, (Act No. XVIII of 1879) by his order, dated the 15th June 1908, framed a list containing the names of 11 persons who by the evidence of general repute were proved to his satisfaction to habitually act as touts, and directed it to be hung in his own Court and in all Courts subordinate to him, including the rent Courts. The appellant Kedar Nath is one of the persons whose name is on that list. He has applied for the revision of that order of the learned District Judge. There is no appeal from such an order, nor is there any revision, either under section 439 of the Code of Criminal Procedure or section 622 of the Code of Civil Procedure. The only section under which the High Court has been held entitled to interfere with an order passed under section 36 of the Legal Practitioners' Act is section 15 of the High Courts Act, 24 and 25 Vict., Cap. 104. In the application for revision there is no ground to the effect that section 15 of the High Courts Act gives the power of superintendence to the whole Court, and not to a Bench of two Judges, and that therefore this Bench has no jurisdiction to dispose of this revision, but, as the ground deals with the jurisdiction of the Court and is of great importance, we allowed the learned counsel for the applicant to argue it. He contends that section 15 of the said Act gives the High Court power to "call for returns," to make general rules for regulating the practice and proceedings of the Courts subject to its appellate jurisdiction, and to prescribe forms for every proceeding in the said Courts, and no one can contend that a Bench of two Judges of this Court has power to do any of the above acts, and that as the power of superintendence is also given by the same section a Bench of two Judges has no power to exercise it. If it has such a power the result will be that the whole Court will be bound by the Act of two
Judges only. The learned Government Advocate in answer to this contention says that Rule 4 of the Rules of the High Court, which is as follows:—"Save as provided by law or by these rules or by special order of the Chief Justice every other case shall be heard and disposed of by a Bench of two Judges," gives the Bench a power to dispose of the application for revision, which undoubtedly is a case, and for which there is no provision in the rules of the High Court. He also argues that there has been a course of decisions in this Court as well as in other courts in which the cases under section 36 of the Legal Practitioners' Act have been dealt with by a Bench of two Judges and not by the High Court as a whole, and that objection as to the jurisdiction of a Bench of two Judges to deal with the matter has never been taken. See I. L. R., 1 All., 101; L. L. R., 9 All., 101; I. L. R., 21 All., 181; Miscellaneous No. 39 of 1901, decided on the 6th June 1901; Miscellaneous No. 127 of 1904, decided on the 22nd February 1905, and the cases under section 36 of the Legal Practitioners' Act in the other High Courts quoted on p. 1040, under section 15 of the High Courts Act, in the Code of Civil Procedure by O'Kinealy, 6th edition.

In my opinion the contention of the learned counsel for the applicant is well founded. The power of superintendence conferred upon the High Court by section 15 of the High Courts Act, which power has been extended to interference with the orders passed under section 36 of the Legal Practitioners' Act, is no doubt conferred upon the whole of the High Court and not upon a Bench of two Judges. Rule 4 of the High Court Rules, owing to the saving clause, "save as provided by law," does not empower a Bench of two Judges to dispose of the Revision, inasmuch as that power under section 15 of the High Courts Act vests in the whole Court.

There exists, no doubt, a course of decisions in which the case under section 36 of the Legal Practitioners' Act have been disposed of by a Bench of two Judges, but in none of these cases was the question of jurisdiction raised, and in the absence of any decision on that point the course can be no authority for the provisions that a Bench of two Judges has jurisdiction to deal with.
a case of this nature under section 15 of the High Courts Act. To infer a rule of law from the silence of the Judges is inconsistent with their function.

For these reasons I am of opinion that this Bench has no jurisdiction to dispose of the revision. It follows from what has been said that a single Judge of this Court has also no power to admit a revision from an order passed by a District Judge under section 36 of the Legal Practitioners' Act. The application for revision is not therefore properly before this Bench and the learned counsel for the applicant on his own showing has no locus standi to be heard. I would therefore reject the application.

AIKMAN, J.—This is an application by one Kedar Nath for the revision of an order of the learned District Judge of Meerut passed under the provisions of section 36 of the Legal Practitioners Act, 1870, whereby he directed that a list should be prepared of the names of eleven persons, one of them being the applicant Kedar Nath, who had been proved to his satisfaction to act habitually as touts, and ordered this list should be hung up in his own Court and in all Courts subordinate to him. He further ordered that the persons whose names were entered in these lists should be excluded from the precincts of these Courts.

The petitioner is represented here by learned counsel who has argued the case with much ability.

The Legal Practitioners' Act confers on this Court no right of interference by way of appeal or revision in the case of an order under section 36, nor is any right of interference conferred by the Code of Civil Procedure or the Code of Criminal Procedure. It has been held, however, that this Court can interfere with such an order under the general powers of superintendence over subordinate Courts which are conferred on High Courts by sections 15, 24 and 25 Vict. Cap. CIV, though, as will be seen from the Full Bench decisions in Tej Ram v. Har Sukh (1), and Muhammad Suleman Khan v. Fatima (2), its powers of interference under that section are very limited.

The learned counsel took objection to the competence of this Bench to hear this case. He contended in the first place with

(1) (1876) I. L. R., 1 All., 101. (2) (1880) I. L. R., 2 All., 104.
reference to Rule 2 of the Rules of Court, that the case must be heard by a Bench of at least three Judges. The case is not a charge against a legal practitioner, and I hold it is not a disciplinary case within the meaning of the rule. I would therefore overrule this contention.

Mr. Howard next contended that with reference to the language of sections 15, 24 and 25 Vict., Cap CIV, this case could only be dealt with by the Full Court. This is an ingenious argument. I think it must be admitted that no division Bench of the Court could of its own authority take upon itself to exercise the powers conferred by that section. But it appears to me that the Court has an inherent right to delegate to one or more of its members the power to deal with applications such as the present asking the Court to exercise the power of superintendence conferred by the section, and that it is not necessary that such cases should be dealt with by the Full Court. That the Court has delegated that power is clear from Rule 1 (xiii) and Rule 4. It would be in the highest degree inconvenient if every application under section 15 had to be dealt with by the whole Court. That Division Benches of the various High Courts have been in the habit of dealing with applications under section 15 is shown by numerous reported cases. I think for these reasons that Mr. Howard's second contention must be overruled.

Moreover, if his contention were held to be valid it would follow that the single Judge who issued the rule in this case had no power to issue it.

As stated above, the right of this Court to interfere under section 15 with the proceedings of a subordinate Court is strictly limited. It cannot interfere to correct an error of fact or even an error of law. See the cases cited above. All it can do is to direct a Court to exercise jurisdiction when it has declined to deal with a case within its jurisdiction or to abstain from taking action in matters of which it has not cognizance.

My only doubt in this case was whether the District Judge had power to make his order applicable to Rent Courts. These Courts are not subordinate to the District Judge in all branches of their work, but in certain classes of cases they are. I am not
therefore prepared to say that the order so far as it referred to Rent Courts was entirely without jurisdiction.

In my opinion no good ground has been made out for interference and I would dismiss the application.

BY THE COURT.—The order of the Court is that the application is dismissed.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.

Muhammad Yahiya and others (Plaintiffs) v. Rashid-Ud-Din (Defendant)  

Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.

In a suit for contribution among co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. Ibn Hasan v. Ram Dai (1) and Ibn Hasan v. Brijbhukan Saran (2) referred to.

This was a suit for contribution arising out of the following facts. There was a mortgage executed by the plaintiffs and some of the defendants and the predecessors of others on the 20th of August 1892. A decree for sale was obtained on it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. The plaintiffs came into Court alleging that their property had contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. They therefore claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court of first instance, relying on the case of Ibn Hasan v. Brijbhukan Saran (2), dismissed the suit upon the ground that the whole of the mortgage money was not realized by sale of the plaintiff’s property alone. The plaintiffs appealed to the High Court.

*First Appeal No. 155 of 1900, from a decree of Raj Nath, Subordinate Judge of Allahabad dated the 24th of May 1900.

(1) (1899) I. L. R., 13 All., 110. (2) (1904) I. L. R., 25 All., 407.
reference to Rule 2 of the Rules of Court, that the case must be heard by a Bench of at least three Judges. The case is not a charge against a legal practitioner, and I hold it is not a disciplinary case within the meaning of the rule. I would therefore overrule this contention.

Mr. Howard next contended that with reference to the language of sections 15, 24 and 25 Vict., Cap. CIV, this case could only be dealt with by the Full Court. This is an ingenious argument. I think it must be admitted that no division Bench of the Court could of its own authority take upon itself to exercise the powers conferred by that section. But it appears to me that the Court has an inherent right to delegate to one or more of its members the power to deal with applications such as the present asking the Court to exercise the power of superintendence conferred by the section, and that it is not necessary that such cases should be dealt with by the Full Court. That the Court has delegated that power is clear from Rule 1 (xiii) and Rule 4. It would be in the highest degree inconvenient if every application under section 15 had to be dealt with by the whole Court. That Division Benches of the various High Courts have been in the habit of dealing with applications under section 15 is shown by numerous reported cases. I think for these reasons that Mr. Howard’s second contention must be overruled.

Moreover, if his contention were held to be valid it would follow that the single Judge who issued the rule in this case had no power to issue it.

As stated above, the right of this Court to interfere under section 15 with the proceedings of a subordinate Court is strictly limited. It cannot interfere to correct an error of fact or even an error of law. See the cases cited above. All it can do is to direct a Court to exercise jurisdiction when it has declined to deal with a case within its jurisdiction or to abstain from taking action in matters of which it has not cognizance.

My only doubt in this case was whether the District Judge had power to make his order applicable to Rent Courts. These Courts are not subordinate to the District Judge in all branches of their work, but in certain classes of cases they are. I am not
therefore prepared to say that the order so far as it referred to
Rent Courts was entirely without jurisdiction.

In my opinion no good ground has been made out for inter-
ference and I would dismiss the application.

BY THE COURT.—The order of the Court is that the appli-
cation is dismissed.

APPLETATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.
MUHAMMAD YAHUYA AND OTHERS (PLAINTIFFS) V. BAHADUR UD-DIN
(DEFENDANT)

Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only
of the mortgaged property—Suit for contribution by mortgagor whose pro-
erty has been sold.

In a suit for contribution amongst co-mortgagors, even if it is a condition
precedent to the institution of such a suit that the whole mortgage debt
should have been satisfied by sale of mortgaged property, it is not also neces-
sary that it should have been satisfied wholly out of the property of the
plaintiff. Ibn Hasan v. Ram Das (1) and Ibn Hasan v. Brijbhukan Saran
(2) referred to.

This was a suit for contribution arising out of the following
facts. There was a mortgage executed by the plaintiffs and some
of the defendants and the predecessors of others on the 20th of
August 1892. A decree for sale was obtained on it on the 11th
of July 1902. On the 22nd of April 1903 portions of the mort-
gaged property were sold by auction in execution of the decree and
the whole amount of the mortgage was thereby discharged.
The plaintiffs came into Court alleging that their property had contri-
buted towards the mortgage debt a much larger amount than that
for which it was proportionately liable. They therefore claimed
the difference between the amount realized by the sale of their
property and the amount of their proportionate liability. The
Court of first instance, relying on the case of Ibn Hasan v.
Brijbhukan Saran (2), dismissed the suit upon the ground that
the whole of the mortgage money was not realized by sale of the
plaintiff's property alone. The plaintiffs appealed to the High
Court.

(1) (1889) I. L. R., 12 All., 110. (2) (1904) I. L. R., 25 A.
Baba Jogindro Nath Chaudhri, for the appellants.

Pandit Tej Bahadur Sapru, for the respondent.

BAKERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs in respect of a mortgage executed by them and by some of the defendants and the predecessors in title of other defendants. The mortgage was made on the 20th of August 1892, and a decree was obtained on the basis of it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. One of the mortgagors whose property was sold has already sued for and obtained a decree for contribution. The present suit was brought by the plaintiffs for contribution against those of the mortgagors or their representatives whose interests in the mortgaged property were not sold by auction. The allegation of the plaintiffs is that their property has contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. The plaintiffs accordingly claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court below has dismissed the suit simply on the ground that the whole of the mortgage money was not realized by the sale of the plaintiffs' property alone, and in support of its opinion it has relied on the decision of this Court in the case of Ibn Hasan v. Brijbhusan Suran (1). In my judgment the Court below has misunderstood that ruling. According to the view which I took in that case the present suit was clearly maintainable. But even according to the opinion of the majority of the Judges who decided that case the suit is also maintainable. What was held in that case was that unless the whole amount of the mortgage had been discharged, a suit for contribution was not maintainable. In the present case the whole of the mortgage money has admittedly been realized by the sale of the property of some of the mortgagors, and therefore the plaintiffs have a right of contribution if the sale of their property has discharged more than their rateable share of the debt. The question in the case referred to above was whether a suit for contribution

(1) (1901) I. L. R. 26 All. 407.
could be maintained unless the whole amount of the provision was discharged, and the majority of the Judges, including my self, answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in Ibnu Hasun v. Bhjurhalan Siron (1) upon which reliance has been placed by the appellants' learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contribution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of Ibnu Hasun v. Ram Dai (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle, that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

BY THE COURT:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 552 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded

(1) (1904) I. L. R. 26 All., 407. (2) (1899) I. L. R., 12 All., 110.
The undermentioned Gazetteers of Districts in the United Provinces have recently been published by the Government Press, and are available for sale to the public at the Government Book Depot, Allahabad. The prices quoted include packing and postage charges:

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1872—IX (Indian Contract Act), Section 23—Contract

1. I recover the rent in a Court of law.

Choga Lal v. Piyari, I. L. R., 31 All.

1881, section 78

1873—XIX (N. W. P. Land Revenue Act), Sections 132, 241—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), Section 223 (k)—Partition—Civil and Revenue Courts—Jurisdiction. A plaintiff came into Court upon the allegation that a certain grove had upon partition been wrongly allotted to the defendants' mahal whereas it should have been allotted to his (the plaintiff's) mahal, and he claimed a decree for a declaration of his title or for possession Held that section 203 (k) of the United Provinces Land Revenue Act, 1901, barred the cognizance of such a suit by a Civil Court. Khirkom Prasad v. Kudhr Mal, Weekly Notes, 1900, p. 11, distinguished.

Japanese Nath v. Tirtha Sambai, I. L. R., 31 All.

1879—XVIII (Legal Practitioners Act), Section 36—Order declaring certain persons to be insolvent—Practice—Jurisdiction. Practice—Statutes 24 and 25 Vict., Cap. CIV, Section 15—Rules of High Court of the 18th January 1896, Rules 1 (xiii) and 4.

The District Judge of Meerut held an inquiry under section 30 of the Legal Practitioners Act, 1879, as the result of which he ordered certain persons to be declared insolvent and excluded from the precincts of the Courts in the judicial division. The parties affected applied to the High Court against the Judge's order under section 15 of Statute 24 and 25 Vict., Cap. CIV. On this application being laid before a division Bench for disposal it was held.

Per Karamat Husain, J., that the disciplinary powers of the High Court under section 15 of the Statute being exercisable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application neither had a single Judge jurisdiction to admit it.

Per Aitken, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, and rule 1 (xiii) of the Rules of Court of the 18th January 1893 effected such a delegation but the powers of the Court under section 15 of the Statute were limited, and in this instance no case for their exercise had been shown.

Taj Rimmer, Har Subh, I. L. R., 9 All., 101, and Mohamed Salim Khan v. Imtiaza, I. L. R., 9 All., 104, referred to.

In the matter of the petition of Kedark Nath, I. L. R., 31 All.
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ACTS—1851—V (PROBATE AND ADMINISTRATION ACT), SECTION 79.

Kanika Lol v. Manoj, I. L. R., 31 All.

XII (N.W. P. RENT ACT), SECTION 9—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 22, 32, (2)—Occupancy holding—Succession—Suit for declaration of right to a share in an occupancy holding—Civil and Revenue Courts—Jurisdiction.] Held that a suit in a Civil Court for a declaration of the plaintiff's right to a share in an occupancy holding is not precluded by section 32 (2) of the Agra Tenancy Act. Held also that there was nothing in the Rent Act of 1881, to prevent a woman becoming an occupancy tenant, and if she did so, on her death the tenancy would pass to her heirs and not the heirs of her husband.


—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 6—Hindu.

Jagni Nath v. Dibbo, I. L. R., 31 All.

—1897—VII (SUIT Valuation ACT), SECTION 8—Act No. VII of 1870 (Court Fees Act), section 7, clause (c)—Valuation of suit—

The law as laid down in these cases has not been affected by the passing of Act No. VII of 1897, section 8.

Kedar Singh v. Motabadi Singh, I. L. R., 31 All.

—(LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 4 (6), 32, (2)—Rent free grant—“holding”—“tenant.” Held that a rent free grant is not a “holding,” nor is the grantee a “tenant” within the meaning of the Agra Tenancy Act, 1901. Abdul Karim v. Raman, Weekly Notes, 1908, p. 197, approved.

Sagar Mal v. Matan Lal, I. L. R., 31 All.

See Act No. XII of 1881, section 2.

—(LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 222 (k), See Act No. XIX of 1873, sections 152, 241

ADMINISTRATION, See Act No. V of 1881, section 75

APPEAL, See Criminal Procedure Code, section 195

CIVIL AND REVENUE COURTS, See Act No. XIX of 1873, sections 132, 241

CIVIL PROCEDURE CODE, SECTION 244—Execution of decrees—Jurisdiction of Court executing a decree—Suit by representatives of
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mortgagor judgment-debtor for declaration of invalidity of mortgage.] Held that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the suit for the possession of the deceased that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of section 244 of the Code of Civil Procedure. Lalidhar v. Chaturbhuj, I.L.R., 21 All., 277, followed

Jagir Nath Singh v. Sheo Chulam, I.L.R., 31 All ... 45

CONTRACT, See Act No. IX of 1872, section 23 ... 58

CONTRIBUTION, See Mortgage ... 65

CRIMINAL PROCEDURE CODE, section 195—Sanction to prosecute—Appeal—] Held that when sanction to prosecute has been granted by a Court under the provisions of section 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section Sabiy Ram v. Ramji Lal, I.L.R., 25 All., 554, Emperor v. Serb Mandal, Weekly Notes, 1909, p. 102, and Mudali v. Veera Chetti, I.L.R., 30 Mad, 382, referred to

Kankan Lal v. Chhadamuni Lal, I.L.R., 31 All ... 48

EXECUTION OF DECREE, See Civil Procedure Code, section 244 ... 45

HINDU LAW, See Act No. IV of 1862, section 6 ... 53

"HOLDING," See Act (Local) No. II of 1901, sections 4 (5), 32 (2) ... 49

JURISDICTION, See Act No. XIX of 1873, sections 132, 241 ... 41

——— See Act No. XVIII of 1879, section 36 ... 59

——— See Civil Procedure Code, section 244 ... 45

MORTGAGE—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold ] In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. Ibra Hussain v. Ram Das, I.L.R., 12 All., 110, and Ibra Hussain v. Brij Bhushan Saran, I.L.R., 26 All., 407, referred to

Muhammad Yahiya v. Razi ud din, I.L.R., 31 All ... 65

OCCUPANCY HOLDING, See Act No XII of 1881, section 9 ... 51

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STATUTES 24 AND 25 VICT., CAP. SIV., SECTION 15, See Act No. XVIII of 1879, section 36 ... 53

SUCCESSION, See Act No. XII of 1881, section 9 ... 51

SURETY, See Act No. V of 1891, section 78 ... 50

"TENANT," See Act (Local) No. I of 1901, sections 4 (5), 32 (2) ... 42

VALUATION OF SIT, See Act No. VII of 1887, section 8 ... 44
Subordinate Judge" within the meaning of section 14. If then the Subordinate Judge had jurisdiction to hold the inquiry, it is quite clear that he had jurisdiction to grant the sanction, and the learned District Judge had jurisdiction to confirm the order of the Subordinate Judge. The application then is not brought within the provisions of section 622 of the Code of Civil Procedure, and this Court has no power to interfere with it. As a result the application must be dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burnhill.

JAGAN NATH (PLAINTIFF) v. THIRUBENI SAHAI AND OTHERS (DEFENDANTS)

Act No. XIX of 1878, (N.-W. P. Land Revenue Act), sections 132, 241—
Act (Local) No. III of 1901, (United Provinces Land Revenue Act), section 223 (k)—Partition—Civil and Revenue Courts—Jurisdiction

A plaintiff came into Court upon the allegation that a certain grove had upon partition been wrongly allotted to the defendants' mahal whereas it should have been allotted to his (the plaintiff's) mahal, and he claimed a decree for a declaration of his title or for possession. Held that section 203 (k) of the United Provinces Land Revenue Act, 1901, barred the cognizance of such a suit by a Civil Court. Kishen Prasad v. Kather Mal (1) distinguished.

This was an appeal under section 10 of the Letters Patent from a judgment of Banerji, J. The facts of the case sufficiently appear from the judgment under appeal which was as follows:—

BANERJI, J.—The facts of this case are these—The village Alipur was by an imperfect partition made in 1831 divided into 32 pattis. On the 5th of August 1892, Hira Lal, a co-sharer in the village, applied to the Revenue Court for perfect partition and prayed that certain pattis which belonged to him should be formed into a separate mahal. The defendants Tiruben Sahai, Gomti Sahai and Musammat Sunaj Kunwar, who were named as opposite parties to the application of Hira Lal, made an application on the 15th of December 1892 in which they asked that their pattis

*Appeal No. 52 of 1907 under section 10 of the Letters Patent.
(1) Weekly Notes, 1900, p. 11.
also should be formed into a separate mahal. On the 18th of August 1893 a partition proceeding was drawn up to the effect that 20 pattis should be formed into different mahals and 12 pattis, one of which was patti No. 32, should form a separate mahal to be called the mahal of the non-applicants for partition. Accordingly a partition was effected, which has been confirmed by the Collector. By this partition the village was divided into 26 mahals, the 26th mahal being that of the non-applicants for partition. The pattis of Tirsbeni Sahai and others were included in mahal Hira Lal. In patti No. 32, which is the patti of the plaintiff and which was included in the 26th mahal, the mahal of the non-applicants for partition, there is a grove No. 623. This grove was allotted to the mahal in which the defendants are co-sharers. The plaintiff states that he has a half share in the grove, that the defendants have no right to that half share and that the inclusion of the whole of the grove in the defendants' share was improper. The plaintiff accordingly brought the present suit for a declaration of his right to a half share of the grove No. 623 and in the alternative for possession of that share. The court of first instance dismissed the suit as barred by the provisions of section 233, clause (k) of the Land Revenue Act (No. III of 1901). The lower appellate Court has set aside the decree of that Court and has decreed the plaintiff's claim. That Court was of opinion that as under the partition proceeding patti No. 32 was excluded from partition, the revenue authorities had no jurisdiction to include the grove in suit, which appertained to the said patti, in the mahal of the defendants. The learned Judge relies upon the decision of this Court in Kishen Prasad v. Kadher Mal (1). That case is clearly distinguishable from the present. What happened in that case was that under a previous partition of the land of the village four mahals had been formed, one of which was called patti shamlat. Subsequently a partition of patti shamlat alone took place and certain land which appertained to one of the other three mahal was partitioned. It was held that this partition did not preclude the plaintiff's right to a which was not the subject of the partition of.

(1) Weekly Notes, 1900, p. 11.
shamilat. In the present case the whole of the village was under partition. The revenue authorities directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants for partition, was to consist of 12 pattis. If land which appertained to one of these 12 pattis was allotted to another of the mahals under the partition, that was a matter relating to partition and ought to have formed the subject of an appeal under section 132 of Act No. XIX of 1873, which was the Act under which the partition in question was effected. Rightly or wrongly, the revenue authorities allotted to the defendants' mahal what the plaintiff says ought to have been allotted to his mahal, namely, the mahal of the non-applicants for partition. This was clearly a question relating to the partition or union of mahals within the meaning of clause (k), section 233 of Act No. III of 1901 and was therefore not cognizable by a Civil Court. The plaintiff mistook his remedy, and, instead of appealing against the order confirming the partition, he brought the present suit in a Civil Court. Such a suit falls within the prohibition of section 233 (k) and is not maintainable. The Court of first instance was in my judgment right. I accordingly allow the appeal, set aside the decree of the court below and restore that of the Court of first instance with costs in all Courts.

Against this judgment the plaintiff appealed.

Dr. Satish Chandra Banerji (for whom Babu Sarat Chandra Chaudhri), for the appellant.

Babu Sital Prasad Ghosh, for the respondents.

STANLEY, C. J., and BURKITT, J.—We agree in the view taken by the learned Judge of this Court from whom this appeal has been preferred, and dismiss the appeal with costs.
Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

KHURRAM SINGH and others (Plaintiff(s)) v. MATABADAL SINGH
AND OTHERS (Defendants).*

Act No. VII of 1887 (Suit Valuation Act); section 8—Act No. VII of 1870
(Court Fees Act), section 7, clause ix—Valuation of suit—Suit for redemption of mortgage.

Held that the value for purposes of jurisdiction of a suit for redemption of mortgage is the amount of the principal mortgage money and not the value of the property mortgaged. Kukai Singh v. Atma Ram (1) and Amanat Begum v. Bhayan Lai (2) followed. The law as laid down in these cases has not been affected by the passing of Act No. VII of 1887, section 8.

This was a suit for redemption of mortgage. The amount secured by the mortgage was Rs. 1,000, but the value of the property mortgaged was said to be Rs. 9,000. The suit was filed in the Court of the Subordinate Judge, who directed the plaint to be returned for presentation in the proper court upon the ground that the suit was within the jurisdiction of the Munsif. Against this order the plaintiff appealed to the High Court. At the hearing a preliminary objection was taken on behalf of the respondents that the valuation of the suit was rightly decided by the Subordinate Judge, and, such being the case, an appeal lay to the District Judge and not to the High Court.

Munshi Gokul Prasad, for the appellants.
Mr. W. Wallach, for the respondents.

Aikman and Karamat Husain, JJ.—This is an appeal from an order of the learned Subordinate Judge of Jaunpur returning a plaint to the appellants for presentation in the Court of the Munsif. The suit was one for redemption of a mortgage, the amount secured by the mortgage being Rs. 1,000. In the plaint it is stated that the value of the property is Rs. 9,000. The learned counsel for the respondents takes a preliminary objection based on section 539 of the Code of Civil Procedure, viz., that the appeal does not lie to this Court, but to the Court of the District Judge. This preliminary objection really raises the issue as to whether the plaintiffs' suit was cognizable by the Munsif or by the Subordinate Judge. If the "value" of the suit is to be taken to be the amount secured by the mortgage, then under

*First Appeal No. 34 of 1908, from an order of Tajammul Husain, Subordinate Judge of Jaunpur, dated the 2nd of July 1907.

(1) (1883) I. L. R., 5 All., 352. (2) (1886) I. L. R., 8 All., 435.
section 19 (1) of Act No. XII of 1887, the plaint should have been filed in the Court of the Munsif and the action taken by the Subordinate Judge in returning it is right. In the case of Kubair Singh v. Atma Ram it (1) was held by Stuart, C.J., and Tyrrell, J., that the value of the subject-matter of a suit like the present was not the market value of the land, but the amount of the mortgage money. In the Full Bench case of Amanat Begam v. Bhajan Lal (2) a similar view was taken. The learned vakil for the appellants contends that, having regard to the provisions of section 8 of Act No. VII of 1887, an Act which was passed after the rulings referred to, those rulings are no longer law. That section provides that in suits other than those referred to in the Court Fees Act, section 7, paragraph ix, where court fees are payable ad valorem under the Court Fees Act, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. One of the kinds of suits referred to in paragraph ix of section 7 is a suit against a mortgagee for the property mortgaged. The present suit is one of that nature. But the section of the Suits' Valuation Act relied on by the appellants' learned vakil does not prescribe what is to be taken as the value of a suit for redemption. This being so, we think that the section relied on does not affect the rulings to which we have referred above. We must therefore sustain the preliminary objection. We direct that the memorandum of appeal be returned to the appellants for presentation in the proper Court. The respondents are entitled to their costs in this Court.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.
JAGAR NATH SINGH and ANOTHER (PLAINTIFFS) v. SUFO GULAM SINGH (DEFENDANT).*

Civil Procedure Code, section 244—Execution of decree—Jurisdiction of Court executing a decree—Suit by representatives of mortgagor judgment-debtor for declaration of invalidity of mortgage.

Held that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings to challenge the jurisdiction of the Court.
as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been made. A separate suit therefore, on the part of such persons seeking a declaration that the mortgagor was not competent to make the mortgage in question will not be barred under the provisions of section 244 of the Code of Civil Procedure. Lalidhar v. Chaturbhuj (1) followed.

The facts of this case are as follows:

One Musammat Raghubansa, a Hindu widow, executed a mortgage in favour of Sheo Ghulam Singh. The mortgagee obtained a decree for sale on that mortgage on the 1st of April 1905. Thereafter the mortgagor died, and Jagar Nath Singh and others were brought upon the record of the execution proceedings as the reversionary heirs of the last full owner the husband of the mortgagor. The reversioners filed an objection to the sale upon the ground that the mortgage was executed by Musammat Raghubansa without legal necessity. Their objection was disallowed, and they then filed a suit for a declaration that the mortgaged property was not liable to be sold in execution of the mortgagee's decree. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim; but on appeal by the defendants the suit was dismissed by the District Judge as being barred by the provisions of section 244 of the Code of Civil Procedure. The plaintiffs thereupon appealed to the High Court.

Munshi Iswar Saran and Babu Jogul Kishor, for the appellants.

The Hon'ble Pandit Sundar Lal and Dr. Tej Bahadur Sapru, for the respondent.

STANLEY, C.J., and BANERJII, J.—This appeal arises out of a suit for a declaration that a share of certain zamindari property was not liable to be sold in execution of a decree obtained against a Hindu widow on foot of a mortgage executed by her. Musammat Raghubansa executed a mortgage in favour of the defendant Sheo Ghulam Singh and on foot of that mortgage Sheo Ghulam Singh obtained a decree for sale on the 1st of April 1905. After this date Musammat Raghubansa upon the appellants, who claimed to b

(1) (1883) I. L. R., 21 A1
deceased owner, the husband of Musammat Raghunath, were brought upon the record as the representatives of Musammat Raghunath on an application under section 89 of the Transfer of Property Act for an order absolute. They filed an objection to the sale on the ground that the mortgage was executed by Musammat Raghunath without legal necessity. Their objection was disallow,ed, and thereupon the suit out of which this appeal has arisen was filed for a declaration that the property was not liable to be sold in execution of the mortgage decree. The Court of first instance decreed their claim, but upon appeal the lower appellate Court reversed the decision of the Court below and dismissed the plaintiffs' suit, on the ground that it was barred by the provisions of section 244 of the Code of Civil Procedure. The learned advocate for the respondent admits that this section does not apply and that the learned District Judge was wrong in the view taken by him. The case is on all fours with that of Lila- dhar v. Chaturbhuj (1). In that case it was held by one of us and by Aikman, J., that when a decree for sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. In view of this decision the learned District Judge was clearly wrong. We therefore allow the appeal, set aside the decree of the lower appellate Court, and, as the appeal was decided upon a preliminary point, we remand the case under section 562 of the Code to that Court, with directions that it be reinstated in the file of pending appeals and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1889) I. L. R., 21 All., 277.
REVISIONAL CRIMINAL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.
KANHAI LAL AND ANOTHER (OPPOSITE PARTY) v. CHHADAMMI LAL
(APPLICANT). *

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal.

Held that when sanction to prosecute has been granted by a Court under the provisions of section 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. Salig Ram v. Ramji Lal (1), Emperor v. Surk Mal (2) and Muthuswami Mudali v. Veeni Chefii (3) referred to.

In this case one Chhadammi Lal applied in the Court of the Munsif of Bareilly for sanction to prosecute Kanhai Lal and another for an offence punishable under section 193 of the Indian Penal Code. Their application was refused, upon which a further application was made to the District Judge who granted the sanction prayed for. The persons against whom the sanction had been granted thereupon applied to the High Court in its revisional criminal jurisdiction against the order of the District Judge.

Babu Satya Chandra Munkerji, for the applicants.
Babu Sital Prasad Ghosh, for the opposite party.

AIKMAN and KARAMAT HUSAIN, JJ.—One Chhadammi Lal applied to the Munsif for sanction to prosecute the present applicants for an offence punishable under section 193, Indian Penal Code. Sanction was refused by the Munsif. Chhadammi Lal then applied to the learned District Judge, who granted the sanction. The applicants have presented a petition which is headed as a "Criminal Revision" against the order of the District Judge. It may be taken as decided by the Full Bench in Salig Ram v. Ramji Lal (1) that this Court has no revisional powers on the criminal side to interfere with an order passed by a Civil Court granting sanction under the provisions of section 195, Code of Criminal Procedure. We are bound by that ruling, and must therefore hold that we have no power of interference in revision. But it is contended that apart from the revisional powers conferred on this Court by Chapter XXXII of the Code of

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* Criminal Revision No. 656 of 1903, from an order of W. H. Webb, Esq., District Judge of Bareilly, dated the 17th of July 1903.

(1) (1903) I. L. R., 24 All., 534. (2) Weekly Notes, 1908, p. 102.
(3) (1907) I. L. R., 30 Mad., 852.
Criminal Procedure, we have power under section 195; clause (6) of that Code to revoke the sanction which the learned District Judge has given. In the case of *Muthuswami Mundali v. Veeri Chetti* (1) Mr. Justice Wallis expressed his opinion that it was never intended by section 195 that there should be more than one appeal in a case like the present. In the case of *Kum Emperor v. Serb Mal* (2) we expressed our concurrence with what was said by Wallis, J., in the case referred to. We see no reason to alter our opinion. We therefore hold that we have no power of interference in this case, and reject the application.

**APPENDATE CIVIL.**

_Before Sir John Stanley, Knt. C.J., and Mr. Justice Banerji._

**SAGAR MAL (DEFENDANT) v. MAKHAN LAL AND OTHERS (PLAINTIFF).**

_Act (Local) No. II of 1901 (Agra Tenancy Act), sections 2 & 32 (3)—Rent free grant—"Holding"—"Tenant"._

_Held that a rent free grant is not a "holding" nor is the grantee a "tenant" within the meaning of the Agra Tenancy Act, 1901. Abdul Karim v. Ramzan (3) approved._

The plaintiff in this case brought his suit in a Civil Court for partition of a rent-free holding. The Court of first instance (Munsif of Meerut) gave the plaintiff a decree, and this decree was in appeal confirmed by the Additional Judge. One of the defendants, Sagar Mal, appealed from this decree to the High Court, upon the ground that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition.

_Pandit M. L. Sandal, for the appellant._

_Mr. M. L. Agarwala, for the respondents._

_STANLEY, C.J. and BANERJI, J.—This appeal arises in a suit for partition of a rent free holding. Both the Courts below granted the plaintiff a decree. This appeal has been preferred by one of the defendants, Sagar Mal, and the only ground of appeal pressed—_**Second Appeal No. 1284 of 1907 from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 31st of May 1907, confirming a decree of Hari Mohan Banerji, Munsif of Meerut, dated the 12th of January 1907._**

(1) (1907) I. L. R. 30 All., 292. (2) Weekly Notes, 1908, p. 102. (3) Weekly Notes, 1908, p. 107.
before us is that in the case of a rent free grant, as of any other tenancy coming under the Agra Tenancy Act, a Civil or a Revenue Court is prohibited by section 32, clause (2), of the Act from entertaining a suit for partition. We are of opinion that this section does not apply to a rent free grantees. The section in question falls within Chapter II, which deals with "the devolution, transfer and division of tenancies." A tenant is defined in section 4, clause (5), and does not include a rent free grantee. A rent free grantee, as also a mortgagee of proprietary rights, is by that definition expressly excluded. Consequently a rent free grant does not appear to us to be a "holding" within the meaning of section 32. The word "holding" in that section means, we think, the holding of a tenant as defined by the Act. We may point out that the heading of section 32 is:—"Division of tenancies," that is the division of the holdings of tenants as defined in section 4. We may also point out that Chapter X of the Act deals with the re-umption of rent free grants. A separate Chapter in the Act is devoted to these grants. This view was expressed by our brother Richards in the case of Abdul Karim v. Ramzan (1). Our learned brother, after referring at length to some of the section of the Agra Tenancy Act, held that a suit for partition of land alleged to be rent free is not excluded from the jurisdiction of the Civil Court either by section 233 (6) of the Land Revenue Act or by section 32 of the Agra Tenancy Act. We therefore agree in the view expressed by both the Courts below and dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1908, p. 107.
Before Mr. Justice Askman and Mr. Justice Karamat Husain.

AYUB ALI KHAN (DEFENDANT) v. MASHUQ ALI KHAN (PLAINTIFF).*

Act No. XII of 1881 (North-Western Provinces Rent Act), section 9—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 22, 32 (2)—Occupancy holding—Succession—Suit for right to a share in an occupancy holding—Civil and Revenue Courts—Jurisdiction.

 Held that a suit in a Civil Court for a declaration of the plaintiff's right to a share in an occupancy holding is not precluded by section 32 (2) of the Agra Tenancy Act.

 Held also that there was nothing in the Rent Act of 1881 to prevent a woman becoming an occupancy tenant, and if she did so, on her death the tenancy would pass to her heirs and not the heirs of her husband.

The facts out of which this appeal arose were as follows:

An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the name of his widow, Musammam Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902, after the new Tenancy Act came into force. Upon her death, her step-brother Mashuq Ali Khan endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the entire holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon Mashuq Ali Khan brought the present suit in the Civil Court for a declaration of his right to a moiety of the holding, for joint possession thereof and also for damages. The Court of first instance (Munsif of Buland-shahr) threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge of Aligarh held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the defendant Ayub Ali Khan appealed to the High Court.

Baba Surendra Nath Sen, for the appellant.

Maulvi Muhammad Isloq, fo. the respondent.

AYUB Ali KHAN and KARAMAT HUSAIN, JJ.—An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the

* First Appeal No. 44 of 1903 from an order of Khasigar Mohan Gose, Additional Judge of Aligarh, dated the 8th of January 1903.
name of his widow, Musammat Raul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902 after the new Tenancy Act came into force. Upon her death her step-brother Mashuq Ali Khan, plaintiff respondent, endeavored to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the whole holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon the plaintiff Mashuq Ali Khan brought a suit in the Civil Court for declaration of his right to a moiety of the holding, for joint possession thereof, and also for damages. The Court of first instance threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the present appeal has been preferred. Two pleas have been urged before us. One is that the suit is obnoxious to the provisions of section 32 (2) of the Agta Tenancy Act, which prohibits any suit for the division of a holding or distribution of the rent thereof being entertained by a Civil or Revenue Court. In our opinion this plea cannot prevail. If, having got in declaration, the plaintiff attempted to sue for actual division of the holding or distribution of the rent he might be met by this section. We do not think that this section prohibits a suit like the present. It was next urged that, having regard to the provisions of section 22 of the Act which provides for succession to tenancies, the plaintiff does not possess the right which he sets up. The decision of this plea is more difficult. After giving the point our best consideration, we are of opinion that under the circumstances of the case the plaintiff has the right of succession under section 22 of the Act. The plaintiff's sister succeeded under the former Act No. XII of 1831. Under section 9 of that Act the occupancy right devolved to her “as if it were land.” She being a Muhammadan widow acquired in our opinion an absolute right to be considered an occupancy tenant. Succession to her occupancy right is governed by section 22 of the new Act. It is true that that section is worded as if males alone can be expropriatory, occupancy or non-occupancy tenants, but we can find nothing in the other provisions of the Act which would prevent a woman
acquiring such rights. There is nothing to prevent a woman being a tenant of agricultural land, and if she held it continuously for 12 years she would acquire a right of occupancy just as a man would. We cannot therefore attach to the fact that the words in section 22 are words importing only the masculine gender the weight which is sought to be placed upon them. We think that Musammat Rasul-un-nissa having been an occupancy tenant, her half brother, who, it is not denied, was the son of the same father, is entitled to succeed under clause (c) of the section. The same question was very fully considered by the members of the Board of Revenue in Ikramuddin v. Irshad Ali (1). There it was held that a Muhammadan widow who succeeded to an occupancy holding acquired an absolute estate, and that on her death, after the 1st of January 1902, the persons to succeed will be her heirs and not the heirs of her deceased husband. We agree in this view. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr Justice Richards and Mr Justice Griffin

JAGAN NATH (PLAINTIFF) v. MUBRO AND OTHERS (DEFENDANTS)

Act No. IV of 1882 (Transfer of Property Act), section 6—Hindu Law—
Transfer by a Hindu reversioner of his reversionary interest.

Held that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. Sham Sunder Lal v. Achkan Kamar (2) followed.

On the 6th of September 1884, Tota Ram and Har Sukh, who then had a reversionary interest in certain property expectant on the death of a Hindu widow, Musammat Shitabo, executed a mortgage thereof in favour of one Jagan Nath. Musammat Shitabo was in possession, and her name was recorded in the revenue papers. The mortgage deed was registered and from the registration endorsement it appeared that the mortgagors appeared before the Sub Registrar, acknowledged the deed and admitted receipt of the mortgage money. Musammat Shitabo died on the 5th October 1885. On the 18th of January 1906

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*First Appeal No. 100 of 1906 from a decree of Kuswar Nabadar, Subordinate Judge of Shabazpur, dated the 18th April of 1906.

(1) Sh. Dc. Board of Revenue No. 2 of 1895. (2) (1859) L. R. 23 I. A. 182.
the mortgagee instituted the present suit against various trans-
scendents both from Musammam; Shitabo and the mortgagors to enforce
his mortgage. The Court of first instance (Subordinate Judge
of Shahjahanpur) found that no consideration for the mortgage
had actually passed, but that the mortgage was executed in order
that the mortgage might carry on litigation on behalf of the
mortgagors against the widow. That Court therefore dismissed
the suit. The plaintiff appealed to the High Court.

Babu Jogindro Nath Chaudhri (for whom Babu Svat Chandra Chaudhri), for the appellant.

Maulvi Muhammad Ishaq and Babu Durga Charan Banerji, for the respondents.

Richardus and Griffin, JJ — This was a suit to enforce a
mortgage dated the 6th of September 1834. The defence was that
the mortgage was without consideration, that the mortgagors had
no power to mortgage the property and that the suit was barred
by limitation. The admitted facts are that at the date of the
mortgage one Musammam Shitabo was in possession as a Hindu
widow, having succeeded her husband, one Bhola, who died
childless. A number of transfers have since been made. Some
of the defendants are the transferees of Musammat Shitabo and
some are transferees of Tota Ram and Har Sukh the mort-
gagors named in the mortgage deed. The mortgage deed
dears interest at the rate of 37½ per cent. per annum. Musam-
mat Shitabo died on the 5th of October 1888, and no proceed-
ings were taken until the institution of the present suit on
the 18th of January 1908. The Court below has found that
the deed was fictitious and that no consideration passed. The
mortgage deed was registered, and it appears from the en-
donsement of the Registrar that the mortgagors appeared before
him, acknowledged the deed and admitted receipt of the mortgage
money. The money was not paid before the Sub-Registrar, and
Jagan Nath, the mortgagee, produces no receipt. The defendants'
witnisses depose that Tota Ram and Har Sukh were very poor
persons and that they entered into an arrangement with Jagan
Nath that Jagan Nath should carry on litigation for them, and
in the event of its being successful, the property was to be shared
and that as part of this arrangement the mortgage in suit was
executed; that the Rs. 2,000 was never paid, and that Jagan Nath did not carry on the litigation. That there was litigation going on at that time is very clear, and the nature of the litigation appears. It was a suit by Har Sukh and Tota Ram to set aside alienations made by Musammat Shitabo on the ground that she as Hindu widow had no right to alienate the property she had succeeded to as widow of Bhola. It further appears that Shitabo was entered as the owner at this very time in the public khewat. We see no reason to differ from the finding of the learned Subordinate Judge that there was no consideration for the mortgage. Jagan Nath years ago instituted a suit on another bond executed by Har Sukh in his favour without any mention of the present bond, though the latter was for a much larger amount. It has been held by the Privy Council in the case of Sham Sunder Lal v. Achhan Kunwar (1) that it is not competent for a Hindu reversioner to transfer his reversionary interest expectant on the death of Hindu widow. See also the case of Nand Kishore Lal v. Ramesh Ram Tewary (2). It is, however, contended on behalf of the plaintiff that he can call to his aid the provision of section 43 of the Transfer of the Property Act, 1882, which provides that "where a person erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." This section, of course, cannot apply if the deed was really without consideration, but even if there was some consideration for the deed, it would be necessary for the plaintiff to show that there was an erroneous representation by Har Sukh and Tota Ram that they were in possession of the property at the date of the mortgage. Jagan Nath when examined did not attempt to show that he did not know that Musammat Shitabo was in possession as a Hindu widow, or that there was any representation to him which made him think that Har Sukh and Tota Ram were in possession of the estate. On the other hand he says that he was told that money was wanted for litigation, and we know from the evidence on the record that the nature of this litigation was to set aside

(2) (1902) L. R., 29 Cal, 352.
alienations by Musammat Shitabo, and that Musammat Shitabo was alive and was a party to the litigation. Both these grounds are fatal to the plaintiff's case. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Achman and Mr. Justice Karamat Husain.
KANDHYA LAL (APPLICANT) v. MANKI (OPPOSITE PARTY).*

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, his is not a continuing guarantee within the meaning of section 129 of the Indian Contract Act, 1872. Such a surety cannot of his own free will withdraw from his suretyship. Subroya Chetty v. Kangammat (1) followed Raj Naran Mookerjee v. Ful Kumari Debi (2) subsequent thereto.

In this case letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Munammat Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate. One Khandhya Lal became surety. Less than six months afterwards Khandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Munammat Manki to provide a fresh surety. The District Judge rejected this application. The surety thereupon appealed to the High Court.

Babu Lalit Mohan Banerji, for the appellant.
Babu Sitat Prasad Ghosh, for the respondent.

Achman and Karamat Husain, J.J.—The respondent Musammat Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Khandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammat Manki.

* First Appeal No. 64 of 1908 from an order of G. A. Paterson, District Judge of Benares, dated the 30th of March 1908.

to furnish a fresh surety. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a surety bond given under the circumstances stated can be cancelled—see Basantar Mohanty v. Pali Kumar Dihal and Subroka Chetty v. Regiment 2. The lower Court held that a surety bond given under the circumstances stated is a continuing guarantee within the meaning of s. 129 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administratrix had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says:—"I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged." If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammam Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

Appeal dismissed.

(1) 1903 I.L.R. 29 Cal. 69  (2) 1903 I.L.R. 23 Mad. 101.
aliensations by Musammat Shitali, and that Musammat Shitali was alive and was a party to the litigation. Both these grounds are fatal to the plaintiff's case. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr Justice Aikman and Mr Justice Karamat Husain.

KANDHYA LAL (APPLICANT) v. MANKI (OPPOSITE PARTY) *


When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, his is not a continuing guarantee within the meaning of section 129 of the Indian Contract Act, 1872. Such a surety's neat of his own free will withdraw from his suretyship. Subroya Chetty v. Ramani (1) followed. Boy Narain Mukerjee v. Pall Kumari Debi (2) disapproved.

In this case, letters of administration to the estate of her deceased husband were granted by the District Judge of Benares to one Musammat Manki conditioned on her giving a bond with one surety for the due collection and administration of the estate. One Kandhya Lal became surety. Less than six months afterwards, Kandhya Lal applied to the District Judge asking him to cancel the bond which he had given and to call upon Musammat Manki to provide a fresh surety. The District Judge rejected this application. The surety therewith appealed to the High Court.

Babu Lalit Mohan Banerji, for the appellant.

Babu Sital Prasad Ghosh, for the respondent.

Aikman and Karamat Husain, JJ.—The respondent Musammat Manki obtained from the District Judge letters of administration for the estate of her deceased husband on condition of her giving a bond together with a surety for the due collection, getting in and administering the estate. The appellant Kandhya Lal became surety for her. Less than six months afterwards the appellant asked the District Judge to cancel the surety bond which he had given and to call upon Musammat Manki.

* First Appeal No. 04 of 1903 from an order of G. A. Paterson, District Judge of Benares, dated the 30th of March 1903.

(1) (1905) I. L. R. 23 Mad., 101. (2) (1902) I. L. R., 29 Cal., 68.
to furnish a fresh security. The District Judge rejected this application. The appellant comes here in appeal. The Courts at Calcutta and Madras are at variance as to whether a security bond given under the circumstances stated can be cancelled—see Raj Narain Meeterjee v. Bal Kumar D L E (1) and Sabrana Cherty v. Raghunath (2). The former Court held that a security bond given under the circumstances stated is a continuing guarantee within the meaning of section 128 of the Contract Act and may be revoked in regard to future transactions by the surety. This view was not accepted by the Madras High Court. In our opinion the decision of the Madras High Court is right. We do not think that when a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this can be said to be a continuing guarantee within the meaning of the Contract Act. It appears that in the Calcutta case the Court deferred disposing of the case until it had inquired whether the administrator had been guilty of maladministration of the estate, and the learned Chief Justice in his judgment says:— "I am not dealing with the case of a person who becomes surety, and then from mere caprice or for no sound reason desires to be discharged." If the case was one of continuing guarantee the surety had an absolute right to revoke his guarantee as to all future transactions whatever his motive may have been. It was in consequence of the appellant becoming surety that letters of administration were issued to Musammat Manki, and once these were issued, it appears to us that the appellant had no right to withdraw his surety. We may also add that the Probate and Administration Act confers no power upon the District Judge or upon this Court to cancel a surety. For the above reasons we are of opinion that the decision of the Court below was right and we dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji

CHOGA LAL (PLAINTIFF) v. PIYARI AND ANOTHER (DEFENDANTS)*

Act No. IX of 1872 (Indian Contract Act), section 23—Contract—Agreement immoral or opposed to public policy—Lease of house to a prostitute

Held that knowingly letting a house to a prostitute with the object of her carrying on thereon prostitution is immoral and contrary to public policy; and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a court of law.

A suit for arrear of rent of two huts (Nos. 307 and 309, Sudder Bazaar, Jhansi), rented jointly from the plaintiff by two prostitutes, Piyari and Kallo, was brought in the Court of the Cantonment Magistrate of Jhansi exercising powers of a Court of Small Causes. The defendants pleaded that recovery of rent was barred, inasmuch as to the plaintiff's knowledge the huts were rented by the defendants for immoral purposes, and reference was made to the case of Gourcenath Mookerjee v. Madhomonee Peshakur (1). The Court referred the case to the High Court under the provisions of section 617 of the Code of Civil Procedure.

Babu Harendra Krishna Mukerji, for the plaintiff.
Lala Girdhari Lal Agarwala, for the defendants.

STANLEY C.J., and BANERJI, J.—This is a reference made by the learned Cantonment Magistrate of Jhansi exercising the powers of a Judge of a Court of Small Causes, under section 617 of the Code of Civil Procedure. The question which he submits for the opinion of the Court is whether the English law is operative in a suit to recover rent due for a residence or quarters rented to a prostitute, with knowledge that such residence or quarters would be used by her to carry on her immoral trade and profession. It seems to us unnecessary to determine whether the English law is applicable in this country, because we find that there is an express provision of the Indian Contract Act under which a contract for such a purpose would be illegal. Section 23 of that Act provides that the consideration or object of an agreement is lawful, unless,

*Miscellaneous No. 271 of 1906.

(1) (1892) 15 W.R., 445.
amongst other things, the Court regards it as immoral or opposed to public policy, if the object of an agreement is immoral or opposed to public policy, clearly the agreement cannot be enforced. It cannot be denied that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy, and a landlord who knowingly rents a house to a prostitute to carry on prostitution cannot recover the rent in a Court of law. This is the answer which we give to the reference.

REVISIONAL CIVIL.

Before Mr Justice Achman, and Mr Justice Karamat Hussain.

IN THE MATTER OF THE PETITION OF KEDAR NATH.*

Act No. XVIII of 1872 (Legal Practitioners Act), section 50—Orders declaring certain persons to be bots—Jurisdiction—Practice—Statute 21 and 25 Vict. Cap. CIV, section 15—Rules of High Court of the 18th January, 1834, rules 1 (xii) and 4.

The District Judge of Meerut held an inquiry under section 50 of the Legal Practitioners Act, 1872, as a result of which he ordered certain persons to be proscribed and excluded from the precincts of the courts in the judicial division. The parties affected applied to the High Court against the Judge’s order under section 15 of Statute 21 and 25 Vict. Cap CIV. On this application being heard before a division bench for disposal it was held:

For Karamat Hussain, J., that the disciplinary powers of the High Court under section 15 of the Statute being exercisable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application neither had a single Judge jurisdiction to admit it.

For Achman, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, annul rule 1 (xii) of the Rules of Court of the 18th January 1838 effects such a delegation. But the powers of the Court under section 15 of the Statute were limited, and in this instance no case for their exercise had been shown. Tej Ram v. Har Sult (1) and Muhammad Sulaiman Khan v. Fatima (2) referred to.

In this case the District Judge of Meerut had taken proceedings under section 50 of the Legal Practitioners’ Act against certain persons alleged to be bots, and by an order dated the 15th

*Civil Revision No. 50 of 1909, from an order of L. Stuart, Esq., District Judge, Meerut, dated the 16th of June 1909.

(1) (1875) I. L. R., 1 All., 101. (2) (1859) I. L. R., 9 All., 101.
June 1898 had directed that a list should be prepared of the names of eleven persons who were found to be touts and hung up in his own Court and in all Courts subordinate to his, including the rent courts. Against this order Kedar Nath, one of the persons affected thereby, applied to the High Court under section 15 of the Charter Act.

Mr. E. A. Howard, (with whom Mr. R. K. Sorabji and Babu Harbati Chatur Chatterji) for the applicant, argued that the procedure of the District Judge was defective in that the evidence against the alleged touts was taken behind their backs. It was not sufficient that the evidence was shown to the persons affected thereby; they should have been allowed to cross-examine the witnesses against them.

It was also argued that under the Charter Act the powers given by section 15 were exercisable only by the whole Court and not by a bench of two judges, and the cases of In the matter of Kose Babu (1) and Lad Singh v. Ghansham Singh (2) were referred to as to the practice of the Court.

It was further contended that at any rate the order could have no application to Revenue Courts, which were not subordinate to the District Judge.

The Government Advocate (Mr. W. Wallach), in support of the Judge, referred pointed out that the Judge's procedure had been in accordance with that adopted by the High Court in the case of Kose Babu (1) He had acted in a regular manner and made an exhaustive enquiry and the applicant had been given an opportunity to cross-examine the witnesses.

As to the question of the jurisdiction of the Bench, that he submitted was governed by the rules of Court, rules 1 (xiii) and 4 of which gave power to a Divided Bench to hear cases of the nature of the present. If, however, it was necessary that the powers given by section 15 of the Charter Act must be exercised by the whole Court, then the application was not yet before the Court at all, a single judge having no power to admit it.

As to whether the District Judge's order could apply to Rent Courts, it was argued that in several matters the Collector was subordinate to the District Judge, though in others he was
amongst other things, the Court regards it as immoral or opposed to public policy. If the object of an agreement is immoral or opposed to public policy, clearly the agreement cannot be enforced. It cannot be denied that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy, and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. This is the answer which we give to the reference.

REVISIONAL CIVIL.

Before Mr. Justice Aikman, and Mr Justice Karamat Hussain.

IN THE MATTER OF THE PETITION OF KEDAR NATH.

Act No. XVIII of 1879 (Legal Practitioners Act), section 36—Order declaring certain persons to be touts—Revision—Jurisdiction—Practice—Statute 24 and 25 Vict., Cap CIV, section 15—Rules of High Court of the 15th January, 1838, rules 1 (xiii) and 4.

The District Judge of Meerut held an inquiry under section 36 of the Legal Practitioners Act, 1879, as the result of which he ordered certain persons to be proclaimed to be touts and excluded from the precincts of the courts in the judicial division. The parties affected applied to the High Court against the Judge's order under section 15 of Statute 24 and 25 Vict., Cap CIV. On this application being laid before a division Bench for disposal, it was held:

Per KARAMAT HUSSAIN, J., that the disciplinary powers of the High Court under section 15 of the Statute being exercisable only by the full Court, a bench of two Judges had no jurisdiction to adjudicate upon the application neither had a single Judge jurisdiction to admit it.

Per AIKMAN, J., that the Court had an inherent power to delegate to one or more of its members the power to deal with applications such as the present, an rule 1 (xiii) of the Rules of Court of the 15th January 1893 effecting such a delegation. But the powers of the Court under section 15 of the Statute were limited, and in this instance no case for their exercise had been shown. Tef Ram v. Har Sakh (1) and Muhammad Suleman Khan v. Fatima (2) referred to.

In this case the District Judge of Meerut had taken proceedings under section 36 of the Legal Practitioners' Act against certain persons alleged to be touts, and by an order dated the 15th

(1) (1875) I. L. R. 1 All., 101.
(2) (1880) I. L. R. 2 All., 102.
June 1908 had directed that a list should be prepared of the names of eleven persons who were found to be touts and hung up in his own Court and in all Courts subordinate to his, including the rent courts. Against this order Kedar Nath, one of the persons affected thereby, applied to the High Court under section 15 of the Charter Act.

Mr. E. A. Howard, (with whom Mr. R. K. Sorabji and Babu Parbati Charan Chatterji) for the applicant, argued that the procedure of the District Judge was defective in that the evidence against the alleged touts was taken behind their backs. It was not sufficient that the evidence was shown to the persons affected thereby: they should have been allowed to cross-examine the witnesses against them.

It was also argued that under the Charter Act the powers given by section 15 were exercisable only by the whole Court and not by a bench of two Judges, and the cases of In the matter of Kuar Bahadur (1) and Lal Singh v. Ghansham Singh (2) were referred to as to the practice of the Court.

It was further contended that at any rate the order could have no application to Revenue Courts, which were not subordinate to the District Judge.

The Government Advocate (Mr. W. Wallack), in support of the Judge's order pointed out that the Judge's procedure had been in accordance with that adopted by the High Court in the case of Kuar Bahadur (1). He had acted in a regular manner and made an exhaustive enquiry and the applicant had been given an opportunity to cross-examine the witnesses.

As to the question of the jurisdiction of the Bench, that he submitted, was covered by the rules of Court, rules 1 (xiii) and 4 of which gave power to a Division Bench to hear cases of the nature of the present. If, however, it was necessary that the powers given by section 15 of the Charter Act must be exercised by the whole Court, then the application was not yet before the Court at all, a single Judge having no power to admit it.

As to whether the District Judge's order could apply to Rent Courts, it was argued that in several matters the Collector was subordinate to the District Judge, though in others he was

not; but the language of section 36 of the Legal Practitioners’ Act was wide enough to include the Rent Courts. In any case the Collector and District Magistrate were the same, and it made no practical difference whether the applicant was excluded from a particular place as the District Magistrate’s Court or as the Collector’s.

KARAMAT HUSAIN, J.—The learned District Judge of Meerut acting under section 36 of the Legal Practitioners’ Act, (Act No. XVIII of 1879) by his order, dated the 15th June 1908, framed a list containing the names of 11 persons who by the evidence of general repute were proved to his satisfaction to habitually act as touts, and directed it to be hung in his own Court and in all Courts subordinate to him, including the rent Courts. The appellant Kedar Nath is one of the persons whose name is on that list. He has applied for the revision of that order of the learned District Judge. There is no appeal from such an order, nor is there any revision, either under section 439 of the Code of Criminal Procedure or section 622 of the Code of Civil Procedure. The only section under which the High Court has been held entitled to interfere with an order passed under section 36 of the Legal Practitioners’ Act is section 15 of the High Courts Act, 24 and 25 Vict., Cap. 104. In the application for revision there is no ground to the effect that section 15 of the High Courts Act gives the power of superintendence to the whole Court, and not to a Bench of two Judges, and that therefore this Bench has no jurisdiction to dispose of this revision, but, as the ground deals with the jurisdiction of the Court and is of great importance, we allowed the learned counsel for the applicant to argue it. He contends that section 15 of the said Act gives the High Court power to “call for returns,” to make general rules for regulating the practice and proceedings of the Courts subject to its appellate jurisdiction, and to prescribe forms for every proceeding in the said Courts, and no one can contend that a Bench of two judges of this Court has power to do any of the above acts, and that as the power of superintendence is also given by the same section a Bench of two Judges has no power to exercise it. If it has such a power the result will be that the whole Court will be bound by the Act of two.
Judges only. The learned Government Advocate in answer to this contention says that Rule 4 of the Rules of the High Court, which is as follows:—“Save as prescribed by law or by these rules or by special order of the Chief Justice every other case shall be heard and disposed of by a Bench of two Judges,” gives this Bench a power to dispose of the application for revision, which undoubtedly is a case, and for which there is no provision in the rules of the High Court. He also argues that there has been a course of decisions in this Court as well as in other courts in which the cases under section 38 of the Legal Practitioners' Act have been dealt with by a Bench of two Judges and not by the High Court as a whole, and that the objection as to the jurisdiction of a Bench of two Judges to deal with the matter has never been taken. See I. L. R., 1 All., 101; I. L. R., 9 All., 104; I. L. R., 21 All., 181; Miscellaneous No. 39 of 1901, decided on the 6th June 1901; Miscellaneous No. 127 of 1904, decided on the 22nd February 1905, and the cases under section 38 of the Legal Practitioners' Act in the other High Courts quoted on p. 1001, under section 15 of the High Courts Act, in the Code of Civil Procedure by O'Kinealy, 6th edition.

In my opinion the contention of the learned counsel for the applicant is well-founded. The power of superintendence conferred upon the High Court by section 15 of the High Courts Act, which power has been extended to interference with the orders passed under section 38 of the Legal Practitioners' Act, is no doubt conferred upon the whole of the High Court and not upon a Bench of two Judges. Rule 4 of the High Court Rules, owing to the saving clause, “save as provided by law,” does not empower a Bench of two Judges to dispose of the Revision, inasmuch as that power under section 15 of the High Courts Act vests in the whole Court.

There exists, no doubt, a course of decisions in which the case under section 38 of the Legal Practitioners' Act have been disposed of by a Bench of two Judges, but in none of these cases was the question of jurisdiction raised, and in the absence of any decision on that point the course cannot be no authority for the provisions that a Bench of two Judges has jurisdiction to deal with
a case of this nature under section 15 of the High Courts Act. To infer a rule of law from the silence of the Judges is inconsistent with their function.

For these reasons I am of opinion that this Bench has no jurisdiction to dispose of the revision. It follows from what has been said that a single Judge of this Court has also no power to admit a revision from an order passed by a District Judge under section 36 of the Legal Practitioners' Act. The application for revision is therefore not properly before this Bench and the learned counsel for the applicant on his own showing has no locus standi to be heard. I would therefore reject the application.

AIKMAN, J.—This is an application by one Kedar Nath for the revision of an order of the learned District Judge of Meerut passed under the provisions of section 36 of the Legal Practitioners Act, 1879, whereby he directed that a list should be prepared of the names of eleven persons, one of them being the applicant Kedar Nath, who had been proved to his satisfaction to act habitually as a tout, and ordered this list should be hung up in his own Court and in all Courts subordinate to him. He further ordered that the persons whose names were entered in these lists should be excluded from the precincts of these Courts.

The petitioner is represented here by learned counsel who has argued the case with much ability.

The Legal Practitioners' Act confers on this Court no right of interference by way of appeal or revision in the case of an order under section 36, nor is any right of interference conferred by the Code of Civil Procedure or the Code of Criminal Procedure. It has been held, however, that this Court can interfere with such an order under the general powers of superintendence over subordinate Courts which are conferred on High Courts by sections 15, 21 and 25 Vict, Cap. CIV, though, as will be seen from the Full Bench decisions in Taj Ram v. Har Sakh (1), and Muhammad Suleman Khan v. Fatima (2), its powers of interference under that section are very limited.

The learned counsel took objection to the competence of this Bench to hear this case. He contended in the first place with

(1) (1878) I. L. R., 1 All., 102.  
(2) (1880) I. L. R., 9 All., 104.
reference to Rule 2 of the Rules of Court, that the case must be
heard by a Bench of at least three Judges. The case is not a
charge against a legal practitioner, and I hold it is not a dis-
ciplinary case within the meaning of the rule. I would therefore
overrule this contention.

Mr. Howard next contended that with reference to the
language of sections 15, 24 and 25 Vict., Cap. CIV, this case
could only be dealt with by the Full Court. This is an ingenious
argument, I think it must be admitted that no division Bench
of the Court could of its own authority take upon itself to exer-
cise the powers conferred by that section. But it appears to me
that the Court has an inherent right to delegate to one or more
of its members the power to deal with applications such as the
present asking the Court to exercise the power of superin-
tendence conferred by the section, and that it is not neces-
sary that such cases should be dealt with by the Full Court.
That the Court has delegated that power is clear from Rule
1 (xiii) and Rule 4. It would be in the highest degree in-
convenient if every application under section 15 had to be
dealt with by the whole Court. That Division Benches of the
various High Courts have been in the habit of dealing with
applications under section 15 is shown by numerous reported
cases. I think for these reasons that Mr. Howard's second con-
tention must be overruled.

Moreover, if his contention were held to be valid it would
follow that the single Judge who issued the rule in this case had
no power to issue it.

As stated above, the right of this Court to interfere under
section 15 with the proceedings of a subordinate Court is strictly
limited. It cannot interfere to correct an error of fact or even
an error of law. See the cases cited above. All it can do is to
direct a Court to exercise jurisdiction when it has declined to
deal with a case within its jurisdiction or to abstain from taking
action in matters of which it has not cognizance.

My only doubt in this case was whether the District Judge
had power to make his order applicable to Rent Courts. These
Courts are not subordinate to the District Judge in all branches
of their work, but in certain classes of cases they are. I am not
therefore prepared to say that the order so far as it referred to Rent Courts was entirely without jurisdiction.

In my opinion no good ground has been made out for interference and I would dismiss the application.

BY THE COURT.—The order of the Court is that the application is dismissed.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Hazerji.

MUHAMMAD YAHYA AND OTHERS (PLAINTIFFS) v. GASHID-UD-DIN (DEFENDANT)

Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.

In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. *Ibn Hassan v. Ram Das (1)* and *Ibn Hasan v. Brijbhusan Saran (2)* referred to.

This was a suit for contribution arising out of the following facts. There was a mortgage executed by the plaintiffs and some of the defendants and the predecessors of others on the 20th of August 1892. A decree for sale was obtained on it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. The plaintiffs came into Court alleging that their property had contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. They therefore claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court of first instance, relying on the case of *Ibn Hassan v. Brijbhusan Saran (2)*, dismissed the suit upon the ground that the whole of the mortgage money was not realized by sale of the plaintiff’s property alone. The plaintiffs appealed to the High Court.

*First Appeal No. 152 of 1904, from a decree of Raj Nath, Subordinate Judge of Allahabad, dated the 25th of May 1904.*

(1) (1899) 1 L.R. 12 All. 110

(2) (1904) 1 L.R. 73 All. 407.
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Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1830 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

In the partition proceedings the plaintiff made no objection to the defendant's title under section 74 of Act XVII of 1876, but he filed an application in which he asked that "the share of Manna Singh (the deceased) should be decided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Manna Singh." Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 29 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons beside the parties to the present suit and also because the plaintiff should have raised the question of the defendants' title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition.
Held by the Judicial Committee that the order of the Revenue

Crown in the partition proceedings should that the shares of all the villages sued for.

Chokhey Singh v. Jote Singh, I. L. R. 31 All.

1877—XV—(INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 27—Agreement to sell—Rescission of contract—Act No. IX of 1872 (Indian Contract Act), sections 65, 65—Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of defendants under the foreclosure decree. The defendants neither

the decisions of the High Court.

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138. See Civil Procedure Code, sections 241, 318, 319

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could be maintained unless the whole amount of the mortgage was discharged, and the majority of the Judges constituting the Bench answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in *Ibn Hasan v. Brijbhukan Suran* (1) upon which reliance has been placed by the appellants’ learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgager who has discharged more than his rateable portion of the debt, is not entitled to contribution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of *Ibn Hasan v. Ram Dai* (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

By the Court:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 662 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

*Appeal decreed and cause remanded.*

(1) (1864) I. L. R. 20 All. 407.    (2) (1889) I. L. R. 12 All. 110.
AMMA BIBI AND OTHERS (PLAINTIFFS) v. UDIT NARAIN MISRA
AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature for the North-Western
Provinces, Allahabad.]

Act No XV of 1877 (Indian Limitation Act), schedule II, article 97—Agreement
to sell—Rescission of contract—Act No IX of 1872. (Indian Con-
tract Act, sections 55, 65—Suit to recover money paid as part of purchase
money when consideration failed—Suit for specific performance and in
alternatives for refund of money paid—Accrual of cause of action.

The defendants, against whom a decree for foreclosure was outstanding,
agreed to sell certain immovable property to the plaintiff, and the plaint-
iff paid into Court as part of the consideration the amount due by the
defendants under the foreclosure decree. The defendants neither executed
a conveyance of the property which they had agreed to sell, nor did they
return to the plaintiff the money which he had paid on their behalf. On 10th
December 1896 the plaintiff instituted a suit against the defendants for a
refund of the money so paid by him, alleging that the defendants had failed
to fulfill their part of the contract, which was to execute a conveyance of the
property within one month. The defendants denied this, and the first Court,
while finding that the period of one month had been fixed by the parties for
the execution of the deed of sale, held on the evidence that time was not of
the essence of the contract, and that the plaintiff could not (as he claimed)
rescind the contract under section 55 of the Contract Act and recover the
money he had paid, and this decision was on appeal affirmed by the High
Court on 16th January 1900. On 16th April 1900 the plaintiff sued the
defendants claiming specific performance of the agreement to sell, or in the
alternative for a refund of the money paid by him as part of the consideration
for the sale agreed upon. The first Court gave the plaintiff a decree for
specific performance. On appeal by the defendants it was held by the High
Court on 30th April 1903, (1) that the terms of the agreement to sell not
being satisfactorily proved no decree for specific performance could be made ;
(2) that the plaintiff was therefore entitled to recover the money which he
had paid under the agreement ; and (3) that, following the case of Hassu
Khoo v. Dhum Singh (1), the plaintiff’s alternative claim for a refund on
failure of consideration was governed as to limitation by article 97 of
schedule II of the Limitation Act 1877, and was not barred by lapse of time,
which limitation only began to run from the date of the High Court’s
decree declaring the agreement to sell to be unenforceable. The plaintiff
appealed from the decision of the High Court of 18th January 1900, and the
defendants from that of 30th April 1903 to His Majesty in Council, and both

*Present.—LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOTT,
and SIR ANTHUR WILSON.

(1) (1888) I. L. R., 47 All., 47, L. R., 15 I. A., 211.
appeals were dismissed by their Lordships of the Judicial Committee, who
upheld the decisions of the High Court.

Four appeals consolidated (Nos 55, 56, 57 and 58 of 1906) from
decrees of the High Court at Allahabad. In Nos 55 and 56 the decrees (18th
January 1900) of the High Court affirmed decrees (4th May 1897) of the
Subordinate Judge of Gorakhpur; and in Nos 57 and 58 the decrees (30th
April 1903) of the High Court reversed decrees (27th September 1900) of
the same Subordinate Judge.

The original plaintiff in all the four suits out of which the
appeals arose was one Muhammad Minnat Ulla who is now
represented by the appellants in appeals 55 and 56, and the
respondents in appeals 57 and 58. On 10th December 1896 Minnat
Ulla brought two suits (275 and 276 of 1896) against two
separate sets of defendants, of whom the principal was Udit
Narain Misra in suit 275 and Rama Shankar Misra in suit 276,
those defendants now being respectively the principal re-
spondents in appeals 55 and 56 and the principal appellants in
appeals 57 and 58. In both the suits 275 and 276 of 1896 the plaintiff
alleged that the defendants had agreed to sell certain property
to him on, (among others) the condition that they should execute
and register the necessary sale-deeds within a month from the
16th September 1896 the date of the agreements. In accordance
with these agreements the plaintiff paid a substantial portion
of the consideration for the sales as earnest money in the manner
agreed upon. The defendants however did not execute the sale-
deeds within the stipulated time, and the plaintiff therefore sued
them for a return with interest of the purchase money which had
been paid by him in respect of the sales, alleging that the de-
fendants, by omitting to execute the deeds within a month, had
failed to carry out their contract. In these suits the Subordinate
Judge found on the evidence that one month’s time was agreed
upon between the parties for the completion of the sale, and in
his judgment he said :-

"The plaintiff comes into court on the allegation that the defendants
having failed to complete the sale within the specified time of one month,
the contract to sell and purchase is at an end and that therefore he is entitled
to recover the amount which he has paid for them together with interest
thereon. Section 75 of Act IX of 1872, therefore applies to the case and
the plaintiff is entitled to rescind the contract if time be found to have been
of the essence of the contract. In order to determine this I must first refer to the terms of the contract embodied in the petition, Exhibit II. The terms as set forth in the document are as follow:—"That in lieu of the aforesaid amount (Rs 13,855-6) as well as in lieu of the amount due to Maulvi Minnat Ulla, the defendant would in the course of one month execute and have registered a sale-deed of the four villages specified below in favour of the Maulvi at the rate of Rs 2-6 per cent, per annum according to the Government roll, and whatever may be found due to the Maulvi after the execution of the sale-deed, the condition of the former deed would hold good and according to the conditions in the old deed the same property would continue hypothecated in the balance of the purchase money and at the time of the execution of the sale-deed, the Maulvi would execute an agreement to reconvey the property sold to the defendant within one year subject to the conditions agreed upon between the parties." In these terms I find nothing to support the contention that the time of one month is of the essence of the contract. According to the terms of the agreement, the one year for reconveyance is to be reckoned after the execution of the sale-deed, on whatever date it may be executed. It does not appear that the plaintiff had to sustain a substantial loss if the sale was not completed within one month."

And after referring to the cases of Ram Gopal Mookerjee v. Musseeb (1), Brojo Soundowree Debra v. Collins (2), Soollan Chand v. Schaller (3), Dadabhowy Dajibhoy Baria v. Pessonji Marwanji Barucha (4) and Buldeo Doss v. Howe (5), which last case was distinguished from the present, the Subordinate Judge concluded:—

"For the reasons and with regard to the rulings cited above I am of opinion that the time of one month was not of the essence of the contract, and that therefore the plaintiff is incompetent to rescind it."

He dismissed both suits on that ground; and on appeal the High Court (Sir Arthur Strachey, C. J., and Banerji, J.) on 18th January 1900 said in affirming that decision—

"We agree with the Court below that there is no reason for the view that time was of the essence of the contract. Upon that view the decision of the Court below is correct and the appeal must be dismissed with costs."

The plaintiffs obtained leave to appeal to His Majesty in Council.

The suits which led to appeals 57 and 58 were on dismisal of the suits 275 and 276 of 1895 instituted in the Court of the same Subordinate Judge on 16th April 1900 being numbered 83 and 84 of that year. The facts with regard to them will be found

(1) (1890) 8 Moo. I. A., 232. (3) (1878) I. L. R., 4 Cal., 252.
(5) (1880) I. L. R., 9 Cal., 64.
fully stated in the report of the hearing of them on appeal before
the High Court (Sir John Stanley, C.J. and Burkitt, J.) in
I. L. R., 25 All., 618. The suits were for specific performance
of the contract, or in the alternative for return of the earnest
money paid by the plaintiff. The Subordinate Judge gave the
plaintiff decrees for specific performance. On appeal the High
Court stated that in view of the conflict of testimony they were
not satisfied as to what the contract really was, and could not
therefore give a decree for specific performance; but holding
that the suits were not barred by limitation as was contended by
the defendants, the High Court made a decree in each suit for
the recovery of the sum paid by the plaintiff with interest.
From that decision the defendants appealed to His Majesty in
Council.

In these appeals

Ross for the appellants in appeals 55 and 56, and for the
respondents in appeals 57 and 58 contended in appeals 55 and 56
that the courts below were in error in holding that time was
not of the essence of the contract. The Subordinate Judge found
on the evidence that the period of one month was agreed upon
by the parties for the completion of the sale, and if so, it must
have been intended to be a binding condition. It was submitted
that time was of the essence of the contract, and that the plain-
tiff was entitled on failure of the defendants to complete the
sale within the time stipulated to rescind the contract under
section 55 of the Contract Act (IX of 1872) and that the
decision of the Courts in India to the contrary should be set
aside.

With respect to appeals 57 and 58 it was contended for the
respondents that the suits out of which they arose had been rightly
held barred either by the Civil Procedure Code (Act XIV of
1882) or by the Limitation Act (XV of 1877). As it had been
found that the contract was not enforceable and a decree for
specific performance could not therefore be granted, it was clear
that the plaintiffs, on their alternative plea, were entitled for the
reasons given by the High Court to a return of the money paid
by them in consideration of the sale. The decision in these
appeals should be upheld.
De Gruyther, K. C., for the respondents in appeals 55 and 56, and the appellants in appeals 57 and 58, contended that the lower Courts had rightly held that time was not of the essence of the contract, even if the period of a month had been fixed for completion, and that the contract could not therefore be rescinded under section 55 of the Contract Act.

For the appellants in appeals 57 and 58 it was contended that the suits were barred by the law of limitation; article 113 of Schedule II of the Limitation Act prescribing a period of three years from the date fixed for performance of the contract, so that the cause of action arose on the expiry of the month which it had been found was so fixed, and these suits were brought more than three years after that time. With regard to the plaintiffs' right to a return of the money paid, that also was barred by the three years period of limitation, the cause of action arising from the same date. It was also submitted that that question was res judicata in the former suit, and the present suits for it were therefore barred by section 13 of the Code of Civil Procedure, and also by section 43 of that Code. Reference was also made to section 65 of the Contract Act, articles 97 and 120 of the second schedule of the Limitation Act, and section 12 of the Civil Procedure Code.

1908, November 10th—The judgment of their Lordships was delivered by LORD MACNAUGHTEN:

Their Lordships are of opinion that the judgment of the High Court is quite right. They will therefore humbly advise His Majesty that the appeals and the cross-appeals ought all to be dismissed. The parties will bear their own costs of their respective appeals.

Appeals dismissed.

Solicitors for appellants in appeals 55 and 56, and for respondents in appeals 57 and 58:—Barrow, Rogers and Nevill.

Solicitors for respondents in appeals 55 and 56, and for appellants in appeals 57 and 58:—Ranken, Ford, Ford and Chester.

J. V. W.
CHOKHEY SINGH AND ANOTHER (DEFENDANTS) v. JOTE SINGH (PLAINTIFF) AND CROSS-APPEAL.

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Compromise—Document signed by claimants in mutation proceedings—Acquiescence in partition proceedings—Act No. XVII of 1876 (Oudh Land Revenue Act), section 74—Suit to dispute title and recover possession of shares to which plaintiff was entitled by Hindu law—Estoppel—Suit in Civil Court on title after partition.

The plaintiff and defendants were claimants to the estate, consisting of 30 villages, of a deceased Hindu, and though by the ordinary Hindu law the plaintiff, as brother of the deceased, was entitled to the whole property against the defendants, who were nephews (son, of a deceased brother) the three claimants in the mutation proceedings signed in 1896 a document which stated that the property was held, one moiety by the plaintiff and the other moiety by the defendants, and that "there is no other legal heir except the deponents; the mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto," and the revenue authorities effected mutation of names in that way. In 1902 partition which left the parties in the same state as to possession was effected in accordance with the provisions of the Oudh Land Revenue Act (XVII of 1876). In a suit brought in 1904 to recover possession as heir of the deceased of the half share held by the defendants, the latter pleaded (inter alia) that their possession was the result of a compromise come to between the parties in the mutation proceedings which was evidenced by the document of 1896, and that the plaintiff was estopped by such mutual arrangement from asserting his present claim.

Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1896 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

In the partition proceedings the plaintiff made no objection to the defendants' title under section 74 of Act XVII of 1876; but he filed an application in which he asked that "the share of Munnu Singh (the deceased) should be decided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 23 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons beside the parties to the present suit and so...
because the plaintiff should have raised the question of the defendants' title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition.

Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no other parties than the parties to this suit were affected by the partition of the shares in the one village as to which the Courts differed. The Revenue Court had clearly given effect to the plaintiff's application as to the question of title, for no inquiry under section 74 of Act XVII of 1876 was made and the question of title was left to be decided by the Civil Court. The grounds of estoppel therefore failed and the plaintiff was entitled to the shares in all the villages sued for.

Appeal (61 of 1907) and cross-appeal (82 of 1907) consolidated from a judgment and decree (4th May 1906) of the Court of the Judicial Commissioner of Oudh which varied a decree (18th June 1905) of the Subordinate Judge of Sitapur who had decreed the plaintiff's claim in full.

The principal question raised on this appeal was the right of succession to the property consisting of 30 villages of one Munnu Singh who died on 24th May 1890. The claimants were his brother Jote Singh, and Chokhey Singh and Gajraj Singh his nephews the sons of a deceased brother. Under the ordinary Hindu law applicable Jote Singh was the nearest heir and entitled to the whole estate, but by an order of the revenue authorities dated 5th November 1893 mutation of names was in fact effected by leaving the property as it was then held, namely an eight anna share in the name of Jote Singh, and the other eight anna share in the names of Chokhey Singh and Gajraj Singh, the former being the elder having a slightly larger share. After mutation of names the parties remained in possession of their respective shares, and later a partition of a portion of the estate was effected in accordance with the provisions of Act XVII of 1876.

The suit out of which the present appeal arose was instituted on 24th November 1904 by Jote Singh against Chokhey Singh and Gajraj Singh to recover possession from them of the eight anna share of Munnu Singh's estate which they had held before and since the mutation proceedings and refused to give up. The plaintiff claimed title as next heir and stated that his consent to the mutation proceedings was given under a misconception of law,
The defence was that on the death of Munnu Singh the defendants, though excluded by the ordinary law, claimed to be entitled to the whole estate under an oral will of Munnu Singh and as being joint in estate with him, and that a compromise was come to between the parties, the result of which was the order in the mutation proceedings. The defendants pleaded a custom in the family that nephews were not excluded by brothers, and contended that the plaintiff was estopped by the mutual arrangement, and by his having acquiesced in the partition from asserting his present claim.

Of the documentary evidence referred to in their report exhibit A 1, which was a joint statement of the claimants in the mutation proceedings, the material portion is set out in their Lordships' judgment. Exhibit A 17, which was a copy of a petition of objections filed by the plaintiff Jote Singh under section 73 of Act XVII of 1876 (the Oudh Land Revenue Act), dated 27th October 1900, in the matter of a claim by a person of the same name (Jote Singh) for partition of Thoke Bhawani in the village Bihat Biram, was to the effect that the plaintiff desired that his interest in the village should be separated from that of the person claiming partition, and stated that he “does not wish to keep his share joint with that of the other defendants.” Exhibit No. 58, the purport of which (so far as it is material) is also given in their Lordships' judgment, was an application filed by Jote Singh in reply to the objections taken by the present defendants Chokhey Singh and Gajraj Singh in the matter of the partition of the village Bihat Biram, dated 20th December 1902, and Exhibit A '13 was the order of the Deputy Collector of Sitapur, dated 5th July 1902, regarding the partition of the village of Bihat Biram, and showed that the village was divided into two thokes namely Nathi Singh, and Bhawani Singh, the former of which was allotted to persons none of whom were parties to the present suit; and the latter was partitioned between Chokhey Singh and Gajraj Singh the defendants, who received 3 annas 3½ pies of it, and Jote Singh the plaintiff, who obtained 7 annas and 8½ pies.

The Subordinate Judge found that there was no ground for the defendants' allegations that they were joint with Munnu Singh, and that he made an oral will in their favour; and held
The dispute on the death of Munnu Singh was not settled by a compromise as alleged by the defendants; that the plaintiff did not consent to mutation in favour of the defendants under any misconception of law; that the succession to the property was not governed by any special custom; and that the plaintiff was not stopped from claiming the property in suit under the provisions of the ordinary Hindu Law. After finding that there was a partition of the property subsequent to the mutation, the Subordinate Judge said:

“It is urged by the learned vakils for the defendants that, inasmuch as there was a partition in accordance with the mutation proceedings, the plaintiff cannot be allowed to bring this suit, the object of which is, as they contend, to disturb or set aside the partition proceedings.

“I do not think that the object of this suit is to disturb or set aside the partition effected by the Revenue Court. The partition remains intact, even after the plaintiff gets a decree in this case. The fact that the decree in this case will either entitle the plaintiff to a fresh partition with regard to the land in defendants' possession or entitle the plaintiff to the land in defendants' possession cannot be said to have an effect of disturbing or setting aside the partition made by the Revenue Courts.” I, therefore, find that the fact of partition between the parties does not render the suit unmaintainable. It was further argued by the learned vakils for the defendants that the statement of the plaintiff in the mutation proceedings is a bar to this suit. There is no doubt that the plaintiff through his agent stated before the Tahsildar of Mirzah during the pendency of the mutation proceedings that the defendants were in possession of half the property of Munnu Singh and that the mutation should be effected accordingly. It has not been proved that this statement was the result of any compromise or settlement arrived at between the parties or that it was made to avoid any litigation. Hence, as held by their Lordships of the Privy Council in Muhammad Imam Ali Khan v. Husain Khan (1) the statement in question can be no bar to this suit.

The decree made by the Subordinate Judge was one in favour of the plaintiff for possession of the property in dispute.

The appeal was heard by two Judges (Mr. E. Chamier, Officializing Judicial Commissioner, and Mr. L. G. Evans, additional Judicial Commissioner) of the Court of the Judicial Commissioner of Oudh, who agreed with the findings of the Subordinate Judge that the defendants and Munnu Singh did not constitute a joint family, and that there was no will of Munnu Singh in their favour; that no custom of the kind alleged by the defendants was proved; that the allegation of a dispute and a

subsequent compromise between the parties, on the death of
Munnu Singh in 1896, was not established; and that, reject-
ing the evidence founded on such allegation, there was nothing in
the circumstances of the case with regard to the shares in 29 of the
villages in suit which afforded a ground for holding that the
plaintiff was estopped from bringing this suit, citing as author-
ity the case of Muhammad Imam Ali Khan v. Hussin Khan
(1) with regard, however, to the share in the village of Bihat
Biram they considered that the circumstances were somewhat
different, and that the plaintiff was estopped from claiming any
share in that village. The decision of the Court of the Judicial
Commissioner on that point is set out in their Lordships' judg-
ment. The claim of the plaintiff was therefore allowed to shares
in all the disputed property except the shares in the village of
Bihat Biram.

Both parties appealed from this decision to His Majesty in
Council.

On these appeals:

De Gruyther, K. C., and J. Redwood Davies for the appellants
in appeal No. 61 and for the respondents in the cross-appeal
contended that the evidence on the record was sufficient to estab-
lish a compromise of the rights of the parties claiming as heirs to
the estate of Munnu Singh under which the defendants validly
acquired the half share of which they had been ever since in
possession. That such an arrangement was made was evidenced
by the fact that mutation of names was made on those terms, and
by the plaintiff's consent to such mutation having been given.
He admitted in his evidence that his consent was not given under
any misconception of law as he was at the time aware that he
was entitled to the whole of the property. Exhibit A 1 was
referred to as showing that the plaintiff agreed to the defendants
holding the half share which he was now suing for; that docu-
ment stated that no one objected to mutation being made in that
way. The plaintiff also had acquiesced in that settlement for a long
time, and had allowed a partition of the property to be made in
accordance with it; and it was submitted that he could not now
maintain a suit to set aside that disposition of the property:

Reference was made to the Oudh Land Revenue Act (XVII of 1876) sections 68, 73, 74 and 75; and the case of Muhammad Imam Ali Khan v. Husain Khan (1) which had been cited in the judgments of the courts below as authority for the plaintiff's not being estopped by any admission made during the mutation proceedings, was distinguished; and it was submitted that the plaintiff was not estopped by his conduct, and by the provisions of the above Act, from claiming not only any share in the village of Bihat Biram, but also any portion of the property in dispute.

Sir R. Finlay, K. C. and G. E. A. Ross for the respondent in appeal 61 and for the appellant in the cross-appeal contended in appeal 61 that on the evidence there was no dispute between the parties, which was settled by awarding the property in suit to the defendants; and that had been established by the concurrent findings of both the courts in India. The mutation proceedings conferred no title on the defendants, nor in any way affected the plaintiff's rights, and the Court of the Judicial Commissioner held rightly held that the plaintiff was not estopped by his conduct from maintaining the present suit. That court said:—“All that the defendants did in consequence of the action or inaction of the plaintiff was to take possession of half the property and enjoy the profits thereof. All that is proved in the present case is that the plaintiff gratuitously admitted the right of the defendants to a share.” Reference was made to Muhammad Imam Ali Khan v. Husain Khan (2). In the cross-appeal it was contended that the Court of the Judicial Commissioner was in error in holding that the plaintiff was estopped from claiming the share in the village of Bihat Biram because the special circumstances which had been found by that court to estop the plaintiff from claiming the said share did not amount to an estoppel. Nor was he estopped by the provisions of Act XVII of 1876 (The Oudh Land Revenue Act), to sections 63 and 219, clauses (d) and (e), of which Act reference was made. Exhibit No. 53 was referred to, to show that in the partition proceedings the plaintiff reserved his right to question in a separate suit the title of the defendants to the share in the village of Bihat Biram. Assuming, therefore, without admitting, that the plaintiff did not raise any objection in

(1) (1879) I. L. R. 26 Calc. 61. (2) (1879) I. L. R. 26 Calc. 61 99,100.
the partition proceedings with regard to the right of the defendant to possession of the said share, he was not debarred from claiming the share in a suit in the Civil Court.

De Gruyther, K. C., replied.

1903, December 7th:—The judgment of their Lordships was delivered by Sir Andrew Scoble:—

The suit out of which these appeals arise relates to the right of succession to the property of one Munnu Singh, who died childless on the 21st May 1898. The property consists of shares in some thirty villages in the District of Sitapur, in the Province of Oudh. The claimants are Jote Singh, the only surviving brother of the deceased, and Chokhey Singh and Gajraj Singh, his nephews, the sons of a brother who had predeceased him.

It is not disputed that, under the ordinary Hindu law applicable to the family, Jote Singh was the nearest heir and entitled to succeed to the whole estate. His nephews, however, sought to defeat his claim on various grounds. They alleged that they had been joint with Munnu Singh during his lifetime, and that he had made an oral will in their favour. Both Courts in India found against them on these points. They set up a family custom, whereby brothers and brothers' sons are entitled to succeed together, but they entirely failed to establish such a custom. They further asserted a compromise—and this was the only ground argued before their Lordships—under which they claimed to have acquired a half-share in the estate, by agreement with Jote Singh.

There is no doubt that by an order of the 5th November, 1899, mutation of names in respect of Munnu Singh's property was effected in the following manner, viz., one half into the name of Jote Singh and one half into the names of Chokhey Singh and Gajraj Singh, the former, being the elder, having a slightly larger share. But this mutation of names by itself confers no proprietary title, and it was therefore sought to prove that it was the result of a valid compromise made at the time of the mutation proceedings, and that Jote Singh was thereby estopped from asserting his present claim. Both Courts in India have found as a fact that there was no such compromise,
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(1) (1883) I. L. R. 25 Cal. 61.  
(2) (1933) I. L. R. 25 Cal. 101 (177)
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and their Lordships see no reason to dissent from the conclusion at which they arrived. It was, however, argued before their Lordships that the Courts below had not given sufficient attention to a document (Exhibit A-1) signed by the three claimants in the mutation proceedings, in which it is stated that—

"Jote Singh, a son brother of the deceased, is in possession of half of the jagir of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the jethani right of Chokhey Singh at the rate of 4 per cent, are in possession of the other half of his share. There is no other legal heir except the deponents. The mutation in respect of the deceased’s share in all the villages should be allowed and nobody has any objection thereto."

There is no reference in the document to any compromise, and it does not appear to their Lordships that it contains any words that can be construed as amounting to an abandonment by Jote Singh of his legal rights. It is merely a statement of the facts as they existed in regard to possession of the property—the main point considered by the Revenue authorities upon applications for mutation of names—and, by its silence as to a compromise, tends to support the conclusion that no compromise was ever made.

The Courts in India concurred in holding that, as regards twenty-nine of the villages in which Munnu Singh was a sharer, Jote Singh was entitled to succeed him as his heir according to Hindu law, but as regards one village, Bibhat Biram, they differed. That village had been the subject of partition proceedings under the Oudh Land Revenue Act (Act XVII of 1876), and the Judicial Commissioner held that, as a portion of Munnu Singh's share in Bibhat Biram was allotted to Chokhey Singh and Gajraj Singh at the partition, Jote Singh was estopped from now claiming it. The Subordinate Judge had held that there was no such estoppel.

The judgment of the learned Judicial Commissioner upon the point is in these terms:—

In 1908, one Jote Singh (not the plaintiff) applied for partition of one of the villages in the village, whereupon the plaintiff presented a petition (see Exhibit A-17) praying that his entire interest in the village should be separated from that of the applicant Jote Singh as well as from the share of the present defendant, and this was done with the result that the defendants were allotted separate plots, which includes the share now in dispute, and their father, Baliram Singh's, share in the village as one of the sons of Himal Singh.
The effect of the decree of the Court below is to give the plaintiff a portion of the patti allotted to the defendants at the partition. The defendants, no doubt, conducted their case at the partition on the assumption that they were entitled to half the share of Munnu Singh, junior, and it seems impossible now to put them back into the position which they occupied before the partition, for the partition dealt with the shares of other persons besides those of the parties to the present suit.

Moreover, in the partition the plaintiff had an opportunity, of which he should have availed himself, of objecting to the defendants’ title (see section 74 of Act XVII of 1876, the Revenue Act which was then in force). Had he raised the question then, it would have been disposed of before the partition. In my opinion, it is too late now for the plaintiff to claim that portion of Munnu Singh’s share in Bihat Biram which was allotted to the defendants at the partition. It appears to me that as to this the plaintiff is estopped.

The learned Judicial Commissioner appears to their Lordships to have been under a misconception on two points of fact. If the order of the Revenue Court in the partition proceedings be looked at, it will be found that it divides the village into two thokes, the first of which, thoke Hathi Singh, is partitioned among five families, none of whom are parties to this suit; while the second thoke, Bhawani Singh, is divided between the parties to this suit, in almost equal proportions. The shares of no other persons are therefore affected by the partition order. In the second place, it appears from Exhibit No. 59, an application filed by Jote Singh in reply to the objections taken by Chokhey Singh and Gajraj Singh in the partition proceedings, and dated 20th December 1902, that Jote Singh asked that “the share of Munnu Singh should be divided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh.” The Revenue Court appears to have given effect to this application, for no inquiry under section 74 of Act XVII of 1876 was made, and the question of title was left to be decided by the Civil Court in Jote Singh’s present suit, which was filed on the 24th November 1904. In the opinion of their Lordships the grounds of estoppel relied on by the learned Judicial Commissioner both fail.

Their Lordships will humbly advise His Majesty that the appeal of Chokhey Singh and Gajraj Singh should be dismissed and the cross appeal of Jote Singh allowed; that the decree of the Judicial Commissioner should be discharged, and the decree...
of the Subordinate Judge restored except as to costs, Chokhey Singh and Gajraj Singh paying Jote Singh's costs in both Courts. The appellants Chokhey Singh and Gajraj Singh will pay the costs of Jote Singh in both the appeal and the cross-appeal.

Appeal (No. 61) dismissed.

Cross appeal (No. 62) allowed.

Solicitors for the appellants in appeal No. 61, and for the respondents in appeal No. 62:—T. L. Wilson & Co.

Solicitor for the respondent in appeal No. 61, and for the appellant in appeal No. 62:—Douglas Grant.

J. V. W.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Bamji, Mr. Justice Akbar & Mr. Justice Griffin.

BHAGWATI (Plaintiff) v. BANWARILAL and OTHERS (Defendants).* Civil Procedure Code, sections 244, 318, 319—Execution of decree—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder—auction-purchaser—Act No. XV of 1877 (Indian Limitation Act) Schedule II, article 139

A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor, is in the same position as would be any other purchaser at a sale held in execution of a decree Sakkajit v. Sri Gopal (1) and Mahabir Prasad Singh v. Mahagnlax (2) referred to.

If after confirmation of a sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure, but also by suit. section 244 of the Code is not a bar to such suit and does not apply to such an application Raynor v. The Maccorin Bank, Limited (3), Nagyad and Dada Mrjji (4) and Gulam Ali v. Madho Ram (5) referred to. Kalim Singh v. Tukur Das (6) and Shri Narain v. Nur Mohammad (7) overruled. Mathuradas Das v. Chudawas Prin Chudawas (8) and Kallayat Pathan v. Ramnath Menon (9) dismissed from Mahomed Huq v. Habib Ma (10) followed Sera Mahbub.

*Second Appeal No. 258 of 1895 from a decree of Manil Dakhil, Subordinate Judge of Mirzapur, dated the 4th of January 1896, numbering a decree of Ram Das, Munsil of Amethi dated the 25th of September 1894.

(1) 1894 I. L. R. 17 All. 222. (2) Weekly Notes, 1900, p. 67; S. C. 3 A. L. J. 274.
(3) (1903) I. L. R. 7 All. 61. (8) (1900) I. L. R. 10 All. 72.
(5) (1904) I. L. R. 17 All. 447. (10) (1901) 0 C. L. J. 749.


An application under section 318 of the Code is not an application for execution or to take a step in aid of execution. The opinion of Knox, J., in Kesra Narain v. Abul Hasan (11) and Mot Lal v. Makund Singh (12) dissenting from. So held by Banerji, J., (Aikman and Grifflin J.J., concurring).

STANLEY, C. J., contra (Knox J., concurring).

Where after sale held in execution of a decree and confirmation of such sale the auction-purchaser fails to get possession of the property purchased, proceedings on the part of the purchaser in order to obtain possession are still proceedings relating to the execution, discharge or satisfaction of the decree within the meaning of section 244 of the Code of Civil Procedure. Mot Lal v. Makund Singh (12), Muttia v. Appasami (13), Saratcolina Moitra v. Raj Kumar Roy (14), Kattayat Pathumayi v. Raman Menon (15), Har Din Singh v. Lachman Singh (16), Kasinatha Ayyar v. Uthumansu Routhan (17), Ram Narain Sahoo v. Bansi Pershad (18), Sandhu Taraganar v. Hussain Sahib (3), and Sheo Narain v. Nur Muhammad (19) referred to.

And if the decree-holder has become the auction-purchaser he does not thereby lose his character of decree-holder so as to make any questions thereafter arising between himself and the judgment-debtor other than questions between the parties to the suit in which the decree was passed. Mahabir Pershad Singh v. Macnaghten (20), Veraraghava v. Venkata (21) and Muttia v. Appasami (13) referred to.

The facts out of which this appeal arose were as follows:

One Musammat Mohini obtained a decree for sale on a mortgage against Shankar Lal. On November 16, 1894, the property was put up to sale and purchased by the decree-holder in the name of Bausidhar. On November 27, 1897, Musammat Mohni obtained the certificate of sale, and on September 20, 1900,

(1) (1883) I. L. R. 9 Cal., 602; (11) (1904) I. L. R. 29 All., 355.
(2) (1897) I. L. R., 14 Cal., 644; (12) (1897) I. L. R., 19 All., 477.
(3) (1904) I. L. R., 29 Mad., 87; (13) (1900) I. L. R., 13 M. d., 304.
(4) (1904) I. L. R., 10 Cal., 695; (14) (1900) I. L. R., 27 Cal., 709.
(6) Weekly Notes, 1894, p. 122; (16) (1900) I. L. R., 25 All., 343.
(7) (1905) I. L. R., 3 All., 38; (17) (1901) I. L. R., 25 Mad., 522.
(9) (1907) I. C. W. N., 553; (19) (1907) I. L. R., 30 All., 72.
(10) (1904) G. C. L., J., 749; (20) (1899) I. L. R., 19 Cal., 682.
(21) (1892) I. L. R., 5 Mad., 217.
she made a gift of the property to the plaintiff, Musammam Bhagwati. The judgment debtor, however, remained in possession of the property, and in 1904, Musammam Bhagwati brought the present suit to recover possession from them. The defence to the suit was, amongst others, that section 214, Code of Civil Procedure, barred the suit. The court of first instance (Munsif of Amroha) sustained this plea and dismissed the suit, and this decree was on appeal affirmed by the Subordinate Judge of Moradabad. The plaintiff thereupon appealed to the High Court.

Upon the appeal coming on for hearing before Stanley, C. J., and Banerji, J., on May 16, 1903, it was referred to a Full Bench.

Before the Full Bench:

Munshi Gokul Prasad, for the appellant. The question is whether the suit is barred by section 214 (c), Code of Civil Procedure. There is no question of stay here. There are two essential points to consider, (1) whether the question is between parties to the suit and (2) whether it is one relating to the execution, satisfaction or discharge of the decree. Even though the question may relate to execution, satisfaction or discharge, section 214 will not apply if the question does not arise between the parties to the suit, that is, the judgment debtor or his representatives on the one side, and the decree-holder or his representatives on the other. A question between two judgment-debtors inter se or a judgment-debtor and his representative, as is the case here, does not come within the purview of this section. Raynor v. Mussoorie Bank, Limited (1), Gour Mohun Gouli v. Dinanath Karmokar (2), Maguntal Mulji v. Doshi Mulji (3), Ram Saran Pande v. Janki Pande (4) and Bakhtawar Lal v. Baru Mul (5).

Secondly, the decree was for sale; after the sale had been carried out and confirmed the decree was fully executed, and it mattered nothing to the decree-holder whether the auction-purchaser got possession or not. The auction purchaser must come in under sections 318 and 319, Code of Civil Procedure, and it is well-settled that an order under any one of these sections is


Now a decree-holder who has purchased at auction occupies, in the eye of the law, the same position as an independent purchaser does. Mahabir Pershad Singh v. Macnaghten (8).

The fact that the decree-holder has purchased is a mere accident. Subhajit v. Sri Gopal (9).

Article 138, schedule II, Indian Limitation Act, also favours the contention that a suit like the present is maintainable. If the law gives concurrent remedies, a person may elect to adopt the one he prefers. There is no bar to such a suit.

Kalian Singh v. Thakur Das (10), proceeds on two grounds, viz., that the auction-purchaser is a representative of the judgment-debtor, and that, according to the Privy Council, section 244 must be liberally construed. In this view the case does not affect the present question, as it is contended that the question must arise between the judgment-debtor or his representatives and the decree-holder or his representatives arrayed on opposite sides. In Prosunno Kumar Sanyal v. Kali Das Sanyal (11) it was admitted that the question related to the execution, discharge and satisfaction of the decree, and that it was sought to set aside the sale on the ground of fraud.

Delivery of possession is an extraneous incident of the sale. The case of Madhusudan v. Gobinda Pria (12) is difficult to reconcile with the later cases of the same Court, e.g., in 1 C. W. N., 658, and in 6 C. L. J., 749. Kasinatha Ayyar v. Uthumuna Routhan (13), was a case in which the terms of the decree in that particular case were in question and the decision must be taken as confined to the facts therein, as observed in Quinn v. Leathem (14). Kattiyat v. Raman (15) was decided apparently on the

(1) Weekly Notes, 1889, p 45. (8) (1883) I. L. R., 16 Cal., 662, 692.
(2) Weekly Notes, 1893, p 122. (9) (1894) I. L. R., 17 All., 225, 227.
(3) (1895) I. L. R., 8 All., 30. (10) Weekly Notes, 1906, p. 57.
(7) (1904) 8 C. L. J., 742. (14) (1901) A. C., 435, 506, Per Lord Halsbury, L. C.
(15) (1902) I. L. R., 28 Mad., 740.
principle of stare decisis. Sandhu Taraganar v. Hussain Sahib, (1), Manicka Odyan v. Rajagopal Pillai (2), Sheo Narain v. Nur Muhammad (3), and Bhuni Mol v. Makkhan Lal (4) are authorities to the contrary, but it is submitted that the principle of these rulings is opposed to the accepted interpretation of, and is not warranted by, the language of section 244, which is very clear in itself.

Mr. B. E. O'Connor, for the respondents. The tendency of all the courts, since the Privy Council has so held, has been to relegate such questions as have arisen in the present case to section 211 in order to ensure expeditious determination of them. The cases cited from the Madras reports only emphasize that view, and it is certainly in the interests of all parties, inasmuch as determining such questions under section 244 means so much cheapness. It is submitted that the decree-holder by becoming auction-purchaser does not lose his character of decree-holder—one cannot disembodify the man. He remains decree-holder all the same. In the case of an independent auction-purchaser the distinction is that he has never been a party to the suit, but the decree-holder has been one all along up to the date of sale. There can be no valid reason why at the time of delivery of possession he should figure as somebody else. The auction-sale cannot be regarded as the point of cleavage.

In the cases of Madhusudan v. Gobinda Pria (5) and Kesri Narain v. Abul Hasan (6) application for delivery of possession has been regarded as an application for execution of the decree.

Again Moti Lal. v. Makund Singh (7) holds that an application by a decree-holder to be put into possession of property he has purchased at auction is a "step in aid of execution." It is submitted that these cases go to show that the decree for sale is not complete until in accordance with it the purchaser is also put in possession. It is, therefore, submitted that when a decree-holder seeks to recover possession upon his failure to get it, his remedy is under section 211. The cases in I. L. R. 23 Mad., 87, and in I. L. R., 30 Mad., 507, favour this contention. Article 138, sch. II, Limitation Act, regulates the period of limitation, and its

(3) (1907) I. L. R., 30 All., 72. (6) (1904) I. L. R. 28 All., 385, 387.
(7) (1907) I. L. R., 19 All., 477, 479.
provision cannot control section 244 of the Code of Civil Procedure which regulates the remedies open to the decree-holder and the judgment-debtor.

Gokul Prasad, in reply, referred to the observation of Stanley, C. J., in Gulzar Lal v. Madho Ram (1), as to the character of a purchaser at auction.

Stanley, C. J.—The facts of this case as found by the lower appellate court are as follows:—In execution of a mortgage decree obtained by one Musammat Mohini against one Shankar Lal, the interest of the latter in certain property was sold and purchased in the name of the defendant Bansidhar as a benamidar for the decree-holder Musammat Mohini. On the 27th of November 1897 the sale certificate was issued to Musammat Mohini and she by a tamliknana, dated the 20th of September 1900, transferred her interest to her daughter-in-law, the plaintiff Musammat Bhagwati. Bansidhar, the nominal purchaser, purported to resell the property to the defendant Ganga on the 27th of July 1897, and Ganga purported again to sell it to Musammat Mohini, but these last-mentioned sales may be left out of consideration as it is admitted by both Bansidhar and Ganga that Musammat Mohini was the real purchaser. The representatives of the mortgagor were in possession of the property at the date of the sale and they or their transferees have remained in such possession up to the present time. The suit out of which this appeal has arisen was instituted on the 1st of September 1904, that is, about seven years after the date of the sale, for the recovery of possession of portion of the property, the subject-matter of the sale. Both the lower courts have held that the suit is barred by the provisions of section 244 of the Code of Civil Procedure.

In consequence of the conflict of authority in this Court on the question involved in the case, this appeal has been laid before a Full Bench. Section 244 prescribes that all questions arising between the parties to a suit, or their representatives, relating to the execution, discharge or satisfaction of a decree, shall be determined by the court executing the decree, and not a by separate suit. Two questions must be answered in the affirmative before we can

(1) (1904) I. L. R., 29 All., 447, 453.
hold that section 244 applies to this case, namely (1) is a mortgagor, who in a suit for sale upon his mortgage applies to the court for and obtains leave to bid and buys the mortgaged property, amenable to the provisions of section 244, and (2) is the plaintiff a representative of the decedent's representative Musammat Mohini within the meaning of the expression 'representatives' as used in the section?

To take the first question, the argument in support of a negative answer to it was that as auction-purchaser the decedent Musammat Mohini occupied a different character from that of decedent, and that as purchaser she was not a party to the suit, and therefore no question touching the execution of the decree arose between the parties to the suit or their representatives. It is said that it was a mere accident that the decedent became the purchaser and that she must be held to occupy the position of a purchaser who had no connection whatever with the suit. It was further contended that the proceedings in the suit determined so soon as the sale was confirmed and that delivery of possession was outside and beyond the scope of the suit, and therefore it was not open to the plaintiff to apply for possession in the execution department and further that in any case the plaintiff was entitled to maintain a separate suit for possession.

I fail to see how the purchase by a decedent's representative of the mortgaged property can be properly described as an accident. In no way, as it appears to me, can a purchase of the kind be regarded as a mere accident. In the first place a mortgagee-decedent is not permitted to bid at a sale held in execution of his own decree save with the leave of the Court. The obtaining of such leave is a deliberate act on his part. Then again the making of the highest bid is a deliberate act, and in no true sense, therefore, can a purchase of the kind made by a mortgagee be regarded as accidental. The observation of Lord Watson in Mahabir Pershad Singh v. Macnaghten (1), that 'leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser' is relied on as establishing a dual character in a

(1) (1889) I. L. R., 16 Cal., 682.
decree-holder purchaser according to which he may for one purpose lay aside his legal obligations as a party to the suit while he retains his rights and privileges in other respects. I do not think that Lord Watson intended to lay down any such proposition. What I understand by his language is simply this, that the rule which forbids a mortgagee decree-holder to purchase has no force if permission to bid be given to him by the Court, and that when the grant of permission to bid has been given, such mortgagee is no longer under disability to purchase, but quod the right to purchase is on the same footing as strangers to the suit who may be bidders at the sale.

It was suggested during the argument that a mortgagee who purchases at a sale held in execution of his own decrees occupies a dual character, such as that which is held by an executor or trustee, and that as purchaser he is not also decree-holder and so cannot be regarded as a party to the suit so as to be bound by the provisions of section 244; that, in other words, a question arising between him and the mortgagor judgment-debtor in regard to delivery of possession is not a question arising between the parties to the suit within the meaning of the section. The argument appears to be, that when a sale to a decree-holder mortgagee has been confirmed the decree-holder entirely drops the character of decree-holder and assumes that of purchaser and that any question touching the delivery of possession of the purchased property is not a question between the decree-holder and the mortgagor in possession but is a question between the purchaser only, independently of the character of decree-holder and the mortgagor. The recognition of such a dual personality in a decree-holder purchaser would be, I think, to introduce a strange and novel legal fiction into our jurisprudence. It has been said, and rightly said, that an executor, who is sued as such only, cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. In order that he may be personally bound he must be sued in his personal as well as in his representative capacity. There is, however, in my opinion no analogy between the two cases. An executor not merely claims title from a deceased person, but he represents the deceased person. If he institute a suit in
respect of the estate of the deceased, he does so not presumably for his own benefit but for the benefit of the estate of the deceased. If he be sued as an executor only he is sued as representing the deceased. On the contrary, in the case of a decree-holder he sues on his own behalf and for his own benefit. If he get leave to bid and buys the mortgaged property, he does so on his own account and in his own interest alone. I am unable therefore to see how the character of the decree-holder can be split up into two distinct characters so as to enable him to override the provisions of section 244. By becoming a purchaser he does not cease to be a party to the suit and as such to be bound by any order which may be passed therein. The intention of the Legislature in passing the enactment in question was, as it seems to me, to prevent any question which could be disposed of in execution becoming the cause of fresh litigation—see Viraraghava v. Venkata (1) and Mutia v. Appasami (2).

But we have further to see whether the obtaining of possession by a mortgagee decree-holder, who purchases at a sale in execution of his own decree, is a proceeding in execution within the meaning of section 244. The mortgagees were at the time of the sale, and are still, in possession of the mortgaged property. Is a mortgagee decree-holder who buys the mortgaged property bound to apply to the Court for delivery of possession within the period prescribed for such step, that is three years, or is he entitled to remain quiescent for a period less than twelve years by a day and then institute a suit for possession? A sale of property is not complete until the vendor has delivered to the purchaser such possession as he is able to give. One of the liabilities of the seller is to give to the buyer on being so required such possession of the property as its nature admits (section 55 of the Transfer of Property Act, 1882). Delivery of possession was necessary in this case to render the sale ordered by the Court final and complete, and was therefore, I think, a step in aid of execution. It is said that upon the confirmation of the sale there was nothing more to be done by the Court;

(1) (1882) I. L. R., 5 Mad., 217. (2) (1890) I. L. R., 13 Mad., 604.
but I am unable to accede to this proposition. The delivery of possession is undoubtedly to my mind a step in aid of execution. This was so held in the case of Moti Lal v. Makund Singh (1). In that case Edge, C.J., and Blair, J., in their judgment observed:—"A proceeding in execution cannot be said to be completed (at least so far as the decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree. Consequently it appears to us that an application to be paid out of Court the proceeds of such sale must be considered as the taking of a step in aid of the execution of the decree." And further on:—"The execution of his (the decree-holder’s) decree cannot be said to be satisfied until in the one case he has received the purchase money paid into court, and in the other case until he be put into possession of the property of his judgment-debtor which he has purchased and which represents money." This ruling was followed in the case of Mutti v. Appasami, which I have already cited. In that case a decree-holder purchaser applied under section 318 of the Code of Civil Procedure for delivery of the property purchased by him, which was in the occupancy of the judgment-debtor. The judgment-debtor set up an agreement between him and the applicant in bar of the application. Mutti v. Appasami, J., in the course of his judgment observed:—"When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of section 244." In Saraiatolla Molla v. Raj Kumar Roy (2), Maclean, C.J., and Banerji, J., held that an application by a decree-holder to be put into possession of property which he had purchased under execution proceedings is an application in aid of execution within the meaning of sub-section (4) of article 179 of schedule II to the Limitation Act. The ruling of this Court in the case of Moti Lal v. Makund Singh was approved of. In the case of Kuttayat Puthumayi v. Raman Menon (3), a decree-holder became purchaser of immovable property which was sold in execution of his decree. He applied under section

(1) (1897) L. L. R. 19 All. 477. (2) (1900) L. L. R. 27 Cal. 703. (3) (1902) L. L. R. 29 Mad. 740.
318 of the Code of Civil Procedure for delivery of possession of the property purchased, but his application was rejected as barred by limitation, having been made more than three years after the confirmation of the sale. He then brought a suit to recover possession of the land from the judgment-debtor. It was held, following several other decisions of the Madras and Calcutta High Courts that the proceedings taken by the purchaser to obtain possession of the property purchased related to the execution, discharge or satisfaction of the decree within the meaning of section 244, and the suit was therefore dismissed. I do not think it necessary to cite further authorities for this proposition. It is supported by the rulings in the following cases:—Har Din Singh v. Lachman Singh (1), Kasinatha Ayyar v. Uthumansa Rowthan (2), Ram Narain Sahoo v. Bundi Pershad (3), Sindhu Taruganan v. Hussain Salib (4), Sheo Narain v. Nur Muhammad (5).

According to my view, when a Court has passed a decree for sale in a mortgage suit the proceedings are not at an end when the sale to the decree-holder who has obtained liberty to bid has been confirmed and a certificate of sale granted. In such a case, if the mortgagor is in possession, it is the right of the purchaser to ask for and the duty of the Court to grant an order for delivery of possession to him. Until such possession has been given the decree cannot be said to have been executed or satisfied. In England any party to an action in which a sale has been directed who is in possession of the estate may be ordered by the court to deliver up such possession to the purchaser and the court will enforce such delivery of possession by a writ of possession: Order 51, Rule 1, Rules of the Supreme Court. Section 318 of the Code of Civil Procedure similarly provides that when property sold is in the occupation of the judgment-debtor and a certificate has been granted under section 316, the Court shall on application by the purchaser order delivery to him of the purchased property. Here the decree-holder made the purchase in order to satisfy her debt, and so long as the land remains in the possession of the mortgagor the debt to the extent of the price

(1) (1900) I. L. R., 27 All., 341. (3) (1904) I. L. R., 21 Calc., 737.
(5) (1907) I. L. R., 30 All., 72.
cannot be said to have been satisfied. The fallacy of the argument advanced on behalf of the appellants lies in the assumption that on the grant of the certificate of sale the decree was "completely executed and satisfied." The decree was not, I think, satisfied so long as possession was withheld by the mortgagors from the decree-holder. I may point out that when a decree in a mortgage suit is not wholly satisfied by the proceeds of a sale, proceedings in the suit must be continued if the decree is to be wholly satisfied.

During the argument a suggestion was thrown out that article 138 of schedule II to the Limitation Act supported the appellant's contention. This article allows a period of 12 years to a purchaser of land in execution of a decree within which to bring a suit for possession of the purchased property when, as here, the judgment-debtor was in possession at the date of the sale. This article, it was suggested, was inconsistent with the view expressed in the case of Sheo Narain v. Nur Muhammad. It seems to me that it in no way supports the appellant's contention. A general provision of the kind cannot override the special provisions of section 244. The article in question may be applicable to the case of a purchaser who was a stranger to the suit in which a decree for sale is passed, and who, not being a party to the suit, is not entitled to take proceedings under section 244, but it can in no way, I think, be regarded as controlling the operation of section 244. The conclusion at which I have arrived therefore is that if a mortgagee decree-holder obtain leave to bid at a sale held in execution of his own decree and becomes the purchaser, he must obtain possession from the mortgagor in possession in the execution department and not by an independant suit.

My brother Banerji rightly observed in the case of Gulzari Lal v. Madho Ram (1) that "the trend of recent decisions, both of the Privy Council and of the Courts in this country is in favour of placing on section 244 as wide an interpretation as is compatible with its provisions, so that questions which may be determined by the court executing a decree should not be made the subject of a separate suit." To hold contrary to the view which I have expressed would be not merely to narrow the

(1) (1901) I. L. R., 23 All., 447, 462.
interpretation to be placed on that section but also to overrule a decision of a Division Bench of this Court and of a Division Bench of the Calcutta High Court and several decisions of the Madras High Court, as well as the ruling in Moti Lal v. Makund Singh and the rulings which follow it. On the principle of *stare decisis*, even if there be any doubt as to the propriety of those decisions, I should hesitate to unsettle the law on the question decided by them.

This brings me to the remaining question in the appeal. The plaintiff in this case is not a decree-holder but a donee from the decree-holder. Is she a representative of the decree-holder within the meaning of section 244? I have little or no doubt that she is. It has been held, and I think rightly, that the assignee of a decree-holder purchaser at an auction sale is a representative within the meaning of that expression in section 244. Sandhu Tanagaran v. Hussain Sahib (1); also Dwar Buksh Surkar v. Fatik Jali (2). I see no reason for placing a donee of a decree-holder in a higher position than an assignee for value. The word “representatives” appears to me to include a party who by assignment or gift succeeds to the rights of the decree-holder after decree.

I would therefore answer the second question in the affirmative and would for the reasons which I have given dismiss the appeal.

Knox, J.—The facts found in the appeal are as follows:—

Musammat Mohini as plaintiff obtained a decree for the sale of certain property. In execution of that decree she brought the property to sale and it was purchased by one Bansidhar on the 16th of November 1894. Bansidhar professed to sell the property under a sale-deed dated the 30th of November 1894, to one Gangadhar. Gangadhar professed to sell it to Musammat Mohini the plaintiff. The real purchaser, however, was Musammat Mohini, the decree-holder, and she, on the 27th of November 1897, applied for and obtained the sale certificate. Musammat Mohini, on the 20th of September 1900, executed a tamluknama whereby she transferred this property to Musammat Bhagwati, the present plaintiff.

Musammat Bhagwati, on trying to obtain possession of the property conveyed to her, found herself opposed by Banwari Lal, son of Shankar Lal, who was judgment-debtor in the decree obtained by Musammat Mohini, in pursuance of which, as already stated, a portion of the house was brought to sale and purchased by Musammat Mohini. She accordingly instituted an ordinary suit for dispossession of Shankar Lal and other persons, who, she alleged, were in collusion with him in refusing to deliver possession. All the defendants, except certain pro forma defendants, put forward as an answer to the plaintiff's claim, that she was a representative of the decree-holder and that as she did not obtain possession of the property purchased within three years, she was not entitled to file the suit and that section 244 of the Code of Civil Procedure operated as a bar. The court of first instance holding that the suit was barred by section 244, dismissed it. The lower appellate court, also taking the same view, held that the suit was barred.

Section 244 lays down that questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof shall be determined by order of the court executing a decree and not by separate suit.

It has been held by a Full Bench of this Court, Gulzari Lal v. Madho Ram (1) following a Full Bench judgment of the Calcutta High Court, Ishan Chunder Sirkar v. Beni Madhub Sirkar (2), that the term "representative" as used in section 244 of the Code of Civil Procedure does not mean only the legal representative of a judgment-debtor, i.e. his heir, executor or administrator, but that it means his representative in interest, and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree. In this case my brother BANENJY hold, and I think rightly, that every purchaser of the judgment-debtor's interest, who is bound by the decree, is a representative of the judgment-debtor within the meaning of the section, whether he is a purchaser under a private sale from the judgment-debtor or a purchaser at a

(1) (1891) I. L. R., 29 All., 417. (2) (1890) I. L. R., 24 Cal., 62.
compulsory sale, held in execution of a decree obtained against the judgment-debtor. He could see no distinction in principle between the case of a purchaser at a private sale and that of an auction-purchaser provided that the decree in execution could be enforced against him.

By a similar process of reasoning it appears to me that a donee from a decree-holder, if he, should the necessity arise, can enforce the decree in the execution sale, should be held to fall within the category of representatives of a decree-holder for the purpose of section 244 of the Code.

The object of that section, it appears to me, was to provide for the speedy determination of any question between the decree-holder and the judgment-debtor, should any still be left at such a late stage of the litigation between them. A decree-holder who has fought out his case, won his decree and carried it possibly into several courts of appeal and who elects to buy the property of his judgment debtor which he has put up to auction, ought to be in a position to know all that need be known about the property. He had ample means in the suit and under the procedure which regulates execution to find out all that need be known. It is to the interest of all that the litigation should be put to an end. Section 244 places the representative in the same position as the decree-holder, and I see no advantage in prolonging the strife by giving the decree-holder who has become purchaser a second capacity.

The learned Chief Justice has gone very fully into the remaining questions raised in the appeal and I do not see that I can with advantage add any thing to what he has said upon these points beyond saying that I agree with what has been said upon them.

Agreeing with the learned Chief Justice, I would dismiss this appeal.

BANERJI, J.—The question raised in this appeal is whether a suit by an auction-purchaser or his representative against the judgment-debtor or his representative for possession of the property sold is barred by the provisions of section 210 of the Code of Civil Procedure.
The facts are these: One Musammat Mohini obtained, on the 12th of March 1891, a decree for the sale of certain hypothecated property against Shankar Lal, the father of the first defendant. In execution of that decree she caused the property, which consisted of a house and lands, to be sold by auction on the 10th of November 1894 and purchased it herself in the name of one Bansidhar. The proceeds of the sale were sufficient to satisfy the decree in full. Bansidhar sold the property to Gangadhar, the son of Mohini, and Gangadhar sold it to Mohini, who obtained a certificate of sale on the 27th of November 1897. Subsequently, on the 20th of September 1900, she made a gift of the property to her daughter-in-law, the plaintiff. As possession was withheld from the plaintiff she brought the present suit against the legal representatives of the judgment-debtor on the 1st of September 1904. The property claimed being a share of a house and land, other co-sharers in it were made defendants pro forma. The main defence to the suit was that it was barred by the provisions of section 244 of the Code of Civil Procedure and that the plaintiff’s remedy was an application for possession under section 318 of the Code. This contention prevailed in the court of first instance, which dismissed the suit. The decree of that court having been affirmed by the lower appellate court, the present appeal has been preferred by the plaintiff. It is urged on her behalf that section 241 is no bar to the suit and that she had no remedy under that section.

There cannot be any doubt that the purchaser of immovable property at an execution sale which has been confirmed is entitled to obtain possession of the property. If it is in the occupancy of the judgment-debtor or his tenants, the auction purchaser may apply for delivery of possession under section 318 or section 319, as the case may be. Is a question which arises under either of those sections a question which may be determined under section 241? If it is so, no separate suit will lie. The only clause of that section which can be applicable is clause (c). In order that clause (c) may apply two conditions are essential: first, that the question arises between the parties to the suit in which the decree was passed or
their representatives; and second, that it is a question relating to the execution, discharge, or satisfaction of the decree. As regards the first condition it is manifest that the parties must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of section 244. This has been held so repeatedly that I deem it unnecessary to cite authorities. I may refer, however, to the cases of Raynor v. The Mussoorie Bank Limited (1); Mangalal v. Doshi Mulji (2), in which it was held that a dispute between the judgment-debtor and his own representative is not a question which may be determined under section 244; and Gour Mohun v. Dinanath (3), in which the Calcutta High Court held that the section does not apply when a question arises as to the execution of a decree between two persons each of whom claims to be the representative of the decree-holder.

It was held by a Full Bench of this Court in Gulzari Lal v. Madho Ram (4) that an auction-purchaser of the interests of the judgment-debtor, who is bound by the decree, is his legal representative within the meaning of section 244. Therefore, when a question arises between the judgment-debtor and the auction-purchaser of his interests it is a question between the judgment-debtor and his representative and is consequently not a question which may be determined under that section. The basis of the decision in Kalian Singh v. Thakur Das (5), namely, that the auction-purchaser being the representative of the judgment-debtor, section 244 applies cannot in my humble judgment be held to be sound. It is contended that the fact of the decree-holder being the auction-purchaser makes a difference and that when such a purchaser applies for delivery of possession the question is one between the parties to the suit. I am unable to accede to this contention. The decree-holder as such is not entitled to possession, as

the decree does not award possession. It is only in his capacity as auction-purchaser that he can apply for and obtain possession. In this respect his position is no better and should be no worse than that of any other purchaser. The fact that the decree-holder has purchased the property is, as observed in the Full Bench case of Sabhajit v. Sri Gopal (1), a pure accident. Although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities, and it is in the latter capacity only that he can obtain possession. It was held by their Lordships of the Privy Council in Mubabir Pershad Singh v. Maenaghton (2) that a mortgagee decree-holder who purchases the mortgaged property at auction with the leave of the court is in the same position as any independent purchaser, and sections 318 and 319 of the Code of Civil Procedure make no distinction between a decree-holder auction-purchaser and any other auction-purchaser. I may also refer to article 138 of the second schedule to the Limitation Act, under which a suit may be brought by an auction-purchaser for recovery of possession within twelve years from the date of the auction sale. In that article no distinction is made between different classes of auction-purchasers. I fail to appreciate the reason for holding that if the decree-holder happens to purchase at an auction sale he has a shorter period of limitation for obtaining possession than any other purchaser. In my judgment all auction-purchasers, whether they are decree-holders or not, and whether they purchased under a mortgage decree or under a simple decree for money, are in the same position as regards recovery of possession of the property purchased by them and that it is only in their capacity as auction-purchasers that they can obtain possession. The question, therefore, which arises under section 318 or 319 of the Code of Civil Procedure is not a question between the parties to the suit or their representatives and cannot be determined under section 244. In the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction-purchaser. Under that transfer she acquired no interest

(1) (1894) I. L. R., 17 All., 222. (2) (1889) I. L. R., 16 Calc., 63.
in the decree itself and in no sense can it be said that she is
the holder of the decree or the representative in interest of the
decree-holder quod the decree. Even, therefore, if it be assumed
that a distinction exists between the case of a decree-holder pur-
chaser and any other purchaser (though in my judgment no such
distinction exists) that distinction cannot be held to apply in
the present suit.

I am further of opinion that a question between the auction-
purchaser or his representative and the judgment-debtor or his
representative relating to delivery of possession is not a question
"relating to the execution, discharge or satisfaction of the decree"
within the meaning of section 244, clause (e). Upon the judgment-
debtor's property being sold and the amount due under the
decree being realized the decree is fully executed, discharged and
satisfied, and no question relating to the execution, discharge or
satisfaction of the decree remains to be determined. Whether or
not the auction purchaser obtains possession of the property sold
is wholly immaterial for the purpose of the decree and does not
in any way affect it. If the decree-holder purchases the property
but does not obtain possession, that circumstance would not
entitle him to take out execution of the decree, which has already
been satisfied. So long as the sale subsists he cannot claim a
refund of the purchase money or ask for execution of the decree to
the extent of the amount of the purchase money. It is only when
an auction sale has been set aside under section 310A, 312 or 313,
that the purchaser may under section 315 obtain a refund, but he
is not entitled to a refund if he fails to obtain possession of the
property sold. In this respect also the position of the decree-
holder purchaser is not different from that of any other purchaser.
It is said that an auction sale is not complete until possession has
been delivered to the auction-purchaser. I see no warrant in the
Code of Civil Procedure for such a view. Under section 314 a
sale becomes absolute as soon as it is confirmed, and under
section 316 the property vests in the purchaser from the date
of confirmation of sale. The purchaser may, no doubt, obtain
delivery of possession by an application under section 318 or
319, but the validity of the sale or the completion of it does not
depend on his obtaining possession. I am also unable to hold
that if the decree-holder happens to be the auction-purchaser the property purchased by him may be regarded as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold and it is the amount of this purchase money which the decree-holder obtains as the fruits of the decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money, and he may do so, either in cash or by setting it off against the amount of his decree. In the present case the property was sold for Rs. 400, whereas the amount of the decree was Rs. 87 only. The purchaser had to pay the purchase money in cash and she got the property, not in lieu of the amount of her decree but for a much larger sum. The purchase of the property can, therefore, in no sense be regarded as acquisition of the fruits of the decree, and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and a sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree. Section 83 of the Transfer of Property Act, which lays down what a decree for sale should provide, does not direct that possession should be delivered to the purchaser. So far, therefore, as the purchaser is concerned he does not obtain possession by virtue of the decree and the question of delivery of possession to him is not one relating to the execution, discharge or satisfaction of the decree. That the Legislature intended that a purchaser at auction sale may obtain possession by means of a suit is manifest from article 138 of schedule II of the Limitation Act, to which I have already referred. That article makes no distinction between the case of a decree-holder purchaser and that of any other purchaser. I can find no legitimate reason for holding that if a decree-holder happens to purchase the judgment-debtor's property he should be in a worse position than any other purchaser. I am, therefore, of opinion that a decree-holder auction-purchaser, like any other auction-purchaser, is entitled to claim possession, not only by an application under section 318 or section 319, but also by suit; that he has alternative remedies, one of the remedies being a
summary application for possession, and that section 244 is not a bar to such a suit and does not apply to such an application.

The course of rulings in this Court has, until recently, been to the effect that there is no appeal from an order under section 318 and that such an order is not one under section 244. In Narain Singh v. Pargash (1), Dhunda v. Durga (2), Ghalam Shabbir v. Dwarka Prasad (3) and Baboo Luchman Narain v. Baboo Bhairow Pershad (4) it was held that the appeal lies from an order for delivery of possession to an auction purchaser. The same view was taken by the Calcutta High Court in Bhimal Das v. Ganesh Koer (5) and Mahomed Mosy v. Habib Mia (6). The contrary opinion was expressed in the Court in Kalian Singh v. Thakur Das (7), to which I have already referred. That was a very unfortunate case. The plaintiff as purchaser at an auction sale held in execution of a mortgage decree applied for delivery of possession under section 318. The court of first instance rejected his application as time-barred. On appeal the District Judge held that the application was not time-barred. From his decision an appeal was preferred to the High Court, being First Appeal from Order No. 50 of 1893. The High Court held on 6th August 1898 that no appeal lay from the District Judge and restored the order of the court of first instance. Thereupon the auction-purchaser brought a suit for possession and obtained a decree in the courts below. The High Court on appeal held that the suit was not maintainable and was barred by the provisions of section 244 of the Code of Civil Procedure. The reason for this decision was, as I have pointed out above, that, according to the decision of the Full Bench in Gulzar Lal v. Madho Ram (8), the auction-purchaser was the representative of the judgment-debtor within the meaning of section 244 and that the aforesaid section was therefore applicable. The learned Judges, as it appears to me, omitted to give effect to the consideration that the auction-purchaser being the representative of the judgment-debtor the question was of

(1) Weekly Notes, 1889, p 45. (5) 1 C. W. N., 563.
(2) Weekly Notes, 1893, p 122. (6) 6 C. L. J., 739.
(4) N. W. P. H. C. Rep., 1866, 1864 I. L. R., 26 All., 447.
between the judgment-debtor and his representative and did not therefore come within the purview of section 244. With great deference, therefore, I am unable to follow this ruling. The same view was held by the same learned Judges in *Sheo Narain v. Nur Muhammad* (1) reversing the decision of my brother AIRMAN in that case, reported in *I. L. R., 29 All. 436*. The case of *Kalian Singh v. Thakur Das* was referred to and followed, and reference was also made to two recent decisions of the High Courts at Calcutta and Madras and to the decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). The case in the Calcutta High Court which was referred to is that of *Madhusudan Das v. Gobind Pria Chowdhurani* (3), but that case is irreconcilable with the decision of the same Court in the earlier cases of *Sru Mohun Bania v. Bhagoban Din Pandey* (4) and *Kishori Mohun Roy Chowdhry v. Chandar Nath Pal* (5) and was not followed in the recent case of *Mahomed Mosraf v. Habib Mia* (6). In the case last mentioned the purchaser was the decree-holder and the assignee from him applied for possession under section 318. It was held by BRETT and MOOKERJEE, JJ., that section 244 did not apply and no appeal lay. The case of *Madhusudan Das v. Gobind Pria Chowdhurani* (7) was referred to but was not followed. I may observe that the learned Judges who decided the case of *Madhusudan Das v. Gobind Pria Chowdhurani* themselves felt some difficulty in holding that the question related to the execution, discharge or satisfaction of the decree and they did not refer to the earlier rulings on the point. In *Kaitayat Pathumayi v. Raman Menon* (8), the other case referred to, the learned Judges (BENSON and BHASYAM AYYANGAR, JJ.,) doubted the correctness of the view they were adopting, but felt themselves bound by previous rulings on the point. The same was the case with *Sundhu v. Husain* (9). In that case the learned Chief Justice (SIR ARNOLD WHITE) expressed the opinion that the question could not be regarded as one relating to the execution of the decree. These cases, therefore, so far from supporting the contention of the respondents, are against them. As for the decision.

(1) (1907) *I. L. R., 30 All., 72.*  
(2) (1892) *I. L. R., 19 Calcutta, 663.*  
(3) (1899) *I. L. R., 27 Calcutta, 34.*  
(4) (1883) *I. L. R., 19 Calcutta, 602.*  
(5) (1887) *I. L. R., 14 Calcutta, 644.*  
(6) (1904) *6 C. L. J., 742.*  
(7) (1895) *I. L. R., 27 Calcutta, 34.*  
(8) (1905) *I. L. R., 26 Madura, 742.*  
(9) (1904) *I. L. R., 28 Madura, 57.*
of the Privy Council in *Prosumno Kumar Sanyal v. Kali Das Sanyal* (1), that was a case in which the judgment-debtor sued to set aside a sale on the ground of fraud, the defendant being the decree-holder. It was conceded by counsel that the question was one under section 244 and their Lordships held that it was so. They do not lay down any general rule, but only express approbation of the fact that the courts in India have not placed a narrow interpretation on the provisions of section 244. That ruling does not, in my judgment, justify the application of those provisions to cases, which do not fall within their scope and purview. The only other cases to which the learned counsel for the respondent has referred are *Kesri Narain v. Abul Hasan* (2), in which my brother Knox expressed the opinion that an application under section 318 is an application for execution and *Motti Lal v. Makan Singh* (3), in which an application for delivery of possession was held to be an application to take a step in aid of execution. For the reasons I have already stated I am unable to agree with those decisions.

In my judgment the plaintiff’s suit is not barred by the provisions of section 244 of the Code of Civil Procedure. I would, therefore, allow the appeal and setting aside the decree of the lower appellate court, remand the case to that court for trial of the other questions which arise in the case.

Aikman, J.—The question for decision by this Full Bench is whether a decree-holder who has purchased property at a sale in execution of a decree for money or the assignee of such a decree-holder can maintain a suit against the judgment-debtor or his representative for possession of the property, or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure.

There is no doubt that a purchaser of property sold in execution of a decree for money, whether he be the decree-holder himself or an outsider, can, after he has got a certificate under section 316 of the Code, apply to the Court under section 318 to be put in possession. If for some reason he fails to get possession in this way within three years from the date or grant of the certificate, there is equally little doubt that a purchaser, other

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than the decree-holder, is allowed a period of twelve years under article 137 or 133 of the Limitation Act within which he may bring a regular suit for possession of the property he has bought. I would remark in the first place that there is nothing in the language of these articles which would render them inapplicable to decree-holders who have purchased. If it had been the intention of the Legislature that these articles should have no application to suits by decree-holders, one would have expected the articles to run:—"Suit by a purchaser, other than a decree-holder."

I am unable to see any reason why a decree-holder who happens to have offered a larger amount than any other bidder at a sale in execution of his decree should have only three years within which to enforce his right to the possession of the property he has bought, whilst an outside purchaser has twelve.

It must be remembered that it is not in his capacity of decree-holder that a decree-holder purchases property in execution of his decree for money. To use the language of the judgment of five Judges of this Court in the Full Bench case, Sabhajit v. Sri Gopal (1), it is "a pure accident" that a person who is the holder of the decree is also the auction-purchaser. In the case of both a decree-holder auction-purchaser, and an outside auction-purchaser, the title to the property vests as soon as the sale certificate is issued and not before. The ordinary rule is that a person in whom the title to immovable property has vested can bring a suit for possession thereof at any time within twelve years from the date on which he acquired title. Why should a decree-holder, who happens to have been the highest bidder at a sale, have a shorter period? An independent purchaser would have twelve years within which to enforce his title to the property, and, to use the language of LORD WATSON in the Privy Council judgment in Mahabir Pereshad Singh v. Macnaghten (2), "leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."

In the case of Rajah Enayat Hossain v. Sumeer Chand (3) the plaintiff Sumeer Chand had bought from a decree-holder property which the latter had purchased at a sale in execution

of his own decree. In the judgment in that case their Lordships say that there is no foundation in principle or authority for the distinction which it was attempted to set up between a person standing in the position of a claimant under an execution sale and a claimant under any other conveyance or assignment. True, the distinction which it was attempted to set up in that case was one in favour of the execution purchaser. Such a purchaser is in no better position than one who takes under any other conveyance. But is there any reason why he should be in a worse? So far I have attempted to show that there is no a priori reason why a decree-holder who buys at a sale in execution of his own decree should not have the same right as an independent purchaser to bring a suit to obtain possession. But it is said that section 244 of the Code of Civil Procedure bars any suit by a decree-holder auction-purchaser. If it is clear that the section does bar such a suit, then, however difficult it may be to see why it should, this appeal must fail.

I have had the advantage of reading the judgment of my brother Banerji in this case and I agree so entirely with the reasons he gives for holding that section 244 does not bar such a suit, that I feel it unnecessary to add much.

Great stress has been laid by learned Judges who have taken a different view on an observation of their Lordships of the Privy Council in I. L. R., 19 Calc., 683, where they say:—“Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section.”

This observation must be read with reference to the facts of the case which was before their Lordships, and could never in my opinion have been intended to have the effect of taking away a right of suit, which has never been doubted, at all events in this Court, until recently. It will be seen too, that their Lordships recognise that to bring the question within the purview of section 244 it must, first, be between the parties to the suit or
their representatives, and next, it must relate to the execution, discharge or satisfaction of the decree. I fully agree with the reasoning on which my brother Banerji bases the conclusion at which he has arrived, namely, that a suit by a decree-holder purchaser, or his assignee fulfils neither of these requirements.

Although the case in I. L. R., 27 Cal., 34, is against the appellant, the learned Judges who decided it admit that "the matter is not so clear" and there are at least three decisions of that Court which are in favour of the appellant. I refer to the cases in I. L. R., 26 Cal., 529; 1 C. W. N., 653, and 6 C. L. J., 749.

There are decisions of the Madras High Court which are against the appellant. But even in that Court doubt has been thrown on the propriety of these decisions. In I. L. R., 26 Mad., 716, the learned Judges say:—"If the question was not already settled by more decisions than one of this Court and of the Calcutta High Court, we should entertain considerable doubts as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as relating to the execution, discharge or satisfaction of the decree within the meaning of section 244, Civil Procedure Code, when such proceedings could not possibly affect the execution, discharge or satisfaction of the decree.

Again in I. L. R., 23 Mad., 87, Sir Arnold White, C. J., observed: "If the matter were res integra, I should be disposed to hold that the question is not one relating to the execution, discharge or satisfaction of the decree."

There are cases in this and other Courts in which it has been held that an application by a decree-holder purchaser to be put in possession of the property he has bought is an application to the Court to take a step in aid of execution within the meaning of Article 179 of the Second Schedule of the Limitation Act. The learned counsel for the respondents relied on these cases, which do, to some extent, support the view taken by the lower courts in this case. But I agree with my brother Banerji in doubting the propriety of the view taken in these cases.

An application by an independent purchaser to be put in possession is certainly not an application to take a step in aid of execution, and I do not see why such an application by a decree-holder who has purchased should be deemed to be a step in aid of
execution. He has got the fruits of his decree when the title to the property vested in him.

With all deference to the learned Judges who have expressed a different opinion, I agree entirely with the judgment of my brother Banerji and with the order which he proposes to make in this case.

GRIFFIN, J.—In a decree for sale on a mortgage, there is no provision for delivery of possession to the auction purchaser. The Court executing the decree cannot go beyond its terms unless it is expressly empowered by law to do so. Such a power is conferred on the Court by the provisions of sections 318 and 319 of the Code of Civil Procedure. On the facts found in the present case the decree-holder auction-purchaser might have applied to be placed in possession, under the provisions of section 318 and section 319 of the Code of Civil Procedure. If he did not so apply or if his application was unsuccessful, he could, in my opinion, fall back upon his title and sue for possession. That title he derived not from the decree, which, in so far as it was a decree for sale, had expended its force, but from his purchase. Under Article 183 of schedule II to the Indian Limitation Act he could bring his suit within twelve years from the date of the sale. Neither in the Code of Civil Procedure nor in the Indian Limitation Act is there any distinction drawn between a decree-holder auction-purchaser and a stranger auction-purchaser.

I would therefore concur in the order proposed by my brothers Banerji and Aikman.

BY THE COURT.—In view of the decisions of the majority of the Full Bench the order of the Court is that the appeal be allowed and the decree of the lower appellate court be set aside, and, inasmuch as that court decided the case upon a preliminary point and the Court has overruled it upon that point, we direct that the appeal be remanded to the lower appellate court under the provisions of section 562 of the Code of Civil Procedure, with directions that it be reinstated in the file of pending appeals in its original number and be disposed of on the merits, regard being had to the order of the Court in this case. The costs of this appeal will abide the event.

Appeal decreed.
MISCELLANEOUS CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
LACHMAN DAS (Petitioner) v. NABI BAKHSH AND OTHERS (Opposite Parties).

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 31, 57, 170, 199—Suit by zamindar for ejectment of tenant and sub-lessee—Appeal—Jurisdiction.

A zamindar sued to eject one of his occupancy tenants and also certain sub-lessees to whom the occupancy tenant had sub-let part of his holding for building purposes. Held that this was a suit falling within section 31 (3) of the Agra Tenancy Act, 1901, and an appeal from the decree therein lay to the Commissioner and not to the District Judge.

This was a reference by the District Judge of Saharanpur. The facts of the case appear from the following order.

"In this case a conflict of jurisdiction arises, and as it appears doubtful whether the appeal is cognizable in the Civil or Revenue court and how the appeal is to be disposed of having regard to the provisions of the N.-W. P. Tenancy Act which give rise to the conflict of jurisdiction, I submit the record to Honourable High Court under section 195 of the N.-W. P. Tenancy Act read with section 193 of the Act and 617 of the Civil Procedure Code together with the following statement of the reasons for my doubt.

"The suit in this case was brought under section 57, clauses (b) and (d), and sections 31 and 63 of the Rent Act.

"Plaintiff sued as a zamindar for the ejectment of defendant No. 1, his occupancy tenant, on the ground that defendant No. 1 had sublet his land permanently for building purposes to the remaining six defendants. Defendant No. 1, among other objections, raised the point that the claim was not cognizable by a Revenue Court, but no issue was framed by the Lower Court, and the point was not pressed and no question of jurisdiction was decided.

"On the other hand appellant has also appealed against the amount of compensation, which is a matter which can only be appealed to this court.

"The Honourable High Court is therefore asked for a direction as to which court should entertain this appeal."
Pandit Mohan Lal Nehru, for the appellant.
Mr. J. Simeon, for the opposite party.

STANLEY, C.J., and BANERJI, J.—This case has been referred to us by the learned District Judge of Saharanpur under the provisions of section 195 of the Agra Tenancy Act, the learned Judge having doubts as to whether an appeal preferred to him lay in the Civil Court or in the Revenue Court. The suit out of which the reference arises was brought by a landlord against a tenant and sub-lessees from that tenant. The plaintiff’s allegation was that the tenant, who is the first defendant, had no power to grant sub-leases to the other defendants, and that by granting the leases the tenant had not only contravened the provisions of the Tenancy Act but had also done an act detrimental to the land and inconsistent with the purpose for which it was let. The suit was described in the plaint as one under sections 57 and 31 of the Tenancy Act. Section 57 of that Act provides that a tenant may be ejected on any of the grounds mentioned in the different clauses of the section. The ground mentioned in clause (d) is that the tenant had sub-let or otherwise transferred his holding in contravention of the provisions of the Act. Under clause (b) a tenant may be ejected on the ground of any act or omission detrimental to the land in his holding or inconsistent with the purpose for which it was let. If the suit is only against the tenant on the ground specified in clause (b) it seems to us that an appeal would lie to the District Judge from the decree of the court of first instance under section 177 of the Act, it being one of the suits included in schedule 1V, group B. But where the suit is for ejectment of the tenant and his transfer on the ground mentioned in clause (d) of section 57, it is a suit under the second sub-section of section 31 of the Act and is one of the suits mentioned in group C of the fourth schedule. An appeal in such a case lies to the Commissioner under section 179. The question is whether the present suit is one of the description mentioned in group B, No. 13, or in group C, No. 18. In our judgment the suit was one under section 31 (2), being a suit in which the landlord sued for the ejectment of the tenant and his sub-lessees on the ground mentioned in clause (d) of section 57. The fact of the sub-lessees being made parties to the
suit clearly indicates that the suit is one of the description mentioned above. It is not a suit for the ejectment of the tenant on the ground of the commission of a breach of condition by a sub-lessee or on the ground of any act done or omission made by such lessee, as mentioned in section 61 (1) (a). Therefore the only section under which the suit in this case could be brought, and was brought, was section 31 (2). An appeal from the decree in the suit lay to the Commissioner.

We find that an appeal was preferred to the Commissioner but he returned the memorandum of appeal on the ground that a question of proprietary title was raised. On this point we are unable to agree with the learned Commissioner, inasmuch as the first defendant, the tenant, never denied his tenancy and never claimed proprietary right in the land within the meaning of section 199 of the Act. What he claimed was that under a custom prevailing in the locality he had a right to transfer his holding. This was not a question of proprietary title and section 199 did not therefore apply. In our judgment the appeal ought to have been heard by the Commissioner, and we accordingly direct that the petition of appeal be returned by the District Judge for presentation in the Court of the Commissioner.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

GOPAL PRASAD AND ANOTHER (DEFENDANTS) v. BADAL SINGH AND OTHERS (PLAINTIFFS)

Pre-emption—Wajib-ul-azr—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption.

Held that in the case of a suit for pre-emption based upon a contract embodied in the wajib-ul-azr the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit. Janki Prasad v. Iswar Das (1) and Ram Goyal v. Prat Lal (2) distinguished.

Three suits for pre-emption were filed by the plaintiff Badal Singh against the appellants in respect of three sales, dated 4th May 1906, 27th June 1906, and 27th August 1906, respectively.

* First Appeal No. 91 of 1903 from an order of H. David, Judge of the Court of Small Causes, Cawnpore, exercising powers of a Subordinate Judge, dated the 29th of May 1903.

(1) (1893) I. L. R. 31 All. 374. (2) (1893) I. L. R. 31 All. 441.
The defence to all the suits was that the wajib-ul-azar on which the suits were based was the record of a contract and that the period of settlement for which it was prepared had expired. The Court of first instance (Munsif of Akbarpur) accepted the defence and dismissed all the suits. On appeal the Subordinate Judge held that the period of settlement had not expired at the dates of the sales nor at the date of the institution of the suits, although it had expired before the suits were decreed, and set aside the decrees of the Munsif and remanded the cases for trial on the merits.

The defendants vendees appealed.

Dr. Tej Bahadur Sapru, for the appellants, contended that the pre-emptor must have a subsisting right at the date of the decree and it was not enough that he had a right at the date of sale or at the date of institution of suit. He referred to Jumki Prasad v. Ishar Das (1) and Ram Gopal v. Piari Lal (2).

The plaintiff must show that the contract embodied in the wajib-ul-azar was still subsisting. Here the wajib-ul-azar had ceased to be operative.

Pre-emption was a restraint on alienation and should not be extended beyond the period for which there was a contract. The pre-emptor could not claim the sympathy of the Court or any equity in his favour.

Munshi Govind Prasad, for the respondent, was not called upon.

Richards and Griffin JJ.—This and the connected appeals arise out of pre-emption suits. The plaintiff claims on foot of the wajib-ul-azar. It has been found by both the courts below that the wajib-ul-azar records a contract and not a custom. The court of first instance dismissed the suits upon the ground that the period of settlement for which the wajib-ul-azar was prepared had come to an end. The lower court found that the wajib-ul-azar was still in existence at the dates of the sales. In the present appeal it has been urged on behalf of the defendants vendees that inasmuch as the settlement, and therefore the contract, had come to end before the time at which a decree could be given, the plaintiff’s right to pre-empt must fail. For

(1) (1892) I. L. II., 21 All. 674. (2) (1892) I. L. II., 21 All. 441.
the purpose of these appeals it is assumed that the plaintiff had, at the time of the institution of the suits, a right to pre-empt the property by virtue of the contract which is recorded in the wujib-ul-arz, and the only question argued here and which we have to decide is whether or not the mere fact that before the date of the decree the period of settlement had determined, prevents the plaintiff from enforcing the right of pre-emption and getting a decree in his favour. The point would be absolutely clear in the absence of authority. The contract was a contract which entitled the plaintiff to purchase if any co-sharer sold his share so long as the contract lasted. It is admitted for the purposes of these appeals that the contract was in full force and effect at the time of the sales. Dr. Tej Bahadur on behalf of the appellants, has cited the cases of Janki Prasad v. Ishar Das (1), and Ram Gopal v. Piari Lal (2). In both these cases the plaintiff had a right of pre-emption by virtue of the position of his property in the mahal. Before the sale was made partition proceedings had been commenced for the division of the mahal, and before the time for decree had arrived the plaintiff had ceased to be entitled to pre-emption by reason of the division of the mahal in consequence of the partition proceedings. He had ceased to be a co-sharer and the courts held that a decree ought not to be made in his favour, because the principle underlying the right of pre-emption was the keeping out of the stranger. It will be seen that in the cases cited, the plaintiff's position had quite changed during the pendency of the suit. If he had occupied the position at the time of the sale that he occupied at the time of the decree he would have had no right of pre-emption at all. In the present case the plaintiff's right at the time of the decree was exactly the same right as he had at the time of the institution of the suit. In our judgment, the cases cited do not apply and the decision of the court below was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R., 21 All, 374. (2) (1899) I. L. R., 21 All, 441.
BEHARI BHARATHI (PURCHASER) v. BHAGWAN GIR AND OTHERS (DEED-HOLDERS).*

Act No. IV of 1883 (Transfer of Property Act), sections 88 and 99—Deed-holder holding a decree for sale on a mortgage and also a simple money decree against the same judgment-debtor—Sale in execution of combined decrees not unlawful.

Where a decree holder holds both a decree for sale on a mortgage as well as a simple money decree against the same judgment-debtor it is not unlawful for him to bring to sale the mortgaged property in pursuance of an application that it may be sold for the realization of the amounts of both the decrees.

This was an application to set aside a sale held in execution of a decree. The decree-holders held a mortgage-decree and also a simple money decree against the same judgment-debtor. They in execution of their simple money decree attached the property which was subject to the mortgage. They afterwards prayed that the property may be sold in execution of their mortgage-decree, and an order was passed accordingly. Before the sale was held, however, they asked the Court to sell the property for the realization of the combined amounts of both the decrees and the Court granted the prayer. The sale was held on the 11th of November 1907, and the property was purchased by Behari Bharathi, the appellant. The judgment-debtor applied to set aside the sale, and the Subordinate Judge granted the application. The suction purchaser appealed.

Mr. A. H. C. Hamilton, for the appellant, contended that a joint sale for the amounts under the simple money and mortgage decrees did not contravene the provisions of section 99 of the Transfer of Property Act. The decree holders had already instituted a suit under section 67. Moreover the objection was not raised at the time of sale and should not be entertained now. He referred to Gujrajmati Tevarin v. Akbar Husain, (1).

The Hon’ble Pandit Sundar Lal, for the respondent. The application to set aside the sale was made before confirmation when purchaser’s title was not complete. It could only be completed when the sale was confirmed. The sale had taken

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*First Appeal No. 48 of 1903, from an order of Maula Hakim, Subordinate Judge of Saharanpur, dated the 28th of March 1903.

(1) (1903) I. La Il., 23 All., 199.
The undermentioned Gazetteers of Districts in the United Provinces have recently been published by the Government Press, and are available for sale to the public at the Government Book Depot, Allahabad. The prices quoted include packing and postage charges:

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Apply to the SUPERINTENDENT,
The United Provinces Code, Vol. II, Fourth Edition, 1908, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared to be in or extended to the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index. Rs. 10 (Rs. 1) for both Vols., or Rs. 5 (Rs. 2) for each Volume.

In the Press.

The Bombay Code, Vol. IV.
A Digest of Indian Law Cases, 1907, by C. E. Grey, Barrister-at-Law, and 1907, by B. D. Bose, Barrister-at-Law.

II. D. and Assam Code, Vol. III

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act I of 1846 (Legal Practitioners), as modified up to 1st October, 1907
1st XXXVII of 1850 (Public Servants Inquiry), as modified up to 1st August, 1903
1st XXX of 1853 (Naturalization of Aliens), as modified up to 30th April, 1898
2nd XX of 1853 (Legal Practitioners), as modified up to 1st September, 1897
2nd XIII of 1857 (Opium), as modified up to 1st August, 1903
2nd XXIV of 1859 (Madras District Police), as modified up to 1st November, 1907
2nd XXII of 1868 (Sarcasms and Parades) as modified up to 1st August, 1903
2nd XXV of 1867 (Press and Registration of Books), as modified up to 1st October, 1897
2nd VII of 1870 (Court Fees), as modified up to 1st October, 1899
2nd XXVII of 1871 (Criminal Tribes), as modified up to 1st September, 1905
2nd I of 1872 (Evidence), as modified up to 1st May, 1898
2nd III of 1872 (Special Marriages), as modified up to 1st November, 1900
2nd IX of 1872 (Contract), as modified up to 1st February, 1908
2nd XI of 1876 (Presidency Banks), as modified up to 1st March, 1907
2nd I of 1878 (Opium), as modified up to 1st October, 1907
2nd VI of 1878 (Treasure Trove), as modified by Act XII of 1931, as reprinted on the 16th February, 1903
2nd XI of 1878 (Arms) as modified up to 1st October, 1903
2nd VIII of 1878 (Sea Customs), as modified up to 1st June, 1903
2nd XVI of 1879 (Transport of Arms), as modified up to 1st October, 1907
2nd IV of 1884 (Explosives), as modified up to 1st September, 1908
2nd IV of 1892 (Indian Merchandise), as modified up to 1st August, 1908
2nd VI of 1890 (Charitable Endowments), as modified up to 1st August, 1908
2nd XI of 1896 (Excise), as modified up to 1st March, 1907
2nd XII of 1899 (Stamps), as modified up to 1st March, 1907
2nd XIII of 1899 (Municipal and Police), as modified up to 1st November, 1908

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts [unrepealed] of the Governor General of India in Council from 1860 up to date.
[For acts may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Act XXV of 1556 (Hindu Woman's Re-marriage)
Act XV of 1856 (Hindu Widow’s Re-marrige) ... ... In Nagri. 6 p. (1 a)
Act III of 1857 (Gambling), as modified up to 1st January, 1905 ... In Urdu 1 a. (1 a)
Act XVI of 1873 Village and Road, Police, United Provinces) ... In Urdu. 1 a. (1 a)
Act IX of 1874 (European Vagrancy) ... ... In Urdu. 2 a. (1 a)
Act XI of 1876 (Presidency Bank), as modified up to 1st March, 1899 ... In Urdu. 3 a. 9 p (1 a 6 p)
Ditto ditto ditto ... ... ... In Nagri. 3 a. 6 p. (1 a 6 p)
Act XVIII of 1876 (Oudh Laws) ... ... ... In Urdu. 2 a. (1 a)
Act I of 1878 (Opium), as modified up to 1st October, 1907 ... In Urdu. 1 a. 6 p (1 a)
Act VII of 1883 (Succession Certificate), as modified up to 1st December 1903 ... ... ... In Urdu. 1 a. 9 p (1 a)
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Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1896 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Manma Singh. Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 20 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons besides the parties to the present suit and also because the plaintiff should have raised the question of the defendants' title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition.
Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no other parties than the parties to this suit were affected by the partition of the shares in the one village as to which the Courts differed. The Revenue Court had clearly given effect to the plain-

ttherefore failed and the plaintiff was entitled to the shares in all the villages sued for.

Chokhey Singh v. Jote Singh, I. L. R., 31 All.

1577—XV—(Indian Limitation Act). Schedule II. Article 97—Agreement to sell—Rescission of contract—Act No. IX of 1872 (Indian Contract Act), sections 55, 55—Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of money paid—Accrual of cause of action.) The defendants against whom a decree for foreclosure was outstanding agreed to sell certain immovable property to the plaintiff, and the plaintiff paid into Court as a part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to

...
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---(LOCAL)—1901—II (AGRA TENANCY ACT), section 31, 57, 179, 199—Suit by zamindar for ejectment of tenant and sub-lessee—Appeal—Jurisdiction] A zamindar sued to eject one of his lessees as agent of his master.

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CIVIL PROCEDURE CODE, sections 214, 318, 319—Execution of decrees—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder auction purchaser—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 188.] A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree Sabahi v. Sri Gopal, I. L. R., 17 All, 222, and Mahabir Pershad Singh v. Macnaughten, I. L. R., 16 Cal., 682, referred to.

If after confirmation of a sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure but also by suit: section 244 of the Code is not a bar to such suit and does not apply to such an application. 


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STANLEY, C. I., contra (Knox J., concurring).


And if the decree-holder has become the auction-purchaser he does not thereby lose his character of decree-holder so as to make any questions thereafter arising between himself and the judgment debtor other than those questions between the parties to the suit in which the decree was passed. Mahendar Pershad Singh v. Marjunkoon, I. L. R., 16 Cal., 632, Terangchunu v. Benkesing, I. L. R., 5 Mad., 217, and Mutia v. Appasami, I. L. R., 13 Mad., 504, referred to.

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PRE-EMPTION—Wajib-ul-arz—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption] Held that in the case of a suit for pre-emption based upon a contract entered into under the wajib-ul-arz the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit.  

Gopal Prasad v. Iswar Dey, I. L. R., 21 All., 411.  
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could be maintained unless the whole amount of the mortgage was discharged, and the majority of the Judges constituting the Bench answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in *Ibn Hasan v. Brijbhusan Saran* (1) upon which reliance has been placed by the appellants' learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contribution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of *Ibn Hasan v. Ram Dai* (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

BY THE COURT:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

(1) (1904) I. L. R. 29 All. 407. (2) (1889) I. L. R. 12 All. 110
THE INDIAN LAW REPORTS, [VOL. XXXI.

PRIVY COUNCIL.

AMMA BIBI AND OTHERS (PLAINTIFFS) v. UDIT NARAIN MISRA AND OTHERS (DEFENDANTS), and 3 other appeals consolidated.
[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 97—Agreement to sell—Recession of contract—Act No. IX of 1872, (Indian Contract Act, sections 55, 65—Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of money paid—Accrual of cause of action.

The defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immovable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which they had paid on their behalf. On 10th December 1895 the plaintiff instituted a suit against the defendants for a refund of the money so paid by him, alleging that the defendants had failed to fulfil their part of the contract, which was to execute a conveyance of the property within one month. The defendants denied this, and the first Court, while finding that the period of one month had been fixed by the parties for the execution of the deed of sale, held on the evidence that time was not of the essence of the contract, and that the plaintiff could not (as he claimed) rescind the contract under section 56 of the Contract Act and recover the money he had paid: and this decision was on appeal affirmed by the High Court on 18th January 1900. On 16th April 1900 the plaintiff sued the defendants claiming specific performance of the agreement to sell, or in the alternative for a refund of the money paid by him as part of the consideration for the sale agreed upon. The first Court gave the plaintiff a decree for specific performance. On appeal by the defendants it was held by the High Court on 30th April 1903, (1) that the terms of the agreement to sell not being satisfactorily proved no decree for specific performance could be made; (2) that the plaintiff was therefore entitled to recover the money which he had paid under the agreement; and (3) that, following the case of Basti Kaur v. Dhan Singh (1), the plaintiff’s alternative claim for a refund on failure of consideration was governed as to limitation by article 97 of schedule II of the Limitation Act 1877, and was not barred by lapse of time, inasmuch as limitation only began to run from the date of the High Court’s decree declaring the agreement to sell to be unenforceable. The plaintiff appealed from the decision of the High Court of 19th January 1900, and the defendants from that of 30th April 1903 to His Majesty in Council, and both

*Present—Lord MACNAUGHTEN, Lord ATKINSON, Sir ANDREW SCOBIE, and Sir ARTHUR WILSON.

(1) (1888) I. L. R. II. All. 47, I. L. R. 16 I. A. 211.
appeals were dismissed by their Lordships of the Judicial Committee, who upheld the decisions of the High Court.

Four appeals consolidated (Nos 55, 56, 57 and 58 of 1906) from decrees of the High Court at Allahabad. In Nos. 55 and 56 the decrees (18th January 1900) of the High Court affirmed decrees (4th May 1897) of the Subordinate Judge of Gorakhpur; and in Nos. 57 and 58 the decrees (30th April 1903) of the High Court reversed decrees (27th September 1900) of the same Subordinate Judge.

The original plaintiff in all the four suits out of which the appeals arose was one Muhammad Minnat Ulla who is now represented by the appellants in appeals 55 and 56, and the respondents in appeals 57 and 58. On 10th December 1896 Minnat Ulla brought two suits (275 and 276 of 1896) against two separate sets of defendants, of whom the principal was Udit Narain Misra in suit 275 and Rama Shankar Misra in suit 276, those defendants now being respectively the principal respondents in appeals 55 and 56 and the principal appellants in appeals 57 and 58. In both the suits 275 and 276 of 1896 the plaintiff alleged that the defendants had agreed to sell certain property to him on, (among others) the condition that they should execute and register the necessary sale-deeds within a month from the 15th September 1896 the date of the agreements. In accordance with these agreements the plaintiff paid a substantial portion of the consideration for the sale as earnest money in the manner agreed upon. The defendants however did not execute the sale-deeds within the stipulated time, and the plaintiff therefore sued them for a return with interest of the purchase money which had been paid by him in respect of the sales, alleging that the defendants, by omitting to execute the deeds within a month, had failed to carry out their contract. In these suits the Subordinate Judge found on the evidence that one month's time was agreed upon between the parties for the completion of the sale, and in his judgment he said:—

"The plaintiff comes into court on the allegation that the defendants having failed to complete the sale within the specified time of one month, the contract to sell and purchase is at an end and that therefore he is entitled to recover the amount which he has paid for them together with interest thereon. Section 53 of Act IX of 1872, therefore applies to the case and the plaintiff is entitled to rescind the contract if time be found to have been
of the essence of the contract. In order to determine this I must first refer to the terms of the contract embodied in the petition, Exhibit II. The terms as set forth in the document are as follow:—That in lieu of the aforesaid amount (Rs. 18,665.6) as well as in lieu of the amount due to Maulvi Minnat Ulla, the defendant would in the course of one month execute and have registered a sale-deed of the four villages specified below in favour of the Maulvi at the rate of Rs. 2.6 per cent. per annum according to the Government roll, and whatever may be found due to the Maulvi after the execution of the sale-deed, the condition of the former deed would hold good and according to the conditions in the old deed the same property would continue hypothecated in the balance of the purchase money, and at the time of the execution of the sale-deed, the Maulvi would execute an agreement to reconvey the property sold to the defendant within one year subject to the conditions agreed upon between the parties. In these terms I find nothing to support the contention that the time of one month is of the essence of the contract. According to the terms of the agreement, the one year for reconveyance is to be reckoned after the execution of the sale-deed, on whatever date it may be executed. It does not appear that the plaintiff had to sustain a substantial loss if the sale was not completed within one month."

And after referring to the cases of Ram Gopal Mookerjee v. Masseyk (1), Brojo Soonduree Debia v. Collins (2), Shooltan Chand v. Schiller (3), Dadabhoy Dajibhoy Baria v. Pestonji Marwanji Barucha (4) and Buldeo Doss v. Howe (5), which last case was distinguished from the present, the Subordinate Judge concluded:

"For the reasons and with regard to the rulings cited above I am of opinion that the time of one month was not of the essence of the contract, and that therefore the plaintiff is incompetent to rescind it."

He dismissed both suits on that ground; and on appeal the High Court (Sir Arthur Strachey, C.J., and Banerji, J.) on 18th January 1900 said in affirming that decision—

"We agree with the Court below that there is no reason for the view that time was of the essence of the contract. Upon that view the decision of the Court below is correct and the appeal must be dismissed with costs."

The plaintiffs obtained leave to appeal to His Majesty in Council.

The suits which led to appeals 57 and 58 were on dismissal of the suits 275 and 276 of 1890 instituted in the Court of the same Subordinate Judge on 16th April 1900 being numbered 83 and 84 of that year. The facts with regard to them will be found

fully stated in the report of the hearing of them on appeal before the High Court (Sir John Stanley, C.J. and Burkhitt, J.) in I. L. R., 25 All., 618. The suits were for specific performance of the contract, or in the alternative for return of the earnest money paid by the plaintiff. The Subordinate Judge gave the plaintiff decrees for specific performance. On appeal the High Court stated that in view of the conflict of testimony they were not satisfied as to what the contract really was, and could not therefore give a decree for specific performance; but holding that the suits were not barred by limitation as was contended by the defendants, the High Court made a decree in each suit for the recovery of the sum paid by the plaintiff with interest. From that decision the defendants appealed to His Majesty in Council.

In these appeals

Ross for the appellants in appeals 55 and 56, and for the respondents in appeals 57 and 58 contended in appeals 55 and 56 that the courts below were in error in holding that time was not of the essence of the contract. The Subordinate Judge found on the evidence that the period of one month was agreed upon by the parties for the completion of the sale, and if so, it must have been intended to be a binding condition. It was submitted that time was of the essence of the contract, and that the plaintiff was entitled on failure of the defendants to complete the sale within the time stipulated to rescind the contract under section 55 of the Contract Act (IX of 1872) and that the decision of the Courts in India to the contrary should be set aside.

With respect to appeals 57 and 58 it was contended for the respondents that the suits out of which they arose had been rightly held barred either by the Civil Procedure Code (Act XIV of 1882) or by the Limitation Act (XV of 1877). As it had been found that the contract was not enforceable and a decree for specific performance could not therefore be granted, it was clear that the plaintiffs, on their alternative plea, were entitled for the reasons given by the High Court to a return of the money paid by them in consideration of the sale. The decision in these appeals should be upheld.
CHOKHEY SINGH AND ANOTHER (DEFENDANTS) v. JOTHE SINGH (PLAINTIFF) AND CROSS-APPEAL.

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Compromise—Document signed by claimants in mutation proceedings—Acquiescence in partition proceedings—Act No. XVII of 1870 (Oudh Land Revenue Act), section 74—Suit to dispute title and recover possession of share to which plaintiff was entitled by Hindu law—Estoppel—Suit in Civil Court on title after partition.

The plaintiff and defendants were claimants to the estate, consisting of 30 villages, of a deceased Hindu, and though by the ordinary Hindu law the plaintiff, as brother of the deceased, was entitled to the whole property as against the defendants, who were nephews (sons of a deceased brother) the three claimants in the mutation proceedings signed in 1890 a document which stated that the property was held, one moiety by the plaintiff and the other moiety by the defendants, and that "there is no other legal heir except the deponents; the mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto." and the revenue authorities effected mutation of names in that way. In 1902 partition which left the parties in the same status as to possession was effected in accordance with the provisions of the Oudh Land Revenue Act (XVII of 1870). In a suit brought in 1904 to recover possession as heir of the deceased of the half share held by the defendants, the latter pleaded (inter alia) that their possession was the result of a compromise come to between the parties in the mutation proceedings which was evidenced by the document of 1890, and that the plaintiff was estopped by such mutual arrangement from asserting his present claim.

Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1890 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

In the partition proceedings the plaintiff made no objection to the defendants' title under section 74 of Act XVII of 1870, but he filed an application in which he asked that "the share of Munnu Singh (the deceased) should be decided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 29 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons beside the parties to the present suit and also

because the plaintiff should have raised the question of the defendants’ title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition

Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no other parties than the parties to this suit were affected by the partition of the shares in the one village to which the Courts differed. The Revenue Court had clearly given effect to the plaintiff’s application as to the question of title, for no inquiry under section 74 of Act XVII of 1876 was made and the question of title was left to be decided by the Civil Court. The grounds of estoppel therefore failed and the plaintiff was entitled to the shares in all the villages sued for.

Appeal (61 of 1907) and cross-appeal (62 of 1907) consolidated from a judgment and decree (4th May 1906) of the Court of the Judicial Commissioner of Oudh which varied a decree (13th June 1905) of the Subordinate Judge of Sitapur who had decreed the plaintiff’s claim in full.

The principal question raised on this appeal was the right of succession to the property consisting of 30 villages of one Mannu Singh who died on 24th May 1896. The claimants were his brother Jote Singh, and Chokhney Singh and Gajraj Singh his nephews the sons of a deceased brother. Under the ordinary Hindu law applicable Jote Singh was the nearest heir and entitled to the whole estate, but by an order of the revenue authorities dated 5th November 1898 mutation of names was in fact effected by leaving the property as it was then held, namely, an eight anna share in the name of Jote Singh, and the other eight anna share in the names of Chokhney Singh and Gajraj Singh, the former being the elder having a slightly larger share. After mutation of names the parties remained in possession of their respective shares, and later a partition of a portion of the estate was effected in accordance with the provisions of Act XVII of 1876.

The suit out of which the present appeal arose was instituted on 24th November 1904 by Jote Singh against Chokhney Singh and Gajraj Singh to recover possession from them of the eight anna share of Mannu Singh’s estate which they had held before and since the mutation proceedings and refused to give up. The plaintiff claimed title as next heir and stated that his consent to the mutation proceedings was given under a misconception of law.
The defence was that on the death of Munnu Singh the defendants, though excluded by the ordinary law, claimed to be entitled to the whole estate under an oral will of Munnu Singh and as being joint in estate with him, and that a compromise was come to between the parties, the result of which was the order in the mutation proceedings. The defendants pleaded a custom in the family that nephews were not excluded by brothers, and contended that the plaintiff was stopped by the mutual arrangement, and by his having acquiesced in the partition from asserting his present claim.

Of the documentary evidence referred to in their report exhibit A 1, which was a joint statement of the claimants in the mutation proceedings, the material portion is set out in their Lordships’ judgment. Exhibit A 17, which was a copy of a petition of objections filed by the plaintiff Jote Singh under section 73 of Act XVII of 1876 (the Oudh Land Revenue Act), dated 27th October 1900, in the matter of a claim by a person of the same name (Jote Singh) for partition of Thoke Bhawani in the village Bihat Biram, was to the effect that the plaintiff desired that his interest in the village should be separated from that of the person claiming partition, and stated that he “does not wish to keep his share joint with that of the other defendants.” Exhibit No. 53, the purport of which (so far as it is material) is also given in their Lordships’ judgment, was an application filed by Jote Singh in reply to the objections taken by the present defendants Chokhey Singh and Gajraj Singh in the matter of the partition of the village Bihat Biram, dated 20th December 1902, and Exhibit A 18 was the order of the Deputy Collector of Sitapur, dated 5th July 1902, regarding the partition of the village of Bihat Biram, and showed that the village was divided into two thokes namely Hathi Singh, and Bhawani Singh, the former of which was allotted to persons none of whom were parties to the present suit; and the latter was partitioned between Chokhey Singh and Gajraj Singh the defendants, who received 8 annas 3½ pies of it, and Jote Singh the plaintiff, who obtained 7 annas and 8½ pies.

The Subordinate Judge found that there was no ground for the defendants’ alleges that they were joint with Munnu Singh, and that he made an oral will in their favour; and held
that the dispute on the death of Munnu Singh was not settled by a compromise as alleged by the defendants; that the plaintiff did not consent to mutation in favour of the defendants under any misconception of law; that the succession to the property was not governed by any special custom; and that the plaintiff was not estopped from claiming the property in suit under the provisions of the ordinary Hindu Law. After finding that there was a partition of the property subsequent to the mutation, the Subordinate Judge said:

"It is urged by the learned vakils for the defendants that, inasmuch as there was a partition in accordance with the mutation proceedings, the plaintiff cannot be allowed to bring this suit, the object of which is, as they contend, to disturb or set aside the partition proceedings.

"I do not think that the object of this suit is to disturb or set aside the partition effected by the Revenue Court. The partition remains intact, even after the plaintiff gets a decree in this case. The fact that the decree in this case will either entitle the plaintiff to a fresh partition with regard to the land in defendants' possession or entitle the plaintiff to the land in defendants' possession cannot be said to have an effect of disturbing or setting aside the partition made by the Revenue Courts." I, therefore, find that the fact of partition between the parties does not render the suit unsustainable. It was further urged by the learned vakils for the defendants that the statement of the plaintiff in the mutation proceedings is a bar to this suit. There is no doubt that the plaintiff through his agent stated before the Talukdar of Mirzah during the pendency of the mutation proceedings that the defendants were in possession of half the property of Munnu Singh and that the mutation should be effected accordingly. It has not been proved that this statement was the result of any compromise or settlement arrived at between the parties or that it was made to avoid any litigation. Hence, as held by their Lordships of the Privy Council in Muhammad Imam Ali Khan v. Husain Khan (1) the statement in question can be no bar to this suit.

The decree made by the Subordinate Judge was one in favour of the plaintiff for possession of the property in dispute.

The appeal was heard by two Judges (Mr. E. Chambers, Officiating Judicial Commissioner, and Mr. L. G. Evans, additional Judicial Commissioner) of the Court of the Judicial Commissioner of Oudh, who agreed with the findings of the Subordinate Judge that the defendants and Munnu Singh did not constitute a joint family, and that there was no will of Munnu Singh in their favour; that no custom of the kind alleged by the defendants was proved; that the allegation of a dispute and a

subsequent compromise between the parties, on the death of Munnu Singh in 1898, was not established; and that, rejecting the evidence founded on such allegation, there was nothing in the circumstances of the case with regard to the shares in 29 of the villages in suit which afforded a ground for holding that the plaintiff was estopped from bringing this suit, citing as authority the case of Muhammad Imam Ali Khan v. Husain Khan (1) with regard, however, to the share in the village of Bihat Biram they considered that the circumstances were somewhat different, and that the plaintiff was estopped from claiming any share in that village. The decision of the Court of the Judicial Commissioner on that point is set out in their Lordships’ judgment. The claim of the plaintiff was therefore allowed to shares in all the disputed property except the shares in the village of Bihat Biram.

Both parties appealed from this decision to His Majesty in Council.

On these appeals:

De Gruyther, K.C., and J. Redwood Davies for the appellants in appeal No. 61 and for the respondents in the cross-appeal contended that the evidence on the record was sufficient to establish a compromise of the rights of the parties claiming as heirs to the estate of Munnu Singh under which the defendants validly acquired the half share of which they had been ever since in possession. That such an arrangement was made was evidenced by the fact that mutation of names was made on those terms, and by the plaintiff’s consent to such mutation having been given. He admitted in his evidence that his consent was not given under any misconception of law as he was at the time aware that he was entitled to the whole of the property. Exhibit A 1 was referred to as showing that the plaintiff agreed to the defendants holding the half share which he was now suing for; that document stated that no one objected to mutation being made in that way. The plaintiff also had acquiesced in that settlement for a long time, and had allowed a partition of the property to be made in accordance with it; and it was submitted that he could not now maintain a suit to set aside that disposition of the property.

Reference was made to the Oudh Land Revenue Act (XVII of 1876) sections 68, 73, 74 and 75; and the case of Muhammad Imam Ali Khan v. Husain Khan (1) which had been cited in the judgments of the courts below as authority for the plaintiff's not being estopped by any admission made during the mutation proceedings, was distinguished; and it was submitted that the plaintiff was estopped by his conduct, and by the provisions of the above Act, from claiming not only any share in the village of Bihat Biram, but also any portion of the property in dispute.

Sir R. Finlay, K. C. and G. E. A. Ross for the respondent in appeal 61 and for the appellant in the cross-appeal contended in appeal 61 that on the evidence there was no dispute between the parties, which was settled by awarding the property in suit to the defendants; and that had been established by the concurrent findings of both the courts in India. The mutation proceedings conferred no title on the defendants, nor in any way affected the plaintiff's rights, and the Court of the Judicial Commissioner had rightly held that the plaintiff was not estopped by his conduct from maintaining the present suit. That court said:—"All that the defendants did in consequence of the action or inaction of the plaintiff was to take possession of half the property and enjoy the profits thereof. All that is proved in the present case is that the plaintiff gratuitously admitted the right of the defendants to a share." Reference was made to Muhammad Imam Ali Khan v. Husain Khan (2). In the cross-appeal it was contended that the Court of the Judicial Commissioner was in error in holding that the plaintiff was estopped from claiming the share in the village of Bihat Biram because the special circumstances which had been found by that court to estop the plaintiff from claiming the said share did not amount to an estoppel. Nor was he estopped by the provisions of Act XVII of 1876 (The Oudh Land Revenue Act), to sections 68 and 210, clauses (d) and (e), of which Act reference was made. Exhibit No. 58 was referred to, to show that in the partition proceedings the plaintiff reserved his right to question in a separate suit the title of the defendants to the share in the village of Bihat Biram. Assuming, therefore, without admitting, that the plaintiff did not raise any objection in

the partition proceedings with regard to the right of the defendants to possession of the said share, he was not debarred from claiming the share in a suit in the Civil Court.

De Gruyther, K. C., replied.

1908, December 7th:—The judgment of their Lordships was delivered by Sir Andrew Scoole:—

The suit out of which these appeals arise relates to the right of succession to the property of one Munna Singh, who died childless on the 24th May 1896. The property consists of shares in some thirty villages in the District of Sitapur, in the Province of Oudh. The claimants are Jote Singh, the only surviving brother of the deceased, and Chokhey Singh and Gajraj Singh, his nephews, the sons of a brother who had predeceased him.

It is not disputed that, under the ordinary Hindu law applicable to the family, Jote Singh was the nearest heir and entitled to succeed to the whole estate. His nephews, however, sought to defeat his claim on various grounds. They alleged that they had been joint with Munna Singh during his lifetime, and that he had made an oral will in their favour. Both Courts in India found against them on these points. They set up a family custom, whereby brothers and brothers' sons are entitled to succeed together, but they entirely failed to establish such a custom. They further asserted a compromise—and this was the only ground argued before their Lordships—under which they claimed to have acquired a half-share in the estate, by agreement with Jote Singh.

There is no doubt that by an order of the 5th November, 1896, mutation of names in respect of Munna Singh's property was effected in the following manner; viz., one half into the name of Jote Singh and one half into the names of Chokhey Singh and Gajraj Singh, the former, being the elder, having a slightly larger share. But this mutation of names by itself confers no proprietary title, and it was therefore sought to prove that it was the result of a valid compromise made at the time of the mutation proceedings, and that Jote Singh was thereby estopped from asserting his present claim. Both Courts in India have found as a fact that there was no such compromise,
and their Lordships see no reason to dissent from the conclusion at which they arrived. It was, however, argued before their Lordships that the Courts below had not given sufficient attention to a document (Exhibit A-1) signed by the three claimants in the mutation proceedings, in which it is stated that:

"Jote Singh, own brother of the deceased, is in possession of half of the haggat of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the jethani right of Chokhey Singh at the rate of 4 per cent, are in possession of the other half of his share. There is no other legal heir except the deponents. The mutation in respect of the deceased’s share in all the villages should be allowed and nobody has any objection thereto."

There is no reference in the document to any compromise, and it does not appear to their Lordships that it contains any words that can be construed as amounting to an abandonment by Jote Singh of his legal rights. It is merely a statement of the facts as they existed in regard to the possession of the property—the main point considered by the Revenue authorities upon applications for mutation of names—and, by its silence as to a compromise, tends to support the conclusion that no compromise was ever made.

The Courts in India concurred in holding that, as regards twenty-nine of the villages in which Munnu Singh was a sharer, Jote Singh was entitled to succeed him as his heir according to Hindu law, but as regards one village, Bihat Biram, they differed. That village had been the subject of partition proceedings under the Oudh Land Revenue Act (Act XVII of 1876), and the Judicial Commissioner held that, as a portion of Munnu Singh’s share in Bihat Biram was allotted to Chokhey Singh and Gajraj Singh at the partition, Jote Singh was estopped from now claiming it. The Subordinate Judge had held that there was no such estoppel.

The judgment of the learned Judicial Commissioner upon the point is in these terms:

In 1900, one Jote Singh (not the plaintiff) applied for partition of one of the villages in the village, whereupon the plaintiff presented a petition (see Exhibit A-17) praying that his entire interest in the village should be separated from that of the applicant Jote Singh as well as from the shares of the present defendants, and this was done with the result that the defendants were allotted separate patti, which includes the share now in dispute, and their father, Balram Singh’s, share in the village as one of the sons of Munnu Singh.
The effect of the decree of the Court below is to give the plaintiff a portion of the patti allotted to the defendants at the partition. The defendants, no doubt, conducted their case at the partition on the assumption that they were entitled to half the share of Munnu Singh, junior, and it seems impossible now to put them back into the position which they occupied before the partition, for the partition dealt with the shares of other persons besides those of the parties to the present suit.

Moreover, in the partition the plaintiff had an opportunity, of which he should have availed himself, of objecting to the defendants' title (see section 74 of Act XVII of 1876, the Revenue Act which was then in force). Had he raised the question then, it would have been disposed of before the partition. In my opinion, it is too late now for the plaintiff to claim that portion of Munnu Singh's share in Rhat Biram which was allotted to the defendants at the partition. It appears to me that as to this the plaintiff is estopped.

The learned Judicial Commissioner appears to their Lordships to have been under a misconception on two points of fact. If the order of the Revenue Court in the partition proceedings be looked at, it will be found that it divides the village into two thokes, the first of which, thoke Hathi Singh, is partitioned among five families, none of whom are parties to this suit; while the second thoke, Bhawani Singh, is divided between the parties to this suit, in almost equal proportions. The shares of no other persons are therefore affected by the partition order. In the second place, it appears from Exhibit No. 58, an application filed by Jote Singh in reply to the objections taken by Chokhey Singh and Gajraj Singh in the partition proceedings, and dated 20th December 1902, that Jote Singh asked that "the share of Munnu Singh should be divided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." The Revenue Court appears to have given effect to this application, for no inquiry under section 74 of Act XVII of 1876 was made, and the question of title was left to be decided by the Civil Court in Jote Singh's present suit, which was filed on the 21st November 1901. In the opinion of their Lordships the grounds of estoppel relied on by the learned Judicial Commissioner both fail.

Their Lordships will humbly advise His Majesty that the appeal of Chokhey Singh and Gajraj Singh should be dismissed and the cross appeal of Jote Singh allowed; that the decree of the Judicial Commissioner should be discharged, and the decree
of the Subordinate Judge restored except as to costs, Chokhoy Singh and Gajraj Singh paying Joto Singh's costs in both Courts.

The appellants Chokhoy Singh and Gajraj Singh will pay the costs of Joto Singh in both the appeal and the cross-appeal.

Appeal (No. 61) dismissed.

Cross appeal (No. 62) allowed.

Solicitors for the appellants in appeal No. 61, and for the respondents in appeal No. 62:—T. L. Wilson & Co.

Solicitor for the respondent in appeal No. 61, and for the appellant in appeal No. 62:—Douglas Grant.

J. V. W.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Ashman and Mr. Justice Griffin.

Bhagwat (Plaintiff) v. Banwari Lal and Others (Defendants).

Civil Procedure Code, sections 244, 318, 319—Execution of decree—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder auction-purchaser—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 133.

A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree. Sabaji v. Sri Gopak (1) and Madhur Parmesh Singh v. Macnaghten (2) referred to.

If after confirmation of a sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, his claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure, but also by suit—section 244 of the Code is not a bar to such suit and does not apply to such an application. Navcar v. The Mussoree Bank, Limited (3). Nangalal v. Dosh Mulji (4) and Gokul Lal v. Madho Ram (5) referred to. Kailan Singh v. Thakur Das (6) and Sdeo Narain v. Nur Muhammad (7) overruled. Madhusudan Das v. Gotarada Princ Choudhurani (8) and Kattabat Pathumagi v. Nanan Menon (9) dissent the from. Mohamed Mozaffar v. Hubab Mia (10) followed. Sere Mohsen.

*Second Appeal No. 988 of 1906, from a decree of Maula Hakim, Subordinate Judge of Munderah, dated the 4th of January 1906, affirming a decree of Hama Das, Munsif of Amritsar, dated the 24th of September 1904.

(1) (1904) I. L. R. 17 All., 222. (2) Weekly Notes, 1906, p. 87; S. C. 3 A. L. R., 244.

(2) (1859) I. L. R., 10 Calc., 692. (7) (1907) I. L. R., 20 All., 72.

(3) (1895) I. L. R., 7 All., 101. (8) (1909) I. L. R., 27 Calc., 34.


Bani v. Bhagoban Din Pandey (1), Kishori Mohan Roy Chowdhry v. Chunder Nath Pal (2) and Sunbhu Taraganar v. Hussain Sahib (3) referred to. Prosuno Kumar Sanyal v Kali Das Sanyal (4) distinguished.


An application under section 318 of the Code is not an application for execution or to take a step in aid of execution. The opinion of Knox, J., in Keire Narain v. Abul Haq (11) and Moti Lal v. Makund Singh (12) dissented from. So held by Bankusi, J., (Aikman and Griffin JJ., concurring).

Stanley, C. J., contra (Knox J., concurring).

Whereafter sale held in execution of a decree and confirmation of such sale the auction purchaser fails to get possession of the property purchased, proceedings on the part of the purchaser in order to obtain possession are still proceedings relating to the execution, discharge or satisfaction of the decree within the meaning of section 241 of the Code of Civil Procedure. Motti Lal v. Makund Singh (13), Muttiga v Appasami (13), Sairatoolla Molla v. Raj Kumar Roy (14), Kottayat Pathumaye v. Kaman Menon (15), Har Din Singh v. Lachman Singh (16), Kannatho Aygar v. Uthumantha Routhan (17), Ram Narain Sahoo v. Bandh Pershad (18), Sandhu Taraganar v. Hussain Sahib (3), and Shoo Narain v. Nur Muhammad (19) referred to.

And if the decree-holder has become the auction-purchaser he does not thereby lose his character of decree-holder so as to make any questions thereafter arising between himself and the judgment-debtor other than questions between the parties to the suit in which the decree was passed. Makbir Pershad Singh v. Macunghien (20), Vararaghava v. Venkata (21) and Muttiga v. Appasami (13) referred to.

The facts out of which this appeal arose were as follows:

One Musammat Molini obtained a decree for sale on a mortgage against Shankar Lal. On November 16, 1894, the property was put up to sale and purchased by the decree-holder in the name of Bunsidhar. On November 27, 1897, Musammat Molini obtained the certificate of sale, and on September 20, 1900,
she made a gift of the property to the plaintiff, Musammat Bhagwati. The judgment-debtors, however, remained in possession of the property, and in 1904, Musammat Bhagwati brought the present suit to recover possession from them. The defence to the suit was, amongst others, that section 244, Code of Civil Procedure, barred the suit. The court of first instance (Munsif of Amroha) sustained this plea and dismissed the suit, and this decree was on appeal affirmed by the Subordinate Judge of Moradabad. The plaintiff thereupon appealed to the High Court.

Upon the appeal coming on for hearing before Stanley, C. J., and Banerji, J., on May 16, 1908, it was referred to a Full Bench.

Before the Full Bench:

Munshi Gokul Prasad, for the appellant. The question is whether the suit is barred by section 244 (c), Code of Civil Procedure. There is no question of stay here. There are two essential questions to consider, (1) whether the question is between parties to the suit and (2) whether it is one relating to the execution, satisfaction or discharge of the decree. Even though the question may relate to execution, satisfaction or discharge, section 244 will not apply if the question does not arise between the parties to the suit, that is, the judgment debtor or his representatives on the one side, and the decree-holder or his representatives on the other. A question between two judgment-debtors inter se or a judgment-debtor and his representative, as is the case here, does not come within the purview of this section.


Secondly, the decree was for sale; after the sale had been carried out and confirmed the decree was fully executed, and it mattered nothing to the decree-holder whether the auction-purchaser got possession or not. The auction-purchaser must come in under sections 318 and 319, Code of Civil Procedure, and it is well settled that an order under any one of those sections is

Now a decree-holder who has purchased at auction occupies, in the eye of the law, the same position as an independent purchaser does. Muhabir Persaud Singh v. Macnaghten (8).

The fact that the decree-holder has purchased is a mere accident. Sabinjot v. Smt. Gopul (9).

Article 138, schedule II, Indian Limitation Act, also favours the contention that a suit is like the present is maintainable. If the suit gives concurrent remedies, a person may elect to adopt the one he prefers. There is no bar to such a suit.

Kulan Singh v. Thukur Das (10), proceeds on two grounds, viz., that the auction-purchaser is a representative of the judgment-debtor, and that according to the Privy Council, section 244 must be liberally construed. In this view the case does not affect the present question, as it is contended that the question must arise between the judgment-debtor or his representatives and the decree-holder or his representatives arrayed on opposite sides. In Prosunno Kumar Sanyal v. Kuli Das Sanyal (11) it was admitted that the question related to the execution, discharge and satisfaction of the decree, and that it was sought to set aside the sale on the ground of fraud.

Delivery of possession is an extraneous incident of the sale. The case of Madhusudan v. Gobinda Pris (12) is difficult to reconcile with the later cases of the same Court, e.g., in 1 C. W. N., 658. and in 6 C. L. J., 749. Kasinatha Ayyar v. Uthumansa Rowthan (13), was a case in which the terms of the decree in that particular case were in question and the decision must be taken as confined to the facts therein, as observed in Quinn v. Leatham (14). Kattayat v. Raman (15) was decided apparently on the

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(2) Weekly Notes, 1893, p. 123. (9) (1804) I. L. R., 17 All., 224, 225.
(3) (1835) I. L. R., 8 All., 36. (10) Weekly Notes, 1896, p. 67.
(6) (1877) 1 C. W. N., 658. (14) (1901) A. C., 463, 566, Per Lord

(15) (1902) I. L. R., 29 Mad., 750.
principle of stare decisis. Sandhu Taraganar v. Hussain Sahib, (1) Manicka Oduyan v. Rajagopal Pillai (2), Sheo Narain v. Nur Muhammad (3), and Dhan Mat v. Makkhan Lal (4) are authorities to the contrary, but it is submitted that the principle of these rulings is opposed to the accepted interpretation of, and is not warranted by, the language of section 244, which is very clear in itself.

Mr. B. E. O'Connor, for the respondents. The tendency of all the courts, since the Privy Council has so held, has been to relegate such questions as have arisen in the present case to section 244 in order to ensure expeditious determination of them. The cases cited from the Madras reports only emphasize that view, and it is certainly in the interests of all parties, inasmuch as determining such questions under section 244 means so much cheapness. It is submitted that the decree-holder by becoming auction-purchaser does not lose his character of decree-holder—one cannot disembowel the man. He remains decree-holder all the same. In the case of an independent auction-purchaser the distinction is that he has never been a party to the suit, but the decree-holder has been one all along up to the date of sale. There can be no valid reason why at the time of delivery of possession he should figure as somebody else. The auction-sale cannot be regarded as the point of cleavage.

In the cases of Madhusudan v. Gobinda Pria (5) and Kesri Narain v. Abul Hasan (6) application for delivery of possession has been regarded as an application for execution of the decree.

Again Moti Lal v. Makund Singh (7) holds that an application by a decree-holder to be put into possession of property he has purchased at auction is a “step in aid of execution.” It is submitted that these cases go to show that the decree for sale is not complete until in accordance with it the purchaser is also put in possession. It is, therefore, submitted that when a decree-holder seeks to recover possession upon his failure to get it, his remedy is under section 211. The cases in I. L. R. 25 Mad., 67, and I. L. R., 30 Mad., 507, favour this contention. Article 138, sch. II, Limitation Act, regulates the period of limitation, and its

provision cannot control section 244 of the Code of Civil Procedure which regulates the remedies open to the decree-holder and the judgment-debtor.

Gokul Prasad, in reply, referred to the observation of Stanley, C. J., in Gulzar Lal v. Madho Ram (1), as to the character of a purchaser at auction.

Stanley, C.J.—The facts of this case as found by the lower appellate court are as follows:—In execution of a mortgage decree obtained by one Musammat Mohini against one Shankar Lal, the interest of the latter in certain property was sold and purchased in the name of the defendant Bausidhar as a benami-dar for the decree-holder Musammat Mohini. On the 27th of November 1897 the sale certificate was issued to Musammat Mohini and she by a tanati-knana, dated the 20th of September 1900, transferred her interest to her daughter-in-law, the plaintiff Musammat Bhagwati. Bausidhar, the nominal purchaser, purported to resell the property to the defendant Ganga on the 27th of July 1897, and Ganga purported again to sell it to Musammat Mohini, but these last-mentioned sales may be left out of consideration as it is admitted by both Bausidhar and Ganga that Musammat Mohini was the real purchaser. The representatives of the mortgagor were in possession of the property at the date of the sale and they or their transferees have remained in such possession up to the present time. The suit out of which this appeal has arisen was instituted on the 1st of September 1904, that is, about seven years after the date of the sale, for the recovery of possession of portion of the property, the subject-matter of the sale. Both the lower courts have held that the suit is barred by the provisions of section 244 of the Code of Civil Procedure.

In consequence of the conflict of authority in this Court on the question involved in the case, this appeal has been laid before a Full Bench. Section 244 prescribes that all questions arising between the parties to a suit, or their representatives, relating to the execution, discharge or satisfaction of a decree, shall be determined by the court executing the decree, and not a by separate suit. Two questions must be answered in the affirmative before we can

(1) (1904) I. L. R., 25 All., 447, 453.
hold that section 214 applies to this case, namely (1) is a mortgagee, who in a suit for sale upon his mortgage applies to the court for and obtains leave to bid and buys the mortgaged property, amenable to the provisions of section 214, and (2) is the plaintiff a representative of the decree-holder Musammat Mohini within the meaning of the expression 'representatives' as used in the section?

To take the first question, the argument in support of a negative answer to it was that as auction-purchaser the decree-holder Musammat Mohini occupied a different character from that of decree-holder, and that quod purchaser she was not a party to the suit, and therefore no question touching the execution of the decree arose between the parties to the suit or their representatives. It is said that it was a mere accident that the decree-holder became the purchaser and that she must be held to occupy the position of a purchaser who had no connection whatever with the suit. It was further contended that the proceedings in the suit determined so soon as the sale was confirmed and that delivery of possession was outside and beyond the scope of the suit, and therefore it was not open to the plaintiff to apply for possession in the execution department and further that in any case the plaintiff was entitled to maintain a separate suit for possession.

I fail to see how the purchase by a decree-holder mortgagee of the mortgaged property can be properly described as an accident. In no way, as it appears to me, can a purchase of the kind be regarded as a mere accident. In the first place a mortgagee decree-holder is not permitted to bid at a sale held in execution of his own decree save with the leave of the Court. The obtaining of such leave is a deliberate act on his part. Then again the making of the highest bid is a deliberate act, and in no true sense, therefore, can a purchase of the kind made by a mortgagee be regarded as accidental. The observation of Lord Watson in Mahabir Pershad Singh v. Macnaghten (1), that 'leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser' is relied on as establishing a dual character in a

(1) (1889) L. L. R., 16 Calc., 682.
decrees-holder purchaser according to which he may for one purpose lay aside his legal obligations as a party to the suit while he retains his rights and privileges in other respects. I do not think that Lord Watson intended to lay down any such proposition. What I understand by his language is simply this, that the rule which forbids a mortgagee decrees-holder to purchase has no force if permission to bid be given to him by the Court, and that when the grant of permission to bid has been given, such mortgagee is no longer under disability to purchase, but that the right to purchase is on the same footing as strangers to the suit who may be bidders at the sale.

It was suggested during the argument that a mortgagee who purchases at a sale held in execution of his own decree, occupies a dual character, such as that which is held by an executor or trustee and that as purchaser he is not also decrees-holder and so cannot be regarded as a party to the suit so as to be bound by the provisions of section 241; that, in other words, a question arising between him and the mortgagor judgment-debtor in regard to delivery of possession is not a question arising between the parties to the suit within the meaning of the section. The argument appears to be, that when a sale to a decrees-holder mortgagee has been confirmed the decrees-holder entirely drops the character of decrees-holder and assumes that of purchaser and that any question touching the delivery of possession of the purchased property is not a question between the decrees-holder and the mortgagor in possession but is a question between the purchaser only, independently of the character of decrees-holder and the mortgagor. The recognition of such a dual personality in a decrees-holder purchaser would be, I think, to introduce a strange and novel legal fiction into our jurisprudence. It has been said, and rightly said, that an executor, who is sued as such only, cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. In order that he may be personally bound he must be sued in his personal as well as in his representative capacity. There is, however, in my opinion no analogy between the two cases. An executor not merely claims title from a deceased person, but he represents the deceased person. If he institute a suit in
respect of the estate of the deceased, he does so not presumably for his own benefit but for the benefit of the estate of the deceased. If he be sued as an executor only he is sued as representing the deceased. On the contrary, in the case of a decree-holder he sues on his own behalf and for his own benefit. If he get leave to bid and buys the mortgaged property, he does so on his own account and in his own interest alone. I am unable therefore to see how the character of the decree-holder can be split up into two distinct characters so as to enable him to override the provisions of section 244. By becoming a purchaser he does not cease to be a party to the suit and as such, to be bound by any order which may be passed therein. The intention of the Legislature in passing the enactment in question was, as it seems to me, to prevent any question which could be disposed of in execution becoming the cause of fresh litigation —see Virarahava v. Venkata (1) and Mullia v. Appasami (2).

But we have further to see whether the obtaining of possession by a mortgagee decree-holder, who purchases at a sale in execution of his own decree, is a proceeding in execution within the meaning of section 244. The mortgagees were at the time of the sale, and are still, in possession of the mortgaged property. Is a mortgagee decree-holder who buys the mortgaged property bound to apply to the Court for delivery of possession within the period prescribed for each step, that is three years, or is he entitled to remain quiescent for a period less than twelve years by a day and then institute a suit for possession? A sale of property is not complete until the vendor has delivered to the purchaser such possession as he is able to give. One of the liabilities of the seller is to give to the buyer on being so required such possession of the property as its nature admits (section 55 of the Transfer of Property Act, 1882). Delivery of possession was necessary in this case to render the sale ordered by the Court final and complete, and was therefore, I think, a step in aid of execution. It is said that upon the confirmation of the sale there was nothing more to be done by the Court,

(1) (1852) I. L. R., 5 Mad., 217. (2) (1850) I. L. R., 13 Mad., 504.
but I am unable to accede to this proposition. The delivery of possession is undoubtedly to my mind a step in aid of execution. This was so held in the case of Moti Lal v. Makund Singh (1). In that case Edge, C.J., and Blair, J., in their judgment observed:—"A proceeding in execution cannot be said to be completed (at least so far as the decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree. Consequently it appears to us that an application to be paid out of Court the proceeds of such sale must be considered as the taking of a step in aid of the execution of the decree." And further on:—"The execution of his (the decree-holder’s) decree cannot be said to be satisfied until in the one case he has received the purchase money paid into court, and in the other case until he be put into possession of the property of his judgment-debtor which he has purchased and which represents money."

This ruling was followed in the case of Mutthia v. Appasami, which I have already cited. In that case a decree-holder purchaser applied under section 313 of the Code of Civil Procedure for delivery of the property purchased by him, which was in the occupancy of the judgment-debtor. The judgment-debtor set up an agreement between him and the applicant in bar of the application. Mutthusami Ayyar, J., in the course of his judgment observed:—"When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of section 244." In Sariatoolla Molla v. Raj Kumar Roy (2), Maclean, C. J., and Banerji, J., held that an application by a decree-holder to be put into possession of property which he had purchased under execution proceedings is an application in aid of execution within the meaning of sub-section (4) of article 179 of schedule II to the Limitation Act. The ruling of this Court in the case of Moti Lal v. Makund Singh was approved of.

In the case of Kattayat Puthumayi v. Raman Menon (3), a decree-holder became purchaser of immovable property which was sold in execution of his decree. He applied under section

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(1) (1897) L. L. R., 19 All., 477. — (2) (1900) I. L. R., 27 Cal., 742.
(3) (1902) L. L. R., 26 Mad., 740.
318 of the Code of Civil Procedure for delivery of possession of
the property purchased, but his application was rejected as barred
by limitation, having been made more than three years after the
confirmation of the sale. He then brought a suit to recover
possession of the land from the judgment-debtor. It was held,
following several other decisions of the Madras and Calcutta
High Courts that the proceedings taken by the purchaser to
obtain possession of the property purchased related to the execution,
discharge or satisfaction of the decree within the meaning of
section 244, and the suit was therefore dismissed. I do not
think it necessary to cite further authorities for this proposition.
It is supported by the rulings in the following cases:—Har
Din Singh v. Lachman Singh (1), Kasinatha Ayyar v. Uthu-
mansa Rowthan (2), Ram Narain Sahoo v. Bandi Pershad (3),
Muhammad (5).

According to my view, when a Court has passed a decree for
sale in a mortgage suit the proceedings are not at an end when
the sale to the decree-holder who has obtained liberty to bid has
been confirmed and a certificate of sale granted. In such a case,
if the mortgagor is in possession, it is the right of the purchaser
to ask for and the duty of the Court to grant an order for deli-
very of possession to him. Until such possession has been given
the decree cannot be said to have been executed or satisfied.
In England any party to an action in which a sale has been
directed who is in possession of the estate may be ordered by
the court to deliver up such possession to the purchaser and the
court will enforce such delivery of possession by a writ of pos-
session: Order 51, Rule 1, Rules of the Supreme Court. Sec-
tion 318 of the Code of Civil Procedure similarly provides that
when property sold is in the occupation of the judgment-debtor
and a certificate has been granted under section 316, the Court
shall on application by the purchaser order delivery to him of the
purchased property. Here the decree-holder made the purchase
in order to satisfy her debt, and so long as the land remains in the
possession of the mortgagors the debt to the extent of the price

(1) (1900) I. L. R., 25 All., 343. (2) (1901) I. L. R., 25 Mad., 123.
(3) (1904) I. L. R., 31 Cal., 737. (4) (1904) I. L. R., 29 Mad., 87.
(5) (1907) I. L. R., 30 All., 72.
cannot be said to have been satisfied. The fallacy of the argu-
ment advanced on behalf of the appellants lies as it appears to me
in the assumption that on the grant of the certificate of sale the
decree was "completely executed and satisfied." The decree
was not, I think, satisfied so long as possession was withheld by
the mortgagors from the decree-holder. I may point out that
when a decree in a mortgage suit is not wholly satisfied by the
proceeds of a sale, proceedings in the suit must be continued if
the decree is to be wholly satisfied.

During the argument a suggestion was thrown out that article
138 of schedule II to the Limitation Act supported the appellant's
contention. This article allows a period of 12 years to a pur-
chaser of land in execution of a decree within which to bring a suit
for possession of the purchased property when, as here, the judg-
ment-debtor was in possession at the date of the sale. This
article, it was suggested, was inconsistent with the view expressed
in the case of Sheo Narain v. Nur Muhammad. It seems to me that it in no way supports the appel-
licant's contention. A general provision of the kind cannot override the special pro-
visions of section 244. The article in question may be applicable to the case of a purchaser who was a stranger to the suit in which
a decree for sale is passed, and who, not being a party to the suit,
is not entitled to take proceedings under section 244, but it can in no way, I think, be regarded as controlling the operation of
section 244. The conclusion at which I have arrived therefore is
that if a mortgagee decree-holder obtain leave to bid at a sale
held in execution of his own decree and becomes the purchaser,
he must obtain possession from the mortgagor in possession in the
execution department and not by an independent suit.

My brother BANERJI rightly observed in the case of Gulzari
Lal v. Madho Ram (1) that "the trend of recent decisions, both
of the Privy Council and of the Courts in this country is in favour
of placing on section 244 as wide an interpretation as is com-
patible with its provisions, so that questions which may be deter-
mined by the court executing a decree should not be made the
subject of a separate suit." To hold contrary to the view
which I have expressed would be not merely to narrow the

(1) (1904) I. L. R., 23 All., 447, 463.
interpretation to be placed on that section but also to overrule a
decision of a Division Bench of this Court and of a Division Bench
of the Calcutta High Court and several decisions of the Madras
High Court, as well as the ruling in Moti Lal v. Makund Singh
and the rulings which follow it. On the principle of stare
decisis, even if there be any doubt as to the propriety of those
decisions, I should hesitate to unsettle the law on the question
decided by them.

This brings me to the remaining question in the appeal. The
plaintiff in this case is not a decree-holder but a donee from the
decree-holder. Is she a representative of the decree-holder within
the meaning of section 244? I have little or no doubt that she is.
It has been held, and I think rightly, that the assignee of a decree-
holder purchaser at an auction sale is a representative within the
meaning of that expression in section 244. Sandhu Taraganar
v. Hussain Sahib (1); also Dwar Buksh Sirkar v. Fatik Jali
(2). I see no reason for placing a donee of a decree-holder in
a higher position than an assignee for value. The word
"representatives" appears to me to include a party who by
assignment or gift succeeds to the rights of the decree-holder
after decree.

I would therefore answer the second question in the affirm-
ative and would for the reasons which I have given dismiss the
appeal.

Knox, J.—The facts found in the appeal are as follows:—

Musammat Mohini as plaintiff obtained a decree for the sale
of certain property. In execution of that decree she brought
the property to sale and it was purchased by one Bansidhar on
the 16th of November 1891. Bansidhar professed to sell the
property under a sale-deed dated the 30th of November 1891,
to one Gangadhar. Gangadhar professed to sell it to Musamm-at
Mohini the plaintiff. The real purchaser, however, was Musam-
matt Mohini, the decree-holder, and she, on the 27th of November
1897, applied for and obtained the sale certificate. Musamm-at
Mohini, on the 20th of September 1900, executed a tamluknama
whereby she transferred this property to Musammat Bhagwati,
the present plaintiff.

(1) (1901) I. L. L., 23 Mad., 57. (2) (1539) I. L. L., 2 Col., 253.
Musammat Bhagwati, on trying to obtain possession of the property conveyed to her, found herself opposed by Banwari Lal, son of Shankar Lal, who was judgment-debtor in the decree obtained by Musammat Mohini, in pursuance of which, as already stated, a portion of the house was brought to sale and purchased by Musammat Mohini. She accordingly instituted an ordinary suit for dispossession of Shankar Lal and other persons, who, she alleged, were in collusion with him in refusing to deliver possession. All the defendants, except certain pro forma defendants, put forward as an answer to the plaintiff’s claim, that she was a representative of the decree-holder and that as she did not obtain possession of the property purchased within three years, she was not entitled to file the suit and that section 241 of the Code of Civil Procedure operated as a bar. The court of first instance holding that the suit was barred by section 244, dismissed it. The lower appellate court, also taking the same view, held that the suit was barred.

Section 244 lays down that questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof shall be determined by order of the court executing a decree and not by separate suit.

It has been held by a Full Bench of this Court, Gulsari Lal v. Madho Ram (1) following a Full Bench judgment of the Calcutta High Court, Ishan Chunder Sirkar v. Beni Madhub Sirkar (2), that the term “representative” as used in section 244 of the Code of Civil Procedure does not mean only the legal representative of a judgment-debtor, i.e. his heir, executor or administrator, but that it means his representative in interest, and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree. In this case my brother Banerji held, and I think rightly, that every purchaser of the judgment-debtor’s interest, who is bound by the decree, is a representative of the judgment-debtor within the meaning of the section, whether he is a purchaser under a private sale from the judgment-debtor or a purchaser at a

(1) (1894) I. L. R., 26 All., 447.   (2) (1896) I. L. R., 21 Calc., 62.
compulsory sale, held in execution of a decree obtained against the judgment-debtor. He could see no distinction in principle between the case of a purchaser at a private sale and that of an auction purchaser provided that the decree in execution could be enforced against him.

By a similar process of reasoning it appears to me that a donee from a decree-holder, if he, should the necessity arise, can enforce the decree in the execution sale, should be held to fall within the category of representatives of a decree-holder for the purpose of section 244 of the Code.

The object of that section, it appears to me, was to provide for the speedy determination of any question between the decree-holder and the judgment-debtor, should any still be left at such a late stage of the litigation between them. A decree-holder who has fought out his case, won his decree and carried it possibly into several courts of appeal and who elects to buy the property of his judgment-debtor which he has put up to auction, ought to be in a position to know all that need be known about the property. He had ample means in the suit and under the procedure which regulates execution to find out all that need be known. It is to the interest of all that the litigation should be put to an end. Section 244 places the representative in the same position as the decree-holder, and I see no advantage in prolonging the strife by giving the decree-holder who has become purchaser a second capacity.

The learned Chief Justice has gone very fully into the remaining questions raised in the appeal and I do not see that I can with advantage add any thing to what he has said upon these points beyond saying that I agree with what has been said upon them.

Agreeing with the learned Chief Justice, I would dismiss this appeal.

BANERJI, J.—The question raised in this appeal is whether a suit by an auction-purchaser or his representative against the judgment-debtor or his representative for possession of the property sold is barred by the provisions of section 244 of the Code of Civil Procedure.
The facts are these: Ono Musammat Mohini obtained, on the 12th of March 1891, a decree for the sale of certain hypothecated property against Shankar Lal, the father of the first defendant. In execution of that decree she caused the property, which consisted of a house and lands, to be sold by auction on the 10th of November 1891 and purchased it herself in the name of ono Bainsidhar. The proceeds of the sale were sufficient to satisfy the decree in full. Bainsidhar sold the property to Ganga-dhar, the son of Mohini, and Gangadhar sold it to Mohini, who obtained a certificate of sale on the 27th of November 1897. Subsequently, on the 20th of September 1900, she made a gift of the property to her daughter-in-law, the plaintiff. As possession was withheld from the plaintiff she brought the present suit against the legal representatives of the judgment-debtor on the 1st of September 1904. The property claimed being a share of a house and land, other co-sharers in it were made defendants pro forma. The main defence to the suit was that it was barred by the provisions of section 244 of the Code of Civil Procedure and that the plaintiff's remedy was an application for possession under section 318 of the Code. This contention prevailed in the court of first instance, which dismissed the suit. The decree of that court having been affirmed by the lower appellate court, the present appeal has been preferred by the plaintiff. It is urged on her behalf that section 244 is no bar to the suit and that she had no remedy under that section.

There cannot be any doubt that the purchaser of immovable property at an execution sale which has been confirmed is entitled to obtain possession of the property. If it is in the occupancy of the judgment-debtor or his tenants, the auction purchaser may apply for delivery of possession under section 318 or section 319, as the case may be. Is a question which arises under either of those sections a question which may be determined under section 244? If it is so, no separate suit will lie. The only clause of that section which can be applicable is clause (c). In order that clause (c) may apply two conditions are essential: first, that the question arises between the parties to the suit in which the decree was passed or
their representatives; and second, that it is a question relating to the execution, discharge, or satisfaction of the decree. As regards the first condition it is manifest that the parties must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of section 244. This has been held so repeatedly that I deem it unnecessary to cite authorities. I may refer, however, to the cases of Raynor v. The Mussoorie Bank Limited (1); Mafinlal v. Doshi Mulji (2), in which it was held that a dispute between the judgment-debtor and his own representative is not a question which may be determined under section 244; and Gour Mohun v. Dinanath (3), in which the Calcutta High Court held that the section does not apply when a question arises as to the execution of a decree between two persons each of whom claims to be the representative of the decree-holder.

It was held by a Full Bench of this Court in Gulzari Lal v. Madho Ram (4) that an auction-purchaser of the interests of the judgment-debtor, who is bound by the decree, is his legal representative within the meaning of section 244. Therefore, when a question arises between the judgment-debtor and the auction-purchaser of his interests it is a question between the judgment-debtor and his representative and is consequently not a question which may be determined under that section. The basis of the decision in Kallan Singh v. Thakur Das (5), namely, that the auction-purchaser being the representative of the judgment-debtor, section 244 applies cannot in my humble judgment be held to be sound. It is contended that the fact of the decree-holder being the auction-purchaser makes a difference and that when such a purchaser applies for delivery of possession the question is one between the parties to the suit. I am unable to accede to this contention. The decree-holder as such is not entitled to possession, as

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(3) (1901) I. L. R., 26 All., 631.  (4) (1904) I. L. R., 26 All., 447.
the decree does not award possession. It is only in his capacity as auction-purchaser that he can apply for and obtain possession. In this respect his position is no better and should be no worse than that of any other purchaser. The fact that the decree-holder has purchased the property is, as observed in the Full Bench case of Sabhajit v. Sri Gopal (1), a pure accident. Although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities, and it is in the latter capacity only that he can obtain possession. It was held by their Lordships of the Privy Council in Mahabir Pershad Singh v. Macnaghten (2) that a mortgagee decree-holder who purchases the mortgaged property at auction with the leave of the court is in the same position as any independent purchaser, and sections 318 and 319 of the Code of Civil Procedure make no distinction between a decree-holder auction-purchaser and any other auction-purchaser. I may also refer to article 138 of the second schedule to the Limitation Act, under which a suit may be brought by an auction-purchaser for recovery of possession within twelve years from the date of the auction sale. In that article no distinction is made between different classes of auction-purchasers. I fail to appreciate the reason for holding that if the decree-holder happens to purchase at an auction sale he has a shorter period of limitation for obtaining possession than any other purchaser. In my judgment all auction-purchasers, whether they are decree-holders or not, and whether they purchased under a mortgage decree or under a simple decree for money, are in the same position as regards recovery of possession of the property purchased by them and that it is only in their capacity as auction-purchasers that they can obtain possession. The question, therefore, which arises under section 318 or 319 of the Code of Civil Procedure is not a question between the parties to the suit or their representatives and cannot be determined under section 244. In the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction-purchaser. Under that transfer she acquired no interest

(1) (1894) I. L. R., 17 All., 222. (2) (1899) I. L. R., 16 Cal., 653.
in the decree itself and in no sense can it be said that she is the holder of the decree or the representative in interest of the decree-holder qua the decree. Even, therefore, if it be assumed that a distinction exists between the case of a decree-holder purchaser and any other purchaser (though in my judgment no such distinction exists) that distinction cannot be held to apply in the present suit.

I am further of opinion that a question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to delivery of possession is not a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of section 244, clause (c). Upon the judgment-debtor's property being sold and the amount due under the decree being realized the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction purchaser obtains possession of the property sold is wholly immaterial for the purposes of the decree and does not in any way affect it. If the decree-holder purchases the property but does not obtain possession, that circumstance would not entitle him to take out execution of the decree, which has already been satisfied. So long as the sale subsists he cannot claim a refund of the purchase money or ask for execution of the decree to the extent of the amount of the purchase money. It is only when an auction sale has been set aside under section 310A, 312 or 313, that the purchaser may under section 315 obtain a refund, but he is not entitled to a refund if he fails to obtain possession of the property sold. In this respect also the position of the decree-holder purchaser is not different from that of any other purchaser. It is said that an auction sale is not complete until possession has been delivered to the auction-purchaser. I see no warrant in the Code of Civil Procedure for such a view. Under section 314 a sale becomes absolute as soon as it is confirmed, and under section 316 the property vests in the purchaser from the date of confirmation of sale. The purchaser may, no doubt, obtain delivery of possession by an application under section 318 or 319, but the validity of the sale or the completion of it does not depend on his obtaining possession. I am also unable to hold
that if the decree-holder happens to be the auction-purchaser the property purchased by him may be regarded as the proceeds of the sale or the fruits of the decree. The proceeds of the sale consist of the purchase money for which the property was sold and it is the amount of this purchase money which the decree-holder obtains as the fruits of the decree. If he purchases the property he does not get it as an equivalent of the amount of his decree but he has to pay the purchase money, and he may do so, either in cash or by setting it off against the amount of his decree. In the present case the property was sold for Rs. 400, whereas the amount of the decree was Rs. 87 only. The purchaser had to pay the purchase money in cash and she got the property, not in lieu of the amount of her decree but for a much larger sum. The purchase of the property can, therefore, in no sense be regarded as acquisition of the fruits of the decree, and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and a sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree. Section 83 of the Transfer of Property Act, which lays down what a decree for sale should provide, does not direct that possession should be delivered to the purchaser. So far, therefore, as the purchaser is concerned he does not obtain possession by virtue of the decree and the question of delivery of possession to him is not one relating to the execution, discharge or satisfaction of the decree. That the Legislature intended that a purchaser at auction sale may obtain possession by means of a suit is manifest from article 138 of schedule II of the Limitation Act, to which I have already referred. That article makes no distinction between the case of a decree-holder purchaser and that of any other purchaser. I can find no legitimate reason for holding that if a decree-holder happens to purchase the judgment-debtor's property he should be in a worse position than any other purchaser. I am, therefore, of opinion that a decree-holder auction-purchaser, like any other auction-purchaser, is entitled to claim possession, not only by an application under section 318 or section 319, but also by suit; that he has alternative remedies, one of the remedies being a
summary application for possession, and that section 214 is not a bar to such a suit and does not apply to such an application.

The course of rulings in this Court has, until recently, been to the effect that there is no appeal from an order under section 318 and that such an order is not one under section 211. In Narain Singh v. Pargash (1), Dhunda v. Burag (2), Ghulam Shabhir v. Dwarka Prasad (3) and Baboo Luchmee Narain v. Baboo Bhainew Pershad (4) it was held that no appeal lies from an order for delivery of possession to an auction purchaser. The same view was taken by the Calcutta High Court in Bhimal Das v. Gancsha Koor (5) and Mahomed Mosraf v. Habib Mia (6). The contrary opinion was expressed in this Court in Kalian Singh v. Thakur Das (7), to which I have already referred. That was a very unfortunate case. The plaintiff as purchaser at an auction sale held in execution of a mortgage decree applied for delivery of possession under section 318. The court of first instance rejected his application as time-barred. On appeal the District Judge held that the application was not beyond time. From his decision an appeal was preferred to the High Court, being First Appeal from Order No. 50 of 1898. The High Court held on 6th August 1898 that no appeal lay to the District Judge and restored the order of the court of first instance. Thereupon the auction-purchaser brought a suit for possession and obtained a decree in the courts below. The High Court on appeal held that the suit was not maintainable and was barred by the provisions of section 244 of the Code of Civil Procedure. The reason for this decision was, as I have pointed out above, that, according to the decision of the Full Bench in Gulzari Lal v. Madho Ram (8), the auction-purchaser was the representative of the judgment-debtor within the meaning of section 244 and that the aforesaid section was therefore applicable. The learned Judges, as it appears to me, omitted to give effect to the consideration that the auction-purchaser being the representative of the judgment-debtor the question was one

between the judgment-debtor and his representative and did not therefore come within the purview of section 244. With great deference, therefore, I am unable to follow this ruling. The same view was held by the same learned Judges in Sheo Narain v. Nur Muhammad (1) reversing the decision of my brother Akim in that case, reported in I. L. R., 29 All. 486. The case of Kalua Singh v. Thakur Das was referred to and followed, and reference was also made to two recent decisions of the High Courts at Calcutta and Madras and to the decision of their Lordships of the Privy Council in Prosunno Kumar Sanyal v. Kati Das Sanyal (2). The case in the Calcutta High Court which was referred to is that of Madhusudan Das v. Gobind Prin Choudhurani (3), but that case is irreconcilable with the decision of the same Court in the earlier cases of Seru Mohun Bania v. Bhagaban Din Pandey (4) and Kishori Mohun Roy Choudhry v. Chunder Nath Pal (5) and was not followed in the recent case of Mahomed Mosraf v. Habib Mia (6). In the case last mentioned the purchaser was the decree-holder and the assignee from him applied for possession under section 318. It was held by Brett and Mookerjee, JJ., that section 244 did not apply and no appeal lay. The case of Madhusudan Das v. Gobind Prin Choudhurani (7) was referred to but was not followed. I therefore observe that the learned Judges who decided the case of Madhusudan Das v. Gobind Prin Choudhurani themselves felt some difficulty in holding that the question related to the execution, discharge or satisfaction of the decree and they did not refer to the earlier rulings on the point. In Kattayat Pathumayi v. Rama Menon (8), the other case referred to, the learned Judges (Benson and Bhishyam Ayyangar, JJ.,) doubted the correctness of the view they were adopting, but felt themselves bound by previous rulings on the point. The same was the case with Sandhu v. Husain (9). In that case the learned Chief Justice (Sir Arnold White) expressed the opinion that the question could not be regarded as one relating to the execution of the decree. These cases, therefore, so far from supporting the contention of the respondents, are against them. As for the decision.

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(1) 1897 1 L.R. 20 All. 72  (5) 1887 1 L. R. 14 Cal. 644.
(2) 1892 1 L. R. 19 Cal. 688.  (6) 1904 9 C. L. J. 749.
(3) 1894 1 L. F. 27 C. L. J. 52.  (7) 1899 1 L. R. 27 Cal. 24.
(4) 1883 1 L. K. 8 C. L. J. 62.  (8) 1891 1 L. R. 29 Mad. 743.
of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1), that was a case in which the judgment-debtor sued to set aside a sale on the ground of fraud, the defendant being the decree-holder. It was conceded by counsel that the question was one under section 244 and their Lordships held that it was so. They do not lay down any general rule, but only express approbation of the fact that the courts in India have not placed a narrow interpretation on the provisions of section 244. That ruling does not, in my judgment, justify the application of those provisions to cases which do not fall within their scope and purview. The only other cases to which the learned counsel for the respondent has referred are *Kesri Narain v. Abul Hasan* (2), in which my brother Knox expressed the opinion that an application under section 318 is an application for execution and *Moti Lal v. Makund Singh* (3), in which an application for delivery of possession was held to be an application to take a step in aid of execution. For the reasons I have already stated I am unable to agree with those decisions.

In my judgment the plaintiff's suit is not barred by the provisions of section 244 of the Code of Civil Procedure. I would, therefore, allow the appeal and setting aside the decree of the lower appellate court, remand the case to that court for trial of the other questions which arise in the case.

AIRKMAN, J.—The question for decision by this Full Bench is whether a decree-holder who has purchased property at a sale in execution of a decree for money or the assignee of such a decree-holder can maintain a suit against the judgment-debtor or his representative for possession of the property, or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure.

There is no doubt that a purchaser of property sold in execution of a decree for money, whether he be the decree-holder himself or an outsider, can, after he has got a certificate under section 316 of the Code, apply to the Court under section 318 to be put in possession. If for some reason he fails to get possession in this way within three years from the date or grant of the certificate, there is equally little doubt that a purchaser, other

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(1) (1892) I. L. R., 19 Cal., 633. (2) (1904) I. L. R., 26 All., 355.
(3) (1937) I. L. R., 19 All., 477.
than the decree-holder, is allowed a period of twelve years under article 137 or 133 of the Limitation Act within which he may bring a regular suit for possession of the property he has bought. I would remark in the first place that there is nothing in the language of these articles which would render them inapplicable to decree-holders who have purchased. If it had been the intention of the Legislature that these articles should have no application to suits by decree-holders, one would have expected the articles to run:—Suit by a purchaser, other than a decree-holder.

I am unable to see any reason why a decree-holder who happens to have offered a larger amount than any other bidder at a sale in execution of his decree should have only three years within which to enforce his right to the possession of the property he has bought, whilst an outside purchaser has twelve.

It must be remembered that it is not in his capacity of decree-holder that a decree-holder purchases property in execution of his decree for money. To use the language of the judgment of five Judges of this Court in the Full Bench case, Subhajit v. Sri Gopal (1), it is "a pure accident" that a person who is the holder of the decree is also the auction-purchaser. In the case of both a decree-holder auction-purchaser, and an outside auction-purchaser, the title to the property vests as soon as the sale certificate is issued and not before. The ordinary rule is that a person in whom the title to immovable property has vested can bring a suit for possession thereof at any time within twelve years from the date on which he acquired title. Why should a decree-holder, who happens to have been the highest bidder at a sale, have a shorter period? An independent purchaser would have twelve years within which to enforce his title to the property, and, to use the language of LORD WATSON in the Privy Council judgment in Mahabir Pershad Singh v. Macnaghten (2), "leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."

In the case of Rajah Enayat Hossain v. Sumeer Chand (3) the plaintiff Sumeer Chand had bought from a decree-holder property which the latter had purchased at a sale in execution

(1) (1894) I. L. R., 17 All., 222. (2) (1883) I. L. R., 16 Cal., 82, at P. 623.
(3) (1899) 13 Moz., I. A., 366.
of his own decree. In the judgment in that case their Lordships say that there is no foundation in principle or authority for the distinction which it was attempted to set up between a person standing in the position of a claimant under an execution sale and a claimant under any other conveyance or assignment. True, the distinction which it was attempted to set up in that case was one in favour of the execution purchaser. Such a purchaser is in no better position than one who takes under any other conveyance. But is there any reason why he should be in a worse? So far I have attempted to show that there is no a priori reason why a decree-holder who buys at a sale in execution of his own decree should not have the same right as an independent purchaser to bring a suit to obtain possession. But it is said that section 244 of the Code of Civil Procedure bars any suit by a decree-holder auction-purchaser. If it is clear that the section does bar such a suit, then, however difficult it may be to see why it should, this appeal must fail.

I have had the advantage of reading the judgment of my brother Banerji in this case and I agree so entirely with the reasons he gives for holding that section 244 does not bar such a suit, that I feel it unnecessary to add much.

Great stress has been laid by learned Judges who have taken a different view on an observation of their Lordships in Council in I. L. R., 19 Calc., 653, where they say: "Lordships are glad to find that the Courts in India have placed any narrow construction on the language of the Code, and that when a question has arisen as to the execution or satisfaction of a decree between the parties to the decree the fact that the purchaser, who is a suit-debtor, is interested in the result has never been held to affect the application of the section."

This observation must be read with reference to the facts of the case which was before their Lordships, and could never in my opinion have been intended to have the effect of taking away a right of suit, which has never been doubted, at all events in this Court, until recently. It will be seen too, that their Lordships recognise that to bring the question within the purview of section 244 it must, first, be between the parties to the suit or
their representatives, and next, it must relate to the execution, discharge or satisfaction of the decree. I fully agree with the reasoning on which my brother Banerji bases the conclusion at which he has arrived, namely, that a suit by a decree-holder purchaser, or his assignee fulfils neither of these requirements.

Although the case in I. L. R., 27 Calc., 34, is against the appellant, the learned Judges who decided it admit that ‘the matter is not so clear’ and there are at least three decisions of that Court which are in favour of the appellant. I refer to the cases in I. L. R., 26 Calc., 529; 1 C. W. N., 658, and O C. L. J., 749.

There are decisions of the Madras High Court which are against the appellant. But even in that Court doubt has been thrown on the propriety of these decisions. In I. L. R., 26 Mad., 716, the learned Judges say:—“If the question was not already settled by more decisions than one of this Court and of the Calcutta High Court, we should entertain considerable doubts as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as ‘relating to the execution, discharge or satisfaction of the decree’ within the meaning of section 244, Civil Procedure Code, when such proceedings could not possibly affect the execution, discharge or satisfaction of the decree.

Again in I. L. R., 28 Mad., 87, Sir Arnold White, C. J., observed: “If the matter were res integra, I should be disposed to hold that the question is not one relating to the execution, discharge or satisfaction of the decree.”

There are cases in this and other Courts in which it has been held that an application by a decree-holder purchaser to be put in possession of the property he has bought is an application to the Court to take a step in aid of execution within the meaning of Article 179 of the Second Schedule of the Limitation Act. The learned counsel for the respondents relied on these cases, which do, to some extent, support the view taken by the lower courts in this case. But I agree with my brother Banerji in doubting the propriety of the view taken in these cases.

An application by an independent purchaser to be put in possession is certainly not an application to take a step in aid of execution, and I do not see why such an application by a decree-holder who has purchased should be deemed to be a step in aid of
execution. He has got the fruits of his decree when the title to the property vested in him.

With all deference to the learned Judges who have expressed a different opinion, I agree entirely with the judgment of my brother Banerji and with the order which he proposes to make in this case.

GRIFFIN, J.—In a decree for sale on a mortgage, there is no provision for delivery of possession to the auction purchaser. The Court executing the decree cannot go beyond its terms unless it is expressly empowered by law to do so. Such a power is conferred on the Court by the provisions of sections 318 and 319 of the Code of Civil Procedure. On the facts found in the present case the decree holder auction-purchaser might have applied to be placed in possession, under the provisions of section 318 and section 319 of the Code of Civil Procedure. If he did not so apply or if his application was unsuccessful, he could, in my opinion, fall back upon his title and sue for possession. That title derived not from the decree, which, in so far as it was a decree for sale, had expended its force, but from his purchase. Under Article 138 of schedule II to the Indian Limitation Act he could bring his suit within twelve years from the date of the sale. Neither in the Code of Civil Procedure nor in the Indian Limitation Act is there any distinction drawn between a decree-holder auction-purchaser and a stranger auction-purchaser.

I would therefore concur in the order proposed by my brothers Banerji and Aikman.

BY THE COURT.—In view of the decisions of the majority of the Full Bench the order of the Court is that the appeal be allowed and the decree of the lower appellate court be set aside as much as that court decided the case upon a prelate and the Court has overruled it upon that point, we do not feel appeal be remanded to the lower appellate court under provisions of section 562 of the Code of Civil Procedure unless it be reinstated in the file of pending cases in its original number and be disposed of on its merits, regarding had to the order of the Court in this case. The costs of the appeal will abide the event.

Appeal decreed.
MISCELLANEOUS CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
LACHMAN DAS (PETITIONER) v. NAHIHAKISH AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 31, 57, 179, 192—Suit by zamindar for ejectment of tenant and sub-lessees—Appeal—Jurisdiction.

A zamindar sued to eject one of his occupancy tenants and also certain sub-lessees to whom the occupancy tenant had sub-let part of his holding for building purposes. Held that this was a suit falling within section 31 (2) of the Agra Tenancy Act, 1901, and an appeal from the decree therein lay to the Commissioner and not to the District Judge.

This was a reference by the District Judge of Saharanpur. The facts of the case appear from the following order.

"In this case a conflict of jurisdiction arises, and as it appears doubtful whether the appeal is cognizable in the Civil or Revenue court and how the appeal is to be disposed of having regard to the provisions of the N.-W. P. Tenancy Act which give rise to the conflict of jurisdiction, I submit the record to Honourable High Court under section 195 of the N.-W. P. Tenancy Act read with section 193 of the Act and 617 of the Civil Procedure Code together with the following statement of the reasons for my doubt.

"The suit in this case was brought under section 57, clauses (b) and (d), and sections 31 and 63 of the Rent Act.

"Plaintiff sued as a zamindar for the ejectment of defendant No. 1, his occupancy tenant, on the ground that defendant No. 1 had sublet his land permanently for building purposes to the remaining six defendants. Defendant No. 1, among other objections, raised the point that the claim was not cognizable by a Revenue Court, but no issue was framed by the Lower Court, and the point was not pressed and no question of jurisdiction was decided.

"On the other hand appellant has also appealed against the amount of compensation, which is a matter which can only be appealed to this court.

"The Honourable High Court is therefore asked for a direction as to which court should entertain this appeal.

*Miscellaneous No. 429 of 1907.
Pandit Mohan Lal Nehru, for the appellant.
Mr. J. Simeon, for the opposite party.

STANLEY, C.J., and BANERJI, J.—This case has been referred to us by the learned District Judge of Saharanpur under the provisions of section 195 of the Agra Tenancy Act, the learned Judge having doubts as to whether an appeal preferred to him lay in the Civil Court or in the Revenue Court. The suit out of which the reference arises was brought by a landholder against a tenant and sub-lessees from that tenant. The plaintiff’s allegation was that the tenant, who is the first defendant, had no power to grant subleases to the other defendants, and that by granting the leases the tenant had not only contravened the provisions of the Tenancy Act but had also done an act detrimental to the land and inconsistent with the purpose for which it was let. The suit was described in the plaint as one under sections 57 and 31 of the Tenancy Act. Section 57 of that Act provides that a tenant may be ejected on any of the grounds mentioned in the different clauses of the section. The ground mentioned in clause (d) is that the tenant had sub-let or otherwise transferred his holding in contravention of the provisions of the Act. Under clause (b) a tenant may be ejected on the ground of any act or omission detrimental to the land in his holding or inconsistent with the purpose for which it was let. If the suit is only against the tenant on the ground specified in clause (b) it seems to us that an appeal would lie to the District Judge from the decree of the court of first instance under section 177 of the Act, it being one of the suits included in schedule IV, group B. But where the suit is for ejection of the tenant and his transferee on the ground mentioned in clause (d) of section 57, it is a suit under the second sub-section of section 31 of the Act and is one of the suits mentioned in group C of the fourth schedule. An appeal in such a case lies to the Commissioner under section 179. The question is whether the present suit is one of the description mentioned in group B, No. 13, or in group C, No. 18. In our judgment the suit was one under section 31 (2), being a suit in which the land-holder sued for the ejection of the tenant and his sub-lessees on the ground mentioned in clause (d) of section 57. The fact of the sub-lessees being made parties to the
suit clearly indicates that the suit is one of the description mentioned above. It is not a suit for the ejectment of the tenant on the ground of the commission of a breach of condition by a sub lessee or on the ground of any act done or omission made by such lessee, as mentioned in section 64 (1) (a). Therefore the only section under which the suit in this case could be brought, and was brought, was section 31 (2). An appeal from the decree in the suit lay to the Commissioner.

We find that an appeal was preferred to the Commissioner but he returned the memorandum of appeal on the ground that a question of proprietary title was raised. On this point we are unable to agree with the learned Commissioner, inasmuch as the first defendant, the tenant, never denied his tenancy and never claimed proprietary right in the land within the meaning of section 199 of the Act. What he claimed was that under a custom prevailing in the locality he had a right to transfer his holding. This was not a question of proprietary title and section 199 did not therefore apply. In our judgment the appeal ought to have been heard by the Commissioner, and we accordingly direct that the petition of appeal be returned by the District Judge for presentation in the Court of the Commissioner.

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**APPELLATE CIVIL.**

*Before Mr. Justice Richards and Mr. Justice Griffin.*

**Gopal Prasad and Another (Defendants) v. Badal Singh and Others (Plaintiffs).***

Pre-emption—Wajib-ul-az—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption.

Held that in the case of a suit for pre-emption based upon a contract embodied in the wajib-ul-az the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit. Janks Prasad v. Iswar Das (1) and Ram Gopal v. Pari Lal (2) distinguished.

Three suits for pre-emption were filed by the plaintiff Badal Singh against the appellants in respect of three sales, dated 4th May 1906, 27th June 1906, and 27th August 1906, respectively.

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*First Appeal No. 91 of 1908 from an order of H. David, Judge of the Court of Small Causes, Cawnpore, exercising powers of a Subordinate Judge, dated the 29th of May 1908.*

(1) (1899) I.L.R. 21 All. 374. (2) (1903) I.L.R. 21 All. 441.
The defence to all the suits was that the wajib-ul-arz on which the suits were based was the record of a contract and that the period of settlement for which it was prepared had expired. The Court of first instance (Munsif of Akbarpur) accepted the defence and dismissed all the suits. On appeal the Subordinate Judge held that the period of settlement had not expired at the dates of the sales nor at the date of the institution of the suits, although it had expired before the suits were decreed, and set aside the decrees of the Munsif and remanded the cases for trial on the merits.

The defendants vendees appealed.

Dr. Tej Bahadur Supru, for the appellants, contended that the pre-emptor must have a subsisting right at the date of the decree and it was not enough that he had a right at the date of sale or the date of institution of suit. He referred to Janki Prasad v. Ishar Das (1) and Ram Gopal v. Piari Lal (2).

The plaintiff must show that the contract embodied in the wajib-ul-arz was still subsisting. Here the wajib-ul-arz had ceased to be operative.

Pre-emption was a restraint on alienation and should not be extended beyond the period for which there was a contract. The pre-emptor could not claim the sympathy of the Court or any equity in his favour.

Munshi Govind Prasad, for the respondent, was not called upon.

RICHARDS and GRIFFIN JJ.—This and the connected appeals arise out of pre-emption suits. The plaintiff claims on foot of the wajib-ul-arz. It has been found by both the courts below that the wajib-ul-arz records a contract and not a custom. The court of first instance dismissed the suits upon the ground that the period of settlement for which the wajib-ul-arz was prepared had come to an end. The lower court found that the wajib-ul-arz was still in existence at the dates of the sales. In the present appeal it has been urged on behalf of the defendants vendees that inasmuch as the settlement, and therefore the contract, had come to end before the time at which a decree could be given, the plaintiff’s right to pre-empt must fail. For

(1) (1899) I. L. R., 21 All, 874. (2) (1899) I. L. R., 21 All, 442.
the purpose of these appeals it is assumed that the plaintiff had, at the time of the institution of the suits, a right to pre-empt the property by virtue of the contract which is recorded in the wajib-ul-arz, and the only question argued here and which we have to decide is whether or not the mere fact that before the date of the decree the period of settlement had determined, prevents the plaintiff from enforcing the right of pre-emption and getting a decree in his favour. The point would be absolutely clear in the absence of authority. The contract was a contract which entitled the plaintiff to purchase if any co-sharer sold his share so long as the contract lasted. It is admitted for the purposes of these appeals that the contract was in full force and effect at the time of the sales. Dr. Tej Bahadur on behalf of the appellants, has cited the cases of Janki Prasad v. Ishar Das (1), and Ram Gopal v. Piari Lal (2). In both these cases the plaintiff had a right of pre-emption by virtue of the position of his property in the mahal. Before the sale was made partition proceedings had been commenced for the division of the mahal, and before the time for decree had arrived the plaintiff had ceased to be entitled to pre-emption by reason of the division of the mahal in consequence of the partition proceedings. He had ceased to be a co-sharer and the courts held that a decree ought not to be made in his favour, because the principle underlying the right of pre-emption was the keeping out of the stranger. It will be seen that in the cases cited, the plaintiff’s position had quite changed during the pendency of the suit. If he had occupied the position at the time of the sale that he occupied at the time of the decree he would have had no right of pre-emption at all. In the present case the plaintiff’s right at the time of the decree was exactly the same right as he had at the time of the institution of the suit. In our judgment, the cases cited do not apply and the decision of the court below was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R., 22 All., 374  (2) (1899) I. L. R., 21 All., 441.
Before Mr. Justice Richards and Mr. Justice Griffin.

WILLIAM BHARTHI (PURCHASER) V. BHAGWAN AIR AND OTHERS (DECEASED HOLDERS).*

Act No. 11 of 1897 (Transfer of Property Act), sections 88 and 99—Decree holder holding a decree for sale on a mortgage and also a simple money decree against the same judgment-debtor. Sale in execution of such decree is not unlawful.

Where a decree holder holds both a decree for sale on a mortgage and also a simple money decree against the same judgment-debtor it is not unlawful for him to bring to sale the mortgaged property in pursuance of an application that it may be sold for the realization of the amounts of both decrees.

This was an application to set aside a sale held in execution of a decree. The decree holders held a mortgage-decree also a simple money decree against the same judgment-debtor. They in execution of their simple money decree were entitled to sell the property which was subject to the mortgage. They prayed that the property may be sold in execution of the mortgage-decree, and an order was passed accordingly. A sale was held, however, they asked the Court to set aside the sale and for the realization of the combined amounts of both decrees. The Court granted the prayer. The sale was held on November 1907, and the property was purchased by Bhartih, the appellee. The judgment-debtor appealed against the sale, and the Subordinate Judge granted the application for setting aside the sale, and the Subordinate Judge granted the appeal.

Mr. H. H. C. Hamilton, for the appellee, contended that a sale held in execution of a mortgage decree did not contravene the provisions of section 99 of the Transfer of Property Act. The decree holder already instituted a suit under section 67. Moreover, the application for setting aside the sale and for the realization of the amounts of both decrees was not raised at the time of sale and should have been entertained now. He referred to Gajrajmati Tevarin v. Husain, (1).

The Hon’ble Pandit Sundar Lal, for the respondent, contended that the application to set aside the sale was made before confirming it when purchaser’s title was not complete. It could only be completed when the sale was confirmed. The sale had taken place before the application was made.

* First Appeal No. 40 of 1906, from an order of Maula Baksh, Subordinate Judge of Saharanpur, dated the 25th of March 1906.

(1) (1908) I. L. R., 29 All., 198.
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In order to constitute an offence under the Indian Penal Code, it is not necessary that the counterfeit coin should be made with the primary intention of its being passed as genuine; it is sufficient if the resemblance to genuine coin is so close that it is capable of being passed as such.

Emperor v. Kadir Bakhsh, I. L. R., 30 All. | 33 |

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Section 29, 231—Contra-traf, upon a report made by the police that information given to them charging a person with a specific crime is false, orders person giving such information to be prosecuted under section 211 of the Indian Penal Code, such order is not an order to which section 105 (b) of the Code of Criminal Procedure applies, neither is the order passed without jurisdiction if no previous notice to show cause is given to the accused. The more proper course, however, would be to let the informant bring his witnesses into Court, hear them out, and then, if the case was considered to be a false case, to pass an order that the informant should be tried under section 211 of the Indian Penal Code. Queen-Empress v. Ganga Ram, I. L. R., 8 All., 38, Emperor v. Tula, I. L. R., 29 All., 587 and Haidat Khan v. King-Emporer, I. L. R., 33 Cal., 31, distinguished.

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Sections 302, 304, 325, 323—Administration of dhatura for the purpose of facilitating robbery—Death of person to whom dhatura is so administered—Offence punishable with death. Ordinarily, grievous hurt, and in respect of the travellers who did not die the offence committed was that defined by section 323 of the Code. Queen-Empress v. Tula, I. L. R., 29 All., 145, not followed.

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of the in the every ; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents;

The practice common in litigation in the United Provinces in

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Kishori Lal v. Chunnl Lal I. L. R., 31 All. 115
GUARDIAN AND MINOR, See Act No. XV of 1877, section 8

HIGH COURT. Powers of, See Criminal Procedure Code, sections 145 and 435

HINDU LAW—Hindu widow—Maintenance—Remarriage of widow—Act No. XI of 1856.] During the lifetime of her husband the wife of a Hindu obtained a decree for maintenance against him, and the payment of the maintenance was by the decree made a charge on certain property which had been of the husband, but was then in the hands of certain dependents from him. The husband died, and the widow, being permitted to do so by the rules of her caste, remarried again.


Gajadhar v. Kaunsilla, I. L. R., 31 All.

See Evidence

HINDU WIDOW, See Hindu law

JOINT HINDU FAMILY, See Act No. XV of 1877, section 8

JUDGMENT, See Civil Procedure Code, section 202

LIMITATION, See Act No. XV of 1877, section 8

MAINTENANCE, See Hindu widow

MORTGAGE, See Act No. IV of 1882, sections 82 and 100

MUHAMMADAN LAW—Sunni—Waqf—Provision for celebration of auspicious occasions, etc., in a mosque or masjid, made by the founder towards the religious purposes. The birth of Ali Murti, the expenses of keeping the muazin in the month of members of the community which had been dedicated.

Held that the dedication was not illusory; there was an intention of creating a substantial waqf for pious and charitable purposes, and the objects for which the waqf was created were valid.

Baba Jan v. Kalb Husain, I. L. R., 31 All.

See Act No. IV of 1882, section 53

PROCEDURE, See Civil Procedure Code, (1857), section 203

REVISION, See Criminal Procedure Code, sections 145 and 435

STATUTES—24 and 25 Vic., Cap. CIV, Section 15, See Criminal Procedure Code, sections 145 and 435

SUBROGATION, See Act No. IV of 1882, sections 82 and 100

SUIT FOR DAMAGES AGAINST JOINT TORT-PEASANTS—Compromise between plaintiff and one of the defendants—Such compromise as bar to a decree against the other defendants. The plaintiff sued several
place in contravention of section 99 of the Transfer of Property Act and was void.

RICHARDS and GRIFFIN, JJ.—It appears that the decree-holders held a mortgage decree as well as a simple money decree against the same judgment-debtors. An application was made for the attachment and sale of the mortgage property in execution of the money decree. The property was attached, but no sale took place. The decree-holders then applied to sell the property in execution of the mortgage decree, which was a decree absolute for sale of the mortgaged property. While these proceedings were pending and before the sale was held, the court was asked to sell the property for the realization of the amounts of both the decrees. The property was then sold and was purchased by the appellant, who was not a party to either of the decrees. An application was then made by the judgment debtors to set aside the sale. The court below was of opinion that the sale was null and void on account of the order for sale to realize the amount of both the decrees. The court below seems to have been of opinion that the provisions of section 99 of the Transfer of Property Act were contravened, and refused to confirm the sale, without deciding the other grounds of objection put forward by the judgment-debtors. Hence the present appeal. It seems to us that the court below did not realize that there had been a decree absolute for the sale of the mortgaged property. Section 99 of the Transfer of Property Act is as follows:

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43." In the present case the decree-holder had instituted a suit under section 67. In our opinion there was nothing irregular in selling the property for the amounts of the two decrees. Mr. Sundar Lal who appears for the respondent has been unable to cite any authority for the proposition that such sale is irregular. We allow this appeal, set aside the order of the court below, and remand the case under the provisions of section 562 of the Code.
of Civil Procedure, for determination of the remaining objections. The appellant will have his costs of this appeal. Other costs will be dealt with by the court hearing the appeal.

*Appeal allowed and cause remanded.*

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**PRIVY COUNCIL**

**Kishori Lal, (Defendant) v. Chunni Lal, (Plaintiff).**

*On appeal from the High Court at Allahabad.*

_Evidence—Proof of adoption—Illiterate punditahin widow lady—Non-appearance of plaintiff in Court as witness—Absence of any account of expenditure on ceremony—Mode of paying out business—Inability to give date of adoption—Inconsistent and contradictory evidence—Practice for each litigant to cause his opponent to be cited as a witness._

Where the question on an appeal was whether his claim to be the adopted son of an illiterate punditahin widow lady had been established by the respondent, who lived in her house and was the manager of her business consisting mostly of "rentandari and money dealings," and on whom the burden of proof rested.

_Held by the Judicial Committee (reversing the decision of the High Court) that having regard to the contradiction between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; the absence of all reference to the date of the adoption; and above all the non-production of any account of expenditure at the ceremony, which, if his witnesses spoke the truth, must have been notorious in the neighborhood where it took place, the respondent had failed to discharge the burden of proof which lay upon him, and had not established his claim._

The practice common in litigation in the United Provinces in India for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent as a witness, and that give the counsel for each litigant the opportunity of cross-examination on his own client, is approved of by their Lordships of the Judicial Committee as resulting in the embarrassment of litigation, and as being a practice which judicial tribunals ought to set themselves to render as abortive as it is objectionable.

Two appeals, 36 and 47 of 1807, consolidated from a judgment and decree (12th July 1809) of the High Court of Judicature at
Allahabad, which reversed a judgment and decrees (7th February 1902) of the Court of the Subordinate Judge of Aligarh.

The principal question raised on these appeals was whether the respondent Chunni Lal was validly adopted by a lady named Musammam Lachchho as son to her husband Dwarka Das.

The facts of the case are sufficiently stated in their Lordships' judgment.

Chunni Lal from 1891 until July 1899 used to manage the lady's business which consisted largely of "zamindari and money dealings." On 29th July 1899 Musammam Lachchho executed a deed of endowment of certain property, and two powers of attorney to enable mutation of names to be made of the endowed property. In these documents Chunni Lal also entered his own name as her adopted son. The deed of endowment was registered and in consequence publicity was given to the claim advanced by Chunni Lal. His adoption was immediately challenged by the appellant Kishori Lal, a reviser to the estate of Dwarka Das expectant on the death of his widow, who on 22nd September 1899 instituted a suit (out of which arose appeal 47 of 1907) against Musammam Lachchho and Chunni Lal, mainly for a declaration that the latter had not been validly adopted.

In defence Chunni Lal filed a written statement in which he alleged a formal adoption in the year 1877 made with the permission of Dwarka Das, and also pleaded a custom validating an adoption by the widow of a Bohra Brahmin even without her husband's authority. On 19th March 1900 a written statement was filed purporting to be the written statement of Musammam Lachchho. She obtained information of this some months later and on 29th December 1900 presented a petition repudiating the written statement already filed and denying that she had anything to do with it. On 2nd January 1901 she filed a written statement in which she denied that she had ever adopted Chunni Lal, that her husband had ever given her authority to adopt, and that the Bohra Brahmins were governed by a custom which validated an adoption without authority from the husband.

On 21st December 1900 the suit out of which arose appeal 46 of 1907 was instituted by Chunni Lal against Musammam Lachchho for a declaration of the validity of his adoption and for
possession of the estate of Dwarka Das; and to that suit Kishori Lal was added as a defendant. Both defendants denied that the adoption had ever been made.

The two cases were heard together.

The Subordinate Judge decided that Chunni Lal had not been adopted in fact; that Dwarka Das had not given any authority to adopt; and that the custom set up was not proved. He was of opinion that Chunni Lal and his father Maya Ram, were only karindas (agents) of Musammat Lachhu who had all along held possession of the estate. In accordance with these findings he made decrees granting Kishori Lal the relief claimed by him, and dismissing Chunni Lal’s suit with costs.

Chunni Lal appealed from both decrees to the High Court and the appeals were heard by Sir J. Stanley, C. J., and Burkitt, J., who came to the conclusion that Dwarka Das had given his wife authority to adopt and that she had in pursuance of that authority validly adopted Chunni Lal, and as a result decrees were made reversing the decrees of the Subordinate Judge, dismissing the suit of Kishori Lal, and granting Chunni Lal possession of the property in suit.

In the course of their judgment the High Court made the following remarks which are alluded to by their Lordships of the Judicial Committee:

"The learned Subordinate Judge comments upon the fact that Chunni Lal himself did not come into the witness box. In this case a most objectionable practice which has become prevalent in these Provinces was adopted by the defendants. It has become a not uncommon practice for a plaintiff or defendant, as the case may be, to summon as his or her witness the opposite party. What the object of so doing is it is difficult to see, unless it be to lead the opposite party to keep out of the witness box until the case for his adversary is opened. Such a practice is obviously objectionable. A party should have the opportunity of presenting his case to the court in whatever way he may consider most favourable. This he cannot well do if he is first subjected to what amounts to a cross-examination at the hands of the pleader of the opposite party. There is also this danger that a witness so summoned may not be called at all, and so his case having already closed he is deprived of the benefit of his evidence unless the court permit his examination at that stage of the case. In the present case Chunni Lal though summoned by the opposite party was not called as a witness. We should always under such circumstances dispose of his examination of a party who has been so summoned and not called as a witness and whose evidence might be most material. We should have done so in the
present case; but for the fact that we are abundantly satisfied upon the evidence which has been adduced as to the side upon which truth lies. We therefore have not thought fit to put the parties to the delay and expense which would be consequent upon an adjournment of the case."

And after a full examination of the whole of the evidence in the case they concluded their judgment in the following terms:

"We have then the following facts: as it seems to us, clearly established, namely, that Chunni Lal lived with Musammat Lachchho from the time of the alleged adoption, that his marriage and janeo expenses were defrayed at the expense of Musammat Lachchho, that the dasthaus ceremony of his son was likewise defrayed at her expense; that as adopted son he was appointed her sarbarchar in 1801, that in some suits and bonds he is described as adopted son, that he has been managing her property since the death of his brother Deokaran, that he took part in the ceremonies connected with the dedication of the temple at Soron and in the pole ceremony two years later on, and that in the samitkarma by which the temple was endowed there is an express recital of his adoption and of the permission given by Dwarka Das to Musammat Lachchho to adopt. In addition to all these matters we have the evidence of a great number of respectable and well-to-do persons, caste fellows and others, who testify to the fact of the adoption, and amongst others, Kashi Ram, the uncle of Chunni Lal, who is himself a rascally heir of Dwarka Das, on the same level with Kishori Lal. This evidence appears to us to be overwhelming and decisive. It outweighs any inference which might be drawn from the fact that Chunni Lal was known by some persons at all events as the son of Maya Ram and was not known to have been adopted as a son of Dwarka Das, and from the fact that upon adoption mutation of names was not effected in his favor, but the property left in the ostensible ownership of Musammat Lachchho. The desire to have a son in the case of a Hindu is strong, and it is highly probable that Dwarka Das, who had married a young wife, no doubt in the hope of having a son, when he was disappointed in this hope would have given permission to his wife to adopt. The delay in carrying out the adoption does not appear to us unnatural as the learned Subordinate Judge seems to suppose. Musammat Lachchho, a young woman, might not unnaturally desire to retain control of her husband's property as long as possible and no inference unfavourable to the adoption can be drawn from the fact that she delayed the adoption for so many years. We are inclined to think that the key to this litigation is to be found in the answer already mentioned which Musammat Lachchho gave to a question in cross-examination and that answer is:—"Chunni Lal has acted against my wishes and I can tell him this to his face." Evidently there was a quarrel between them, and Musammat Lachchho, who is illiterate and probably not an over conscientious or truthful woman, judging from her evidence, determined to undo what she had done and repudiate the adoption. Possibly she thought that after the lapse of so many years Chunni Lal would not be able to procure satisfactory evidence of it."
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The two cases were heard together.

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Chunni Lal appealed from both decrees to the High Court and the appeals were heard by Sir J. Stanley, C. J., and Burritt, J., who came to the conclusion that Dwarka Das had given his wife authority to adopt and that she had in pursuance of that authority validly adopted Chunni Lal, and as a result decrees were made reversing the decrees of the Subordinate Judge, dismissing the suit of Kishori Lal, and granting Chunni Lal possession of the property in suit.

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present case, but for the fact that we are abundantly satisfied upon the evidence which has been adduced as to the side upon which truth lies. We therefore have not thought fit to put the parties to the delay and expense which would be consequent upon an adjournment of the case."

And after a full examination of the whole of the evidence in the case they concluded their judgment in the following terms:

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evidence of it."
On these appeals

De Gruyther, K.C. and B. Dube, for the appellant contended that on the evidence the adoption of the respondent by Musammat Lachchho was not proved. They pointed out that up to the year 1888 there was no trace to be found in any document of the adoption alleged. Musammat Lachchho had remained in possession of the estate, and was still in possession; her name had remained recorded as owner notwithstanding the alleged adoption, and still appeared as owner in the Collector’s registers; and the business continued to be carried on in her name and for her benefit. The first mention of an adoption was to be found in a bond dated 16th June 1888 which purported to have been executed in favour of Musammat Lachchho and "of Chunni Lal her adopted son." This was followed on 17th December 1890 by three similar bonds executed in renewal of bonds in favour of Musammat Lachchho alone, being a date subsequent to the year of the alleged adoption. In later years there were a few other transactions of the same nature; and attention was called to the fact that as Chunni Lal, his father Maya Ram, and his brother Desharam were managing the business for Musammat Lachchho they could at any time have obtained the insertion of Chunni Lal’s name in certain renewed bonds without either her knowledge or consent; and it was in evidence that that was so in the case of the deed of endowment from the registration of which she first came to know that Chunni Lal claimed to be her adopted son. It was also the case that on every occasion from 1892 to 4th March 1899 when Chunni Lal had to give his parentage in public he invariably described himself as the son of Maya Ram, whereas if he had been in fact adopted he would have described himself as the son of Dwarka Das. Chunni Lal himself had not given evidence at all; important documents in his possession had not been produced; and many things that required explanation by him remained unexplained. Had the adoption been on the scale and as numerously attended as alleged it would have been an event well remembered in so small a place as the village where it was said to have taken place, and there would have been accounts of the expenditure, which would have been large, yet no such accounts were produced. Reference was made to the
Registration Manual, North-Western Provinces (1885), Part II, Rule 155 which provided that the Registrar should explain the terms of a document to pardinashin ladies and illiterate persons. But many of the document had not been explained to Musammat Lach-boo; in fact it was doubtful whether she ever saw many of them at all. There was no sufficient evidence that Dwarka Das gave any authority to his widows to adopt; and the custom as to such an adoption as is alleged being valid without her husband’s permission was not established. It was also submitted that the High Court had failed to give due weight to the numerous admitted facts in the case, which were either wholly inconsistent with an adoption, or rendered it improbable that an adoption ever was made. Reference was made to Meer Usdullah v. Beeby Imam-man (1), and it was submitted that the principles there laid down as to dealing with conflicting evidence should be applied to this case.

Ross for the respondent contended for (inter alia) the reasons given in the extract from the judgment of the High Court above set out that the adoption was fully proved by the evidence in the case, and particularly by the documents relating to the dedication of the temple at Soron. Reference was made to Mutsaddi Lal v. Kundan Lal (2), Mayne’s Hindu Law, 7th edition, page 176, paragraph 137, Chandra Kunwar v. Chaudhri Narpat Singh (3) and Lali v. Murlihokar (4).

De Gruyther, K. O., replied.

1903 December 15th:—The judgment of their Lordships was delivered by

LORD ATKINSON:—These are consolidated appeals from two decrees of the High Court of Judicature for the North-Western Provinces, Allahabad, dated the 12th July 1904, by which the decrees of the Subordinate Judge were reversed.

The main question for decision in the suits in which these decrees were pronounced, and the sole question for the decision of their Lordships on these appeals, is one of fact, namely, whether Musammat Lachehho, a pardinashin lady who is

(1) (1893) 1 Moz. I. A., 12, at p. 44; (2) (1906) L. L. R., 23 All., 184;
(3) (1896) 2 Moz. I. A., 55 (67); (4) (1906) L. L. R., 23 All., 483;
(382) L. R., 33 I. A., 27; (452) L. R., 33 I. A., 97 (101).
circumstances under which, and the manner in which, her business was carried on and her affairs managed, make the three above-mentioned facts all the more significant.

Dwarka Das, a resident of the village of Thulai, in the District of Aligarh, died in the year 1854 possessed of considerable movable and immovable property situate in this and some neighbouring villages, leaving his two widows, Musammat Jasoda and Musammat Lachchho, him surviving. He was a childless man. Musammat Jasoda, who was much the elder of the two widows, died in 1863. Musammat Lachchho, who had only been married in the year 1852, is still alive. Dwarka Das had a relative, a first cousin once removed, named Maya Ram, who at one time lived in the village of Punner, not far from Thulai. He was by Dwarka Das appointed agent to help in the management of the latter's affairs. After the death of Dwarka Das, Maya Ram continued to act as agent for the widows, and the survivor of them, Musammat Lachchho, up to the time, of his own death in the year 1891, residing with them for a portion of that time, and always taking his food where he did his work. Maya Ram had three sons, Deokaran, the eldest, Moti Ram, and Chunni Lal (the respondent). Deokaran was associated with his father in the management of the estate, and after his father's death continued to manage it up to the time of his own death in the year 1891, when the management was taken up by Chunni Lal, aided by Radha Kishan, who was appointed to assist in the business about six or seven years afterwards. Radha Kishan was married to the daughter of Deokaran, is the attorney of the respondent, superintends this litigation on the latter's behalf, and must therefore be privy to the suppression of the evidence above referred to.

On the 23rd April 1880 Musammat Lachchho executed a power of attorney in the widest possible terms, appointing Deokaran her attorney, empowering him (amongst other things) to institute and defend suits, receive rents, grant leases, release any debt, obtain in her favour any bond relating to money dealings, and to have the same registered, or to execute any bond on her behalf, or file in or take back any document from any court. The endorsement on this instrument describes her occupation as
proper sums in the separate accounts of each. Without these ledgers it is impossible to ascertain who ultimately bore the burden of any expenditure recorded in the day-books. As far as the books produced are concerned, there is, therefore, no proof whatever that the expenses of Chunni Lal’s marriage were really borne by Lachchho. She herself says she advanced the money for the marriage and that it was disbursed. If the ledgers were produced, this matter would most probably have been cleared up. That ledgers existed is established by the admission of the respondent himself. In the year 1894, he instituted a suit in the joint names of himself and Lachchho against one Kunj Lal. On the 14th January 1895, a list of documents was produced with the plaintiff. It is signed by Radha Kishan as agent for Musammat Lachchho, and contains the following item:—

"Eight account books, i.e., 5 day books and 3 ledgers from Sambat 1920 to Sambat 1950, relating to the plaintiff’s business."

No ledgers whatever have been produced in these actions by the respondent, and only two day-books. The only witness who purports to account for their disappearance is Radha Kishan who verified this list. He deposes as follows:—

"The goods and property of the kothi (firm) are in Chunni Lal’s possession. My pay is Rs. 100 a year. I wrote the account books and performed the court business. I saw those account books also which were at the time prior to my entering the service. I did not see the account books of the time of Dwarka Das. I have seen the account books from Sambat 1933. I might have seen some account books of the time prior to this also. I saw them in the kothi. The bazaar house is called kothi.

His examination was continued on the following day, when he again returned to this subject and deposed:—

"The account books, in reference to one of which I made my statement yesterday, were in existence. They were in that very house in which Chunni Lal lived. Now I hear that they are missing. Perhaps they might be locked up. The account books were filed in connection with the case of Kunj Lal. I do not recollect the period for which the account books were filed. They were subsequently taken back from the court and had been kept in the kothi."

The only rational conclusion which can be drawn from this testimony is that evidence of a most important character has been deliberately suppressed by the respondent. That fact, coupled with his non-production as a witness, covers his case with suspicion. The account books which have been produced,
however, cover the period of his alleged adoption in the year 1877. It must, if it took place, have attracted the attention of almost every inhabitant of the small village of Thulai, and involved considerable expense. The accounts put in evidence on both sides are most detailed in character. Petty items of expenditure down to a fraction of a rupee are duly recorded under many heads. Having regard to the well-known habits of the people of India, as well as to the mode in which the business of this firm was carried on, it is inconceivable that, if this ceremony of adoption ever in fact took place, an account would not have been kept of expenditure incurred in respect of it. Yet there is only one item (a disputed one) of Rs. 5 in the accounts produced in which the word “adoption” is mentioned. It occurs in the middle of the items relating to the marriage of Chunni Lal in the year 1873, and, in their Lordships’ opinion, plainly refers to this latter event. Many witnesses have been examined on both sides. They are of somewhat the same class and character—zamindars, money-lenders, persons accused of serious crime though not convicted, inhabitants of the village of Thulai and the adjacent villages; numbers of them of the same brotherhood, some of the same gotra as the respondent, many mere cultivators. They flatly contradict each other on almost every important point. Several of the respondent’s witnesses not only prove that Dwarka Das before his and gave permission to his wives to adopt a son, and gave directions to build a temple to his memory; but, with a vividness of recollection which is almost supernatural, purport to recite the very words used by him for that purpose more than half a century before they themselves spoke. Others, again, purport to describe the most minute details of the ceremony of adoption, and to repeat the very words used by Maya Ram when he gave over his son, then 9 or 10 years old, to Lachchho and placed him on her lap, though that event must have occurred close on 25 years before the evidence was given.

In addition, many of the respondent’s witnesses deposite that, on the occasion of the dedication of the temple built by Lachchho near a place called Soron to the idol Dwarka Dhib, certain religious ceremonies were performed by Chunni Lal, because he was the adopted son of Dwarka Das, while almost as many
witnesses examined on behalf of the appellant—including the priest of the temple, Gopi Nath, who was present both at the ceremony of pratishttha (the placing of the idol in the temple for the first time) performed in 1883, and the khamb ceremony performed in 1893—proved that both of these ceremonies were performed by Lachchho herself, because Chunni Lal was not the adopted son of Dwarka Das, and that invitations to these ceremonies (two of which were produced) were sent out in the name of Dwarka Das, not in the name of his son, as they would have been had he been adopted. The inhabitants of Thulai examined on the appellant’s behalf denied that such a remarkable ceremony as that of the adoption described ever took place in their village, while the members of the brotherhood and others examined on the respective sides proved that Chunni Lal passed and was known amongst his brotherhood and neighbours as the adopted son of Dwarka Das, or the son of Maya Ram, his natural father, and not the adopted son of Dwarka Das, according as they were examined for the respondent or appellant. It is impossible to reconcile these conflicting statements on any theory of the defective memory, or failing powers of observation, of the several witnesses who thus contradict each other. The only safe guide to follow in such a case is that afforded by the action and conduct of the principal parties concerned, and the contents of the documents produced. If Chunni Lal was adopted in the year 1877, as alleged, he became the absolute owner of the considerable property, movable and immovable, of which Dwarka Das died possessed, Musammam Lachchho being only entitled to her maintenance out of it; yet down to the time he began to quarrel with her (save in certain matters to be hereafter specially dealt with) not only did he never exercise the rights of an owner over the property, but he did not even assume the airs of ownership. He came to age, according to the Hindu Law, when he was 16, i.e., about 1883, and according to the Indian Majority Act, 1875 (No. IX of 1875), about 1885. Yet, after he reached the age of manhood, he continued for years to act as paid agent over the estate—which, if he was adopted, was his own—at a salary the same in amount as his father received, namely, 3½ roopas. Musammat
Lachchho has continued down to the present to be the registered owner of all the real property belonging to Dwarka Das in the khewats of the several villages in which that property is situated. Only once does Chunni Lal's name appear in any khewat, and then he is registered as the cultivator of a certain grove, and is described, not as the adopted son of Dwarka Das, but as the son of his natural father, Maya Ram. The income from these several villages was recovered and received by Masammat Lachchho in her own name, through the hands of her several agents, including the respondent.

It is not suggested that there was any agreement or arrangement that she should be permitted to remain registered as owner of these lands and act in all respects in that character. The respondent, in his written statement filed in the first action, says her name was "caused to be entered simply to console her." From a time, however, long prior to the adoption down to a recent date, she carried on this business of a money-lender. It may be fairly presumed that it was lucrative, else she would have abandoned it. Maya Ram, Deckarar, and Chunni Lal were her agents for that purpose. Yet, though several documents connected with this business were given in evidence, in none of them of an earlier date than the 15th July 1833 does the respondent's name appear, or is any mention whatever made of the adoption.

That, however, is not all. In corroboration of those of the appellant's witnesses who stated that Chunni Lal passed and was known among his brotherhood as the son of Maya Ram, his natural father, and not as the adopted son of Dwarka Das, a deposition made by him was put in evidence, from which it appeared that in a public court in December 1892 he deposed on oath that his name was Chunni Lal and his father's name Maya Ram. On the 7th January 1896 he signed a vakalatnama, executed in a pending suit, in which he described himself as son of Maya Ram. Again, on the 15th July 1898 he signed a similar document, drawn up and executed in a suit instituted by himself, which contains a similar description. A fourth document, possibly the most significant of all, was also given in evidence, namely, a list of biddings at a public auction held on the 21st
October 1895, at which he purchased some property for Rs. 1,200, in which he is described as "Chunni Lal, son of Maya Ram." It may be that the significance of these descriptions can, as was contended on his behalf, be explained away; but if so, the explanation should be given by the respondent himself upon oath, and he has abstained from giving it. As they stand, unexplained, they are inconsistent with his case, and support on this point the evidence given on behalf of the appellant.

It is, however, contended on the respondent's behalf that the several documents now about to be referred to discharge the burden of proof which rests upon him, and establish the fact of his adoption.

It is necessary to examine them in detail.

The first four are money-bonds executed in favour of Musammat Lachchho and Chunni Lal, who is described as the "adopted son," not of Dwarka Das, but of Lachchho. The consideration for two out of the four is a previous debt due to Lachchho alone. The first in date may be taken as a sample of the others. It is a hypothecation bond, dated the 16th June 1888, executed by Jamna and Lekha, two sons of Man Singh, deceased, for a sum of Rs. 800 due "to Musammat Lachchho, wife of Dwarka Das, and Chunni Lal, adopted son of Musammat Lachchho aforesaid." It is witnessed by Kadher Mal, one of the respondent's witnesses, who, in reference to it, deposed that it was written under Deokaran's supervision; that it was not read out to him; that he thought the bond was made in favour of Lachchho; and that the bond at the time of its registration was not read out by the sub-registrar to the executants, one of whom (Jamna) appears to be illiterate.

The fifth document is a petition dated the 8th June 1891, purporting to have been presented on Lachchho's behalf by her pleader Lokman Das, praying that "her adopted son, Chunni Lal," might be appointed her sarbarahkar. It is signed by Deokaran as her mukhtar on her behalf. Like the four preceding documents, it is altogether his work. Lokman Das, her pleader, was examined, and stated that Lachchho never came to him on any occasion, and there is nothing to show that the contents of any one of these documents were ever brought to her knowledge.
In the month of February 1893, after the death of Deokaran, a suit was instituted in the name of Musammam Lachchho against one Gajadhar Singh to recover the amount of a promissory note, dated the 30th December 1889, executed in her favour by Gajadhar Singh and his father, Chet Ram. The pleaders for her in that case were Lokman Das and Jogindar Nath. The latter states that Chunnl Lal gave him instructions and came to him to look after the case, and that Lachchho never came to him. The defendant in his written statement raised, on information and belief, the defence that the plaintiff could not recover, as she had adopted Chunnl Lal, and that all the property of Dwarka Das, of which this note was part, vested in him. The statement or reply, if any, filed in answer is not in the record, but from the judgment of the Subordinate Judge of Aligarh it would appear that the defence put forward on Lachchho’s behalf, presumably on Chunnl Lal’s instructions, was that she had adopted Chunnl Lal as the son of her late husband, but that, notwithstanding this adoption, she had been and was in possession of the money-lending business inherited by her from her late husband, and the decision was to the effect that it was clear upon the evidence that the plaintiff was herself in possession of the money-lending business, and that, as owner in possession as well as the promisee of the note, she was entitled to sue. A good deal of suspicion attaches to these proceedings. They appear to disclose something like contrivance on Chunnl Lal’s part to get upon the record an admission of his adoption which would not affect the result of the proceedings. Had the suit failed, Lachchho would possibly have heard of the failure, but she would most probably know nothing of the averments contained in the pleadings. From first to last the efforts of Chunnl Lal and his brother Deokaran seem to have been directed to bind Lachchho by descriptions of Chunnl Lal as her adopted son, introduced into instruments upon the operation of which that description could have no effect whatever, and which would probably never be known to her.

The only other documents with which it is necessary to deal at length are (1) those connected with a suit which purported to be instituted on the 12th November 1894 in the names of
Musammam Lachchho and Chunni Lal, described as “adopted son of Dwarka Das,” against Kunji Lal and Duli Chand to recover possession of a shop in the market town of Hathras part of the estate of Dwarka Das, in which a compromise was entered into, and (2) those connected with a grant of land made to endow the temple erected by the widow to the memory of her husband, at Soron, because these are the only documents whose contents there is any evidence to show were brought to the knowledge of Musammam Lachchho. In the suit against Kunji Lal and Duli Chand, Lokman Das was again the pleader for the plaintiffs. He is not able to state whether he was instructed by Chunni Lal or some other agent of Lachchho’s. The claim contains averments that:

“...In his lifetime Dwarka Das was in proprietary possession and enjoyment of the said shop, and since his death Musammam Lachchho, plaintiff, has been in proprietary possession and enjoyment thereof for about 40 years and Chunni Lal, plaintiff, who is joint with her, has been in possession and enjoyment of it since the time of his adoption.”

A compromise was arrived at to the effect that the plaintiffs should obtain a decree for possession, the defendants to obtain proprietary possession of the house on paying a lump sum of Rs. 1,500, with interest, within a certain time, and the costs of this and of a preceding suit instituted by the widow alone for rent not to be recovered.

This compromise was embodied in a memorandum entitled “Chunni Lal and Musammam Lachchho, plaintiffs, v. Kunji Lal and Duli Chand, defendants.” It is signed by Chunni Lal, Duli Chand and Kunji Lal. It does not contain, in the body of it, any reference whatever to the fact of adoption, and except that the plural “plaintiffs” is once used in it instead of the singular “plaintiff,” it might, as far as its language is concerned have been drawn up between Lachchho alone and the defendants. This memorandum was filed in Court, and a decree in the suit was on the 13th May 1895 made upon the basis of it. Before decree, however, one Ahmad Husain, an officer of the Munsiff’s Court at Hathras, went to the village of Thulai to get the compromise verified by Musammam Lachchho. He says that he read over and explained to her the contents of the memorandum, but on cross-examination he admitted that he did not remember...
whether any "mention of the adoption was made." Unless he read out the title and emphasized the plural plaintiffs, there is nothing whatever in the document to suggest to Lachchho that she was not suing in this suit, as she had in the previous suit sued, for rent in her own name and in her own right. In this latter suit she was defeated, not on any non-joiner point, or because she was not owner, but solely for the reason that the agreement to pay rent for the shop had not been satisfactorily proved. Ahmad Hussain states he drew and signed an attestation clause on this document—in which it is stated that Musammat Lachchho "heard and understood the contents" of the compromise—and duly attested the same. It purports to bear her mark. And the names of Kanhai Ram and Radha Kishan are signed as witnesses. Kanhai Ram was not examined. Radha Kishan swears that "the written statement" (presumably the compromise) was read over to her, and that she put her mark to it. He says nothing about her having understood it, or about its having been explained to her. On that evidence it is, in their Lordships' opinion, impossible to hold that Musammat Lachchho was joined with the knowledge that Chunni Lal was joined with her in the suit as the adopted son of Dwarka Das, or that he was so described on the record.

The documents in the case on which the respondent most strongly relies are those connected with the endowment of the temple at Soron. They are three in number: (1) A tamliknama bearing date the 29th July 1899; (2) a special power of attorney dated the 8th August 1899; and (3) a special power of attorney dated the 10th August in the same year. They each purport to be executed by Musammat Lachchho and Chunni Lal who is described in each of them as the adopted son of Dwarka Das, and made a party to them in that character.

The tamliknama contains many long and complicated recitals, and amongst others the following:—

"According to the custom of my caste and the members of my brotherhood and under lawful authority and by the permission of my husband, I adopted to him Chunni Lal during his minority and made him his successor, after performing religious ceremonies and carrying out the injunctions of the Hindu law. He (Chunni Lal) has now attained majority and he lives jointly with me and looks after all the affairs relating to the estate of
Dwarka Das. In accordance with the will of my husband, I, the Musamat, constructed at Sorun, at the place where the Hindus perform worship, during the minority of the aforesaid Chunni Lal, a paccs stone building called Kunj at the cost of Rs. 50,000, under the supervision and management of Maya Ram, the natural father of the aforesaid Chunni Lal; and in Sambat 1940, I, after Chunni Lal, one of the executants, had attained majority, installed therein Thakur Dwarka Bhish Maharaj after performing the praththa ceremony according to the principle of the Hindu law."

The document then proceeds to declare, in its operative part, that the Thakur therein named shall remain in proprietary possession of the landed property therein described, in order to pay thereout his salary, and have the temple at Sorun cleaned and kept in repair, &c. By the first power of attorney Radha Kishan is appointed attorney to procure a mutation of names in the registry in respect of this property so dedicated, and the second power of attorney is to somewhat similar effect. Musamat Lachchho in her evidence admits that she had built this temple, desired to endow it, and executed a deed for that purpose in favour of Thakurji, the deity named in it. She, however, positively denies that the deed was ever read over to her. She must have been about 60 years of age at that time, and she says her sight was dim. She admits that the registrar came to her house about the deed. She says that she sat behind the curtain, and he outside it; that he asked her if she had executed a deed in favour of Thakurji, and she replied yes: that he questioned her about the property she had given over to Thakurji, and she told him it was the property of Jahanpur and Tor. She says that the deed was not read out to her by any of those present when she witnessed it, that she asked them to have it read out to her, and was told it would be read out afterwards. She further says that the registrar did not read it out, but merely told her it was a deed of gift to Thakurji. If this account be true, it is obvious that nothing occurred to call her attention to the statements in the deed concerning Chunni Lal's adoption, and in the face of her evidence it is incumbent on the respondent to establish conclusively that these particulars of the deed were brought to her notice before he can in any way rely upon them as admissions against her. The deed was tendered for registration, and its registration the sub-registrar in Hathras called upon her. ...
order to verify it. In his certificate he states that she “admitted the completion and execution of this document after hearing and understanding the same.” He was examined as a witness. His evidence is rather extraordinary. He does not deny that she was inside the curtain and he outside, but he says that he read it over to her word for word; that his clerk also read it over to her; that he asked her if she understood the document word for word; that she replied, “I executed the document and I have understood it”; that she then added, “Chunni Lal is my adopted son”; that he said to her, what was the necessity of making mention of adoption therein, and that she replied, “I have made mention (of it) herein to make the matter more secure so that no dispute may arise in future.” He admitted that he had not noted down that Lachchho had told him she had made the adoption. This witness proves rather too much. His clerk, who is alive, was not examined. His business would naturally be to find out if she knew that she was disposing of property by this deed, what was its nature and extent, and what was the purpose of the disposition. If the respondent’s case be true, his adoption had been notorious for 22 years. Radha Kishan says that he also read the vakalatnama and power of attorney to Lachchho. Girdhari Lal, who was a witness to both this deed and the power of attorney of the 10th August, was not produced. Ram Prasad, whose name appears on the power of attorney of the 8th August, was called; he admitted that he drafted this document and said he read it over to Lachchho. He also states that both Lachchho and Chunni Lal said the latter was her adopted son, and then makes the extraordinary statement that it was suggested that the name of Musammat Lachchho should be expunged. According to this evidence the deed was read over to Lachchho three or four times, on as many separate occasions by as many different persons. Why this repetition? It is evident that Chunni Lal and his attorney, who is charged with the duty of superintending this litigation on his principal’s behalf, and is therefore party to the suppression of evidence, arranged this entire business. Their Lordships are not satisfied that the passages of these documents dealing with the adoption of Chunni Lal were brought to the knowledge of Lachchho and their effect explained to her, though
the gift and declaration may have been. It was entirely collateral to the main purpose of the deed thus to record what, according to the respondent, was a notorious fact. Their Lordships cannot concur with the High Court that the fact that these or any other documents of the like kind containing such collateral recitals were registered and acted upon raises any presumption whatever that Lachchho was aware of the existence of the recitals in the instrument acted upon.

Of the many suspicious things about these documents containing references to adoption, or describing the respondent as an adopted son, one of the most suspicious is the absence of all reference to the date of the adoption. For all they disclose, it might have occurred at any time between his birth in 1865 or 1866, and July 1888. As far as appears in this case, the date of that ceremony was first fixed when the plaint in the second suit was filed on the 24th December 1900. The first action (i.e., that in which Kishori Lal was plaintiff) was instituted on the 22nd September 1899, over fifteen months previously. In this latter case, though Chunni Lal pleaded that he was adopted, he did not name any date for the ceremony. Having regard to all these facts—the contradictions between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent’s story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; and, above and beyond all, the non-production of any account of the expenditure at the ceremony of adoption—their Lordships think that the most rational and just conclusion is this, that the respondent has failed to discharge the burden of proof of the adoption which undoubtedly lay upon him, that is, that his case is not proven.

Their Lordships will therefore humbly advise His Majesty that those appeals should be allowed, the decrees of the High Court discharged with costs, and the decrees of the Subordinate Judge restored.
The respondent must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant:—Pyke, Parrott & Co.
Solicitors for the respondent:—T. L. Wilson & Co.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

BIBA JAN (Plaintiff) v. KALB HUSAIN AND OTHERS (Defendants) *

Muhammadan Law—Sunni—Waqf—Provision for celebration of anniversary of
birth of Ali Murtaza, expenses of the Muharram and the death anniver-
saries of members of the family of the waqif, also for repairs of imambars
—Waqf held to be valid.

A Muhammadan lady belonging to the Sunni sect purported to make a
waqf of all her property and provided that a sum amounting to decidedly the
larger portion of the income of the dedicated property should be applied an-
nually towards the following purposes, viz., the celebration of the birth of Ali
Murtaza, the expenses of keeping tazias in the month of Muharram, the anni-
versaries of the deaths of members of the waqif's family and the expenses for
repairs of an imambars which the waqif had built, and declared that the prop-
erty had been dedicated to God and charitable and religious purposes.

Held that the dedication was not illusory; there was an intention of
creating a substantial waqf for pious and charitable purposes, and the objects
for which the waqf was created were valid.

The facts of the case were as follows:—

The plaintiff alleged that one Musammat Najiban was the
daughter of plaintiff's father's sister, and was the owner of
considerable movable and immovable property; that she died
on the 4th of June 1904, when she was about 90 years old; that
Kalb Husain, defendant No. 1, was the mukhtar-i-am and
servant of Musammat Najiban; that Ata-ullah, defendant No. 2,
also lived with the said Musammat at Bareilly, being the brother
of the defendant No. 1; that Musammat Maddo Jan, plaintiff's
own sister, who was defendant No. 3 in the suit, also lived with
the said Musammat Najiban, who on account of her old age and
having no child or near heir was under the undue influence of all
these defendants; that the plaintiff was living in her husbands'

* First Appeal No. 52 of 1907, from a decree of Girraj Kishor Datt, Subor-
dinate Judge of Bareilly, dated the 17th of November 1906.
house in the Budaun district; that on the death of Musammat Najibban the plaintiff and her sister, defendant No. 3, became entitled to all the property left by the said Musammat in equal shares; that when the plaintiff made efforts to take possession of the property and to obtain mutation of names in her favour in the Revenue Court, she found that the name of the defendant No. 1 had been entered in the revenue papers in respect of a five biswa zamindari share in mauza Gurgawan under a deed of sale, dated 18th February 1902; that the names of defendants Nos. 1 and 2 were so entered in respect of another five biswa share in the said mauza under a waqfnama, dated the 2nd of November 1902, and that the names of all these defendants were entered in respect of the remaining property under a deed of gift, dated 26th February 1903; that the plaintiff desired to bring a separate suit in respect of the deeds of sale and gift, the present suit being only for possession and mesne profits in respect of the plaintiff's share in five out of ten biswas of mahals mushtaqil and iitimali in the said mauza Gurgawan and a house named iinambara in Bareilly, which were in the possession of the defendants Nos. 1 and 2 as mutawallis under the said waqfnama and for a declaration that the waqfnama was altogether invalid in law.

The defendants Nos. 1 and 2 contested the suit on the allegations that the plaintiff was not the daughter of Sana-ullah, Musammat Najibban's maternal uncle, and had no right to bring the suit; that the defendants were the sons of the said Sana-ullah, and one Musammat Mammi Jan, being the daughter of the said Sana-ullah, was a necessary party to the suit; that the deed of endowment was valid according to Muhammadan law, and had been executed by Musammat Najibban of her own free will and without any undue influence of any person and while she was in full possession of her senses and in proper health; and the waqf had relinquished her own possession of the endowed property and had properly put the mutawallis in possession thereof; that the greater part of the income of the endowed property had been assigned for pious and charitable purposes, and a margin of the profits had been left to meet probable contingencies like those of alluvion, diluvion, costs of litigation and arrears, &c., and that if the endowment be held invalid and the plaintiff be proved to be a
The respondent must pay the costs of the appeals.  

Appeals allowed.

Solicitors for the appellant:—Pyke, Parrott & Co.

Solicitors for the respondent:—T. L. Wilson & Co.

J. V. W.

**APPELLATE CIVIL.**

**Before Mr. Justice Richards and Mr. Justice Griffin.**

*BIBA JAN (PLAINTIFF) v. KALB HUSAIN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Sunna—Waqf—Provision for celebration of anniversary of birth of Ali Murtaza, expenses of the Muharram and the death anniversaries of members of the family of the waqif, also for repairs of imambars—Waqf held to be valid.

A Muhammadan lady belonging to the Sunna sect purported to make a waqf of all her property and provided that a sum amounting to decidedly the larger portion of the income of the dedicated property should be applied annually towards the following purposes, viz., the celebration of the birth of Ali Murtaza, the expenses of keeping tazias in the month of Muharram, the anniversaries of the deaths of members of the waqif’s family and the expenses for repairs of an imambars which the waqif had built, and declared that the property had been dedicated to God and charitable and religious purposes.

Held that the dedication was not illusory; there was an intention of creating a substantial waqf for pious and charitable purposes, and the objects for which the waqf was created were valid.

**The facts of the case were as follows:**—

The plaintiff alleged that one Musammat Najiban was the daughter of plaintiff’s father’s sister, and was the owner of considerable movable and immovable property; that she died on the 4th of June 1901, when she was about 90 years old; that Kalb Husain, defendant No. 1, was the mukhtar-i-am and servant of Musammat Najiban; that Ata-ullah, defendant No. 2, also lived with the said Musammat at Bareilly, being the brother of the defendant No. 1; that Musammat Maddo Jan, plaintiff’s own sister, who was defendant No. 3 in the suit, also lived with the said Musammat Najiban, who, on account of her old age and having no child or near heir was under the undue influence of all these defendants; that the plaintiff was living in her husbands’

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*First Appeal No. 62 of 1907, from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 17th of November 1906.*
house in the Budaun district; that on the death of Musammat Najiban the plaintiff and her sister, defendant No. 3, became entitled to all the property left by the said Musammat in equal shares; that when the plaintiff made efforts to take possession of the property and to obtain mutation of names in her favour in the Revenue Court, she found that the name of the defendant No. 1 had been entered in the revenue papers in respect of a five biswa zamindari share in mauza Gurgawan under a deed of sale, dated 18th February 1902; that the names of defendants Nos. 1 and 2 were so entered in respect of another five biswa share in the said mauza under a waqfnama, dated the 2nd of November 1902, and that the names of all these defendants were entered in respect of the remaining property under a deed of gift, dated 26th February 1903; that the plaintiff desired to bring a separate suit in respect of the deeds of sale and gift, the present suit being only for possession and mesne profits in respect of the plaintiff's share in five out of ten biswas of mahals mushtaqil and iltimali in the said mauza Gurgawan and a house named imambara in Bareilly, which were in the possession of the defendants Nos. 1 and 2 as mutawallis under the said waqfnama and for a declaration that the waqfnama was altogether invalid in law.

The defendants Nos. 1 and 2 contested the suit on the allegations that the plaintiff was not the daughter of Sana-ullah, Musammat Najiban's maternal uncle, and had no right to bring the suit; that the defendants were the sons of the said Sana-ullah, and one Musammat Mammi Jan, being the daughter of the said Sana-ullah, was a necessary party to the suit; that the deed of endowment was valid according to Muhammadan law, and had been executed by Musammat Najiban of her own free will and without any undue influence of any person and while she was in full possession of her senses and in proper health; and the waqif had relinquished her own possession of the endowed property and had properly put the mutawallis in possession thereof; that the greater part of the income of the endowed property had been assigned for pious and charitable purposes, and a margin of the profits had been left to meet probable contingencies like those of alluvion, diluvion, costs of litigation and arrears, &c., and that if the endowment be held invalid and the plaintiff be proved to be a
daughter of Sana-ullah, she could only claim one out of seven shares of Musammam Najibah’s property and that the mesne profits claimed were excessive.

The Court below found that the plaintiff was one of the two daughters of Sana-ullah; that the defendants Nos. 1 and 2 were not sons of Sana-ullah, although they styled themselves as such, being the sons of one Musammam Dhumra a prostitute, who had never been married to Sana-ullah, although living with him; that Mammi Jan was not a necessary party, being the daughter of the said Musammam Dhumra; that the donor had built the imambars house in which she used to hold majlisas (religious meetings) during ashra (the first ten days) of muharram, and being of a charitable and religious turn of mind, used to spend Rs. 1,000 to Rs. 1,200 per annum in these majlisas and charities, and that the waqfnama had been validly executed by her and was consistent with her religious and charitable ideas; that the deed of endowment was not in favour of the defendants Nos. 1 and 2 except in so far as it made them the Mutawallis, and that the waqf in the present case was a valid waqf under the Muhammadan law. It accordingly dismissed the suit with costs. The plaintiff appealed.

Mr. Abdul Majid, for the appellant, submitted that the Fatawa Alamgiri was the most authoritative book for Sunni Muhammadans. According to it appropriations for reciting the Quran were void. Observance of taziadari ceremonies during the muharram were not in accordance with Sunni tenets. There must be qurbat (or nearness) between the appropriation and the object. If a Sunni Muhammadan were to make a waqf for taziadari ceremonies, there would be total absence of qurbat. He cited Baillie’s Digest of Muhammadan Law, pp. 558, 569, 575.

It might be good to hold prayer meetings on the anniversary of a death, but it was not the general practice to observe ceremonies on the anniversary of a birth. The law was that the property must go for charitable purposes. If this whole waqf was void. The gist of the evidence was that muharram illuminations took place and some distributed. These were not the sort of acts which
house in the Badaun district; that on the death of Musammat Najjaban the plaintiff and her sister, defendant No. 3, became entitled to all the property left by the said Musammat in equal shares; that when the plaintiff made efforts to take possession of the property and to obtain mutation of names in her favour in the Revenue Court, she found that the name of the defendant No. 1 had been entered in the revenue papers in respect of a five biswa zamindari share in mauza Gurgawan under a deed of sale, dated 18th February 1902; that the names of defendants Nos. 1 and 2 were so entered in respect of another five biswa share in the said mauza under a waqfnama, dated the 2nd of November 1902, and that the names of all these defendants were entered in respect of the remaining property under a deed of gift, dated 26th February 1903; that the plaintiff desired to bring a separate suit in respect of the deeds of sale and gift, the present suit being only for possession and mesne profits in respect of the plaintiff's share in five out of ten biswas of mahals mushtaqil and iltimali in the said mauza Gurgawan and a house named imambara in Bareilly, which were in the possession of the defendants Nos. 1 and 2 as mutawallis under the said waqfnama and for a declaration that the waqfnama was altogether invalid in law.

The defendants Nos. 1 and 2 contested the suit on the allegations that the plaintiff was not the daughter of Sana-ullah, Musammat Naj jaban's maternal uncle, and had no right to bring the suit; that the defendants were the sons of the said Sana-ullah, and one Musammat Mammi Jan, being the daughter of the said Sana-ullah, was a necessary party to the suit; that the deed of endowment was valid according to Muhammadan law, and had been executed by Musammat Najjaban of her own free will and without any undue influence of any person and while she was in full possession of her senses and in proper health; and the waqif had relinquished her own possession of the endowed property and had properly put the mutawallis in possession thereof; that the greater part of the income of the endowed property had been assigned for pious and charitable purposes, and a margin of the profits had been left to meet probable contingencies like those of alluvion, diluvion, costs of litigation and arrears, &c., and that if the endowment be held invalid and the plaintiff be proved to be a
daughter of Sana-ullah, she could only claim one out of seven shares of Musammat Najihan's property and that the mensa profits claimed were excessive.

The Court below found that the plaintiff was one of the two daughters of Sana-ullah; that the defendants Nos. 1 and 2 were not sons of Sana-ullah, although they styled themselves as such, being the sons of one Musammat Dhumun, a prostitute, who had never been married to Sana-ullah, although living with him; that Mammi Jan was not a necessary party, being the daughter of the said Musammat Dhumun; that the donor had built the imambara house in which she used to hold majlis (religious meetings) during ashra (the first ten days) of muharram, and being of a charitable and religious turn of mind, used to spend Rs. 1,000 to Rs. 1,200 per annum in these majlis and charities, and that the waqfnama had been validly executed by her and was consistent with her religious and charitable ideas; that the deed of endowment was not in favour of the defendants Nos. 1 and 2 except in so far as it made them the Mutawallis, and that the waqf in the present case was a valid waqf under the Muhammadan law. It accordingly dismissed the suit with costs. The plaintiff appealed.

Mr. Abdul Majid, for the appellant, submitted that the Fatawa Alamgiri was the most authoritative book for Sunni Muhammadans. According to it appropriations for reciting the Quran were void. Observance of taxiadari ceremonies during the muharram were not in accordance with Sunni tenets. There must be gurbat (or nearness) between the appropriation and the object. If a Sunni Muhammadan were to make a waqf for taxiadari ceremonies, there would be total absence of gurbat. He cited Baillie's Digest of Muhammadan Law, pp. 563, 569, 575.

It might be good to hold prayer meetings on the anniversary of a death, but it was not the general practice to observe ceremonies on the anniversary of a birth. The law was that the bulk of the property must go for charitable purposes. If this was not so, the whole waqf was void. The gist of the evidence was that during muharram illuminations took place and some sweets were distributed. These were not the sort of acts which
were meritorious and for which a valid waqf could be made according to Sunni laws. The *fatehah brasi* referred to in the deed could not mean the celebration of the death anniversaries of persons of the family. This was never countenanced by Sunni law. The establishment of an imambarga is not a valid object among Sunni Muhammadans. Any sum appropriated for the purposes of the imambarga would not go for any valid object, and except for the Imambarga no certain object of appropriation was mentioned in the deed. The waqfnama was certainly invalid so far as this was concerned and it was therefore invalid as a whole. Regarding *fatehas*, illuminations and object of waqfs, counsel submitted the following original texts for consideration of the Court:—

(1) "It is reported by Abdullah, son of Masud, that the Prophet of God, may the mercy and peace of God be upon him, has said,—He who beats the cheeks and tears the garments and laments lamentations of the days of dark, is not among us (i.e. among my followers)."

"It is reported by Burdah that Abu Musa became unconscious. Then his wife, Umma Abdullah, came and cried out weeping. When he came to his senses, he said, Do you not know (he mentioned the tradition saying) that the Prophet of God, may the mercy and peace of God be upon him, said 'I am angry with the person who gets his head shaved, weeps loudly, and tears his garments.' These traditions are reported by Bukhari and Muslim."

[The Mishkatul Masabih, chapter relating to lamentation on the dead, sub-chapter I, p. 150.]

(2) "Among the objectionable inventions is the act done in most of the towns, i.e. the display of large number of lights by waste of money on certain nights of the year."

[The *Al-ukduDuoirat-o f i-tankihil-Futawat Hamidiyat-i*, p. 359.]

(3) "The Prophet of God, may the mercy and peace of God be upon him, has forbidden the recital of elegies."

[The book of the traditions reported by Ibn-i-Maja, the chapter relating to dead bodies, p. 115.]

So far as *fateha* was concerned there might be some difference of opinion among the authorities. It might be meritorious to some extent. So far as *tazia* was concerned there was no doubt that considered it meritorious according to Sunnis. The case of *Kaleboola v. Nusecruddeen* purposes could be meritorious and what *waqfs* (1) (1894) I. L. R., 18 Mad., 501.
might be valid. As in that case, so in this, the waqf contravened the rule against perpetuities. Unless it could be shown that all the objects of tazidari were valid, the waqf wholly failed. The case of Sayed Mustafa v. Amina Begum (1) was a case relating to waqf made by a Shia Muhammadan. Even then the waqf was declared invalid.

There was a difference between Shia and Sunni lawyers as to the definition of waqf: Amir Ali, Muhammadan Law, 390, 2nd ed. According to the Shias a waqf must be for pious objects. According to Sunnis a waqf must lead to the benefit of mankind. The question of the validity of waqf with reference to fatekah ceremonies was discussed in Phul Chand v. Akbar Yar Khan (2), and this was the only reported case counsel could find on the point. The learned Judge had not found whether in this case there was any purpose of endowment pious, religious, or beneficial to mankind according to Sunni ideas. He ought to have found whether the sect or religion to which the waqf was a party countenanced such observances and whether such observances were customary.

So far as the muallad sharif, the celebration of the birth ceremony of the Prophet was concerned, it was incumbent on every pious Musalmans. But the basical difference between the Sunnis and Shias lay where we came to the position of the fourth Caliph. On the whole, according to Shias, the endowment must be for pious purposes, which according to the Sunnis must be for charitable objects.

It was also to be seen that the waqf was not certain as to all the objects referred to in it—Fatma Bibi v. The Advocate General of Bombay (3). If their Lordships were of opinion that any of the purposes of waqf mentioned in the deed was illegal the question would remain whether the bulk of the property had been dedicated for charitable purposes or not, or whether it was a perpetual bequest to the mutawallis in the guise of a waqf. The following cases were referred to:—Phul Chand v. Akbar Yar Khan (4), Muhammad Ahsanulla v. Amar Chand (5) and Abul Fathu v. Rasamaya (6).

(1) (1844) 2 A. L. J. R., 519. (4) (1866) I. L. R., 15 All., 211.
(2) (1888) I. L. R., 19 All., 211. (5) (1859) I. L. R., 17 Cal., 493.
(3) (1881) I. L. R., 6 Bom., 42. (6) (1894) I. L. R., 22 Cal., 619.
A consideration of this question would render it necessary for their Lordships to inquire into the total income and expenditure of the endowed property in order to ascertain whether the appropriation made in the deed was for valid purposes or not. According to the plaintiff out of a total income of Rs. 2,500 after all appropriations and expenses there was a balance of Rs. 1,500 unprovided for in the deed, and this was clearly to go into the pockets of the mutawallis.

Mr. Abdul Raof (Mr. B. E. O'Conor with him), for the respondents. The validity of the waqf was attacked on the ground that the objects for which it had been made were not countenanced by Sunni law and that the persons for the benefit of whose souls the endowment had been made were not regarded as sacred by the Sunni Muhammadans. Hazrat Ali was respected by Sunnis as well as Shias. The other three Caliphs his predecessors were revered by the Sunnis only. To say that any ceremony for the commemoration of Hazrat Ali was illegal would be contrary to Sunni tenets. The essence of the muharram ceremonies was that the Musalmans mourned the sad death of the two Imams Hasan and Husain. They were the grandsons of the Prophet and the sons of Hazrat Ali, whom the Shias and Sunnis would alike revere. The real object of taziadari (muharram ceremonies) was to assemble to mourn for the sad death of the two Imams. The merits of the ceremonies were not to be judged by any artificial ceremonials that perhaps had gathered round the true object. The people who assembled there would observe a manner of mourning and it could never make the waqf illegal because the idea of the waqf was to commemorate the death of the two Imams. The original authorities cited on behalf of the appellant had no bearing on this point. In reply to that the respondents submitted various authorities in the original. Fatehas are offered for the benefit of the souls of the deceased as the Roman Catholics celebrated their mass. The merits from them would also accrue to the good of those who offered them. It was to be observed also that during all these ceremonies substantial gifts were distributed to the poor and to all those who assembled in the masjids.
It had been argued before their Lordships that portion of the appropriation was had because the object had not been mentioned with certainty. The words *Fatchah larsi* etc., could not mean *Fatchahs* for the benefit of all dead souls. A reasonable construction was to be put on such language conveying the waqif's intentions. The language could only mean that the dead persons of the donor’s own family were referred to. Ameer Ali Muhammadan Law, Vol. 1, 3rd ed. 174.

There was no uncertainty in the subject-matter, neither in the object. The motive was for the good of the poor (ibid. page 323). Even mere vagueness, if there was any, could not invalidate the whole waqf. The law would hold it valid for all the valid purposes enumerated in the deed. Something like the doctrine of *cy-pres* it was submitted, would apply. The case of *Kaleooloo v. Naseerudddeen* (1) would support the respondents' case better than it would the appellant's. At page 213 it was mentioned that a waqf for *fatchahs* was valid when made for the benefit of the souls of the saints. Again at page 206 the practice, the appellant so strongly objected to, was reported to have been sanctioned by long usage and custom. These specific pleas had not been raised in the Court below and so there was no discussion of such matters in the judgment. Had they been so raised there would have been overwhelming evidence to show that the Sunnis as a matter of fact observe such ceremonies.

Upon a proper construction of the deed it would appear that the entire income was to go for charitable purposes. The waqif herself regarded her entire ten biswas property to be yielding an income of Rs. 2,000 only; for she had leased the whole 10 biswas share for that sum. The corpus of the 5 biswa share had been dedicated. The income, whatever it was, (the donor herself regarded it at Rs. 1,000 per annum) was to be regarded as dedicated. No special provisions had been made for the benefit of the mutawallis who were always accountable for the property to the public. It was only when a specific portion of the income was dedicated to charity, side by side with any provisions for the mutawallis that a question could arise whether a specific dedication for public charity had been made. Any

(1) (1894) I.L.R. 18 201.
restricting the accountability of the mutawallis were certainly void, but so was not the waqf. Here the question could not arise whether the whole was a scheme in disguise for the benefit of the mutawallis. The donor herself calculated the income of the endowed property to be Rs. 1,000. The position of the Mutawallis in respect of expenditure from this income was more like that of an executor of will. The mere fact that there could be a possible surplus left with the mutawallis would not invalidate the waqf. The whole corpus and so the whole income, together with any possible increase or diminution, was the subject-matter of the waqf. The case of Muhammad Munawar Ali v. Rasul-Idran (1) related to the waqf of a Sunni. At page 336 the clauses of the waqf are discussed. There a substantial portion of the property had not been dedicated for charitable purposes. Here the entire property had been so dedicated.

The case of Lucknowy v. Amir Alum (2), would show how far fatehahs, &c., were good purposes for waqf. The word Urs as defined in Hughes' Dictionary of Islam, showed that they were ceremonies for the celebration of any celebrated saint of Islam.

Only a small portion of the income had not been shown as specifically appropriated to any of the specific objects mentioned in the deed. That was because the up-keep of the estate was expensive. Portions of the mahals were subject to heavy litigation owing to alluvion and diluvion. The extra expenses for all these had to be met. The respondents submitted that no portion of the income was meant for their personal benefit. The respondents also relied on Phul Chand v. Akbar Yar Khan (3), Sayed Mustafa v. Amina (4). The original authorities submitted will show that the whole waqf could not be set aside simply because an insignificant portion could be said to be unauthorized. The waqf was not bad either on the ground that it was illusory or upon the ground that the objects were not authorized by Muhammadan law.

Mr. Abdul Majid, replied.

Richards and Griffin, J.J.—The plaintiff in this suit seeks to set aside a waqfnama, dated the 2nd of November, 1902, executed by one Musammam Najibun, and for possession of a half share in property dealt with by the waqfnama, and for mesne profits.

(1) (1893) I. L. R., 21 All, 332. (3) (1896) I. L. R., 19 All, 212.
(2) (1892) I. L. R., 9 Cal., 170. (4) (1894) I. L. R., 512.
The plaintiff alleged that the execution of the deed was brought about by the undue influence of Kalb Hussain, that Najibian was insane when she executed the deed and that no valid endowment had been created (1) because the objects were not legal, and (2) because the endowment was illusory and really made for the benefit of Kalb Hussain and his brother Ataullah, the mutawallis appointed by the waqfnama. This appeal is closely connected with First Appeal No. 341 of 1906 decided on the 27th November 1908, and also with another First Appeal No. 340 of 1906, which it has been unnecessary for us to decide inasmuch as the parties compromised it. The evidence in all these cases was by consent read as evidence in each case. The two connected appeals Nos. 340 and 341 of 1906 arose out of suits to set aside a deed of sale, executed by Musammam Najibian on the 18th of February, 1903, in favour of Kalb Hussain on the grounds of the insanity of Musammam Najibian and the undue influence of Kalb Hussain. The case of the plaintiff, so far as the plea of insanity was concerned, completely failed, and we have given our reasons at length in First Appeal No. 341 of 1906 for holding that the case founded on undue influence has also failed. The court below decided in favour of the plaintiff in the connected cases on the ground that the transaction came under the provisions of section 16 of the Contract Act. But the present suit was dismissed, the court below being clearly of opinion that Najibian was not insane and that undue influence was not proved. We agree with the court below in this finding and we do not think it necessary to discuss the evidence, particularly as we have already dealt with it in our judgment in First Appeal No. 341 of 1906.

There remains the question of the validity of the waqfnama. In the court below this was certainly not the main ground of attack on the waqfnama, but it was raised by the pleadings and has been argued by Mr. Abdul Majid in support of the appeal. Najibian, it is clear from the evidence, was piously and charitably disposed for a number of years before her death. She had built an Imambara at a cost of several thousand rupees. She was in the habit of keeping tazias and distributing gifts of food in charity. Her expenses in these acts
of charity amounted to Rs. 1,000 or Rs. 1,200 a year. She took a special interest in these matters. Before her death she made a pilgrimage to Mecca and after her return she continued the same pious course of action. All this clearly appears from the evidence. The endowed property, which of course includes the imambara, is stated in the waqfnama to be worth Rs. 40,000. The landed property exclusive of the imambara is worth Rs. 30,000. It appears that the tenants were somewhat unruly and there was considerable amount of litigation in realizing the rents. Part of the landed property consisted of a share in an alluvial mahal, the income of which was subject to fluctuation. The waqfnama is to the following effect:

"Whereas there are 5 biswa zamindari share in 10 biswa patta sarth in the village Gargawan, pargana Aouli, and a parga newly built house used as Imambara No. 356, in Bareilly near the library, bounded as given below, worth Rs. 40,000, and I am up to this time in proprietary possession thereof without the participation of anyone, I have now in a sound state of body and mind without coercion and of my own accord made a waqf of the whole of the said property, i.e. 5 biswas of the village Gargawan and the house used as imambara together with all the original and appended rights, zamindari appurtenances, sur land, grous, collection houses, abadi, bazar (market), all the sexes items and waqfs, etc., including mahinka lands, for religious and charitable purposes subject to the following conditions and have appointed Kalb Husain, general attorney, and Ataullah, sons of Shibli Sanaullah, as mutawallis (superintendents) of the endowed property and put the said mutawallis in possession thereof like myself. I shall get mutation of names in respect of the said zamindari share duly effected in the revenue department (Court).

1. The said mutawallis should collect rent and every sum of money due in respect of the endowed property, and pay the Government revenue, the village expenses and the salaries of the servants and out of the remaining amount of net profits they should pay under their own management Rs. 200 annually for the expenses of maulid (birthday anniversary) of the last of the Prophets (may the mercy of God be upon him) and that of Ali Murtaza in the months of Rabbi-ul-Awwal and Ramzan respectively, Rs. 600 for the expenses of making offerings and keeping farsas in honour of the chief of the martyrs, namely, Imam Husain and Hasan (may peace be on them) in the month of Muharram, and Rs. 200 for the expenses of the death anniversary of the dead persons and the repairs of the Imambara.

2. The said mutawallis shall, in no case, have power to sell or mortgage the endowed property, nor shall the said property be liable to pay the debt due by the mutawallis or to be sold by auction.
pious and religious ceremony not restricted solely to the Shia sect. It may be that the mode of observing the ceremony differs in the case of each sect, but we are satisfied that in the present case the intention of the donor was to continue and perpetuate the religious ceremonies and charitable works in which she had been engaged during her life. The remaining Rs. 200 is appropriated to the death anniversaries (barsi ammat) and to the repairs of the Imambara. The latter is admittedly a legitimate object of waqf. The contention of the respondents is that the death anniversaries (barsi ammat) should be understood as meaning the death anniversaries of the members of Najibian's family, and we think that this is a reasonable interpretation to be put on the words. We have come to the conclusion, after considering the evidence and the arguments, that the waqf was not illusory and there was an intention of creating a substantial waqf for pious and charitable purposes, and we hold that the objects for which the waqf was created were valid. We therefore dismiss this appeal with costs.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Askman and Mr. Justice Karamat Husain.

EMPEROR v. GUTFALL.

Act No. XLY of 1865 (Indian Penal Code), section 302—Murder—Poisoning by Dhatura—Intention—Knowledge.

Dhatura was administered with the usual object of facilitating robbery, but in such quantity that the person to whom it was given died in the course of a few hours.

Held that the person so administering dhatura was rightly convicted under section 302 of the Indian Penal Code.

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

The Assistant Government Advocate, (Mr. W. K. Porter) for the Crown.

ASKMAN and KARAMAT HUSAIN, JJ.—The appellant Gutfall, alias Ajudhin, has been convicted of an offence punishable under section 302 of the Indian Penal Code and sentenced to transportation for life. He has also been convicted of an offence punishable...
under section 328 of the Indian Penal Code and sentenced to 10 years' rigorous imprisonment. The sentences have been ordered to run concurrently. We have read through the whole of the evidence and we see no reason whatever to doubt the prisoner's guilt. On the 29th of May last he attached himself to an old man Arjun and his grandson Ram Nath, who had gone to Mahaban to purchase an ox. He was previously unknown to them. He said that he was a Thakur of Chilikpurwa and that he too had come to buy an ox. He remained in their company from 2 or 3 gharis after sunrise until after noon. Both Arjun and his grandson partook of the food which the accused had procured. The accused pressed them to go to the village Karahra where he said he had seen some bullocks for sale. After going a short distance Arjun became ill and fell to the ground unconscious. He and his grandson were seen lying on the road that same evening. The grandson was dead. Arjun and the grandson were seen by the Hospital Assistant, who found in each case the pupils of the eyes dilated. When Arjun was found, he was seen to be plucking at the ground with his hands. The brain of Ram Nath was congested and in the opinion of the Hospital Assistant the congestion was probably caused by poison. Although no poison was found by the Chemical Examiner in the portion of the viscera of Ram Nath sent to him, we think that there can be little doubt that dhatura had been administered. When Arjun came to himself, he found that he had been robbed of his money and his grandson's ear-rings had been taken away.

The dhotis of both had also been taken away. At that time no trace was found of the person who had been in the company of Arjun and the deceased.

On the 19th of June two more men, Girdhari and Hallia, were joined by an utter stranger, who persuaded them to partake of food which he gave them. They both became unconscious. Before the accused could make off, some residents of Nathupura came up and had their suspicions aroused by what they saw. They arrested the accused as he was attempting to make off. He was taken to the police station and sent to the Hamirpur jail. There on the 1st of July he was picked out by Arjun from amongst a number of under trial prisoners as the man who had
been in his company for several hours on the 20th of May and had given him the food, after eating which he became unconscious and his grandson died. No reason is assigned to account for Arjun or the other witnesses falsely identifying the accused. The evidence of the Hospital Assistant and of the Chemical Examiner clearly proves that Girdhari and Hallia were drugged with dhatura. The prisoner called evidence to prove an alibi which we agree with the learned Judge in considering quite insufficient to shake the strong case for the prosecution. We see no reason to interfere with other conviction. Although death does not always follow from dhatura poisoning, yet it does follow in a considerable proportion of cases. Here the accused must have given dhatura to Ram Nath in such a large quantity as to result in his death within 3 or 4 hours. We consider therefore that although he may not have intended to kill Ram Nath, he must be held to have known that his act in giving a dangerous substance in such a quantity was at least likely to cause death. We find no reason for interference and dismiss the appeal.

[But see Emperor v. Bhagwan Din, I. L. R., 30 All., 565 —Ed.]

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

JHINGAI SINGH v RAM PANTAP.*

GIV, section 16—Order under section 145, Criminal Procedure Code—
Revision—Powers of High Court.

Where proceedings are in intention, in form and in fact proceeding
under Chapter XII of the Code of Criminal Procedure by a Magistrate duly
empowered to act under that chapter, the High Court has no power to
send for those proceedings either under the Code or under section 16 of the Indian
High Courts Act, 1861. Daulat Koer v. Ramswaro Koetri (1), Tara Khanday
Gosia (2) and Baldeo Rakh Singh v. Bai Ballam Singh (3) referred to.
Maharaj Tewari v. Har Charan Bai (4) followed.

* Criminal Revision No. 735 of 1908, from an order of D. T. X. Wright,
Magistrate 1st Class, of Mirzapur, dated the 21st July 1908.

(2) (1900) I. L. R., 24 Bom., 527. (4) (1903) I. L. R., 28 All., 144.
On the 7th of August 1901, one Mahadeo Singh executed a usufructuary mortgage of certain property belonging to him in favour of Jhingai Singh whereby he mortgaged his interest as Malik Adna in the holding. One Makhan Tiwari claimed to be the occupancy tenant of the same holding, and Ram Partap alleged himself to be the sub-tenant of Makhan. In a litigation between Makhan Tiwari and Jhingai Singh before the Subordinate Judge of Mirzapur, a compromise was filed on May 24th, 1905, whereby, subject to certain terms, Makhan Tiwari agreed to surrender possession of the holding to Jhingai Singh. Jhingai Singh obtained possession and executed a dakhalnama on the 28th of June 1905, in pursuance of the compromise decree. Subsequent to this Makhan Singh, on the 2nd of July 1905, executed a lease of the holding in favour of Ram Partap. Ram Partap filed a complaint under section 145 of the Code of Criminal Procedure in the court of the Magistrate of Mirzapur against Jhingai Singh. The Magistrate held that Ram Pratap was in actual possession. He did not refer to the proceedings in the Civil Court. Jhingai Singh made an application for revision to the High Court.

Babu Durga Charan Banerji, for the applicant, contended that a Magistrate was not justified in disregarding the decree of the Civil Court. It was his duty to uphold and carry out that decree so far as it lay in his power to do so. To take proceedings which necessarily must have the effect of cancelling such decree, was to assume a jurisdiction which the law did not contemplate. The Magistrate having acted without jurisdiction in going behind the judgment of the Civil Court, the High Court had power to interfere. He relied on Daulat Koer v. Rameswari Koeri (1), Baldeo Baksh Singh v. Raj Ballam Singh (2) and In re Pandurang Govind (3).

Dr. Taj Bahadur Sapru, for the opposite party, submitted that where an order under section 145 of the Code of Criminal Procedure existed and the proceedings were in substantial compliance with the requirements of the section, the High Court had no power in revision to interfere. He referred to the proceedings drawn up under section 145, Criminal Procedure Code, and cited


KNOX, J.—This is an application in revision asking this Court to call for the record and to revise an order passed under section 145 of the Code of Criminal Procedure on the ground that the magistrate who passed the order complained of refused to uphold an order passed by the Civil Court and decided the question before him contrary to that order. I have considered the following cases referred to by the learned advocate for the applicant:—Daulat Koer v. Rameswari Koer (5), In re Pandurang Govind (6) and Baldeo Baksh Singh v. Raj Ballon Sing (7) decided by this Court on 11th December 1903. But it has already been held by a Bench of the Court in Maharaj Tewari v. Har Charan Rai (8) that as the law at present stands where the proceedings below are in intention, in form and in fact proceedings under chapter XII of the Code of Criminal Procedure by a magistrate duly empowered to act under that chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861. It has not been shown to me that the proceedings before the learned magistrate were not proceedings under chapter XII of the Code or that he was not duly empowered to act under that chapter. According to the contention of the learned advocate it was after being properly seised of the case that the learned magistrate went out of his way, passed an order which he had no jurisdiction to pass, and that by it the learned advocate’s client has been debarred from all remedy and deprived of the fruits of the case won by him in the Civil Court. This may or may not be so. The fact remains that section 435 expressly excepts records of proceedings under chapter XII, and I know of no other Act or Statute which confers upon this Court the power of sending for such proceedings. The application is dismissed.

Application dismissed.

(1) Weekly Notes, 1907, p. 59. (5) (1839) I. L. R., 26 Cal., 625.
(2) Weekly Notes, 1907, p. 265. (6) (1900) I. L. R., 24 Bom., 527.
(3) Weekly Notes, 1907, p. 49. (7) (1903) 2 A. L. J. R., 274.
(4) (1903) I. L. R., 25 All., 144. (8) (1903) I. L. R., 26 All., 144.
Before Mr. Justice Richards and Mr. Justice Griffin.

KISHAN KUNWAR (plaintiff) v. GANGA PRASAD (defendant).

Civil Procedure Code, (1882), section 202—Procedure—Court not competent to alter judgment after delivery.

Where a District Judge wrote and delivered a judgment in a civil appeal, but suspended the issue of his decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment already delivered and to pronounce a second judgment inconsistent therewith.

The facts out of which this appeal arose are as follows:—

The defendant No. 1 executed a mortgage in favour of Makhan Lal, husband of the plaintiff, on 18th January 1901. Makhan Lal died leaving plaintiff as sole heir and representative. She brought this suit for sale on foot of the mortgage of the 18th of January 1901. The defendant No. 2 held a prior usufructuary mortgage as well as a subsequent mortgage over the same property. He pleaded that two sisters of the mortgagor were also owners of the mortgaged property and were necessary parties to the suit and that the plaintiff, being a mortgagee of the interest of defendant No. 1 alone, could not redeem his mortgage and bring the property to sale. In the court of first instance, the defendant No. 2 prayed for an adjournment, which was refused and the plaintiff’s suit was decreed. On appeal to the District Judge, he, on the 20th May 1903, delivered a judgment holding that there was no cause shown for an adjournment, and also deciding the other points against the defendant No. 2, but adding:—“I defer passing a decree in this appeal for two months in order to give plaintiff an opportunity of producing a succession certificate.” On the 25th May 1903, however, the District Judge passed an order remanding the case to the court of first instance on the ground that as the defendant No. 2’s prayer for an adjournment had not been granted, he had not had a sufficient opportunity of presenting his case. The plaintiff appealed.

The Hon’ble Pandit Sundar Lal, for the appellant, contended that the court below had no jurisdiction to go behind the judgment recorded by it on the 20th May 1903. Section 202 of the Code of Civil Procedure forbade the alteration of a judgment.

* First Appeal No. 83 of 1903, from an order of H. J. Bell, District Judge of Aligarh, dated the 25th of May 1903.
The Judge had simply deferred passing the decree, until a succession certificate was produced. He had no power to re-open the matter and deliver an altogether fresh judgment.

Dr. Satish Chandra Banerji (with him Babu Benoy K. Mukherji), for the respondent, submitted that the case was not finally disposed of on the 20th May 1908. It was still on the list of pending cases. No decree was framed on the basis of the writing dated the 20th May 1908. It was therefore not a 'judgment' within the meaning of the definition in section 2 of the Code.

The only judgment in the case was that dated the 25th May 1908. So long as a case was pending in a court, the court had seisin of it, and if it found that an opinion expressed by it at a former stage was erroneous, it could give effect to its reconsidered opinion when disposing of the case finally. Here the Judge himself stated that all the facts were not fully present before his mind on May 20th.

After an appellate court has expressed an opinion and remitted issues to the lower court, which records findings on those issues, the appellate court can re-open the case and decide it without reference to those findings. He referred to Lackman Prasad v. Jamna Prasad (1) and Amir Kazim v. Zainab Begam (2).

RICHARDS and GRIFFIN, JJ.—This was a suit on foot of a mortgage. The plaintiff’s mortgage was dated the 18th of January 1901. Defendant No. 1 was the executant of the mortgage. Defendant No. 2 held a prior mortgage from the same mortgagor. He also held a second mortgage from the same mortgagor and also alleged that he held a third mortgage from him. The court of first instance decreed the suit. Defendant No. 2 alone appealed. His grounds of appeal to the lower appellate court were that he had not had sufficient opportunity to present his case, and that he had applied to the court of first instance to adjourn the case, which that court refused to do. The matter having come up for trial to the lower appellate court, judgment was delivered on the 20th of May 1908. The court in the clearest possible way decided that defendant No. 2 had had sufficient opportunity in the court below. The judgment goes into the entire facts of the case. It deals with all

(1) (1887) I.L.R. 10 All. 193. (2) Weekly Notes, 1897, P. 152.
the objections of defendant No. 2. It was, however, necessary for the plaintiff before a decree could be passed in her favour that she should produce a certificate to collect debts as the heir of the original mortgagee. The concluding words of the judgment are— "following the course adopted by the High Court in Abdul Karim Khan v. Maqbul-un-nissa (1), I defer passing decree in this appeal for two months in order to give the plaintiff an opportunity of producing the certificate." This judgment is duly signed and dated, and it is impossible to read it without seeing that the Judge intended it to be a complete judgment. He merely deferred passing the decree for production of a certificate to collect debts. He did not even adjourn the case. Five days afterwards the court delivered a second judgment and made an order remanding the case to the court of first instance.

This judgment is inconsistent with the first judgment. According to the first judgment nothing remained to be done except to pass a decree. According to the second judgment the learned District Judge was to pass no decree at all but remanded the case to the court of first instance. Section 202 of the Code of Civil Procedure provides that as soon as a judgment is dated and signed by the Judge in open court it must not be altered or added to, save to correct verbal error or to supply some accidental defect not affecting a material part of the case, or on review. In view of these provisions of the Code, we think that the order of the Court below was illegal. We accordingly allow the appeal, set aside the order of the court below, and remand the case, directing the learned District Judge to deal with the case in accordance with his judgment of the 20th May 1908. The appellant will have his costs.

**Appeal decreed.**

(1) (1908 I. L. R., 30 All., 315.)
of one Baji Lal, who died on the 10th of August 1884. After his death, his widow, Musammat Parbati, was appointed guardian of the persons and property of the plaintiffs, who were then minors. An application was then made to the court for leave to sell a 5 anna 4 pie share in the village and a 7 anna 4 pie share in another village. The District Judge sanctioned this sale on the terms that the defendant No. 1 in this suit, Mani Ram, should give a clear receipt for all that was due to him. The consideration for the sale was to be Rs. 8,400. Instead of carrying out this sale, a sale of a totally different nature was made. The property sold was not the same property which the Judge did give permission to sell, and instead of the minors' getting a clear receipt for all debt that was due to Mani Ram, a sum of Rs. 1,000 only was placed to their credit. It would appear that Mani Ram and the defendants Nos. 2 and 3 had also a mortgage of a part of the property. This they foreclosed, although it was the intention of the sale which the Judge had permitted that the mortgage should be extinguished, at least so far as the minors and their property were concerned. This sale took place on the 28th of April 1886. The plaintiff No. 1 attained majority, according to the finding of the court below, more than 15 years before the institution of the present suit. The suit, however, was brought within three years of the plaintiff No. 2 attaining his majority. In the lower appellate court the suit was determined on the question of limitation, the learned Judge being of opinion that inasmuch as plaintiff No. 1 was of full age he was entitled "to give a discharge" within the meaning of section 8, Limitation Act, and that accordingly the right of plaintiff No. 2 was also barred.

Section 18 of Act XL of 1858 (which was in force at the date of the sale to Mani Ram) provided that no such person (i.e. the guardian) shall have power to sell or mortgage any immovable property, or to grant a lease of the estate for any period exceeding five years without an order of the civil court previously obtained. The sale which Musammat Parbati was induced to make was not in any sense the sale sanctioned by the District Judge. Section 30 of Act No. VIII of 1830 provides that the disposal of immovable property by a guardian in contravention of certain provisions of that Act is voidable. The older Act contains no
corresponding provision, and in our judgment the sale by Musamat Parbati was absolutely null and void. The only question accordingly that we have to decide is whether or not the plaintiffs are entitled to the benefit of the provisions contained in the last portion of section 8, Limitation Act, No. XV of 1877. That section provides as follows:—"When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." The cause of action in the present case unquestionably arose when the defendants took possession in 1886. Section 7 of the last-mentioned Act appears to apply to the case of a sale, plaintiff or applicant being under some disability or to the case of all plaintiffs or applicants being under disability. The section was so construed by a full Bench of the Madras High Court in the case of Periasami v. Krishna Ayyan (1) and accordingly plaintiffs cannot succeed unless they come under the provisions of section 8 and can show that neither of them was capable of giving a discharge without the concurrence of the other. It is a little difficult to understand the meaning of the expression when "a discharge can be given without the concurrence of such person," and we may note that the word "claimants" in section 8 has been omitted from the corresponding section of the new Limitation Act, No. IX of 1908.

As a member of a joint Hindu family, it is quite clear that the plaintiff No. 1 could not have sued alone to recover possession of the joint property. If his brother did not join as plaintiff, it would have been necessary for him to take advantage of the provisions of the Code of Civil Procedure and to make him a defendant. It is equally clear that the plaintiff No. 1 could not have sold or mortgaged the property without the concurrence of his brother plaintiff No. 2. One case cited was Vigneswara v. Bariya (2). That was a suit by two sons to set aside the sale on the ground that it was illegal as contravening the provisions of section 90, Transfer of Property Act. The suit was clearly

not brought in time so far as one of the plaintiffs was concerned and the court decided that the claim of the other brother was also barred, apparently upon the ground that the elder brother could have sued and compromised the suit. It was argued that the elder brother, if he did sue, could not have compromised the suit. The learned Judges pointed out that the elder brother could have sued making his younger brother a co-plaintiff and then compromised the suit with the sanction of the court. It seems to us that the very fact that it would be necessary to obtain leave of the court shows that the elder brother could not have given a good discharge without the concurrence of his brother within the meaning of the section. It is further argued in the present case that the plaintiff No. 1 must be deemed to be the managing member of the family who would have a right to give a discharge. The powers of the manager of a Hindu family are undoubtedly very extensive, but there is nothing in the present case to show that the plaintiff No. 1 ever acted as the manager. In the present case all that he did was to remain quite inactive without taking any step to recover possession of the property or to set aside the transaction which was completely against the interest of himself and his minor brother. On the whole we have come to the conclusion that the plaintiff No. 1 was not capable of giving a discharge without the concurrence of plaintiff No. 2 within the meaning of section 8 of Act XV of 1877. The consequence is that time did not run against either of the plaintiffs and the suit is maintainable. As the case was decided on a preliminary point by the lower appellate court, we allow the appeal, set aside the decree of the court below and remand the case for disposal of the other issues. Costs here and hitherto will abide the result.

Appeal decreed and cause remanded.
Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GAJADHAR AND ANOTHER (DEFENDANTS) v. KAUNSILLA (PLAINTIFF).

Hindu law—Hindu widow—Maintenance—Remarriage of widow—Act No. XV of 1856.

During the lifetime of her husband the wife of a Hindu obtained a decree for maintenance against him, and the payment of this maintenance was by the decree made a charge on certain property which had been of the husband, but was then in the hands of certain donees from him. The husband died, and the widow, being permitted to do so by the rules of her caste (Halwati), married again.


The facts of this case are as follows:—

The plaintiff, Musammat Kaunsilla, had on September 6, 1881, obtained a decree in a suit for maintenance brought by her against her husband and certain other persons to whom her husband had sold or gifted his property.

The material part of the decree was as follows:—

"It is accordingly decreed that the plaintiff do obtain a maintenance of Rs 5 a month and Rs. 150 as arrears up to the date of suit; that she do recover the said amount of maintenance and arrears from the defendant No. 1 and from the two houses in suit; that she be declared entitled to reside in that portion of the house No. 1 which is not in the occupation of Salig Ram, tenant, and the deed of gift and the sale-deed, so far as they affect the plaintiff's right of maintenance and residence, be declared void."

The husband died some time after this, and the transferees continued paying the maintenance. In 1902, however, Musammat Kaunsilla, who was then a widow, according to a custom recognised in her caste (Halwati) remarried, and the transferees of her husband then stopped the allowance. She, thereupon, brought the present suit against the defendants for arrears of maintenance. The court of first instance (Munsif of Allahabad)

*Appeal No. 33 of 1908, under section 10 of the Letters Patent.

(1) (1891) I. L. R. 19 Cal., 259.
(2) (1895) I. L. R. 22 Cal., 533.
(3) (1896) I. L. R. 22 Bom., 321.
(4) (1899) I. L. R. 24 Bom., 69.
(5) (1877) I. L. R., 1 Mad., 226.
(6) (1892) I. L. R. 11 All., 330.
(7) Weekly Notes, 1893, 78.
(8) (1898) I. L. R., 29 All., 473.
decreed the claim. The lower appellate court (Small Cause Court Judge with powers of a Subordinate Judge) modified the decree by dismissing the claim in respect of that portion of the arrear which had accrued due since the date of remarriage.


The Hon'ble Pandit Sundar Lal (with him Babu Durga Charan Banerji), for the appellants contended that according to Hindu conception marriage is a sacrament. Its object is to unite the husband and wife and to transfer the latter into the gatra of the former so that the two persons become one person. When the husband dies he is considered as surviving in the wife. She gets maintenance as the wife or widow, as the case may be, of the person to whom she was married. If she does some act whereby a change occurs in her status as such, the right to get maintenance also comes to an end. Remarriage, it is submitted, is one of such acts being, as it is, a complete severance of her connection with the family of her husband. According to the doctrine of Hindu law it is civil death, and its effect upon the right to get maintenance is the same as if she were actually dead. The decree that was given to her was in her capacity as the wife of her husband, and when she ceased to be that wife her right also ceased. As the widow of her former husband she would get maintenance, but that character also is lost when she remarries. The right to receive maintenance being a recurring right, subsequent conduct although not positive unchastity, would entail its forfeiture. As authority for this position reliance was placed upon West and Bühler's Hindu Law, 2nd edition, Vol. II, p. 999.

The Act XV of 1856 only legalised remarriage of widows, but does not take into consideration the consequences that would arise from such remarriage. The general principles of Hindu law would apply. Murugyi v. Piramakali (1).

The cases in this High Court as to the effect of the Act have not been approved of by the other High Courts, and there is a

(1) (1877) I. L. R., 1 Mad., 225.
catena of authorities, Full Bench and other authorities. Reliance was also placed upon the remarks of \textit{Ranade, J.}, in \textit{Pun. chappa v. Sunganbasama} (1).

The ground on which the obligation to pay maintenance rests is, in the case of the husband, moral and, in that of the father-in-law who has property of the husband in his hands, legal. That being the correct principle, it is submitted that the right and the relationship are co-ordinate: with the cessation of the one, the other also goes. Reliance was placed, besides the cases cited in the judgment, upon \textit{Surampalli Bangaramma v. Surampalli Bramhaze} (2).

In the present case, the second husband is the person under obligation to maintain his wife, by reason of the connection. The former husband and the person deriving title through him are absolved, as the plaintiff cannot be regarded either the wife or the widow of her former husband.

Babu Sital Prasad Ghose (with him Babu Mangal Prasad Bhargava), for the respondent.

The case has been argued on the supposition of those cases which relate to the three higher castes among whom marriage is a sacrament. The parties are \textit{Halwais}, and that strict view of the marriage tie does not prevail among them. Remarriage is sanctioned by custom among them. Further, a court of justice has declared the plaintiff's right to receive maintenance and made it a charge upon the property. Unless something in the texts or in decided cases is shown limiting or extinguishing this right, she cannot be deprived of it.

[He read from p. 95 in \textit{I. L. R.}, 21 Bom, and submitted that the case was no authority for the particular point.]

In the absence of such authority what the appellants can invoke in aid of their position is the text of \textit{Narada}, in which the only case which will entail the forfeiture of the right of maintenance is that of the wife's not "keeping unsullied the bed of her lord." In the caste to which the parties belong it cannot be said that by remarriage the widow has not kept the bed of her lord unsullied, remarriage being lawful among them. The case in \textit{I. L. R.}, 1 Mad., 226, has no bearing. There being a decree

of court the fact of her remarrying will not nullify it, unless the
decree so provided.

The Hon'ble Pandit Sundar Lal replied.

BANERJI, J.—The question in this appeal is whether a
Hindu widow, who according to the custom of her case is
allowed to re-marry, forfeits upon remarriage her right to the
maintenance decreed to her against the estate of her first
husband.

The plaintiff, Musammat Kaunsilla, belongs to the caste of
Halwais or confectioners. She was first married to one Sahtu and
in 1881 brought a suit against him and transferees from him for
her maintenance. On the 6th of September 1881 a decree was
passed in her favour fixing Rs. 5 a month as her maintenance,
which was declared to be a charge on the estate of her husband
in the possession of certain donees from him. The husband died
subsequently, but the transferees of the property continued to pay
her the maintenance decreed to her. In 1905 she married a
second time and thereupon the defendants who are in possession
of the property refused to pay the maintenance. She accordingly
brought the present suit for recovery of arrears of maintenance
by sale of her first husband’s property now in the hands of the
defendants. It has been found that according to the custom of
the caste to which she belongs remarriage is permissible and is
valid. The defendants contended that by marrying a second
time she forfeited her right to maintenance. The court of first
instance decreed her claim in part. The lower appellate court
set aside that decree and dismissed her suit. Upon second
appeal to this court the learned Judge who heard it reversed
the decree of the lower appellate court and restored that of the
court of first instance. From his judgment this appeal has been
preferred under the Letters Patent. It is urged on behalf of
the appellants that Act No. XV of 1856 applies to the case and
that under section 2 of the Act the plaintiff by marrying a
second time forfeited her right to maintenance from the estate
of her first husband. It is also contended that remarriage dis-
solves the relationship between the widow and the family of her
first husband and as the right to maintenance is founded on rela-
tionship, it ceases as soon as the relationship is put an end to by
remarriage. In support of these contentions the learned Advocate for the appellants relied on the rulings of the Calcutta High Court in Mutungini Gupta v. Ram Rutton Roy (1) and Rasul Jehan Begam v. Ram Surun Singh (2); of the Bombay High Court in Vithe v. Govinda (3) and Panchappa v. Sunganbaswa (4) and of the Madras High Court in Murugayi v. Viramakali (5). He also referred to West and Buhler's Hindu Law, Vol. II, p. 999.

Had the question not been concluded by the rulings of this court I should be inclined to accede to the contentions of Pandit Sundar Lal. But as the course of rulings in this court has been uniform, I feel myself bound by those rulings whatever my personal opinion may be. In Har Saran Das v. Nandi (6) it was held by Straight and Brodhurst, JJ., that a widow belonging to the sweeper caste, in which there was no obstacle against the remarriage of widows, did not by marrying again forfeit her interest in the property left by her first husband and that Act No. XV of 1856 did not apply to the case of such a widow. A similar view was held by Straight and Tyrrell, JJ., in Dharam Das v. Nand Lal Singh (7), which was the case of a widow belonging to the Ahir caste. In the case of a widow of the Kurni caste, Ranjit v. Radha Rani (8), Blair and Airman, JJ., followed the above rulings and observed:—"Several unreported cases have all been decided in this court in the same way. We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent curtes curiae in this court." According to these rulings not only is Act No. XV of 1856 inapplicable in the case of a widow who is permitted by the custom of her caste to remarry, but she does not forfeit the property inherited by her from her first husband. The effect of these rulings, therefore, is that the relationship with the family of her first husband does not come to an end, and she does not by remarrying forfeit her right to maintenance. Unchastity may entail a forfeiture of her right to maintenance, but it cannot be said that a widow who has married again has thereby become unchaste. I may observe that Mr. Sundar Lal has not based his contention on this ground.

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mortgaged is a five-biswa share in the village Meadi Khurd. A
two-biswa share in that village had been mortgaged to one Ghumi
Mal by Piare Lal on the 6th of January, 1890. To this mortgage
Shib Lal, the father of Har Prasad, defendant, was also a party.
Har Prasad, who was added as a defendant, contended that he
had discharged the debt due on the aforesaid mortgage and had
thereby acquired a prior charge on the two biswa share of Piare
Lal mortgaged to Ghumi Mal and that the plaintiffs were bound
to pay the amount which he, Har Prasad, had paid to Ghumi
Mal before they could bring to sale a two-biswa share of the
village Meadi Khurd. This contention was overruled by the
court below on two grounds: first that if Har Prasad discharged
the prior mortgage he did not thereby acquire a charge on the
property of Piare Lal; and second that even if he acquired a
charge he could not enforce it against the plaintiffs, who were
puisne mortgagees. The correctness of these findings is impugned
in this appeal which was brought by Har Prasad.

The lower court’s view that a mortgagor, who discharges a
simple mortgage, does not thereby acquire a charge on the pro-
erty of his co-mortgagor comprised in the mortgage for a rate-
able share of the debt, is clearly erroneous. By virtue of the
provisions of sections 82 and 100 of the Transfer of Property
Act a charge is acquired by a co-mortgagor redeeming a mortgage.
This was held in Bhagwan Das v. Har Dei (1). If therefore
Har Prasad, who upon the death of his father, Shib Lal, became
the co-mortgagor of Piare Lal in respect of the mortgage of the
6th of January, 1890, discharged that mortgage, he acquired a
right to obtain contribution from Piare Lal and a charge for
the amount of the contribution on Piare Lal’s two-biswa share.

The next question is whether this charge can take priority
over the plaintiffs’ mortgage. No doubt the charge could be in-
existence when the mortgage was paid off, but as the person
who acquired the charge had discharged a prior mortgage, he
acquired we think priority over an intermediate puisne mort-
gagor. There can be no doubt that a subsequent mortgagee or
the purchaser of the equity of redemption who pays off a prior
mortgage, acquires, on equitable grounds, priority over a puisne

(1) (1902) I. L. R., 29 All., 227.
mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt he discharges, a co-mortgagor is equally subrogated.

It was held by this Court in Pancham Singh v. Ali Ahmad (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee.

The same rule is applied by the courts in America. It is thus stated in Jones on Mortgages, Vol. I, para. 877:—“When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances . . . . . . In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it.” In the present case Har Prasad, who was one of the mortgagors, was entitled to redeem Ghumi Mal, but he was under no obligation as between himself and Piaro Lal to pay the latter’s share of the debt. He could not redeem the mortgage piecemeal and was therefore bound to pay the whole amount of the mortgage. If he paid that amount he was by such payment subrogated to the rights of the mortgagee and was entitled to priority over the subsequent mortgagees, who appear from their mortgage deed to be the sons of the prior mortgagee whose prior mortgage is mentioned in that deed. We have not been referred to any authority in support of the view of the learned Subordinate Judge. For the reasons

(1) (1881) I. L. R., 4 All., 53.
stated above we hold that if Har Prasad discharged the mortgage of the 6th of January, 1890, he acquired priority over the plaintiffs, as regards two biswas of Meadi Khurd, to the extent of the proportionate liability of that property for the mortgage debt. The court below has not found whether he has paid off that debt, and, if he has done so, what is the proportionate amount of liability of the aforesaid share for that debt. We accordingly refer the following issue to that court under the provisions of section 566 of the Code of Civil Procedure:—

Did Har Prasad pay the amount due upon the mortgage of the 6th of January, 1890, and if so, for what portion of that amount was the two-biswa share of the village Meadi Khurd comprised in that mortgage proportionately liable?

The court below will take such additional evidence relevant to the above issue as may be necessary. On receipt of its findings ten days will be allowed for filing objections,

Cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HAMID-UN-NISSA BIBI, (PLAINTIFF) v. NAZIR-UN-NISSA AND ANOTHER (DEFENDANTS).

Act No. IV of 1882 (Transfer of Property Act, section 53—Transfer with intent to defeat or delay creditors—Muhammadan law—Transfer by Muhammadan to one of his wives with intent to defeat claim of the other for dower.

A few days after the institution of a suit against him by his first wife for recovery of her dower, a Muhammadan, who had two wives, transferred the bulk of his property to his second wife in satisfaction of her claim for dower. Held, on suit by the first wife to have the transfer above mentioned set aside, that such transfer was not necessarily unassailable, but that it was necessary to find, first, that the transfer was a real, and not merely a colourable transaction; and, secondly, that the second wife had not combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claim of the first wife.

The facts out of which this appeal arose are as follows:—


---

* Second Appeal No. 1324 of 1907, from a decree of C. Rustomjeer, District Judge of Allahabad, dated the 3rd June 1907, confirming a decree of Raj Nath Bahadur, Subordinate Judge of Allahabad, dated the 16th of May, 1906.
filed a suit against Ali Jawad for the recovery of her dower debt. On the 6th December 1904, Ali Jawad transferred substantially the whole of his property to his second wife Nazir-un-nissa. On the 22nd of February 1905 Hamid-un-nissa in her suit for dower obtained a decree for Rs. 5,000 and proceeded to execute her decree by attachment of property which was the subject of Ali Jawad's gift to his second wife. Nazir-un-nissa successfully objected to the execution of her co-wife's decree, and in consequence the present suit was brought for a declaration that the transfer of his property by Ali Jawad to Nazir-un-nissa was void. The Court of first instance (Subordinate Judge of Allahabad) dismissed the suit, and this decree was on appeal confirmed by the District Judge, mainly with reference to the following cases: Suba Bibi v. Balgobind Das (1), Khodija Bibi v. Shah Muhammad Zaki Alam (2) and Umrao Singh v. Kaniz Fatima (3). The plaintiff appealed to the High Court.

Mr. Abdul Majid, for the appellant.

Dr. Tej Bahadur Sapru, for the respondent.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit brought by the first wife of the defendant Ali Jawad for a declaration that a transfer made by him on the 6th of December, 1904 substantially of all his property in favour of his second wife was void against her. It appears that the appellant, Hamid-un-nissa Bibi, demanded her dower from her husband and instituted a suit for the recovery of it on the 1st of December 1904. Five days after the institution of this suit Ali Jawad made the transfer which is impeached in this suit. On the 22nd of February 1905 the plaintiff appellant obtained a decree for her dower amounting to Rs. 5,000, and forthwith proceeded to execute her decree. She was resisted by the defendant respondent, Musammam Nazir-un-nissa, and in consequence the suit out of which this appeal has arisen was instituted.

The court of first instance dismissed the plaintiff's claim.

Upon appeal the learned District Judge affirmed the decision of the court below.

(1) (1880) I. L. B. 8 All., 1:78
(2) Weekly Notes, 1901, p. 61.
Weekly Notes, 1901, p. 67.
The main ground of that appeal was that the deed of transfer in question was a collusive and fictitious document, and that the dower of the defendant was only 500 dirhams and not, as she alleged, Rs. 20,000. As regard the amount of the dower both courts find that the dower of the defendant, Nazir-un-nissa was Rs. 20,000, but the learned District Judge finds that the impeached deed of transfer was undoubtedly a device on the part of Ali Jawad to deprive his first wife of the fruits of her victory in her suit for dower. He refers to a number of authorities and observes:—“Taking the trend of all these rulings I am of opinion that the deed of gift cannot be looked upon as a fraudulent transaction.” He then says:—“At the time of the gift the dower of the second wife was still due to her and constituted a valid debt in payment of which he could under the law make a valid gift of all his property to her;” and then he observes:—“I must therefore hold that in law the transaction is unimpeachable.” Now it may be true that a transfer by Ali Jawad to his second wife of all his property in satisfaction of her dower may be a valid and unimpeachable transaction, but that is not the sole question for determination. Having found that the transfer to his second wife was made by Ali Jawad for the purpose of defeating his first wife’s claim and depriving her of the fruits of her successful litigation, it was necessary for the learned District Judge to determine whether or not the second wife was a party to the improper conduct of her husband. In other words whether or not she combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claims of the first wife. If she did so combine, she would not be a transferee in good faith. It was further alleged that there was in reality no real and genuine transfer by the husband to his second wife. Before therefore we can determine this appeal we must have definite findings upon the following two issues:—

(1) Whether the transfer of the 6th of December 1901, was a real transaction or merely colourable?

(2) Was the defendant Nazir-un-nissa a transferee of the property comprised in that transfer in good faith?
We refer the above issue to the learned District Judge under order 41, rule 25, Civil Procedure Code. These issues he will determine upon the evidence already before him. On return of the findings the parties will have the usual ten days for filing objections.

Issues remitted.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Banerji.
HAM KUMAR SINGH (Defendant) v. ALI HUSAIN AND OTHERS
(Plaintiffs)

Suit for damages against joint tort feasors—Compromise between plaintiff and one of the defendant—such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. Held that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. Brumme v. Harrison (1) and Thurman v. Wild (2) referred to.

This was an appeal under section 10 of the Letters Patent from a judgment of Richards, J. The facts are stated in the judg-

fore the institution of the present suit criminal proceedings had been commenced against some 12 persons, with the result that 8 out of 12 were convicted. The criminal proceedings were followed by the present proceedings in the Civil Court for damages against the same 12 persons. Before the suit was tried one of the four persons who had been acquitted by the Criminal Court entered into a compromise with the plaintiff. The suit then proceeded against the remaining defendants, with the result that a decree was given against the same 8 persons who had been convicted by the Criminal Court. The only plea argued in the present appeal is that the compromise by one of the defendants, to which I have referred above, barred the plaintiff’s right to a decree against the other defendants or any of them. The appellant relies upon Pollock on Torts, 7th edition, p. 194.

*Appeal No 45 of 1908 under section 10 of the Letters Patent.

He also cites the case of Brinsmead v. Harrison (1) in which it was held that a judgment recovered against one of several joint tort-feasors is a bar to an action against the others for the same cause. It is contended that the compromise is analogous and equivalent to the recovery of a judgment. In my opinion this contention is not correct. The principle on which the case of Brinsmead v. Harrison was decided was that the plaintiff’s cause of action had merged in the judgment on the principle of transit in rem judicatam. In my opinion there is no force in this ground of appeal which is the only ground pressed. It must also be remembered that the compromise was confined to the particular defendant with whom it was made. I accordingly dismiss the appeal with costs.

"The objections under section 561 of the Code of Civil Procedure cannot be sustained and are dismissed with costs."

The same defendant appealed. On this appeal—

Babu Satya Chandra Mukerji for the appellants, contended that, since the plaintiff had accepted Rs. 25 from one of the defendants and had exempted him, he could not maintain his claim against the other defendants. The act of the plaintiff amounted to a release of the other defendants. He cited Underhill on Torts, pp. 112 & 113, Pollock on Torts, 7th edition, p. 194, Brinsmead v. Harrison (1) and Thurman v. Wild (2).

Mr. Muhammad Ishaq Khan, for the respondent, was not called upon.

STANLEY, C.J. and BANERJI, J.—The circumstances under which this appeal has arisen are as follows. The plaintiff, Sheikh Ali Husain, was mercilessly beaten by some persons including some of the defendants in this suit. Thirteen persons were prosecuted for this assault, with the result that eight were convicted. After the conviction of these parties the plaintiff instituted the suit out of which this appeal has arisen for damages for the injuries sustained by him at the hands of his assailants. He claimed a sum of Rs. 325. Amongst the defendants were the 3 persons who were convicted of the assault. During the progress of the case one of the defendants admitted that the assault had been.

(1) (1872) L. R. 7 C. P. 447.  (2) (1840) 11 A and E. 463.
committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff's claim against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff's claim against the other defendants could not be sustained. Reliance was placed upon the leading case of Brinsmead v. Harrison (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of Brinsmead v. Harrison, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit.

(1) (1872) L. R. 7 C. P. 517.
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that the person to whom it was given died in the course of a few hours.

_Held_ that the person so administering drinakara was rightly convicted under section 302 of the Indian Penal Code.

_Emporer v. Gutah, I. L. R., 31 All_,...


_Ganga Dayal v. Mani Ram, I. L. R., 31 All_,...

Plan, who had two wives, transferred the bulk of his property to his second wife in satisfaction of her claim for dower. _Held_, on suit by the first wife to have the transfer above mentioned set aside, that such transfer was not necessarily unimpeachable, but that it was necessary to find, first, that the transfer was a real, and not merely a colourable transaction; and, secondly, that the second wife had not combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claim of the first wife.

_Hamid-un-nisa v. Nazir-un-nisa, I. L. R., 31 All_,...

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e of the other co-mortgagors. _Dhagan Das v. Har Dev, I. L. R., 22 All., 257, and Prachan Singh v. All Abram, I. L. R., 4 All., 29 referred to._

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place in contravention of section 99 of the Transfer of Property Act and was void.

Richards and Griffin, JJ.—It appears that the decree-holders held a mortgage decree as well as a simple money decree against the same judgment-debtors. An application was made for the attachment and sale of the mortgage property in execution of the money decree. The property was attached, but no sale took place. The decree-holders then applied to sell the property in execution of the mortgage decree, which was a decree absolute for sale of the mortgaged property. While these proceedings were pending and before the sale was held, the court was asked to sell the property for the realization of the amounts of both the decrees. The property was then sold and was purchased by the appellant, who was not a party to either of the decrees. An application was then made by the judgment-debtors to set aside the sale. The court below was of opinion that the sale was null and void on account of the order for sale to realize the amount of both the decrees. The court below seems to have been of opinion that the provisions of section 99 of the Transfer of Property Act were contravened, and refused to confirm the sale, without deciding the other grounds of objection put forward by the judgment-debtors. Hence the present appeal. It seems to us that the court below did not realize that there had been a decree absolute for the sale of the mortgaged property. Section 99 of the Transfer of Property Act is as follows:

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43."

In the present case the decree-holder had instituted a suit under section 67. In our opinion there was nothing irregular in selling the property for the amounts of the two decrees. Mr. Sundar Lal who appears for the respondent has been unable to cite any authority for the proposition that such sale is irregular. We allow this appeal, set aside the order of the court below, and remand the case under the provisions of section 562 of the C.-
of Civil Procedure, for determination of the remaining objections. The appellant will have his costs of this appeal. Other costs will be dealt with by the court hearing the appeal.

Appeal allowed and cause remanded.

PRIVY COUNCIL

KISHORI LAL, (DEFENDANT) v. CHUNNI LAL (PLAINTIFF).
and another appeal consolidated.

[On appeal from the High Court at Allahabad].

Evidence—Proof of adoption—Illiterate pardanashin widow lady—Non-appearance of plaintiff in Court as witness—Absence of any account of expenditure on ceremony—Mode of carrying on business—Inability to give date of adoption—Inconsistent and contradictory evidence—Practice for each litigant to cause his opponent to be cited as a witness.

Where the question on an appeal was whether his claim to be the adopted son of an illiterate pardanashin widow lady had been established by the respondent, who lived in her house and was the manager of her business consisting mostly of “zamindari and money dealings,” and on whom the burden of proof rested.

Held by the Judicial Committee (reversing the decision of the High Court) that having regard to the contradiction between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent’s story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; the absence of all reference to the date of the adoption; and above all the non-production of any account of expenditure at the ceremony, which, if his witnesses spoke the truth, must have been notorious in the neighbourhood where it took place, the respondent had failed to discharge the burden of proof which lay upon him, and had not established his claim.

The practice common in litigation in the United Provinces in India for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client, disapproved of by their Lordships of the Judicial Committee as resulting in the embarrassment of litigation, and as being a practice which judicial tribunals ought to set themselves to render as abortive as it is objectionable.

Two appeals, 48 and 47 of 1907, consolidated from a judgment and decrees (12th July 1904) of the High Court of Judicature at

* Present:—Lord MacFAGHTEN, Lord ATKINSON, Sir Andrew SCOTT, and Sir ARTHUR WILSON.
Allahabad, which reversed a judgment and decree (7th February 1902) of the Court of the Subordinate Judge of Aligarh.

The principal question raised on these appeals was whether the respondent Chunni Lal was validly adopted by a lady named Musammat Lachchho as son to her husband Dwarka Das.

The facts of the case are sufficiently stated in their Lordships' judgment.

Chunni Lal from 1891 until July 1899 used to manage the lady's business which consisted largely of "zamindari and money dealings." On 29th July 1899 Musammat Lachchho executed a deed of endowment of certain property, and two powers of attorney to enable mutation of names to be made of the endowed property. In these documents Chunni Lal also entered his own name as her adopted son. The deed of endowment was registered and in consequence publicity was given to the claim advanced by Chunni Lal. His adoption was immediately challenged by the appellant Kishori Lal, a revermarer to the estate of Dwarka Das, expectant on the death of his widow, who on 22nd September 1899 instituted a suit (out of which arose appeal 47 of 1907) against Musammat Lachchho and Chunni Lal, mainly for a declaration that the latter had not been validly adopted.

In defence Chunni Lal filed a written statement in which he alleged a formal adoption in the year 1877 made with the permission of Dwarka Das, and also pleaded a custom validating an adoption by the widow of a Bohra Brahmin even without her husband's authority. On 19th March 1800 a written statement was filed purporting to be the written statement of Musammat Lachchho. She obtained information of this some months later and on 29th December 1900 presented a petition repudiating the written statement already filed and denying that she had anything to do with it. On 2nd January 1901 she filed a written statement in which she denied that she had ever adopted Chunni Lal, that her husband had ever given her authority to adopt, and that the Bohra Brahmins were governed by a custom which validated an adoption without authority from the husband.

On 24th December 1900 the suit out of which arose appeal 46 of 1907 was instituted by Chunni Lal against Musammat Lachchho for a declaration of the validity of his adoption and for
possession of the estate of Dwarka Das; and to that suit Kishori Lal was added as a defendant. Both defendants denied that the adoption had ever been made.

The two cases were heard together.

The Subordinate Judge decided that Chunni Lal had not been adopted in fact; that Dwarka Das had not given any authority to adopt; and that the custom set up was not proved. He was of opinion that Chunni Lal and his father Maya Ram, were only karindas (agents) of Musammat Lauchhe, who had all along held possession of the estate. In accordance with these findings he made decrees granting Kishori Lal the relief claimed by him, and dismissing Chunni Lal’s suit with costs.

Chunni Lal appealed from both decrees to the High Court and the appeals were heard by Sir J. Stanley, C. J., and Burkitt, J., who came to the conclusion that Dwarka Das had given his wife authority to adopt and that she had in pursuance of that authority validly adopted Chunni Lal, and as a result decrees were made reversing the decrees of the Subordinate Judge, dismissing the suit of Kishori Lal, and granting Chunni Lal possession of the property in suit.

In the course of their judgment the High Court made the following remarks which are alluded to by their Lordships of the Judicial Committee:

"The learned Subordinate Judge comments upon the fact that Chunni Lal himself did not come into the witness box. In this case a most objectionable practice which has become prevalent in these Provinces was adopted by the defendants. It has become a not uncommon practice for a plaintiff or defendant, as the case may be, to summon as his or her witness the opposite party. What is the object of avoiding it is difficult to see, unless it be to lead the opposite party to keep out of the witness box until the case for his adversary is opened. Such a practice is obviously objectionable. A party should have the opportunity of presenting his case to the court in whatever way he may consider most favourable. This he cannot well do if he is first subjected to what amounts to a cross-examination at the hands of the pleader of the opposite party. There is also this danger that a witness so summoned may not be called at all, and so his case having already closed he is deprived of the benefit of his evidence unless the court permit his examination at that stage of the case. In the present case Chunni Lal though summoned by the opposite party was not called as a witness. We should always under such circumstances be disposed before determining an appeal to direct the examination of a party who has been so summoned and not called as a witness and whose evidence might be most material. We should have done so in the
present case; but for the fact that we are abundantly satisfied upon the evidence which has been adduced as to the side upon which truth lies. We therefore have not thought fit to put the parties to the delay and expense which would be consequent upon an adjournment of the case."

And after a full examination of the whole of the evidence in the case they concluded their judgment in the following terms:

"We have then the following facts, as it seems to us, clearly established, namely, that Chunni Lal lived with Musammamat Lachchho from the time of the alleged adoption, that his marriage and jance expenses were defrayed at the expense of Musammamat Lachchho, that the dasahau ceremony of his son was likewise defrayed at her expense; that as adopted son he was appointed her sarababbar in 1891, that in some suits and bonds he is described as adopted son, that he has been managing her property since the death of his brother Deokaran, that he took part in the ceremonies connected with the dedication of the temple at Suron and in the pole ceremony two years later on, and that in the tambhekauma by which the temple was endowed there is an express recital of his adoption and of the permission given by Dwarka Das to Musammamat Lachchho to adopt. In addition to all these matters we have the evidence of a great number of respectable and well-to-do persons, caste fellows and others, who testify to the fact of the adoption, and amongst others, Kashi Ram, the uncle of Chunni Lal, who is himself a reversionary heir of Dwarka Das, on the same level with Kishori Lal. This evidence appears to us to be overwhelming and decisive. It outweighs any inference which might be drawn from the fact that Chunni Lal was known by some persons at all events as the son of Maya Ram and, was not known to have been adopted as a son of Dwarka Das, and from the fact that upon adoption mutation of names was not effected in his favour, but the property left in the ostensible ownership of Musammamat Lachchho. The desire to have a son in the case of a Hindu is strong, and it is highly probable that Dwarka Das, who had married a young wife, no doubt in the hope of having a son, when he was disappointed in this hope would have given permission to his wives to adopt. The delay in carrying out the adoption does not appear to us unnatural as the learned Subordinate Judge seems to suppose. Musammamat Lachchho, a young woman, might not unnaturally desire to retain control of her husband’s property as long as possible and no inference unfavourable to the adoption can be drawn from the fact that she delayed the adoption for so many years. We are inclined to think that the key to this litigation is to be found in the answer already mentioned which Musammamat Lachchho gave to a question in cross-examination and that answer is — ‘Chunni Lal has acted against my wishes and I can tell him this to his face.’ Evidently there was a quarrel between them, and Musammamat Lachchho, who is illiterate and probably not an over conscientious or truthful woman, judging from her evidence, determined to undo what she had done and repudiate the adoption. Possibly she thought that after the lapse of so many years Chunni Lal would not be able to procure satisfactory evidence of it."
On these appeals

De Greyther, K.C. and B. Dube, for the appellant contended that on the evidence the adoption of the respondent by Musammat Lachchhoo was not proved. They pointed out that up to the year 1888 there was no trace to be found in any document of the adoption alleged. Musammat Lachchhoo had remained in possession of the estate, and was still in possession; her name had remained recorded as owner notwithstanding the alleged adoption, and still appeared as owner in the Collector's registers; and the business continued to be carried on in her name and for her benefit. The first mention of an adoption was to be found in a bond dated 16th June 1888 which purported to have been executed in favour of Musammat Lachchhoo and "of Chunnai Lal her adopted son". This was followed on 17th December 1890 by three similar bonds executed in renewal of bonds in favour of Musammat Lachchhoo alone, being a date subsequent to the year of the alleged adoption. In later years there were a few other transactions of the same nature; and attention was called to the fact that as Chunnai Lal, his father Maya Ram, and his brother Dookaran were managing the business for Musammat Lachchhoo they could at any time have obtained the insertion of Chunnai Lal's name in certain renewed bonds without either her knowledge or consent; and it was in evidence that that was so in the case of the deed of endowment from the registration of which she first came to know that Chunnai Lal claimed to be her adopted son. It was also the case that on every occasion from 1892 to 4th March 1899 when Chunnai Lal had to give his parentage in public he invariably described himself as the son of Maya Ram, whereas if he had been in fact adopted he would have described himself as the son of Dwarka Das. Chunnai Lal himself had not given evidence at all; important documents in his possession had not been produced; and many things that required explanation by him remained unexplained. Had the adoption been on the scale and as numerously attended as alleged it would have been an event well remembered in so small a place as the village where it was said to have taken place, and there would have been accounts of the expenditure, which would have been large, yet no such accounts were produced. Reference was made to the
Registration Manual, North-Western Provinces (1885), Part II, Rule 155 which provided that the Registrar should explain the terms of a document to pardana-shir ladies and illiterate persons. But many of the documents had not been explained to Musammat Lachchho; in fact it was doubtful whether she ever saw many of them at all. There was no sufficient evidence that Dwarka Das gave any authority to his widows to adopt; and the custom as to such an adoption as is alleged being valid without her husband's permission was not established. It was also submitted that the High Court had failed to give due weight to the numerous admitted facts in the case, which were either wholly inconsistent with an adoption, or rendered it improbable that an adoption ever was made. Reference was made to *Meer Usdoollah v Beeby Imam*man (1), and it was submitted that the principles there laid down as to dealing with conflicting evidence should be applied to this case.

Ross for the respondent contended for (inter alia) the reasons given in the extract from the judgment of the High Court above set out that the adoption was fully proved by the evidence in the case, and particularly by the documents relating to the dedication of the temple at Soron. Reference was made to *Mutsaddi Lal v. Kundan Lal* (2), *Mayne's Hindu Law*, 7th edition, page 176, paragraph 137, *Chandra Kunwar v. Chaudhri Narpat Singh* (3) and *Lali v. Murlidhar* (4).

De Gruyther, K. C., replied.

1908 DECEMBER 15th.—The judgment of their Lordships was delivered by

LORD ATKINSON:—These are consolidated appeals from two decrees of the High Court of Judicature for the North-Western Provinces, Allahabad, dated the 12th July 1901, by which the decrees of the Subordinate Judge were reversed.

The main question for decision in the suits in which these decrees were pronounced, and the sole question for the decision of their Lordships on these appeals, is one of fact, namely, whether Musammat Lachchho, a pardana-shin lady who is

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(1) (1863) 1 Moz. I. A., 19, at p. 44.  
(2) (1863) L. L. R., 28 All., 377;  
(3) (1898) L. L. R., 23 All., 184;  
(4) (1906) L. L. R., 28 All., 488;  
(382) L. R., 33 I. A., 55 (67)  
(402) L. R., 23 I. A., 97 (101).
illiterate, the widow of one Dwarka Das, deceased, adopted with the permission of by the direction of her husband, given shortly before his death, the respondent, Chunni Lal, as his son. The burden of proving the adoption rested on him. The lady denies on oath most positively that she ever adopted the respondent. The Subordinate Judge held that the evidence showed he had not been adopted, and decided against him. The High Court decided in his favour. The case is a most perplexing one, but the difficulty which their Lordships have found in coming to any confident conclusion on the point on which the courts in India differed, does not arise so much from the direct conflict between the evidence of the witnesses examined on behalf of the respective parties, as from three matters for the latter two of which the respondent is entirely responsible, namely, (1) the non-production of any account-book containing items relating to the expenses of the ceremony of adoption, which, if his witnesses speak the truth, took place in the small village of Thulai, and was a prolonged and somewhat pompous function at which 1,000 guests were feasted; (2) the suppression of three day-books and three ledgers which were in his, the respondent’s, custody and keeping; and (3) his non-appearance as a witness at the trial before the Subordinate Judge, though several transactions to which he was a party were proved to have taken place, which called imperatively on him for an explanation.

As to this last matter, it would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance.

The relations subsisting between Musammam Lachillo and the different members of the respondent’s family, the
circumstances under which, and the manner in which, her business was carried on and her affairs managed, make the three above-mentioned facts all the more significant.

Dwarka Das, a resident of the village of Thulai, in the District of Aligarh, died in the year 1854 possessed of considerable movable and immovable property situate in this and some neighbouring villages, leaving his two widows, Musammat Jassoda and Musammat Lachchho, him surviving. He was a childless man, Musammat Jassoda, who was much the elder of the two widows, died in 1863. Musammat Lachchho, who had only been married in the year 1852, is still alive. Dwarka Das had a relative, a first cousin once removed, named Maya Ram, who at one time lived in the village of Punner, not far from Thulai. He was by Dwarka Das appointed agent to help in the management of the latter's affairs. After the death of Dwarka Das, Maya Ram continued to act as agent for the widows, and the survivor of them, Musammat Lachchho, up to the time, of his own death in the year 1891, residing with them for a portion of that time, and always taking his food where he did his work. Maya Ram had three sons, Deokaran, the eldest, Moti Ram, and Chunni Lal (the respondent). Deokaran was associated with his father in the management of the estate, and after his father's death continued to manage it up to the time of his own death in the year 1891, when the management was taken up by Chunni Lal, aided by Radha Kishan, who was appointed to assist in the business about six or seven years afterwards. Radha Kishan was married to the daughter of Deokaran, is the attorney of the respondent, superintends this litigation on the latter's behalf, and must therefore be privy to the suppression of the evidence above referred to.

On the 23rd April 1880 Musammat Lachchho executed a power of attorney in the widest possible terms, appointing Deokaran her attorney, empowering him (amongst other things) to institute and defend suits, receive rents, grant leases, release any debt, obtain in her favour any bond relating to money dealings, and to have the same registered, or to execute any bond on her behalf, or file in or take back any document from any court. The endorsement on this instrument describes her occupation as
"zamindari and money dealings." From documents put in evidence by the appellant, it is plain that Musammat Lachcho had money dealings with her customers in large amounts.

This business of hers appears to have been carried on in a portion of a house called the haveli house or kothi. At first Deokaran, like his father, took his meals in the kothi, and for a time apparently lived there. Subsequently Musammat Lachcho gave the site of a house for Deokaran, or had a house built for him, and from the time the house was built, father, son, and their families lived in it. The respondent, however, has lived in the lady's house for the last 25 or 26 years.

The mode in which her business was carried on was this: all moneys due were recovered and received by, and all disbursements made through the hands of, the agents, and as remuneration they received a certain share of the profits of the business, and were responsible for the loss of capital employed. This is clear from the uncontradicted evidence of Ganga Prasad, one of the appellant's witnesses, and from the extracts from the diaries filed on the latter's behalf. He states:

"I used to come to examine the accounts kept by Maya Ram, Deokaran and Jai Singh. Maya Ram had 2, then 2½, and, at the time of his death, 3½ rogars. The amount of one rogar is Rs. 500 and profits are received on account of it. First the interest due to the banker is paid off, and then the profits are paid. If there is a loss, its amount is recovered from them (gumasthas). If there is a deficiency in the principal, it is undue good. Deokaran had 2, then 2½, and then 3 rogars. Chunni Lal had 3½ rogars, so also Lachman Das. There were seven extra rogars. Chunni Lal's sister was married to my maternal uncle's son. Her marriage took place in another house given by Lachcho. The money for expenses was received from Lachcho on the condition that the same would be deducted from Maya Ram and Deokaran's rogars. There are two sorts of account books viz., (1) those relating to the business carried on by the proprietors alone, and (2) those relating to rogars. Lachcho also had two sets of account books of the sort mentioned by me."

The extracts from the roganmohas (day-books) put in evidence by the respondent strongly corroborate this witness's evidence.

This mode of doing business necessitated the keeping of two sets of books, (1) daybooks containing the receipts and expenditure for each day, and (2) ledgers in which the principal and her agents were respectively debited and credited with the
proper sums in the separate accounts of each. Without these ledgers it is impossible to ascertain who ultimately bore the burden of any expenditure recorded in the day-books. As far as the books produced are concerned, there is, therefore, no proof whatever that the expenses of Chunni Lal’s marriage were really borne by Lachchho. She herself says she advanced the money for the marriage and that it was disbursed. If the ledgers were produced, this matter would most probably have been cleared up. That ledgers existed is established by the admission of the respondent himself. In the year 1894, he instituted a suit in the joint names of himself and Lachchho against one Kunj Lal. On the 14th January 1895, a list of documents was produced with the plaint. It is signed by Radha Kishan as agent for Musammat Lachchho, and contains the following item:

“Eight account books, i.e., 5 day books and 3 ledgers from Sambat 1920 to Sambat 1950, relating to the plaintiff’s business.”

No ledgers whatever have been produced in these actions by the respondent, and only two day-books. The only witness who purports to account for their disappearance is Radha Kishan who verified this list. He deposes as follows:

“The goods and property of the kotia (firm) are in Chunni Lal’s possession. My pay is Rs. 100 a year. I wrote the account books and performed the court business. I saw those account books also which were at the time prior to my entering the service. I did not see the account books of the time of Dwarka Das. I have seen the account books from Sambat 1920. I might have seen some account books of the time prior to this also. I saw them in the kotia. The baveli house is called kotia.

His examination was continued on the following day, when he again returned to this subject and deposed:

“The account books, in reference to one of which I made my statement yesterday, were in existence. They were in that very house in which Chunni Lal lived. Now I hear that they are missing. Perhaps they might have been locked up. The account books were filed in connection with the case of Kunj Lal. I do not recollect the period for which the account books were filed. They were subsequently taken back from the court and had been kept in the kotia.”

The only rational conclusion which can be drawn from this testimony is that evidence of a most important character has been deliberately suppressed by the respondent. That fact, coupled with his non-production as a witness, covers his case with suspicion. The account books which have been produced,
however, cover the period of his alleged adoption in the year 1877. It must, if it took place, have attracted the attention of almost every inhabitant of the small village of Thulai, and involved considerable expense. The accounts put in evidence on both sides are most detailed in character. Petty items of expenditure down to a fraction of a rupee are duly recorded under many heads. Having regard to the well-known habits of the people of India, as well as to the mode in which the business of this firm was carried on, it is inconceivable that, if this ceremony of adoption ever in fact took place, an account would not have been kept of expenditure incurred in respect of it. Yet there is only one item (a disputed one) of Rs. 5 in the accounts produced in which the word “adoption” is mentioned. It occurs in the middle of the items relating to the marriage of Chunni Lal in the year 1878, and, in their Lordships’ opinion, plainly refers to this latter event. Many witnesses have been examined on both sides. They are of somewhat the same class and character—zamindars, money-lenders, persons accused of serious crime though not convicted, inhabitants of the village of Thulai and the adjacent villages; numbers of them of the same brotherhood, some of the same gotra as the respondent, many mere cultivators. They flatly contradict each other on almost every important point. Several of the respondent’s witnesses not only prove that Dwarka Das before his end gave permission to his wives to adopt a son and gave directions to build a temple to his memory; but, with a vividness of recollection which is almost supernatural, purport to repeat the very words used by him for that purpose more than half a century before they themselves spoke. Others, again, purport to describe the most minute details of the ceremony of adoption, and to repeat the very words used by Maya Ram when he gave over his son, then 9 or 10 years old, to Lachchho and placed him on her lap, though that event must have occurred close on 25 years before the evidence was given.

In addition, many of the respondent’s witnesses depose that, on the occasion of the dedication of the temple built by Lachchho near a place called Soron to the idol Dwarka Dihis, certain religious ceremonies were performed by Chunni Lal, because he was the adopted son of Dwarka Das, while almost as many
witnesses examined on behalf of the appellant—including the priest of the temple, Gopi Nath, who was present both at the ceremony of pratishtha (the placing of the idol in the temple for the first time) performed in 1883, and the khamn ceremony performed in 1893—proved that both of these ceremonies were performed by Lachchho herself, because Chunni Lal was not the adopted son of Dwarka Das, and that invitations to these ceremonies (two of which were produced) were sent out in the name of Dwarka Das, not in the name of his son, as they would have been had he been adopted. The inhabitants of Thulai examined on the appellant’s behalf denied that such a remarkable ceremony as that of the adoption described ever took place in their village, while the members of the brotherhood and others examined on the respective sides proved that Chunni Lal passed and was known amongst his brotherhood and neighbours as the adopted son of Dwarka Das, or the son of Maya Ram, his natural father, and not the adopted son of Dwarka Das, according as they were examined for the respondent or appellant. It is impossible to reconcile these conflicting statements on any theory of the defective memory, or failing powers of observation, of the several witnesses who thus contradict each other. The only safe guide to follow in such a case is that afforded by the action and conduct of the principal parties concerned, and the contents of the documents produced. If Chunni Lal was adopted in the year 1877, as alleged, he became the absolute owner of the considerable property, movable and immovable, of which Dwarka Das died possessed, Musammat Lachchho being only entitled to her maintenance out of it; yet down to the time he began to quarrel with her (save in certain matters to be hereafter specially dealt with) not only did he never exercise the rights of an owner over the property, but he did not even assume the airs of ownership. He came to age, according to the Hindu Law, when he was 16, i.e., about 1883, and according to the Indian Majority Act, 1875 (No. IX of 1875), about 1885. Yet, after he reached the age of manhood, he continued for years to act as paid agent over the estate—which, if he was adopted, was his own—at a salary the same in amount as his father received, namely, 3½ rozgars. Musammat
Lachhho has continued down to the present to be the registered owner of all the real property belonging to Dwarka Das in the khewats of the several villages in which that property is situated. Only once does Chunni Lal's name appear in any khewat, and then he is registered as the cultivator of a certain grove, and is described, not as the adopted son of Dwarka Das, but as the son of his natural father, Maya Ram. The income from these several villages was recovered and received by Musammat Lachhho in her own name, through the hands of her several agents, including the respondent.

It is not suggested that there was any agreement or arrangement that she should be permitted to remain registered as owner of those lands and act in all respects in that character. The respondent, in his written statement filed in the first action, says her name was "caused to be entered simply to console her." From a time, however, long prior to the adoption down to a recent date, she carried on this business of a money-lender. It may be fairly presumed that it was lucrative, else she would have abandoned it. Maya Ram, Deokaran, and Chunni Lal were her agents for that purpose. Yet, though several documents connected with this business were given in evidence, in none of them of an earlier date than the 15th July 1838 does the respondent's name appear, or is any mention whatever, made of the adoption.

That, however, is not all. In corroboration of those of the appellant's witnesses who stated that Chunni Lal passed and was known among his brotherhood as the son of Maya Ram, his natural father, and not as the adopted son of Dwarka Das, a deposition made by him was put in evidence, from which it appeared that in a public court in December 1892 he deposed on oath that his name was Chunni Lal and his father's name Maya Ram. On the 7th January 1896 he signed a vakalatnama, executed in a pending suit, in which he described himself as son of Maya Ram. Again, on the 15th July 1898 he signed a similar document, drawn up and executed in a suit instituted by himself, which contains a similar description. A fourth document, possibly the most significant of all, was also given in evidence, namely, a list of biddings at a public auction held on the 21st
October 1895, at which he purchased some property for Rs. 1,200, in which he is described as "Chunni Lal, son of Maya Ram." It may be that the significance of these descriptions can, as was contended on his behalf, be explained away; but if so, the explanation should be given by the respondent himself upon oath, and he has abstained from giving it. As they stand, unexplained, they are inconsistent with his case, and support on this point the evidence given on behalf of the appellant.

It is, however, contended on the respondent's behalf that the several documents now about to be referred to discharge the burden of proof which rests upon him, and establish the fact of his adoption.

It is necessary to examine them in detail.

The first four are money-bonds executed in favour of Musammam Lachchhoa and Chunni Lal, who is described as the "adopted son," not of Dwarka Das, but of Lachchhoa. The consideration for two out of the four is a previous debt due to Lachchhoa alone. The first in date may be taken as a sample of the others. It is a hypothecation bond, dated the 16th June 1883, executed by Jamna and Lekha, two sons of Man Singh, deceased, for a sum of Rs. 800 due "to Musammam Lachchhoa, wife of Dwarka Das, and Chunni Lal, adopted son of Musammam Lachchhoa aforesaid." It is witnessed by Kadher Mal, one of the respondent's witnesses, who, in reference to it, deposed that it was written under Deokaran's supervision; that it was not read out to him; that he thought the bond was made in favour of Lachchhoa; and that the bond at the time of its registration was not read out by the sub-registrar to the executants, one of whom (Jamna) appears to be illiterate.

The fifth document is a petition dated the 8th June 1891, purporting to have been presented on Lachchhoa's behalf by her pleader Lokman Das, praying that "her adopted son, Chunni Lal," might be appointed her sarbarahkar. It is signed by Deokaran as her mukhtar on her behalf. Like the four preceding documents, it is altogether his work. Lokman Das, her pleader, was examined, and stated that Lachchhoa never came to him on any occasion, and there is nothing to show that the contents of any one of these documents were ever brought to her knowledge.
In the month of February 1893, after the death of Deokaran, a suit was instituted in the name of Musammat Lachchho against one Gajadhar Singh to recover the amount of a promissory note, dated the 30th December 1889, executed in her favour by Gajadhar Singh and his father, Chot Ram. The pleaders for her in that case were Lokman Das and Joginder Nath. The latter states that Chunni Lal gave him instructions and came to him to look after the case, and that Lachchho never came to him. The defendant in his written statement raised, on information and belief, the defence that the plaintiff could not recover, as she had adopted Chunni Lal, and that all the property of Dwarka Das, of which this note was part, vested in him. The statement or reply, if any, filed in answer is not in the record, but from the judgment of the Subordinate Judge of Aligarh it would appear that the defence put forward on Lachchho's behalf, presumably on Chunni Lal's instructions, was that she had adopted Chunni Lal as the son of her late husband, but that, notwithstanding this adoption, she had been and was in possession of the money-lending business inherited by her from her late husband, and the decision was to the effect that it was clear upon the evidence that the plaintiff was herself in possession of the money-lending business, and that, as owner-in-possession as well as the promisee of the note, she was entitled to sue. A good deal of suspicion attaches to these proceedings. They appear to disclose something like contrivance on Chunni Lal's part to get upon the record an admission of his adoption which would not affect the result of the proceedings. Had the suit failed, Lachchho would possibly have heard of the failure, but she would most probably know nothing of the averments contained in the pleadings. From first to last the efforts of Chunni Lal and his brother Deokaran seem to have been directed to bind Lachchho by descriptions of Chunni Lal as her adopted son, introduced into instruments upon the operation of which that description could have no effect whatever, and which would probably never be known to her.

The only other documents with which it is necessary to deal at length are (1) those connected with a suit which purported to be instituted on the 12th November 1894 in the names of
Musammat Lachchho and Chunni Lal, described as "adopted son of Dwarka Das," against one Kunji Lal and Duli Chand to recover possession of a shop in the market town of Hathras part of the estate of Dwarka Das, in which a compromise was entered into, and (2) those connected with a grant of land made to endow the temple erected by the widow to the memory of her husband, at Soron, because these are the only documents whose contents there is any evidence to show were brought to the knowledge of Musammat Lachchho. In the suit against Kunji Lal and Duli Chand, Lokman Das was again the pleader for the plaintiffs. He is not able to state whether he was instructed by Chunni Lal or some other agent of Lachchho's. The claim contains averments that:

"In his lifetime Dwarka Das was in proprietary possession and enjoyment of the said shop, and since his death Musammat Lachchho, plaintiff, has been in proprietary possession and enjoyment thereof for about 40 years and Chunni Lal, plaintiff, who is joint with her, has been in possession and enjoyment of it since the time of his adoption."

A compromise was arrived at to the effect that the plaintiffs should obtain a decree for possession, the defendants to obtain proprietary possession of the house on paying a lump sum of Rs. 1,500, with interest, within a certain time, and the costs of this and of a preceding suit instituted by the widow alone for rent not to be recovered.

This compromise was embodied in a memorandum entitled "Chunni Lal and Musammat Lachchho, plaintiffs, v. Kunji Lal and Duli Chand, defendants." It is signed by Chunni Lal, Duli Chand and Kunji Lal. It does not contain, in the body of it, any reference whatever to the fact of adoption, and except that the plural "plaintiffs" is once used in it instead of the singular "plaintiff," it might, as far as its language is concerned have been drawn up between Lachchho alone and the defendants. This memorandum was filed in Court, and a decree in the suit was on the 13th May 1895 made upon the basis of it. Before decree, however, one Ahmad Husain, an officer of the Munsiff's Court at Hathras, went to the village of Thulai to get the compromise verified by Musammat Lachchho. He says that he read over and explained to her the contents of the memorandum, but on cross-examination he admitted that he did not remember
whether any "mention of the adoption was made." Unless he read out the title and emphasized the plural plaintiffs, there is nothing whatever in the document to suggest to Lachchho that she was not suing in this suit, as she had in the previous suit sued, for rent in her own name and in her own right. In this latter suit she was defeated, not on any non-joinder point, or because she was not owner, but solely for the reason that the agreement to pay rent for the shop had not been satisfactorily proved.

Abdul Husain states he drew and signed an attestation clause on this document—in which it is stated that Musammam Lachchho "heard and understood the contents" of the compromise—and duly attested the same. It purports to bear her mark. And the names of Kanhai Ram and Radha Kishan are signed as witnesses. Kanhai Ram was not examined. Radha Kishan swears that "the written statement" (presumably the compromise) was read over to her, and that she put her mark to it. He says nothing about her having understood it, or about its having been explained to her. On that evidence it is, in their Lordships' opinion, impossible to hold that Musammam Lachchho was fixed with the knowledge that Chunni Lal was joined with her in the suit as the adopted son of Dwarka Das, or that he was so described on the record.

The documents in the case on which the respondent most strongly relies are those connected with the endowment of the temple at Soron. They are three in number: (1) A tampiknama bearing date the 29th July 1890; (2) a special power of attorney dated the 8th August 1890; and (3) a special power of attorney dated the 10th August in the same year. They each purport to be executed by Musammam Lachchho and Chunni Lal who is described in each of them as the adopted son of Dwarka Das, and made a party to them in that character.

The tampiknama contains many long and complicated recitals, and amongst others the following:

"According to the custom of my caste and the members of my brotherhood and under the Hindu law, He (Chunni Lal) has now attained majority and he and I have jointly with me and look after all the affairs relating to the estate of..."
Dwarka Das. In accordance with the will of my husband, I, the Musammam, constructed at Soron, at the place where the Hindus perform worship, during the minority of the aforesaid Chunnal Lal, a paces stone building called Kunj at the cost of Rs. 50,000, under the supervision and management of Maya Ram, the natural father of the aforesaid Chunnal Lal; and in Sambat 1940, I, after Chunnal Lal, one of the executants, had attained majority, installed therein Thakur Dwarka Dibegh Maharaj after performing the pratishtha ceremony according to the principle of the Hindu law.”

The document then proceeds to declare, in its operative part, that the Thakur therein named shall remain in proprietary possession of the landed property therein described, in order to pay thereout his salary, and have the temple at Soron cleaned and kept in repair, &c. By the first power of attorney Radha Kishan is appointed attorney to procure a mutation of names in the registry in respect of this property so dedicated, and the second power of attorney is to somewhat similar effect. Musammam Lachchho in her evidence admits that she had built this temple, desired to endow it, and executed a deed for that purpose in favour of Thakurji, the deity named in it. She, however, positively denies that the deed was ever read over to her. She must have been about 60 years of age at that time, and she says her sight was dim. She admits that the registrar came to her house about the deed. She says that she sat behind the curtain, and he outside it; he asked her if she had executed a deed in favour of Thakurji, and she replied yes; that he questioned her about the property she had given over to Thakurji, and she told him it was the property of Jahangirpur and Tor. She says that the deed was not read out to her by any of those present when she witnessed it, that she asked them to have it read out to her, and was told it would be read out afterwards. She farther says that the registrar did not read it out, but merely told her it was a deed of gift to Thakurji. If this account be true, it is obvious that nothing occurred to call her attention to the statements in the deed concerning Chunnal Lal’s adoption, and in the face of her evidence it is incumbent on the respondent to establish conclusively that these particulars of the deed were brought to her notice before she can in any way rely upon them as admissions against her. The deed was tendered for registration, and before its registration the sub-registrar in Hathras called upon her in
order to verify it. In his certificate he states that she "admitted the completion and execution of this document after hearing and understanding the same." He was examined as a witness. His evidence is rather extraordinary. He does not deny that she was inside the curtain and he outside, but he says that he read it over to her word for word; that his clerk also read it over to her; that he asked her if she understood the document word for word; that she replied, "I executed the document and I have understood it"; that she then added, "Chunni Lal is my adopted son"; that he said to her, what was the necessity of making mention of adoption therein, and that she replied, "I have made mention (of it) herein to make the matter more secure so that no dispute may arise in future." He admitted that he had not noted down that Lachchho had told him she had made the adoption. This witness proves rather too much. His clerk, who is alive, was not examined. His business would naturally be to find out if she knew that she was disposing of property by this deed, what was its nature and extent, and what was the purpose of the disposition. If the respondent's case be true, his adoption had been notorious for 22 years. Radha Kishan says that he also read the vakalatnama and power of attorney to Lachchho. Girdhari Lal, who was a witness to both this deed and the power of attorney of the 10th August, was not produced. Ram Prasad, whose name appears on the power of attorney of the 8th August, was called; he admitted that he drafted this document and said he read it over to Lachchho. He also states that both Lachchho and Chunni Lal said the latter was her adopted son, and then makes the extraordinary statement that it was suggested that the name of Musammat Lachchho should be expunged. According to this evidence the deed was read over to Lachchho three or four times, on as many separate occasions by as many different persons. Why this repetition? It is evident that Chunni Lal and his attorney, who is charged with the duty of superintending this litigation on his principal's behalf, and is therefore party to the suppression of evidence, arranged this entire business. Their Lordships are not satisfied that the passages of these documents dealing with the adoption of Chunni Lal were brought to the knowledge of Lachchho and their effect explained to her, though
the gift and declaration may have been. It was entirely collateral to the main purpose of the deed thus to record what, according to the respondent, was a notorious fact. Their Lordships cannot concur with the High Court that the fact that these or any other documents of the like kind containing such collateral recitals were registered and acted upon raises any presumption whatever that Lachchho was aware of the existence of the recitals in the instrument acted upon.

Of the many suspicious things about these documents containing references to adoption, or describing the respondent as an adopted son, one of the most suspicious is the absence of all reference to the date of the adoption. For all they disclose, it might have occurred at any time between his birth in 1865 or 1866, and July 1888. As far as appears in this case, the date of that ceremony was first fixed when the plaint in the second suit was filed on the 24th December 1900. The first action (i.e., that in which Kishori Lal was plaintiff) was instituted on the 22nd September 1899, over fifteen months previously. In this latter case, though Chunni Lal pleaded that he was adopted, he did not name any date for the ceremony. Having regard to all these facts—the contradictions between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; and, above and beyond all, the non-production of any account of the expenditure at the ceremony of adoption—their Lordships think that the most rational and just conclusion is this, that the respondent has failed to discharge the burden of proof of the adoption which undoubtedly lay upon him, that is, that his case is not proven.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed, the decrees of the High Court discharged with costs, and the decrees of the Subordinate Judge restored.
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the gift and declaration may have been. It was entirely collateral to the main purpose of the deed thus to record what, according to the respondent, was a notorious fact. Their Lordships cannot concur with the High Court that the fact that these or any other documents of the like kind containing such collateral recitals were registered and acted upon raises any presumption whatever that Lachchho was aware of the existence of the recitals in the instrument acted upon.

Of the many suspicious things about these documents containing references to adoption, or describing the respondent as an adopted son, one of the most suspicious is the absence of all reference to the date of the adoption. For all they disclose, it might have occurred at any time between his birth in 1865 or 1866, and July 1888. As far as appears in this case, the date of that ceremony was first fixed when the plaint in the second suit was filed on the 24th December 1900. The first action (i.e., that in which Kishori Lal was plaintiff) was instituted on the 22nd September 1899, over fifteen months previously. In this latter case, though Chunni Lal pleaded that he was adopted, he did not name any date for the ceremony. Having regard to all these facts—the contradictions between the principal witnesses examined on the respective sides on almost every important point; the improbabilities of the respondent's story; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on; the suppression of documents; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him; and, above and beyond all, the non-production of any account of the expenditure at the ceremony of adoption—their Lordships think that the most rational and just conclusion is this, that the respondent has failed to discharge the burden of proof of the adoption which undoubtedly lay upon him, that is, that his case is not proven.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed, the decrees of the High Court discharged with costs, and the decrees of the Subordinate Judge restored.
The respondent must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant:—Pyke, Parrott & Co.

Solicitors for the respondent:—T. L. Wilson & Co.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

BIDA JAN (PLAINTIFF) v. KALB HUSAIN AND OTHERS (DEFENDANTS).

Mohammedan Law—Sunna—Waqf—Provision for celebration of anniversary of birth of Ali Murtaza, expenses of Muharram and the death anniversaries of members of the family of the waqf, also for repairs of imambara—Waqf held to be valid.

A Mohammedan lady belonging to the Sunni sect purported to make a waqf of all her property and provided that a sum amounting to decisively the larger portion of the income of the dedicated property should be applied annually towards the following purposes, viz., the celebration of the birth of Ali Murtaza, the expenses of keeping tazias in the month of Muharram, the anniversaries of the deaths of members of the waqf’s family and the expenses for repairs of an imambara which the waqf had built, and declared that the property had been dedicated to God and charitable and religious purposes.

Held that the dedication was not illusory; there was an intention of creating a substantial waqf for pious and charitable purposes, and the objects for which the waqf was created were valid.

The facts of the case were as follows:

The plaintiff alleged that one Musammat Najiban was the daughter of plaintiff’s father’s sister, and was the owner of considerable movable and immovable property; that she died on the 4th of June 1901, when she was about 90 years old; that Kalb Husain, defendant No. 1, was the mukhtar-i-am and servant of Musammat Najiban; that Ata-ullah, defendant No. 2, also lived with the said Musammat at Bareilly, being the brother of the defendant No. 1; that Musammat Maddo Jan, plaintiff’s own sister, who was defendant No. 3 in the suit, also lived with the said Musammat Najiban, who, on account of her old age and having no child or near heir was under the undue influence of all these defendants; that the plaintiff was living in her husband’s...

*Ex parte Appeal No. 62 of 1907, from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 17th of November 1906.
house in the Budaun district; that on the death of Musammat Najiban the plaintiff and her sister, defendant No. 3, became entitled to all the property left by the said Musammat in equal shares; that when the plaintiff made efforts to take possession of the property and to obtain mutation of names in her favour in the Revenue Court, she found that the name of the defendant No. 1 had been entered in the revenue papers in respect of a five biswa zamindari share in mauza Gurgawan under a deed of sale, dated 18th February 1902; that the names of defendants Nos. 1 and 2 were so entered in respect of another five biswa share in the said mauza under a waqfnama, dated the 2nd of November 1902, and that the names of all these defendants were entered in respect of the remaining property under a deed of gift, dated 26th February 1903; that the plaintiff desired to bring a separate suit in respect of the deeds of sale and gift, the present suit being only for possession and mesne profits in respect of the plaintiff’s share in five out of ten biswas of mahals mushtaqil and ilimati in the said mauza Gurgawan and a house named inambara in Bareilly, which were in the possession of the defendants Nos. 1 and 2 as mutawallis under the said waqfnama and for a declaration that the waqfnama was altogether invalid in law.

The defendants Nos. 1 and 2 contested the suit on the allegations that the plaintiff was not the daughter of Sana-ullah, Musammat Najiban’s maternal uncle, and had no right to bring the suit; that the defendants were the sons of the said Sana-ullah, and one Musammat Mammi Jan, being the daughter of the said Sana-ullah, was a necessary party to the suit; that the deed of endowment was valid according to Muhammadan law, and had been executed by Musammat Najiban of her own free will and without any undue influence of any person and while she was in full possession of her senses and in proper health; and the waqif had relinquished her own possession of the endowed property and had properly put the mutawallis in possession thereof; that the greater part of the income of the endowed property had been assigned for pious and charitable purposes, and a margin of the profits had been left to meet probable contingencies like those of alluvion, diluvion, costs of litigation and arrears, &c., and that if the endowment be held invalid and the plaintiff be proved to be a
daughter of Sana-ullah, she could only claim one out of seven shares of Musammat Najibban's property and that the munsab profits claimed were excessive.

The Court below found that the plaintiff was one of the two daughters of Sana-ullah; that the defendants Nos. 1 and 2 were not sons of Sana-ullah, although they styled themselves as such, being the sons of one Musammat Dhuman a prostitute, who had never been married to Sana-ullah, although living with him; that Mammi Jan was not a necessary party, being the daughter of the said Musammat Dhuman; that the donor had built the imambadra house in which she used to hold majlis (religious meetings) during ashra (the first ten days) of muharram, and being of a charitable and religious turn of mind, used to spend Rs. 1,000 to Rs. 1,200 per annum in these majlis and charities, and that the waqfnama had been validly executed by her and was consistent with her religious and charitable ideas; that the deed of endowment was not in favour of the defendants Nos. 1 and 2 except in so far as it made them the Mutawallis, and that the waqf in the present case was a valid waqf under the Muhammadan law. It accordingly dismissed the suit with costs. The plaintiff appealed.

Mr. Abdul Majid, for the appellant, submitted that the Fatawa Alampiri was the most authoritative book for Sunni Muhammadans. According to it appropriations for reciting the Quran were void. Observance of taziadari ceremonies during the muharram were not in accordance with Sunni tenets. There must be qurbat (or nearness) between the appropriation and the object. If a Sunni Muhammadan were to make a waqf for taziadari ceremonies, there would be total absence of qurbat. He cited Baillie's Digest of Muhammadan Law, pp. 558, 569, 575.

It might be good to hold prayer meetings on the anniversary of a death, but it was not the general practice to observe ceremonies on the anniversary of a birth. The law was that the bulk of the property must go for charitable purposes. If this was not so, the whole waqf was void. The gist of the evidence was that during muharram illuminations took place and some sweats were distributed. These were not the sort of acts which
were meritorious and for which a valid waqf could be made according to Sunni laws. The *fatehah brasi* referred to in the deed could not mean the celebration of the death anniversaries of persons of the family. This was never *contra tenanced* by Sunni law. The establishment of an imambara is not a valid object among Sunni Muhammadans. Any sum appropriated for the purposes of the imambara would not go for any valid object, and except for the Imambara no certain object of appropriation was mentioned in the deed. The *waqfnama* was certainly invalid so far as this was concerned and it was therefore invalid as a whole. Regarding *fatehas*, illuminations and object of waqfs, counsel submitted the following original texts for consideration of the Court:

(1) "It is reported by Abdullah, son of Masud, that the Prophet of God, may the mercy and peace of God be upon him, has said,--He who beats the cheeks and tears the garments and laments lamentations of the days of dark, is not among us (i.e. among my followers)."

"It is reported by Burdah that Abu Musa became unconscious. Then his wife, Ummah Abdullah, came and cried out weeping. When he came to his senses, he said, Do you not know (he mentioned the tradition saying) that the Prophet of God, may the mercy and peace of God be upon him, said "I am angry with the person who gets his head shaved, weeps loudly, and tears his garments." These traditions are reported by Bukhari and Muslim."

[The Mishkatul Masabih, chapter relating to lamentation on the dead, sub chapter I, p. 160]

(2) "Among the objectionable inventions is the act done in most of the towns, i.e. the display of large numbers of lights by waste of money on certain nights of the year."

[The *Al-ukudu Durrat-o fi-tankihil-Fatawai Hamidiyat-i*, p. 359.]

(3) "The Prophet of God, may the mercy and peace of God be upon him, has forbidden the recital of elegies."

[The book of the traditions reported by Ibn-i-Maja, the chapter relating to dead bodies, p. 116.]

So far as *fateha* was concerned there might be some difference of opinion among the authorities. It might be meritorious to some extent. But so far as *tazkirtari* was concerned there was no authority which considered it meritorious according to Sunni Muhammadans. The case of *Kalcouda v. Nuseruldeen* (1) showed what purposes could be meritorious and what waqfs

(1) (1834) I. L. R., 12 Mad., 201.
A consideration of this question would render it necessary for their Lordships to inquire into the total income and expenditure of the endowed property in order to ascertain whether the appropriation made in the deed was for valid purposes or not. According to the plaintiff out of a total income of Rs. 2,500 after all appropriations and expenses there was a balance of Rs. 1,500 unprovided for in the deed, and this was clearly to go into the pockets of the mutawallis.

Mr. Abdul Raoof (Mr. B. E. O’Conor with him), for the respondents. The validity of the waqf was attacked on the ground that the objects for which it had been made were not countenanced by Sunni law and that the persons for the benefit of whose souls the endowment had been made were not regarded as sacred by the Sunni Muhammadans. Hazrat Ali was respected by Sunnis as well as Shias. The other three Caliphs his predecessors were revered by the Sunnis only. To say that any ceremony for the commemoration of Hazrat Ali was illegal would be contrary to Sunni tenets. The essence of the muharram ceremonies was that the Musalmans mourned the sad death of the two Imams Hasan and Husain. They were the grandsons of the Prophet and the sons of Hazrat Ali, whom the Shias and Sunnis would alike revere. The real object of taziadari (muharram ceremonies) was to assemble to mourn for the sad death of the two Imams. The merits of the ceremonies were not to be judged by any artificial ceremonials perhaps had gathered round the true object. The people assembled there would observe a manner of mourning and would never make the waqf illegal because the idea of the waqf was to commemorate the death of the two Imams. The original authorities cited on behalf of the appellant had no bearing on this point. In reply to that the respondents submitted various authorities in the original. Fatwas are offered for the benefit of the souls of the deceased as the Roman Catholics celebrated their mass. The merits from them would also accrue to the good of those who offered them. It was to be observed also that during all these ceremonies substantial gifts were distributed to the poor and to all those who assembled in the majlisas.
might be valid. As in that case, so in this, the waqf contravened
the rule against perpetuities. Unless it could be shown that all
relating objects of tazkadr were valid, the waqf wholly failed
the waqf was a of Syed Mustafa v. Amina Begum (1) was act
There was a a. waqf made by a Shia Muhammadan. Even the
to the definition of w. declared invalid.

2nd ed. According to the difference between Shia and Sunni law:
objects. According to Sunni waqf: Amir Ali, Muhammadan Law, 39
of mankind. The question &d; the Shias a waqf must be for the
reference to fathash ceremonies was as of the validity in Phul Chand
Akbar Yar Khan (2), and this was the discussed in Phul Chand
ounsel could find on the point. The learned and Judge held
pious, religious, or beneficial to mankind accord-ns. I am told
found whether in this case there was any purpose the of the death of endur
ideas. He ought to have found whether the sect
which the waqif was a party countenanced such
whether such observances were customary.

So far as the muazzid sharif, the celebration
ceremony of the Prophet was concerned, it was in
every pious Musalman. But the basic difference
Sunnis and Shias lay where we came to the position
Caliph. On the whole, according to Shias, the end
be for pious purposes, which according to the Sunnis
for charitable objects.

It was also to be seen that the waqf was not certain
the objects referred to in it—Fatima Bibi v. The
General of Bombay (3). If their Lordships were of opinion
any of the purposes waqf mentioned in the deed was ill
the question would remain whether the bulk of the property
been dedicated for charitable purposes or not, or whether it was
a perpetual bequest to the mutawallis in the guise of a waqf.

The following cases were referred to:—Phul Chand v. Akbar Yar
Khan (4), Muhammad Ahmadulla v. Amarchand (5) and
Abul Fath v. Rasamaya (6).

(1) (1864) 2 A. L. J. R., 219. (2) (1859) 3 L. L. R., 19 All., 211.
(3) (1859) 3 L. L. R., 19 All., 211. (4) (1859) 3 L. L. R., 17 Cal., 425.
(5) (1853) 3 L. L. R., 17 Cal., 425. (6) (1894) 3 L. L. R., 17 Cal., 618.
restricting the accountability of the mutawallis were certainly void, but so was not the waqt. Here the question could not arise whether the whole was a scheme in disguise for the benefit of the mutawallis. The donor herself calculated the income of the endowed property to be Rs. 1,000. The position of the Mutawallis in respect of expenditure from this income was more like that of an executor of will. The mere fact that there could be a possible surplus left with the mutawallis would not invalidate the waqt. The whole corpus and so the whole income, together with any possible increase or diminution, was the subject-matter of the waqt. The case of Muhammad Munawar Ali v. Rasul-lan (1) related to the waqt of a Sunni. At page 336 the clauses of the waqt are discussed. There a substantial portion of the property had not been dedicated for charitable purposes. Here the entire property had been so dedicated.

The case of Luchmiput v. Amir Akum (2), would show how far fatehahs, &c., were good purposes for waqt. The word Ustas as defined in Hughes’ Dictionary of Islam, showed that they were ceremonies for the celebration of any celebrated saint of Islam.

Only a small portion of the income had not been shown as specifically appropriated to any of the specific objects mentioned in the deed. That was because the upkeep of the estate was expensive. Portions of the mahals were subject to heavy litigation to alluvion and diluvion. The extra expenses for all these matters. The respondents submitted that no portion of the ceremonies meant for their personal benefit. The respondents that perhaps Phul Chand v. Akbar Yar Khan (3), Sayed Mustafa who assembled. The original authorities submitted will show it could never have been set aside simply because an insignificant waqt was to a could be said to be unauthorized. The waqt was original and on the ground that it was illusory or upon the ground bearing objects were not authorized by Muhammadan law.

Mr. A. Majid, replied.

J. J.—The plaintiff in this suit seeks to set aside the bill of waste, dated the 2nd of November, 1902, executed by Najibun, and for possession of a half share in the waqfnama, and for mesu profits.

21 All. 322. (3) (1886) I. L. R. 19 All. 211.
It had been argued before their Lordships that portion of
the appropriation was bad because the object had not been
mentioned with certainty. The words Fatehah barri etc., could
not mean Fatehahs for the benefit of all dead souls. A reason-
able construction was to be put on such language conveying the
waqif's intentions. The language could only mean that the dead
persons of the donor's own family were referred to. Ameer Ali

There was no uncertainty in the subject-matter, neither in
the object. The motive was for the good of the poor (Ibid. pages
323). Even mere vagueness, if there was any, could not invalid-
ate the whole waqf. The law would hold it valid for all the
valid purposes enumerated in the deed. Something like the
doctrine of cy-près it was submitted, would apply. The case of
Kaledoola v. Naseerudden (1) would support the respondent's
case better than it would the appellant's. At page 213, it was
mentioned that a waqf for fatehahs was valid when made for the
benefit of the souls of the saints. Again at page 206, the prac-
tice, the appellant so strongly objected to, was reported to have
been sanctified by long usage and custom. Those specific pleas
had not been raised in the Court below and so there was no dis-
cussion of such matters in the judgment. Had they been
raised there would have been overwhelming evidence to
that the Sunnis as a matter of fact observe such ceremonies.

Upon a proper construction of the deed it was
the entire income was to go for charitable purposes
herself regarded her entire ten biswas property to
income of Rs. 2,000 only; she had leased the
share for that amount. The corpus of the 5 biswa
was dedicated. The income, whatever it was, (the
regarded it as Rs. 1,000 per annum) was to be regard-
cated. No special provisions had been made for the bene-
dmutawalli who were always accountable for the property
public. It was only when a specific portion of the income
was dedicated to charity, side by side with any provisions
the

mutawallis that a question could arise whether a sub-

dedication for public charity had been made. Any condi-

(1) (1854) I. L. R. 18 Mad., 201.
restricting the accountability of the mutawallis were certainly void, but so was not the waqf. Here the question could not arise whether the whole was a scheme in disguise for the benefit of the mutawallis. The donor herself calculated the income of the endowed property to be Rs. 1,000. The position of the Mutawallis in respect of expenditure from this income was more like that of an executor of will. The mere fact that there could be a possible surplus left with the mutawallis would not invalidate the waqf. The whole corpus and so the whole income, together with any possible increase or diminution, was the subject matter of the waqf. The case of Muhammad Munawar Ali v. Rusalan (1) related to the waqf of a Sunni. At page 336 the clauses of the waqf are discussed. There a substantial portion of the property had not been dedicated for charitable purposes. Here the entire property had been so dedicated.

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Mr. Abdul Majid, replied.

RICHARDS and GRIFFIN, J.J.—The plaintiff in this suit succeeded in attaining waqfa, dated the 2nd of November, 1902, executed by one Muhammad Najib Khan, and for possession of a half share in property dealt with by the waqf-nama, and for possession.

(1) (1897) I. L. R. 21 A. I., 333. (2) (1892) I. L. R., 9 Cal., 170. (3) (1894) I. L. R., 19 A. I., 512.
The plaintiff alleged that the execution of the deed was brought about by the undue influence of Kalb Husain, that Najibban was insane when she executed the deed and that no valid endowment had been created (1) because the objects were not legal, and (2) because the endowment was illusory and really made for the benefit of Kalb Husain and his brother Ataullah, the mutawallis appointed by the waqfnama. This appeal is closely connected with First Appeal No. 341 of 1906 decided on the 27th November 1908, and also with another First Appeal No. 340 of 1906, which it has been unnecessary for us to decide inasmuch as the parties compromised it. The evidence in all these cases was by consent read as evidence in each case. The two connected appeals Nos. 340 and 341 of 1906 arose out of suits to set aside a deed of sale, executed by Musammat Najibban on the 18th of February 1903, in favour of Kalb Husain on the grounds of the insanity of Musammat Najibban and the undue influence of Kalb Husain. The case of the plaintiff, so far as the plea of insanity was concerned, completely failed, and we have given our reasons at length in First Appeal No. 341 of 1906 for holding that the case founded on undue influence has also failed. The court below decided in favour of the plaintiff in the connected cases on the ground that the transaction came under the provisions of section 16 of the Contract Act. But the present suit was dismissed, the court below being clearly of opinion that Najibban was not insane and that undue influence was not proved. We agree with the court below in this finding and we do not think it necessary to discuss the evidence, particularly as we have already dealt with it in our judgment in First Appeal No. 341 of 1906.

There remains the question of the validity of the waqfnama. In the court below this was certainly not the main ground of attack on the waqfnama, but it was raised by the pleadings and has been argued by Mr. Abdul Majid in support of the appeal. Najibban, it is clear from the evidence, was pious and charitably disposed for a number of years before her death. She had built an Imambura at a cost of several thousand rupees. She was in the habit of keeping tazias and distributing gifts of food in charity. Her expenses in these acts
of charity amounted to Rs. 1,000 or Rs. 1,200 a year. She took a special interest in these matters. Before her death she made a pilgrimage to Mecca and after her return she continued the same pious course of action. All this clearly appears from the evidence. The endowed property, which of course includes the imambara, is stated in the waqfnama to be worth Rs. 40,000. The landed property exclusive of the imambara is worth Rs. 30,000. It appears that the tenants were some what unruly and there was considerable amount of litigation in realizing the rents. Part of the landed property consisted of a share in an alluvial mahal, the income of which was subject to fluctuation. The waqfnama is to the following effect:—

"Whereas there are a 5 biswa zamindari share in 10 biswa patti surakh in the village Gurgawan, pargana Aonla, and a pucca newly built house used as Imambara No. 23, in Bareilly near the library, bounded as given below, worth Rs. 40,000, and I am up to this time in proprietary possession thereof without the participation of anyone, I have now in a sound state of body and mind without coercion and of my own accord made a waqf of the whole of the said property, viz. 5 biswas of the village Gurgawan and the house used as imambara together with all the original and appended rights, zamindari appertainties, sir land, groves, collection houses, abadi, bazar (market), all the serai, stans and maqafs, etc., including mahruka lands, for religious and charitable purposes subject to the following conditions and have appointed Kalb Husain, general attorney, and Atullah, sons of Shaikh Sansullah, as mutawallis (superintendents) of the endowed property and put the said mutawallis in possession thereof like myself. I shall get mutation of names in respect of the said zamindari share duly effected in the revenue department (Court).

1. The said mutawallis shall collect rent and every sum of money due in respect of the endowed property, and pay the Government revenue, the village expenses and the salaries of the servants and out of the remaining amount of net profits they should pay under their own management Rs. 200 annually for the expenses of milad (birth anniversary) of the last of the Prophets (may the mercy of God be upon him) and that of All Murteza in the months of Rabi-ul-awwal and Rawan respectively, Rs. 600 for the expenses of making offerings and keeping tassas in honour of the chief of the martyrs, namely, Imam Hussain and Hassan (may peace be on them) in the month of Muharram, and Rs. 200 for the expenses of the death anniversary of the dead persons and the repairs of the Imambara.

2. The said mutawallis shall, in no case, have power to sell or mortgage the endowed property, nor shall the said property be liable to pay the debt due by the mutawallis or to be sold by auction.
3. Should the said mutawalli die without appointing anyone as mutawalli or their representative, a qualified male descendant of the present mutawalli shall be appointed as mutawalli; no other person shall have a right to be appointed as mutawalli. On the other hand, this order of succession shall remain in force for all eternity generation after generation. No committee or society can interfere in the endowed property, inasmuch as the profits of the a-aid endowed property have been dedicated for the maintenance of charitable purposes and offerings so that my name may be perpetuated in this world as well as in the next world and my soul benefited in the next world.

4. All the proceedings in the civil, criminal and revenue courts and in the Honourable High Court, Board of Revenue, Privy Council and all the departments in India relating to the affairs of the endowed property shall rest with and be taken under the control of the mutawalli.

5. I have made the endowed property God’s property from this day and divested myself of all proprietary connection therewith. After agreeing to the aforesaid conditions, I have executed this deed of endowment, in order that it may stand as authority and be of use when needed.”

It will be noticed that the mutawallis are directed to collect the rents, then to pay the Government revenue, the village expenses and the salaries of the servants, and then to apply the net profits in certain proportions.

The actual amounts are set out. They come to a sum of Rs. 1,000. It is argued that the property must yield a net profit of more than Rs. 1,000 per annum and that as only Rs. 1,000 is appropriated, the balance would all come into the hands of the mutawallis, Kalb Husain and Ataullah, beneficially. As regards this it must be borne in mind that it is not only Rs. 1,000 which is appropriated by the donor to the service of God. She expressly says that the entire property is appropriated to the service of God. Mr. Abdul Raof counsel on behalf of the respondents, repudiates all claim to any beneficial interest to any part of the income of the estate. If we assume for the purposes of this branch of the case that the objects of the waqf were legal and that the waqfnama was duly executed, the onus of showing that having regard to the value of the property, the waqf was merely illusory lay upon the plaintiff. We have been referred to the extract from the khewat of 1310 husli, exhibit 15 C., in which the Government revenue of the entire 10 biswa share owned by Najiban is shown as Rs. 3,912 and to an extract from
the jamabandi, for 1310 Fasli showing the income of the 10 biswa share for that year. The patwari of the village was examined as one of the plaintiff’s witnesses. He stated that the Government revenue was Rs. 4,537-14-7. That statement was allowed to go unchallenged and it was accepted by the court below. This witness further stated that the village expenses according to the account furnished to him by the agent amounted in 1312 fasli to Rs. 2,244-2-9. The village expenses and the expenses of the management seem no doubt very high, but we think it very probable that for many years the village had been managed in an extravagant way. Muamazon Najiban had been a prostitute and a dancing girl. It appears that the whole 10 biswa share had been leased out for a term of 14 years from 1878 to 1892 at a rent of Rs. 2,000. This would leave only Rs. 1,000 as the profits of the endowed property. This lease had expired in 1892 and the estate is now probably of greater value, but we do not think that there would be a very large surplus over and above Rs. 1,000 after defraying the pay of the servants and the cost of managing the estate. Under the waqfnama the mutawallis get no remuneration for their services and they would of course be justified in paying for the services of manager of the property. Taking all the evidence into consideration we are clearly of opinion that it cannot be said that the main object of the waqfnama was to benefit the mutawallis under the guise of religious and charitable endowment. On the contrary there was a dedication of the entire property to the objects set out in the waqfnama.

The only point that remains is the question of the validity of the objects of the endowment. The parties are Sunnis and it is contended that to endow the property for the purpose of celebrating the milad of Ali Murtaza is not good according to Hanafi School, although it is admitted that a like celebration of the milad of the Prophet stands on quite a different footing and is valid. The appropriation of Rs. 600 to muharram is also challenged on like grounds. We have been referred to no authority forbidding the celebration of the birth of Ali Murtaza. As to the muharram expenses, the deed provides for the making of the offerings, i.e. feeding of the poor on the occasion of the muharram. This is clearly a charitable object, and the keeping of the tazias is a
pious and religious ceremony not restricted solely to the Shia sect. It may be that the mode of observing the ceremony differs in the case of each sect, but we are satisfied that in the present case the intention of the donor was to continue and perpetuate the religious ceremonies and charitable works in which she had been engaged during her life. The remaining Rs. 200 is appropriated to the death anniversaries (barsi ammat) and to the repairs of the Imambara. The latter is admittedly a legitimate object of waqf. The contention of the respondents is that the death anniversaries (barsi ammat) should be understood as meaning the death anniversaries of the members of Najiban's family, and we think that this is a reasonable interpretation to be put on the words. We have come to the conclusion, after considering the evidence and the arguments, that the waqfnama was not illusory and there was an intention of creating a substantial waqf for pious and charitable purposes, and we hold that the objects for which the waqf was created were valid. We therefore dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

EMPEROR v. GUTAIL.

Act No. XXX of 1861 (Indian Penal Code), section 302—Murther—Principles by Aikman—Intention—Knowledge.

D幕 was administered with the usual object of facilitating recovery but in such quantity that the person to whom it was given died in the course of a few hours.

 Held that the person so administering mordor was rightly convicted under section 302 of the Indian Penal Code.

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

The Assistant Government Advocate, (Mr. W. W. Porter) for the Crown.

Aikman and Karamat Husain, JJ.—The appellant G mutilating Ajdhusia, has been convicted of an offence punishable under section 302 of the Indian Penal Code and sentenced to imprisonment for life. He has also been convicted of an offence under

© Crown Appeal No. 80 of 1861 as an order of the High Court of Judicature and of Supreme Court.
under section 328 of the Indian Penal Code and sentenced to 10 years' rigorous imprisonment. The sentences have been ordered to run concurrently. We have read through the whole of the evidence and we see no reason whatever to doubt the prisoner's guilt. On the 29th of May last he attached himself to an old man Arjun and his grandson Ram Nath, who had gone to Mahabgan to purchase an ox. He was previously unknown to them. He said that he was a Thakur of Chilikpurwa and that he too had come to buy an ox. He remained in their company from 2 or 3 gharis after sunrise until afternoon. Both Arjun and his grandson partook of the food which the accused had procured. The accused pressed them to go to the village Karahra where he said he had seen some bullocks for sale. After going a short distance Arjun became ill and fell to the ground unconscious. He and his grandson were seen lying on the road that same evening. The grandson was dead. Arjun and the grandson were seen by the Hospital Assistant, who found in each case the pupils of the eyes dilated. When Arjun was found, he was seen to be plucking at the ground with his hands. The brain of Ram Nath was congested and in the opinion of the Hospital Assistant the congestion was probably caused by poison. Although no poison was found by the Chemical Examiner in the portion of the viscera of Ram Nath sent to him, we think that there can be little doubt that dhatura had been administered. When Arjun came to himself, he found that he had been robbed of his money and his grandson's ear-rings had been taken away.

The dhotis of both had also been taken away. At that time no trace was found of the person who had been in the company of Arjun and the deceased.

On the 19th of June two more men, Girdhari and Hallia, were joined by an utter stranger, who persuaded them to partake of food which he gave them. They both became unconscious. Before the accused could make off, some residents of Nathupura came up and had their suspicions aroused by what they saw. They arrested the accused as he was attempting to make off. He was taken to the police station and sent to the Hamirpur jail. There on the 1st of July he was picked out by Arjun from amongst a number of under trial prisoners as the man who had
been in his company for several hours on the 29th of May and had given him the food, after eating which he became unconscious and his grandson died. No reason is assigned to account for Arjun or the other witnesses falsely identifying the accused. The evidence of the Hospital Assistant and of the Chemical Examiner clearly proves that Girdhari and Hallia were drugged with dhatura. The prisoner called evidence to prove an alibi which we agree with the learned Judge in considering quite insufficient to shake the strong case for the prosecution. We see no reason to interfere with either conviction. Although death does not always follow from dhatura poisoning, yet it does follow in a considerable proportion of cases. Here the accused must have given dhatura to Ram Nath in such a large quantity as to result in his death within 3 or 4 hours. We consider therefore that although he may not have intended to kill Ram Nath, he must be held to have known that his act in giving a dangerous substance in such a quantity was at least likely to cause death. We find no reason for interference and dismiss the appeal.

[But see Emperor v. Bhagwan Din, I. L. R., 30 All., 563 —Ed.]

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

JHINGAI SINGH v. RAM PARTAP.*


Where proceedings are in intention, in form and in fact proceeding under Chapter XII of the Code of Criminal Procedure by a Magistrate duly

*Goverd (2) and Baldeo Baksh Singh v. Bai Ballam Singh (3) referred to. Maharaj Tevar v. Har Charan Bai (4) followed.

* Criminal Revision No. 725 of 1903, from an order of D. T. M. Wright, Magistrate 1st Class, of Mirzapur, dated the 24th July 1903.

(2) (1902) I. L. R., 24 Bom., 527. (4) (1903) I. L. R., 28 All., 144.
On the 7th of August 1901, one Mahadeo Singh executed a usufructuary mortgage of certain property belonging to him in favour of Jhingai Singh whereby he mortgaged his interest as Malik Adna in the holding. One Makhan Tiwari claimed to be the occupancy tenant of the same holding, and Ram Partap alleged himself to be the sub-tenant of Makhan. In a litigation between Makhan Tiwari and Jhingai Singh before the Subordinate Judge of Mirzapur, a compromise was filed on May 24th, 1905, whereby, subject to certain terms, Makhan Tiwari agreed to surrender possession of the holding to Jhingai Singh. Jhingai Singh obtained possession and executed a dakhhalnama on the 28th of June 1905, in pursuance of the compromise decree. Subsequent to this Makhan Singh, on the 2nd of July 1905, executed a lease of the holding in favour of Ram Partap. Ram Partap filed a complaint under section 145 of the Code of Criminal Procedure in the court of the Magistrate of Mirzapur against Jhingai Singh. The Magistrate held that Ram Pratap was in actual possession. He did not refer to the proceedings in the Civil Court. Jhingai Singh made an application for revision to the High Court.

Babu Durga Charan Banerji, for the applicant, contended that a Magistrate was not justified in disregarding the decree of the Civil Court. It was his duty to uphold and carry out that decree so far as it lay in his power to do so. To take proceedings which necessarily must have the effect of cancelling such decree, was to assume a jurisdiction which the law did not contemplate. The Magistrate having acted without jurisdiction in going behind the judgment of the Civil Court, the High Court had power to interfere. He relied on Daulat Koer v. Rameswari Koeri (1), Baldeo Baksh Singh v. Raj Ballam Singh (2) and In re Pandurang Govind (3).

Dr. Tej Bahadur Sapra, for the opposite party, submitted that where an order under section 145 of the Code of Criminal Procedure existed and the proceedings were in substantial compliance with the requirements of the section, the High Court had no power in revision to interfere. He referred to the proceedings drawn up under section 145, Criminal Procedure Code, and cited

(1) (1899) I. L. R. 23 Cal., 625.  (2) (1903) 2 A. L. J., 274.
(3) (1900) I. L. R., 21 Bom., 527.

KNox, J.—This is an application in revision asking this Court to call for the record and to revise an order passed under section 145 of the Code of Criminal Procedure on the ground that the magistrate who passed the order complained of refused to uphold an order passed by the Civil Court and decided the question before him contrary to that order. I have considered the following cases referred to by the learned advocate for the applicant:—Daulat Koer v. Rameswari Koeri (5), Inre Pandurang Gound (6) and Baldeo Baksh Singh v. Raj Ballam Singh (7) decided by this Court on 11th December 1913. But it has already been held by a Bench of the Court in Maharaj Tewari v. Har Charan Rai (8) that as the law at present stands where the proceedings below are in intention, in form and in fact proceedings under chapter XII of the Code of Criminal Procedure by a magistrate duly empowered to act under that chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861. It has not been shown to me that the proceedings before the learned magistrate were not proceedings under chapter XII of the Code or that he was not duly empowered to act under that chapter. According to the contention of the learned advocate it was after being properly seized of the case that the learned magistrate went out of his way, passed an order which he had no jurisdiction to pass, and that by it the learned advocate's client has been debarred from all remedy and deprived of the fruits of the case won by him in the Civil Court. This may or may not be so. The fact remains that section 435 expressly excepts records of proceedings under chapter XII, and I know of no other Act or Statute which confers upon this Court the power of sending for such proceedings. The application is dismissed.

Application dismissed.

(1) Weekly Notes, 1907, p. 50. (5) (1899) I. L. R., 23 Calc., 625.
(4) (1903) I. L. R., 23 All., 144. (8) (1903) I. L. R., 23 All., 144.
Before Mr. Justice Richards and Mr. Justice Griffin.

KISHAN KUNWAR (Plaintiff) v. GANOA PRASAD (Defendant).*

Civil Procedure Code, (1882), section 202—Procedure—Court not competent to alter judgment after delivery.

Where a District Judge wrote and delivered a judgment in a civil appeal, but suspended the issue of his decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment already delivered and to pronounce a second judgment inconsistent therewith.

The facts out of which this appeal arose are as follows:

The defendant No. 1 executed a mortgage in favour of Makan Lal, husband of the plaintiff, on 18th January 1901. Makan Lal died leaving plaintiff as sole heir and representative. She brought this suit for sale on foot of the mortgage of the 18th of January 1901. The defendant No. 2 held a prior usufructuary mortgage as well as a subsequent mortgage over the same property. He pleaded that two sisters of the mortgagor were also owners of the mortgaged property and were necessary parties to the suit and that the plaintiff, being a mortgagee of the interest of defendant No. 1 alone, could not redeem his mortgage and bring the property to sale. In the court of first instance, the defendant No. 2 prayed for an adjournment, which was refused and the plaintiff's suit was decreed. On appeal to the District Judge, he, on the 20th May 1903, delivered a judgment holding that there was no cause shown for an adjournment, and also deciding the other points against the defendant No. 2, but adding:—"I defer passing a decree in this appeal for two months in order to give plaintiff an opportunity of producing a succession certificate." On the 25th May 1903, however, the District Judge passed an order remanding the case to the court of first instance on the ground that as the defendant No. 2's prayer for an adjournment had not been granted, he had not had a sufficient opportunity of presenting his case. The plaintiff appealed.

The Hon'ble Pandit Sundar Lal, for the appellant, contended that the court below had no jurisdiction to go behind the judgment recorded by it on the 20th May 1903. Section 202 of the Code of Civil Procedure forbade the alteration of a judgment.

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* First Appeal No. 83 of 1903, from an order of H. J. Bell, District Judge of Aligarh, dated the 25th of May 1903.
The Judge had simply deferred passing the decree, until a succession certificate was produced. He had no power to re-open the matter and deliver an altogether fresh judgment.

Dr. Satish Chandra Borerji (with him Babu Benoy K. Mukherji), for the respondent, submitted that the case was not finally disposed of on the 20th May 1908. It was still on the list of pending cases. No decree was framed on the basis of the writing dated the 20th May 1908. It was therefore not a judgment within the meaning of the definition in section 2 of the Code.

The only judgment in the case was that dated the 25th May 1908. So long as a case was pending in a court, the court had seisin of it, and if it found that an opinion expressed by it at a former stage was erroneous, it could give effect to its reconsidered opinion when disposing of the case finally. Here the Judge himself stated that all the facts were not fully present before his mind on May 20th.

After an appellate court has expressed an opinion and remitted issues to the lower court, which records findings on those issues, the appellate court can re-open the case and decide it without reference to those findings. He referred to Lachman Prasad v. Jamna Prasad (1) and Amir Kazim v. Zainab Begum (2).

Richards and Griffin, JJ.—This was a suit on foot of a mortgage. The plaintiff’s mortgage was dated the 18th of January 1901. Defendant No. 1 was the executant of the mortgage. Defendant No. 2 held a prior mortgage from the same mortgagor. He also held a second mortgage from the same mortgagor and alleged he held a third mortgage from him. The court at first instance decreed the suit. Defendant No. 2 alone appealed. His grounds of appeal to the lower appellate court were that he had not had sufficient opportunity to present his case, and that he had applied to the court of first instance to adjourn the case, which the court refused to do. The matter having come up for trial to the lower appellate court, judgment was delivered on the 20th of May 1908. The court in the clearest possible way decided that defendant No. 2 had had sufficient opportunity in the court below. The judgment goes into the entire facts of the case. It deals with all

(1) (1887) I.L.R., 10 All., 101. (2) Weekly Notes, 1897, p. 160.
the objections of defendant No. 2. It was, however, necessary for the plaintiff before a decree could be passed in her favour that she should produce a certificate to collect debts as the heir of the original mortgagee. The concluding words of the judgment are—"following the course adopted by the High Court in Abdul Karim Khan v. Maqbul-un-nissa (1), I defer passing decree in this appeal for two months in order to give the plaintiff an opportunity of producing the certificate". This judgment is duly signed and dated, and "it is impossible to read it without seeing that the Judge intended it to be a complete judgment. He merely deferred passing the decree for production of a certificate to collect debts. He did not even adjourn the case. Five days afterwards the court delivered a second judgment and made an order remanding the case to the court of first instance.

This judgment is inconsistent with the first judgment. According to the first judgment nothing remained to be done except to pass a decree. According to the second judgment the learned District Judge was to pass no decree at all but remanded the case to the court of first instance. Section 202 of the Code of Civil Procedure provides that as soon as a judgment is dated and signed by the Judge in open court it must not be altered or added to, save to correct verbal error or to supply some accidental defect not affecting a material part of the case, or on review. In view of these provisions of the Code, we think that the order of the Court below was illegal. We accordingly allow the appeal, set aside the order of the court below, and remand the case, directing the learned District Judge to deal with the case in accordance with his judgment of the 20th May 1903. The appellant will have his costs.

Appeal decreed.

(1) 1909 I. L. R., 30 All., 315.
Before Mr. Justice Richards and Mr. Justice Griffin.

GANOA DAYAL (PLAINTIFF) v. MANI RAM AND OTHERS (DEFENDANTS).* Act No. XV of 1877 (Indian Limitation Act), section 8—Joint Hindu family—Sale of joint property by guardian of minors—Suit to avoid sale—Limitation.

The certificate given by two Hindu minors sold certain property of the minors without the sanction of the District Judge. Within three years of his attaining majority the younger of two minors, who were brothers, sued to avoid the sale. The elder, however, had come of age several years earlier and had taken no steps to repudiate the transaction. Held that the suit was not barred by limitation. Periasami v. Krishna Ayyan (1) and Vigneswara v. B. Ayya (2) referred to.

One Baji Lal died on 19th August 1884 leaving the plaintiff's as his heirs. Musammat Parbat was in February 1886, appointed guardian of the person and property of the plaintiffs, who were minors. She made an application to the court for leave to sell a 5 anna 4 pie share in village Grantha and a 7 anna 4 pie share in village Amritpur. The District Judge sanctioned the sale on the terms that defendant No. 1 Mani Ram should give a clear receipt of all that was due to him and the consideration for the sale was to be Rs. 8,400. Instead of carrying out this sale, a sale of a totally different nature was made on 28th April 1886. The property sold was not the same property which the Judge had given permission to sell, and instead of the minors' getting a clear receipt for all the debts due to Mani Ram, the sum of Rs. 1,000 only was placed to their credit. Mani Ram and defendants Nos. 2 and 3 had also a mortgage on part of the property, which they foreclosed, although it was the intention of the sale which the Judge had permitted that the mortgage should be extinguished as far as the minors and their property were concerned. The plaintiffs brought this suit for cancellation of the sale deed and possession of the property. Plaintiff No. 1 attained majority according to the finding of court below more than 15 years before the institution of the present suit. The suit however was brought within 3 years of plaintiff No. 2 attaining his majority. The first court

* Second Appeal No. 1334 of 1907, from a decree of W. Tuddall, District Judge of Cawnpore, dated the 2nd of September 1907, reversing a decree of Godharil Lal, Subordinate Judge of Cawnpore, dated the 7th of January 1907.

(1) (1502) I. L. R. 25 Mal. 431. (2) (1593) I. L. R. 10 Mad. 452.
(Subordinate Judge of Cawnporo) decreed the suit, but the lower appellate court (District Judge) reversed the decree.

Plaintiff No. 2 appealed.

Mr. Nehal Chand (with him Babu Jogindro Nath Chaudhri and the Hon’ble Pandit Sundar Lal), for the appellant, submitted that the sale by the certificated guardian was void and the minors could ignore the sale.

Act VIII of 1800 was not in force when the present sale took place. The Act in force was Act XV of 1850, which contained no provision similar to that contained in section 30 of the present Act. Section 2 of the present Act had no retrospective effect. *Lala Hurro Prosad v. Basaruth Ali* (1).

Section 8 of the Limitation Act had no application. This was a joint Hindu family. One brother could not give a valid discharge without the concurrence of the other. The Act contemplated only money demands or claims for damages.

Mr. B. E. O’Conor, for the respondent, submitted that section 8 of the Limitation Act applied to a suit of this kind. The elder brother had full power to give a discharge in his capacity of an elder brother and karta of the joint family. Any discharge granted by him in the latter capacity would be binding and could only be impugned if shown to be in fraud of the interests of the joint family. He could have sued to get the alienation set aside, and could have carried on the litigation alone in his capacity of head of the family. If therefore after attaining majority he took no steps to impugn the alienation made by the mother, time would begin to run from the time he attained majority, and limitation would operate equally against the younger brother. The elder of the family always acted as manager. No formal appointment was necessary — *Vigneswaro v. Bapayya* (2), *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (3).


RICHARDS and GRIFFIN, JJ.—This was a suit to recover possession of certain zamindari property. The plaintiffs are the sons

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2. (1833) I. L. R., 33 Cal., 436.  
3. (1853) I. L. R., 25 All., 155.  
of one Baji Lal, who died on the 19th of August 1884. After his death, his widow, Musammat Parbatii, was appointed guardian of the persons and property of the plaintiffs, who were then minors. An application was then made to the court for leave to sell a 5 anna 4 pie share in the village and a 7 anna 4 pie share in another village. The District Judge sanctioned this sale on the terms that the defendant No. 1 in this suit, Mani Ram, should give a clear receipt for all that was due to him. The consideration for the sale was to be Rs. 8,400. Instead of carrying out this sale, a sale of a totally different nature was made. The property sold was not the same property which the Judge did give permission to sell, and instead of the minors’ getting a clear receipt for all debt that was due to Mani Ram, a sum of Rs. 1,000 only was placed to their credit. It would appear that Mani Ram and the defendants Nos. 2 and 3 had also a mortgage of a part of the property. This they foreclosed, although it was the intention of the sale which the Judge had permitted that the mortgage should be extinguished, at least so far as the minors and their property were concerned. This sale took place on the 23rd of April 1886. The plaintiff No. 1 attained majority, according to the finding of the court below, more than 15 years before the institution of the present suit. The suit, however, was brought within three years of the plaintiff No. 2 attaining his majority. In the lower appellate court the suit was determined on the question of limitation, the learned Judge being of opinion that inasmuch as plaintiff No. 1 was of full age he was entitled “to give a discharge” within the meaning of section 3, Limitation Act, and that accordingly the right of plaintiff No. 2 was also barred.

Section 13 of Act XL of 1853 (which was in force at the date of the sale to Mani Ram) provided that no such person (i.e. the guardian) shall have power to sell or mortgage any immovable property, or to grant a lease of the estate for any period exceeding five years without an order of the civil court previously obtained. The sale which Musammat Parbatii was induced to make was not in any sense the sale sanctioned by the District Judge. Section 30 of Act No. VIII of 1890 provides that the disposal of immovable property by a guardian in contravention of certain provisions of that Act is voidable. The older Act contains no
corresponding provision, and in our judgment the sale by Musammat Paibati was absolutely null and void. The only question accordingly that we have to decide is whether or not the plaintiffs are entitled to the benefit of the provisions contained in the last portion of section 8, Limitation Act, No. XV of 1877. That section provides as follows:—“when one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.” The cause of action in the present case unquestionably arose when the defendants took possession in 1886. Section 7 of the last-mentioned Act appears to apply to the case of a sale, plaintiff or applicant being under some disability or to the case of all plaintiffs or applicants being under disability. The section was so construed by a full Bench of the Madras High Court in the case of Periasami v. Krishna Ayyan (1) and accordingly plaintiffs cannot succeed unless they come under the provisions of section 8 and can show that neither of them was capable of giving a discharge without the concurrence of the other. It is a little difficult to understand the meaning of the expression when “a discharge can be given without the concurrence of such person,” and we may note that the word “claimants” in section 8 has been omitted from the corresponding section of the new Limitation Act, No. IX of 1903.

As a member of a joint Hindu family, it is quite clear that the plaintiff No. 1 could not have sued alone to recover possession of the joint property. If his brother did not join as plaintiff, it would have been necessary for him to take advantage of the provisions of the Code of Civil Procedure and to make him a defendant. It is equally clear that the plaintiff No. 1 could not have sold or mortgaged the property without the concurrence of his brother plaintiff No. 2. One case cited was Vigneswara v. Harayya (2). That was a suit by two sons to set aside the sale on the ground that it was illegal as contravening the provisions of section 99, Transfer of Property Act. The suit was clearly

decreed the claim. The lower appellate court (Small Cause Court Judge with powers of a Subordinate Judge) modified the decree by dismissing the claim in respect of that portion of the arrear which had accrued due since the date of remarriage.


The Hon'ble Pandit Sundar Lal (with him Babu Durga Charan Banejri), for the appellants contended that according to Hindu conception marriage is a sacrament. Its effect is to unite the husband and wife and to transfer the latter into the gātra of the former so that the two persons become one person. When the husband dies he is considered as surviving in the wife. She gets maintenance as the wife or widow, as the case may be, of the person to whom she was married. If she does some act whereby a change occurs in her status as such, the right to get maintenance also comes to an end. Remarriage, it is submitted, is one of such acts being, as it is, a complete severance of her connection with the family of her husband. According to the doctrine of Hindu law it is civil death, and its effect upon the right to get maintenance is the same as if she were actually dead. The decree that was given to her was in her capacity as the wife of her husband, and when she ceased to be that wife her right also ceased. As the widow of her former husband she would get maintenance, but that character also is lost when she remarries. The right to receive maintenance being a recurring right, subsequent conduct although not positive unchastity, would entail its forfeiture. As authority for this position reliance was placed upon West and Buhler's Hindu Law, 2nd edition, Vol. II, p. 999.

The Act XV of 1856 only legalises remarriage of widows, but does not take into consideration the consequences that would arise from such remarriage. The general principles of Hindu law would apply. Murugjyi v. Piramakili (1).

The cases in this High Court as to the effect of the Act have not been approved of by the other High Courts, and that is why

(1) (1877) 1 L.R., 1 Mad., 225.
catena of authorities, Full Bench and other authorities. Relyance was also placed upon the remarks of RANADE, J., in Pan-chappa v. Sunganbasaw (1).

The ground on which the obligation to pay maintenance rests is, in the case of the husband, moral and, in that of the father-in-law who has property of the husband in his hands, legal. That being the correct principle, it is submitted that the right and the relationship are co-ordinate: with the cessation of the one, the other also goes. Relyance was placed, besides the cases cited in the judgment, upon Surampalli Bangaramma v. Surampalli Brambaze (2).

In the present case, the second husband is the person under obligation to maintain his wife, by reason of the connection. The former husband and the person deriving title through him are absolved, as the plaintiff cannot be regarded either the wife or the widow of her former husband.

Babu Sital Prasad Ghose (with him Babu Mangal Prasad Bhargava), for the respondent.

The case has been argued on the supposition of those cases which relate to the three higher castes among whom marriage is a sacrament. The parties are Halwais, and that strict view of the marriage tie does not prevail among them. Remarriage is sanctioned by custom among them. Further, a court of justice has declared the plaintiff’s right to receive maintenance and made it a charge upon the property. Unless something in the texts or in decided cases is shown limiting or extinguishing this right, she cannot be deprived of it.

[He read from p. 95 in I. L. R., 21 Bom, and submitted that the case was no authority for the particular point.]

In the absence of such authority what the appellants can invoke in aid of their position is the text of Narada, in which the only case which will entail the forfeiture of the right of maintenance is that of the wife’s not “keeping unsullied the bed of her lord.” In the caste to which the parties belong it cannot be said that by remarriage the widow has not kept the bed of her lord unsullied, remarriage being lawful among them. The case in I. L. R., 1 Mad., 236, has no bearing. There being no decrees

(1) (1899) I. L. R., 21 Bom., 85. (2) (1908) I. L. R., 31 Mad., 333.
of court the fact of her remarrying will not nullify it, unless the
decease so provided.

The Hon'ble Pandit Sundar Lal replied.

Banerji, J.—The question in this appeal is whether a
Hindu widow, who according to the custom of her casté is
allowed to re-marry, forfeits upon remarriage her right to the
maintenance decreed to her against the estate of her first
husband.

The plaintiff, Musammat Kausilia, belongs to the caste of
Halwais or confectioners. She was first married to one Sahi and
in 1881 brought a suit against him and transferees from him for
her maintenance. On the 6th of September 1881 a decree was
passed in her favour fixing Rs. 5 a month as her maintenance,
which was declared to be a charge on the estate of her husband
in the possession of certain donees from him. The husband died
subsequently, but the transferees of the property continued to pay
her the maintenance decreed to her. In 1905 she married a
second time and thereupon the defendants who are in possession
of the property refused to pay the maintenance. She accordingly
brought the present suit for recovery of arrears of maintenance
by sale of her first husband’s property now in the hands of the
defendants. It has been found that according to the custom of
the caste to which she belongs remarriage is permissible and is
valid. The defendants contended that by marrying a second
time she forfeited her right to maintenance. The court of first
instance decreed her claim in part. The lower appellate court
set aside that decree and dismissed her suit. Upon second
appeal to this court the learned Judge who heard it reversed
the decree of the lower appellate court and restored that of the
court of first instance. From his judgment this appeal has been
preferred under the Letters Patent. It is urged on behalf of the
appeal that Act No. XV of 1853 applies to the case and that
under section 2 of the Act the plaintiff by marrying a
second time forfeited her right to maintenance from the estate
of her first husband. It is also contended that remarriage dis-
solves the relationship between the widow and the family of her
first husband and as the right to maintenance is founded on rela-
tionship, it ceases as soon as the relationship is put an end to by
remarriage. In support of these contentions the learned Advocate for the appellants relied on the rulings of the Calcutta High Court in Malangini Gupti v. Ram Rutton Roy (1) and Rusal Jehan Begam v. Ram Surun Singh (2); of the Bombay High Court in Vithu v. Govindra (3) and Punchappa v. Singunbasawa (4) and of the Madras High Court in Murugey v. Viramakuli (5). He also referred to West and Buhler's Hindu Law, Vol. II, p. 999.

Had the question not been concluded by the rulings of this court I should be inclined to accede to the contentions of Pandit Sundar Lal. But as the course of rulings in this court has been uniform, I feel myself bound by those rulings whatever my personal opinion may be. In Har Stran Das v. Nandi (6) it was held by Straight and Brodhurst, J.J., that a widow belonging to the sweeper caste, in which there was no obstacle against the remarriage of widows, did not by marrying again forfeit her interest in the property left by her first husband, and that Act No. XV of 1856 did not apply to the case of such a widow. A similar view was held by Straight and Tyrell, J.J., in Dharam Das v. Nand Lal Singh (7), which was the case of a widow belonging to the Ahir caste. In the case of a widow of the Kurmi caste, Ranjit v. Radhu Rani (8), Blain and Aikman, J.J., followed the above rulings and observed:—"Several unreported cases have all been decided in this court in the same way. We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent cursus curiae in this court." According to these rulings not only is Act No. XV of 1856 inapplicable in the case of a widow who is permitted by the custom of her caste to remarry, but she does not forfeit the property inherited by her from her first husband. The effect of these rulings, therefore, is that the relationship with the family of her first husband does not come to an end, and she does not by remarrying forfeit her right to maintenance. Unchastity may entail a forfeiture of her right to maintenance, but it cannot be said that a widow who has married again has thereby become unchaste. I may observe that Mr. Sundar Lal has not based his contention on this ground.

Ho urges that the right to maintenance has ceased because the relationship with the first husband's family has ceased; but in view of the rulings to which I have referred this contention cannot be accepted. If the widow even after remarriage is entitled to retain the estate of her first husband, she is a fortiori entitled to receive the maintenance fixed for her by the decree passed against her husband and against the transferees of his estate. The appeal therefore fails and must be dismissed.

STANLEY, C.J.—I agree in the proposed order.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Bauerji.

HAR PRASAD (DEFENDANT) v. RAGHUNANDAN PRASAD AND OTHERS

(PLAINTIFFS)

Act No. IV of 1882 (Transfer of Property Act), sections 82 and 100—Mortgage—Effect of satisfaction of entire mortgage debt by one co-mortgagor—Charge—Subrogation.

Held (1) that a mortgagor who discharges the whole mortgage debt obtains thereby a charge on his co-mortgagor's share of the mortgaged property in respect of the amount paid by him in excess of the share of the mortgage debt for which he is proportionately liable; and (2) that such charge takes priority over a subsequent mortgage on the same property created by one of the other co-mortgagors, Bhagwan Das v. Har Dri (1) and Passan Singh v. Ali Ahmad (2) referred to.

The facts of this case are as follows:


On the 6th of January, 1890, Shib Lal and Kevra Lal ancestors of defendants Nos. 1, 2 and 3, had executed a mortgage in favour of one Ghumi Mal. The whole of the money due under the bond was alleged to have been paid off by Har Prasad alone, son of Shib Lal, after the mortgage of the 25th May, 1892, was executed. The present suit was brought by the mortgagees to enforce their mortgage of the 25th May, 1892. To this suit, Har Prasad, son of Shib Lal, was made a defendant on its application. He contended that he had paid Piare Lal's share also of

(1) (1863) I. L. R. 23 All. 227. (2) (1851) I. L. R. 4 All. 43.
the mortgage money due under the mortgage of 6th January, 1890, and so had acquired the title of a prior mortgagee in respect of the mortgage money due from Piare Lal and the property hypothecated. The Lower Court (Subordinate Judge of Bareilly) held that he had acquired no charge by the payment he claimed to have made. The defendant appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the appellant, submitted that a co-debtor had a charge over his other co-debtor’s property for any payment made on his behalf. The charge no doubt arose on the date of payment, but as Har Prasad discharged a prior debt, he was entitled to priority. To ascertain priority, the date of the debt which was discharged should be looked to and not the date of actual payment. There was no difference in principle between the position of a subsequent mortgagee in this respect and that of a subsequent charge holder. He cited Bhagwan Das v. Har Dei (1).

Dr. Satish Chandra Banerji (with him Pandit Moti Lal Nehru), for the respondents, admitted in view of the rulings of this court, that Har Prasad would acquire a charge, but contended that the charge had not a retrospective effect. Section 74 of the Transfer of Property Act dealt with the right of a subsequent mortgagee to pay off a prior mortgage and under that section the subsequent mortgagee acquired all the rights of the prior mortgagee. The language of section 95, however, was different. It only gave the co-mortgagee a charge which was distinct from a mortgage. Section 100 dealt with charges.

A mortgagor paying off the entire debt would not become the prior mortgagee or step into his shoes, nor would a co-mortgagor. The latter’s charge would come into existence when the payment was made and there was no analogy between this right of the co-mortgagor and the right by subrogation which the subsequent mortgagee acquired under section 74. A statutory charge was not to be confounded with a mortgage.

Babu Jogindro Nath Chaudhri replied.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit for sale on a mortgage executed on the 25th of May, 1892, by two persons, Umrao and Piare Lal. One of the properties

(1) (1903) I. L. R., 28 All., 227.
mortgaged is a five-biswa share in the village Meadi Khurd. A two-biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January, 1890. To this mortgage Shib Lal, the father of Har Prasad, defendant, was also a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two-biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad, had paid to Ghumi Mal before they could bring to sale a two-biswa share of the village Meadi Khurd. This contention was overruled by the court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal; and second that even if he acquired a charge he could not enforce it against the plaintiffs, who were puisne mortgagees. The correctness of these findings is impugned in this appeal which was brought by Har Prasad.

The lower court's view that a mortgagor, who discharges a simple mortgage, does not thereby acquire a charge on the property of his co-mortgagor comprised in the mortgage for a rateable share of the debt, is clearly erroneous. By virtue of the provisions of sections 82 and 100 of the Transfer of Property Act a charge is acquired by a co-mortgagor redeeming a mortgage. This was held in Bhagwan Das v. Har Dei (1). If therefore Har Prasad, who upon the death of his father, Shib Lal, became the co-mortgagor of Piare Lal in respect of the mortgage of the 6th of January, 1890, discharged that mortgage, he acquired a right to obtain contribution from Piare Lal and a charge for the amount of the contribution on Piare Lal's two-biswa share.

The next question is whether this charge can take priority over the plaintiff's mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired no priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagor or the purchaser of the equity of redemption who pays off a prior mortgage, acquires, on equitable grounds, priority over a puisne mortgagor.

(1) (1903) I.L.R. 20 All. 227.
mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt he discharges, a co-mortgagor is equally subrogated. It was held by this Court in Pancham Singh v. Ali Ahmad (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee. The same rule is applied by the courts in America. It is thus stated in Jones on Mortgages, Vol. I, para. 877:—“When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances . . . . . . In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it.” In the present case Har Prasad, who was one of the mortgagors, was entitled to redeem Ghumi Mal, but he was under no obligation as between himself and Prane Lal to pay the latter’s share of the debt. He could not redeem the mortgage piecemeal and was therefore bound to pay the whole amount of the mortgage. If he paid that amount he was by such payment subrogated to the rights of the mortgagee and was entitled to priority over the subsequent mortgagees, who appear from their mortgage deed to be the sons of the prior mortgagee whose prior mortgage is mentioned in that deed. We have not been referred to any authority in support of the view of the learned Subordinate Judge. For the reasons

(1) (1881) I. L. R., 4 All., 53.
mortgaged is a five-biswa share in the village Meadi Khurd. A two-biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January, 1890. To this mortgage Shib Lal, the father of Har Prasad, defendant, was a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two-biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad, had paid to Ghumi Mal before they could bring to sale a two-biswa share of the village Meadi Khurd. This contention was overruled by the court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal; and second that even if he acquired a charge he could not enforce it against the plaintiffs, who were puja mortgagees. The correctness of the findings is impugned in this appeal which was brought by Har Prasad.

The lower court's view that a mortgagor, who discharges a single mortgage, does not thereby acquire a charge on the property of mortgagor comprised in the mortgage for a rate is erroneous. By virtue of the

Kamarudin to one of his wives with intent to mortgag the

property

A few days after the institution of a suit against the

demand for recovery of the due, Ahammad, who had two

half of his property to his second wife in satisfaction of the

field, on the part of the first wife to take the transfer above

stated, that such transfer was not necessarily unimpeachable, is

necessarily to find, first, that the transfer was a real, and not an

illegal transaction; and secondly, that the second wife had not

been her husband in carrying out the transaction in question for the

purpose of defeating the claim of the first wife.

The facts out of which this appeal arose are as follow:

Dad Ali, had two wives, Hamid-un-nisa and Naimat-un-nisa. On the 3rd December 1894, Hamid-
mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgagee. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt be discharges, a co-mortgagor is equally subrogated. It was held by this Court in Pancham Singh v. Ali Ahmad (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee. The same rule is applied by the courts in America. It is thus stated in Jones on Mortgages, Vol. I, para. 877:— "When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent encumbrances . . . . . . . . In such case no proof of intent appears that the appellant, Hamid-un-dove is necessary to dower from her husband and instituted the mortgage of it on the 1st of December 1904. Five of his title to straitulation of this suit Ali Jawad made the transfer Har Prasad, who in this suit. On the 22nd of February 1905 the dower amounting to 1,000, and forthwith proceeded to execute her decree. could not be obtained by the defendant respondent, Musammat Nazir- bound to led in consequence the suit out of which this appeal has amount so instituted.

mortgage court of first instance dismissed the plaintiff's claim. gagee pual the learned District Judge affirmed the decision of the court below.

dee (1) (1866) I. L. R., 8 All., 178. (2) Weekly Notes, 1901, p. 64.

Weekly Notes, 1901, p. 67.
We refer the above issue to the learned District Judge under order 41, rule 25, Civil Procedure Code. These issues he will determine upon the evidence already before him. On return of the findings the parties will have the usual ten days for filing objections.

**Issues remitted.**

**Before Sir John Stanley, knight, Chief Justice, and Mr Justice Banerji.**

**H. KUMAR SINGH (DEFENDANT) & ALL HUSAIN AND OTHERS (PLAINTIFFS).**

Suit for damages against joint tort-feasors—Compromise between plaintiff and one of the defendant—such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants Held that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. *Bruneaud v. Harrison* (1) and *Thurman v. Weld* (2) referred to.

This was an appeal under section 10 of the Letters Patent from a judgment of Richards, J. The facts are stated in the judgment under appeal, which was as follows:

"This was a suit for damages for assault. Before the institution of the present suit criminal proceedings had been commenced against some 12 persons, with the result that 8 out of 12 were convicted. The criminal proceedings were followed by the present proceedings in the Civil Court for damages against the same 12 persons. Before the suit was tried one of the four persons who had been acquitted by the Criminal Court at the instance of the plaintiff. The suit then was for acts complained of, from his defendants, with the result that 8 persons who had damages for a piano and damages only paid as against him. It is clear that this suit was not sustained for the same cause of action, notwithstanding Point that the judgment already recovered remained on a suit before the plaintiff v. That is a very different case from the case before us all the tort-feasors were sued in one suit and judgment was not recovered only against who had admitted his liability in the progress of the suit.

(1) (1872) L. R., 7 C. P., 547.
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A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

A creditor, by the fat property is was taken to family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt.

So held by STANLEY, C.J., KNOX, J., and AXMAN, J., concurring.

Held by STANLEY, O.J., and KNOX and AXMAN, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

For BANERJEE, J., concurring:

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JOINT FAMILY PROPERTY, See Hindu law

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committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness, bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff’s claim as against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff’s claim against the other defendants could not be sustained. Reliance was placed upon the leading case of Brinsmead v. Harrison (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of Brinsmead v. Harrison, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit.

(1) (1872) L. R. 7 C. P. 547.
and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for
the appellants is the case of Thurman v. Wild (1). This case does
not appear to us to assist the appellants. In it an action was
brought for damages for a trespass committed by the defendant
as servant and by command of his master. It was held that the
acceptance of satisfaction by the plaintiff from the master was a
good defence to an action against the servant. The ground upon
which this decision was arrived at is to be found in the judg-
ment of LORD DENMAN at page 461 of the report. The pas-
 sage runs as follows:—"He (i. e. the plaintiff) has chosen to accept
from one of the trespassers a compensation for the whole
trespass, and in discharge of all parties, and whether this was
rendered with or without the consent of some of them he is equally
barred as against all." The ground, therefore, of this decision
was that the plaintiff had accepted complete redress from one of
two joint tort-feasors, and having done so he could not sustain a
suit against the others. As LORD DENMAN says:—"He had
accepted a compensation for the whole trespass and in discharge
of all parties." We think under the circumstances that the learned
Judge of this Court was perfectly right in dismissing the appeal
to him and we accordingly dismiss this appeal with costs.

* Appeal dismissed.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Keith,
Mr. Justice Donnerji, Mr. Justice Askmon and Mr. Justice Richards.

CHANDRADEO SINGH AND OTHERS (DEFENDANTS) APPELLANTS;
MATA PHASAD AND ANOTHER (PLAINTIFFS) AND SHEO BABU SINGH
AND OTHERS (DEFENDANTS) RESPONDENTS.

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family
property by father—Liability of son in suit to enforce mortgage—De-
terent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law can
eexecute a mortgage of the joint family property which will be binding on
sons where the loan is not obtained for family necessity or to meet an
ascendant debt.

A debt is not "antecedent" if it is incurred at the time of the execution
of a mortgage for the purpose of securing such debt.

* Second Appeal No. 1028 of 1907.

A creditor suing to enforce against the sons a mortgage executed by the
father in a joint Hindu family over the joint family property is bound to prove
that the loan secured by such mortgage was taken to satisfy an antecedent debt
or was justified by some family necessity, or at least that he had before advan-
ting the loan made inquiries which reasonably led to the belief that the loan was
required for family necessities or to pay off an antecedent debt.

So held by Stanley, C. J., Knox, J., and Aikman, J., concurring.

A mortgage of joint family property was executed by the father of a joint
Hindu family who had sons living at the time. The mortgage was for valuable
consideration but it was not shown that it was executed to meet any antec-
dent debt or for any family necessity. On the other hand it was not alleged
that the debt secured by the mortgage was tainted with immorality.

Held by Stanley, C. J., and Knox and Aikman, JJ., that the mortgage in
question could not be enforced against the sons' interests in the joint family
property.

Per Banerji, J., Richards, J., concurring:—

As regards a Hindu son's liability to pay his father's debts not tainted with
immorality there is no distinction in principle between a debt secured by a
mortgage and an unsecured debt. Unless the debt is of such a nature that it
is not the pious duty of the son to pay it, a mortgage of joint ancestral property
made by the father is binding on and enforceable against the son and his
interest in the property whether the loan secured by the mortgage was incurred
at the time of the mortgage or had been taken at some date anterior to that of
the mortgage. In a suit brought against the son to enforce the mortgage the
onus is not on the plaintiff to prove that the debt was incurred for the benefit
of the family, but it is for the son to prove that, having regard to the nature of
the debt, it was not his pious duty to discharge it.

The following cases were referred to:—Debi Dat v. Jadu Rai (1), Jamma v.
Nari Sakh (2), Baddi Prasad v. Madan Lal (3), Lal Singh v. Deo Narain Singh
(4), Manilal v. Gopal Murra (5), Hanuman Kamat v. Daulat Mundar (6), Ram
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Singh (12), Girhasesh Lal v. Rang Lal (13), Narayana Babu v. Modhun
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Kooner (15), Kamdev Pershad v. Run Bahadur Singh (16), Maharaj Singh
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Chandilala Madanlal v. Kothaperumal (19), Saini Ayyangar v. Punnamal (20),

(1) (1903) 24 All. 459.
(2) (1857) I. L. R. 9 All. 493.
(3) (1893) I. L. R. 15 All. 75.
(4) (1886) I. L. R. 6 All. 379.
(5) Weekly Notes, 1901, p. 57.
(6) (1884) I. L. R. 10 Cal. 525.
(7) (1903) I. L. R. 23 All. 328.
(8) (1900) I. L. R. 27 Cal. 752.
(9) (1903) I. L. R. 29 Mad. 200.
(10) (1879) I. L. R. 6 Cal. 143.
(11) (1908) I. L. R. 30 All. 159.
(12) (1904) I. L. R. 27 All. 10.
(13) (1874) I. L. R. 1 I. A. 321.
(15) (1856) 6 M. R. I. A. 393.
(17) (1893) I. L. R. 23 All. 503.
(18) (1901) I. L. R. 26 B. O. M. 322.
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This was a suit to enforce payment of a mortgage executed in 1883, by sale of the mortgaged property. The suit was brought after the death of the original mortgagor and mortgagee, who were both Hindus governed by the Mitakshara. The defendants, who were the sons and grandsons of the mortgagor, denied that the debt had been taken for the benefit of the family and that the mortgage was binding on them. The courts below found that the debt had been taken by the mortgagor who was also karta of the joint family, but that it was not contracted for legal necessity or to pay an antecedent debt. On the other hand, it had not been alleged or proved that the debt had been taken for immoral purposes. The Court of first instance (Munsif of Janpur), decreted the plaintiffs' claim and this decree was on appeal confirmed by the District Judge.

The defendants appealed. The appeal was referred to the Full Bench on the recommendation of Richards and Karamat Husain, JJ.

Mr. G. W. Dillon (with him Munsib Gobul Prasad), for the appellants:—The suit ought to have been dismissed as it had not been proved that the debt was contracted for a legal necessity or to pay an antecedent debt. The pious liability of Hindu sons to pay their father's debts is not disputed. What is disputed is

(1) (1830) I. L. R. 5 Cal., 825. (10) (1885) I. L. R., 8 All., 231.
(2) (1832) I. L. R. 20 Cal., 323. (11) (1853) I. L. R. 21 All., 233.
(3) (1807) I. L. R., 34 Cal., 184. (12) (1853) I. L. R., 21 All., 121.
(4) (1907) I. L. R., 34 Cal., 735. (13) (1904) I. L. R., 31 All., 316.
(5) (1803) I. L. R., 15 All., 339. (14) (1829) I. L. R., 31 All., 520.
(6) (1816) I. L. R., 7 I. A., 281. (15) (1827) I. L. R., 13 All., 216.
(8) (1806) I. L. R., 12 All., 92. (17) (1840) R. B. J., 47 All., 472.
(9) (1852) I. L. R., 17 Calb., 231. (18) (1853) I. L. R., 20 Calk., 121.
(19) (1855) I. L. R., 12 Calb., 712.
that the father in a joint Hindu family can mortgage family property, there being no legal necessity shown for the mortgage. The limitation prescribed by law for recovery from the sons of a debt due by a Hindu father is six years. See article 120 of the Limitation Act, No. XV of 1877 and the case of *Narsing Misra v. Lalji Misra*, (1). If, therefore, the appellants are right in contending that a Hindu father, in the absence of legal necessity, has no power to mortgage or sell ancestral family property, any claim to recover the amount from the sons *quod* debt is barred by limitation.

For the decision of this case two principles of Hindu law require consideration. The first is that Hindu sons are under a pious liability to pay their father’s debts, if not tainted with immorality. The second is that a Hindu father has no higher powers than any other member of a joint co-parcenary body. These are two distinct principles and in no way dependent upon each other. The first principle, that of the pious liability is not involved in this case and is fully admitted by the appellants. The second principle is still good law and has not been departed from in subsequent decisions. When a person under a disability creates a charge (a Hindu father is under such a disability), it is for the person enforcing a charge so created to prove that the person who created the charge was acting within his powers. In the present case, therefore, the burden lies upon the plaintiffs-mortgagees to prove that the money was borrowed for a legal necessity or to liquidate an antecedent debt. The expression “antecedent debt” nowhere occurs in the Hindu Law.

The earliest cases before the Privy Council, on this branch of Hindu law, were the cases of *Girdharar Lal v. Kantoo Lal* (2), and *Suraj Bansi Koer v. Sheo Parshad Singh* (3). In these cases fathers of Hindu families had become indebted. Being pressed by their creditors they had executed mortgages of ancestral property. Suits had been brought on those mortgages, decrees obtained against the fathers, and sales had taken place in execution. After sales in execution, sons had brought suits to recover their shares in the property sold. Their lordships of the Privy Council held that “where joint ancestral property has passed out

of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a father’s debts, his sons by reason of their duty to pay their father’s debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes.” In other words, they laid down that a Hindu father to liquidate his antecedent debts could mortgage and sell joint family property and that such payment came within the expression “pious purpose.”

He submitted that these cases did not in any way enlarge the father’s powers.

The lower courts relied on Debi Dat v. Jalu Rai (1). That case it was submitted was not rightly decided. In Manbhal Rai v. Gopal Misra (2), it was held that when a father executed a sale-deed of the family property for his own debt and not for a legal necessity or to pay off an antecedent debt, the sale was not binding on the sons. In Kallu v. Fatch (3), the same view was taken as in Debi Dat v. Jalu Rai, but the case of Manbhal Rai v. Gopal Misra was not considered. In the later case of Ram Dyal v. Ajudhia Prasad (4) Manbhal Rai v. Gopal Misra was followed.

The Full Bench case, Karan Singh v. Bhup Singh (5), was not a case of mortgage but of a simple money debt. The difference is this. In the one case the father is contracting a debt, while the other he is hypothecating family property which he cannot do.

The Mitakshara lays down that the father in a joint Hindu family has no higher powers of alienation than any other member. (Mitakshara, chapter 1, section 1, verses 27, 28.) When a son claims exemption on the ground of the immoral nature of the debt, it is for him to prove the immorality, but the creditor had first to prove that a transfer was made for a legal necessity or to pay off an antecedent debt.

The case of Nanoni Babu v. Modhun Mohun (6), relied upon in Debi Dat v. Jalu Rai was not a case of a mortgage.

(1) 1932 I. L. R., 21 All., 439. (2) 1904 I. L. R., 31 All., 329.
(3) Weekly Notes, 1901, p. 57. (4) 1904 I. L. R., 27 All., 16.
(5) 1904 I. L. R., 21 All., 21.
all but one of debt. Therefore the question could not arise in that case and the observations of their Lordships were obiter.


In all cases before the Privy Council from 6 I. A. onwards the suit had been brought after the property had been sold in execution of a decree.

The general principle of Hindu law is that every member of a joint Hindu family stands on an equal footing with and has the same powers as the others. The Privy Council have guarded this principle of Hindu law with great jealousy. Lakshman Dada Naik v. Ram Chandra Dada Naik (19), Madho Prasad v. Mehrban Singh (20), and Balgouvind Das v. Narain Lal (21).

In the case of father and son the Privy Council safe-guarded this principle by the theory of antecedent debt and in the case of others by holding that no member can transfix even his own share without the consent of others, although at the suit of a creditor they allow such undivided share to be attached and sold.
The father thus being under a legal disability to charge the share of the sons except for an antecedent debt or for legal necessity, the onus of proving that his case comes under the exception lies on the creditor who seeks to enforce the charge.

Munshi Gokul Prasad, on the same side, pointed out that there was no case in which the mortgage was the plaintiff and in which the Privy Council had laid down that the burden of proof did not lie upon the plaintiff who was seeking to enforce a transfer made by a person with limited powers like the father, but that it was for the sons to prove the immoral nature of the consideration for the transfer before they could escape liability. He referred to Rameswar Pershad v. Run Bahadur Singh (1).

Mr. M. L. Agarwala (for Mr. W. Wullach), for the respondent. The question whether an alienation by a father can be upheld when no antecedent debt or necessity is proved and the consideration is not immoral, is one of interpretation of certain dicta of the Privy Council. So far as the shastras are concerned, not a word is found in them about antecedent debts. The only ground on which the son is made liable to pay his father's debts is his pious duty to save the soul of his father from going into the regions of torment and this duty is as great in the case of a present debt as in that of an antecedent debt. According to the rulings also an 'antecedent debt' may mean a present debt. Luckman Das v. Giridhur Chowdhry (2), Khabil-ul Rahman v. Govind Pershad (3), Maheswar Dutt Tewari v. Kishun Singh (4). This view was also held by the Madras High Court in Chidambaram Mudaliar v. Koothaperumal (5). In Venkataramanagounder Pantulu v. Venkataramanamu Doss Pantulu (6), the Judges adopt the principle laid down in 27 Mad., 326. There is practically no distinction between a present advance and an antecedent debt. J. C. Ghose, Hindu Law, second edition, 445.

On the question of the onus of proof, the rulings of the Bombay High Court in Chintamanrao Mahendral v. Kashinath (7)

(2) (1880) I. L. R., 5 Calc., 855. (5) (1903) I. L. R., 27 Mad., 228.
(3) 1824 I. L. R., 20 Cal, 328. (6) (1903) I. L. R., 29 Mad., 510.
(7) (1889) I. L. R., 15 Bom., 329.
Ramchandra Mahadev Nadgir v. Faktarappa (1), and Govindkrishna Gujar v. Sukharam Narayan (2) were referred to.

The rulings of the Allahabad High Court also have been, except for two decisions and an obiter dictum, uniformly in favour of the creditor, irrespective of the fact whether he comes as a plaintiff or as a defendant. Sita Ram v. Zulim Singh (3), Kishan Lal v. Garuruddhawaja (4), Debi Dat v. Jadu Rai (5), Kallu v. Fatch (6), and Babu Singh v. Behari Lal (7). The only direct ruling against the respondent is, Jamna v. Nain Sukh (8). In this case it was held that the onus of proving legal necessity lay upon the creditor. This case was decided on the strength of Lal Singh v. Deo Narain Singh (9). But the judgment in that case was disavowed in a later case, Bhawani Bakhsh v. Ram Dat (10), by the judges who delivered the former judgment. Therefore the judgment in 9 All., 493, being based on 8 All., 279, is, it was submitted, incorrect.

In Mandhal Rai v. Gopal Misra (11), the remarks made with regard to antecedent debts were not necessary for the decision of the case. There is a passage in Karan Singh v. Bhop Singh (12), which taken by itself is in favour of the respondent. The passage includes mortgage debts as well as simple money debts.

As to Maharaj Singh v. Bakhwant Singh (13), the remarks in it as to the burden of proof being on the creditor were not necessary for the decision of the case. The immoral nature of the debt was proved in this case and the question did not, therefore, arise at all as to whether the burden of proving legal necessity lay on the creditor: Basa Mal v. Maharaj Singh (14), Beni Midho v. Basdeo Puthak (15), Bhawani Bakhsh v. Ram Dat (16), Pem Singh v. Partab Singh (17), and Lal Singh v. Pulandar Singh (18), were referred to and it was urged that

(1) (1880) 2 Bom., L.R., 450.
(2) (1884) I.L.R., 29 Bom., 393, 399.
(3) (1886) I.L.R., 6 All., 293.
(4) (1893) I.L.R., 21 All., 293.
(5) (1896) I.L.R., 6 All., 459.
(7) (1903) 5 A.L.J.R., 175.
(8) (1897) I.L.R., 9 All., 493.
(9) (1893) I.L.R., 8 All., 279.
(10) (1901) I.L.R., 13 All., 216.
(12) (1904) L.L.R., 27 All., 19, 18.
(13) (1903) I.L.R., 25 All., 509.
(14) (1903) I.L.R., 9 All., 203.
(15) (1903) I.L.R., 22 All., 279.
(16) (1901) I.L.R., 12 All., 53.
(17) (1902) I.L.R., 12 All., 216.
(18) (1903) I.L.R., 29 All., 162.
in Girdharjee Lal v. Kantoo Lal (1), their Lordships of the Privy Council were in doubt as to whether sons could question alienations made by the father, except on the ground of immorality, but in the later case of Nanomi Babuasin v. Medhun Mohun (2), their Lordships held that sons could not set up their right against the remedies of the creditor. This High Court has made observations on this ruling favourable to the creditor in Lachman Das v. Khunnu Lal (3) and Karan Singh v. Bhup Singh (4). The Privy Council clearly lay down in 13 Calc., 21, that a creditor can pursue any remedies open to him against the son which he could have pursued against the father unless the debt is tainted with immorality. This view has been followed in Bhagbut Pershad Singh v. Girja Koer (5) and Mahabin Pershad v. Maheswar Nath Sahai (6).

It was submitted that from 1838 to 1908 there was a uniformity of decisions in this High Court that the omus lay on the son. The principle of stare decisis should not be departed from.

Munshi Gokul Prasad, in reply referred to the principle of Hindu law that no member of a joint Hindu family can alienate family property without necessity. Balgobind Das v. Narain Lal (7). Mitakshara, Chapter I, section 1, verses 27, 28. The power of the father is not greater than that of any other member except that he is the natural manager of the family and that sons have a pious duty to pay the debts of their father. The reason why the father is unable to transfer family property is given by the Privy Council in Sartaj Kuari v. Deoraj Kuari (8).

The power of the father to alienate family property should not be confused with the liabilities of the sons to pay their father’s debts. The Privy Council have applied two different rules of evidence to the two classes of cases, viz., those in which a creditor sues to enforce a charge against joint family property created by a Hindu father who has only a limited power of disposal, and those in which the sons come in as plaintiffs to set aside sales in execution of decrees obtained against the father.

(1) (1874) I. L. R., 1 I. A., 321.
(2) (1885) I. L. R., 13 Calc., 21, P. O.
(3) (1901) I. L. R., 37 All., 16, 18, n. a.
(4) (1890) I. L. R., 15 Cal., 17, P. O.
(5) (1888) I. L. R., 15 Calc., 272.
(6) (1888) I. L. R., 15 All., 333, P. O.
(7) (1888) I. L. R., 15 All., 272, 236.
In the former class of cases they have applied the general rule that a plaintiff seeking to enforce a charge created by a person with limited powers must show that under the circumstances that person was competent to charge the property. This general rule is laid down in the well-known case of Hanoomanpersaud Panday v. Babooce Murraj Koonwerre (1). The same rule has been applied to cases of transfers by a father where in derogation of the rights of his son, under the Mitakshara, he has made an alienation of the family property. Kameshwar Pershad v. Run Bahadur Singh (2). In the latter class of cases they have applied the rule that when the sons sue to recover property which has passed out of the family by sale in execution of a decree obtained against the father, they must prove that the sale took place under such circumstances that they were not bound by it. The Privy Council case in L. L. R., 13 Cal., 21, is a case of that kind. In Nanomi Babuasinc v. Modhun Mohun (3) the Privy Council never said that the sons could not plead limitation; what they said was that sons could not set up their right against the remedies of the creditor, but that implies that there must be in existence some remedies open to the creditor and not barred by time.

As regards the meaning of the phrase 'antecedent debt' it has been held by this court that antecedent debt means a debt contracted before the sale or the mortgage sought to be set aside by the son, and other courts have, in many cases, expressed the same view. The cases of Lal Singh v. Deo Narain Singh (4), Manbhal Rai v. Gopul Misra (5), Ram Dayal v. Ajadhia Prasad (6), Hanuman Kamat v. Duulat Mundar (7), Surju Prasad v. Gulab Chand (8), Chinnaiy v. Perumal (9), Sami Allyaun v. Ponnammal (10), and Venkataramana Pantulu v. Venkataramanand Doss Pantulu (11) were referred to.

The following judgments were delivered:

STANLEY, C.J.—This second appeal was directed to be laid before a Full Bench in consequence of a conflict in the decisions

(2) (1890) I. L. R., 6 Cal., 843, 847-8.
(3) (1889) I. L. R., 8 Cal., 273.
(4) (1901) A. W., 37.
(5) (1856) I. L. R., 13 Cal., 21.
(6) (1883) I. L. R., 13 Cal., 762.
(7) (1884) I. L. R., 10 Cal., 628.
(8) (1890) I. L. R., 23 All., 328.
of this and the other High Courts upon the main question involved in it. The suit is one to enforce payment of a mortgage by sale of the mortgaged property. The mortgage was executed by the late Ram Narain Singh, who was the head of the defendants’ family on the 4th of September 1883 to secure a principal sum of Rs. 400 in favour of Ram Narain Kaler, the father of the plaintiff respondent Sheo Baba Singh and the grandfather of the appellant Chanderdeo Singh. The parties are governed by the law of the Mitakshara. It was found by the Court of first instance that the mortgage was not executed for the purpose of satisfying any antecedent debt and there was no evidence that the consideration was required for the legal necessities of the family, or that the lender made any inquiry as to the purposes for which the money was borrowed. On the other hand it was not proved, or even alleged, that the debt was tainted with immorality. On these findings the court mainly relying on the decision in the case of Deb Dutt v. Judu Rai (1), decreed the plaintiffs’ claim. Upon appeal this decision was upheld by the learned officiating District Judge. He held that the money advanced to the mortgagor could not be said to have been applied to the discharge of any antecedent debt, but at the same time that the debt was not tainted with immorality and consequently the appeal was without any force. A second appeal was preferred, the first ground of appeal being that the mortgage not being one for the payment of an antecedent debt, nor for family necessity, was not binding on the appellants. There is a second ground of appeal, namely, that the claim of the plaintiffs so far as it is based on the pious duty of sons to pay their fathers’ debt is barred by time. In view of the pious obligation of Hindu sons in a Mitakshara family to pay their father’s debts, the learned counsel for the appellants did not for a moment contend that this pious duty did not lie upon his clients. He admitted that they were so liable, but he contended that the mortgage of the 4th of September 1883, not having been made to satisfy an antecedent debt, or for family necessities, was not binding upon the

(1) (1902) I.L.R. 24 All., 452.
appellants. The sole question then for the court is whether a father of a Hindu family governed by the Mitakshara law, can execute a mortgage which will be binding upon his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

The rule of the Mitakshara is to be found in Chapter I, section 1, clause 27. Clause 27 runs as follows:—Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father, or other predecessor; since it is ordained though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten and they who are yet still in the womb require the means of support, no gift or sale should therefore be made,” and then follows in clause 28 an exception to this rule. It runs as follows:—“Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress for the sake of the family, and especially for pious purposes.” This means, I take it that a donation, mortgage or sale cannot be made except for the purposes named or one of them. This is the foundation of all the decisions governing the competency of a Hindu father in a family governed by the Mitakshara to dispose of the joint property of the family. He can dispose of it during a season of distress, for the sake of the family or for pious purpose.

Until recently the decision of this High Court in the case of Jamna v. Nain Sukh (1) was regarded as a binding ruling. In that case Sir John Edge, C. J., and Mahmood, J., held that as a general rule a creditor endeavouring to enforce his claim under an hypothecation bond given by a Hindu father against the estate of

(1) (1897) I. L. R. 9 All. 493.
a joint Hindu family in respect of money lent or advanced to the father, should prove either that the money was obtained by the father for a legal necessity, or that he (the creditor) made such responsible enquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family. In that case in a suit against the members of a joint Hindu family upon a bond given by their father by which family property was hypothecated no evidence was given on either side, as here, as to the circumstances under which the bond was given. It was held that the burden of proof lay upon the plaintiff to show that either the money was obtained for legal necessity or that he had made reasonable inquiries and had obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family.

In the case of Badri Prasad v. Madan Lal (1), a Full Bench of this Court consisting of all the Judges held that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the birth of the sons, which purported to mortgage the joint family property, the consideration having been money advances antecedently made by the mortgagee to the father, not as manager of the family, or with the authority of the sons, or for family purposes, but not for purposes of immorality or for purposes which if the father were dead would exonerate the sons from the pious obligation of paying such debts of the father. In this case, as appears from the judgment of Edge, C.J., the consideration for the bond in suit was a sum of Rs. 1,457-3-0 due under a prior bond of the 7th of October 1881, Rs. 181-4-0 interest due under this bond and a present advance of Rs. 11-9-0. The money was borrowed to pay off an antecedent debt. The present advance of Rs. 11-9-0 being regarded as a negligible quantity. The decision therefore gives no support to the conclusion of the respondents.

In the case of Manbhalal Rai v. Gopal Misa (2) Sir Arthur Strachey, C.J., and my brother Banerji expressed the view that a sale of ancestral property by a father in a joint Hindu family

(1) (1893) I.L.R., 15 All., 75. (2) Weekly Notes 1901, p. 57.
may be set aside on suit by the son so far as it affected their interest in the property if there were no antecedent debt or valid necessity to support it, although the transaction was not shown to be tainted with immorality. In his judgment Sir Arthur Strachey, C.J., commenting upon the view expressed by the learned Judge of this Court from whose decision the appeal had been preferred observed as follows:—"The learned Judge held that the plaintiff was entitled to no relief whatever, inasmuch as he was "a Hindu son impeaching the sale of ancestral property of a joint family made by his father" and it had been "constantly held that when the vendor is the father in a joint family the son can impeach the sale only on the ground that the money was raised for debauchery and other immoral purposes." In my opinion that proposition is too broadly laid down by the learned Judge. The doctrine limiting the son's power to impeach an alienation of joint family property made by his father is based solely on the pious duty which the Hindu law recognises as incumbent upon a son to pay his father's debts not tainted with immorality. The true rule is that the son cannot impeach an alienation of ancestral joint family property made by a father, for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a debt. That this is the true scope of the doctrine is shown by the numerous decisions, of which it is sufficient to refer to Lal Singh v. Deo Narain Singh (1) the decisions of the Privy Council cited in the judgment in that case, and the judgment of the Full Bench in Badri Prasad v. Madan Lal (2). These cases show that the doctrine has no application to a case in which no antecedent debt of the father, that is a debt antecedent to the alienation in question is concerned as the consideration or object of the alienation. In the present case the deed does not state any antecedent debt of the father as the consideration or the object of the sale. (The italics are mine.) Nothing can be clearer than this language of the learned Chief Justice. In his judgment my brother Banerji endorsed the view expressed by Sir Arthur Strachey in the following language:—"According to the well known rulings of the Privy Council,

(1) (1886) I. L. R., 8 All., 279. (2) (1893) I. L. R., 15 All., 75.
an alienation of joint family property made by the father of a joint Mitakshara family cannot be impeached by his sons, if such alienation has been made in lieu of an antecedent debt or for the payment of the father’s debt, unless the son can prove that the debt was incurred for an immoral purpose, the reason for the rule being that it is the pious duty of the son to pay his father’s debt not tainted with immorality. Had the transaction in the present case been that of a sale made in lieu of an antecedent debt, or for the payment of a debt due by the father, the principle which the learned Judge of this Court has applied would have been applicable. But in this case there was no allegation that the consideration for the sale was an antecedent debt of the father or that it was taken for the purpose of paying off the father’s debt.” Now in that case it was found that there was no consideration at all for the sale. Consequently the suit was bound to succeed; but I cite the case as showing the view of the law which was entertained at this time by the learned Judges who decided it. This was the case of a sale, but it is obvious that no distinction can be drawn between alienation by out and out sale and alienation by mortgage. A mortgage is a sale sub modo. The word ‘alienation’ frequently met with in the text books and judgments embraces both sale and mortgage.

In the case of Ram Dayal v. Ajudhia Prasad (1) my late brother Burkitt and myself adopted the view of the law expressed in Manbahrul v. Gopal Misra.

Now by the expression antecedent debt I understand a debt which is not for the first time incurred at the time of a sale or mortgage that is presently incurred but a debt which existed prior to and independently of such sale or mortgage. It must be a bona fide debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object. This was the interpretation placed upon the expression by the Calcutta High Court in the case of Hanuman Ramat v. Dowlut Mundar (2), in which it was held that although no member of a joint Hindu family governed by the Mitakshara or Mithila law has the authority, without the consent of his co-sharers, to sell or mortgage even his own share.

(1) (1906) L. L. R., 23, All., 328. (2) (1894) L. L. R., 10 Calc., 523.
in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of his own and his sons in order to pay off antecedent personal debts, the sons cannot avoid such alienation unless they prove that the debts were immoral; that to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not merely in consideration of a loan or a payment made to the father on the occasion of his making the alienation; and that in the case of a voluntary sale the purchase money does not constitute an antecedent debt such as to render that sale binding on the sons unless they prove the transaction to have been immoral.

Again in the same High Court in the case of *Surja Prasad v. Golab Chand* (1) Ghose and Harington, J.J., held that in a case of a joint Mitakshara family where the father raised money on a mortgage hypothecating ancestral family property and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgage as to the purpose for which the debt was incurred, the mortgage security could not be enforced against the son (the father having died) unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question and that under the circumstances the mortgage was not binding upon the son, but that the debt not having been proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money decree against the sons, not upon the mortgage security, but upon the simple obligation created by the bond, and that a suit for such a relief must, under the Limitation Act, be instituted within six years from the date of the mortgage bond.

In the Madras High Court in the case of *Venkataramanaya Pantulu v. Venkataramana Doss Pantulu* (2) Sir Arnold White, C. J., and Subramania Ayyar and Davis, J.J., held, following several decisions of that High Court, that when a debt was incurred at the time of sale or mortgage, it was not an

(1) (1900) I. L. R. 27 Cal. 762. \( \text{\textit{(2) (1905) I. L. R. 29 Mad. 203.}} \)
antecedent debt within the meaning of those words as used in the judgment of the Privy Council in Suraj Bansi Koer v. Sheo Persad Singh (1). In their judgment the learned Judges observe:—"As regards the question of sale there does not appear to be any decision, either of the Privy Council or of the Courts of this country, that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to and independently of the sale." I think it to be beyond question that the expression "antecedent debt" means what it expresses, namely a debt incurred prior to and independent of the sale or mortgage sought to be enforced.

The propriety of the decision in the case of Jamma v. Nain Sukh (2) was questioned in the two cases of Debi Dat v. Jada Rai (3) and Babu Singh v. Bihari Lal (4). In the first mentioned case my brother Banerji seems to me to have resiled from the view laid down by him in Munsabat Rai v. Gopal Misra. He and my brother Aikman held in a suit for sale on a mortgage of joint family property executed by a father and three of his sons that the fourth son, who was a minor and four grandsons, also minors who were not executants of the mortgage, were properly arraigned as defendants, inasmuch as their own interests in the joint family property would be liable under the mortgage unless they could show that either the mortgage debt was never incurred or that it no longer subsisted or that it was tainted with immorality. The learned Judges delivered a very short judgment holding that the ruling in the case of Jamma v. Nain Sukh was overruled by their lordships of the Privy Council. They say:—"It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in Badri Prasad v. Madan Lal, and to the ruling of the Privy Council in Nanomi Babuasin v. Mohun Mohun, it can no longer be considered as law. The sons and grandsons of a mortgagee can only dispute the validity of the mortgage either on the ground that the debt was never incurred, or is no longer in existence or that it was tainted with immorality. I may here again point out that in the case of Badri

(1) (1876) I. L. R., 5 Cal., 148.  (2) (1897) I. L. R., 9 All., 493.  (3) (1903) I. L. R., 24 All., 455.  (4) (1908) I. L. R., 20 All., 154.
Prasad v. Madan Lal, the consideration for the mortgage which formed the basis of the suit was with a trifling exception money advances antecedently made by the mortgagor to the father.

In the case of Babu Singh v. Bihari Lal (1), which was a suit for sale upon a mortgage my brothers Banerji and Richards held that the decision in the case of Jamna v. Nain Sukh, could no longer be supported and that it was sufficient in order to establish the liability of a son to pay the personal debt of his father, if the debt be proved and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. In that case my learned brothers quoted with approval my words in the Full Bench case of Karan Singh v. Bhup Singh (2), as follows:—“It is not necessary in order to establish a son’s liability for his father’s debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes, or was such a debt as does not fall within the pious duty of the sons to discharge.” Now the suit of Karan Singh v. Bhup Singh was not a suit to enforce payment of a mortgage debt. It was a case in which a creditor obtained a decree for profits against the lambardar of a village and in execution of that decree attached immovable property belonging to a joint family of which Tota Ram, the lambardar, was the head. The sons and grandsons of the lambardar were the plaintiffs in the suit, and in it they sought a declaration that their interests in the property attached were not liable to attachment and sale in execution of the decree against their father. As pointed out in the judgment there was no allegation that the debt in respect of which the execution proceedings were had was for immoral purposes or such a debt as the sons and grandsons were relieved from their pious obligation to satisfy. This being so, and the sons being liable to satisfy the debt the joint family property was liable to attachment and sale in execution of the decree. The claim was in fact enforced against the sons by reason of their pious obligation to pay their father’s debts. My brothers Banerji,

(1) (1905) I. L. R. 30 All., 153.
(2) (1904) I. L. R., 27 All., 16.
and Richards seem not to recognize any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father’s debts, and a case in which a mortgagee of the father seeks to enforce a mortgage against the son by sale of the mortgaged property.

In the case before us, as I have said, it is not denied that sons in a Mitakshara family are liable to pay their father’s debts, provided those debts be not tainted with immorality. What is denied is that a mortgage by a father in such a family is binding upon his sons if that mortgage had not been executed to satisfy an antecedent debt or a family necessity and the mortgagee has failed to show that he made any reasonable inquiry as to the necessity for the loan. A son admitted to be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father’s debts provided that the suit be not barred by limitation and a decree passed in such a suit may be enforced in execution by sale of the ancestral property of the family.

Now let me turn to the decisions of their Lordships of the Privy Council which have been relied upon as supporting the view that a mortgage executed by a Hindu father, in a Mitakshara family not shown to have been made to satisfy an antecedent debt or a family necessity but not shown to have been for a debt tainted with immorality, is binding upon his sons. The first to which I shall refer is the case of Suraj Bansi Koer v. Sheo Persad Singh (1). In that case an ex parte decree for money had been obtained against a Hindu governed by the Mitakshara Law upon a bond, whereby he had mortgaged his ancestral immovable estate, and the estate was attached and sold. Prior to the sale in execution the judgment debtor died and his infant sons and co-heirs on filing a petition of objections, were referred to a regular suit. They instituted a suit after the sale against the execution creditor and the purchasers for a declaration of their right to the property sold and to have the mortgage bond, the ex parte decree and the execution sale set aside. It appeared that the father’s debt had been incurred without justified necessity and it was held that as between the infants and

(1) (1879) L. R., 9 Cal., 119; L. R., 9 L. A., 63.
the execution creditor neither they nor the ancestral immovable property in their hands was liable for the father's debt, but that as regards the judgment debtor's undivided share in the estate sold whether or not his own alienation was valid by the law as understood in Bengal it was capable of being seized in execution and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceeding having at the time of the judgment debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale. It will be observed that as between the infants and the execution creditor neither they nor the ancestral property in their hands were held to be liable for the debt. In delivering the judgment of their Lordships Sir James W. Colvile remarked that "the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brother except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered) and the fact that the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether in order to bind adult coparceners, their express consent is not required." His Lordship then referring to the case of Girdhara Lall v. Kantoo Lall(1) observed:—"This case is undoubtedly an authority for these propositions. First, that where joint ancestral

(1) (1874) I. R., 1 I. A., 321.
and Richards seem not to recognize any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father’s debts, and a case in which a mortgagee of the father seeks to enforce a mortgage against the son by sale of the mortgaged property.

In the case before us, as I have said, it is not denied that sons in a Mitakshara family are liable to pay their father’s debts, provided those debts be not tainted with immorality. What is denied is that a mortgage by a father in such a family is binding upon his sons if that mortgage had not been executed to satisfy an antecedent debt or a family necessity and the mortgagee has failed to show that he made any reasonable inquiry as to the necessity for the loan. A son admittedly may be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father’s debts provided that the suit be not barred by limitation and a decree passed in such a suit may be enforced in execution by sale of the ancestral property of the family.

Now let me turn to the decisions of their Lordships of the Privy Council which have been relied upon as supporting the view that a mortgage executed by a Hindu father, in a Mitakshara family not shown to have been made to satisfy an antecedent debt or a family necessity but not shown to have been for a debt tainted with immorality, is binding upon his sons. The first to which I shall refer is the case of Swraj Bunsi Kaur v. Sheo Persad Singh (1). In that case an ex parte decree for money had been obtained against a Hindu governed by the Mitakshara Law upon a bond, whereby he had mortgaged his ancestral immovable estate and the estate was attached and sold. Prior to the sale in execution the judgment debtor died and his infant sons and co-heirs on filing a petition of objections, were referred to a regular suit. They instituted a suit after the sale against the execution creditor and the purchasers for a declaration of their right to the property sold and to have the mortgage bond, the ex parte decree and the execution sale set aside. It appeared that the father’s debt had been incurred without justifying necessity and it was held that as between the infants and

(1) (1878) I. L. R., 5 Cal., 145; L. R., 6 L. A., 53.
the execution creditor neither they nor the ancestral immovable property in their hands was liable for the father's debt, but that as regards the judgment debtor's undivided share in the estate sold whether or not his own alienation was valid by the law as understood in Bengal it was capable of being seized in execution and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceeding having at the time of the judgment debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale. It will be observed that as between the infants and the execution creditor neither they nor the ancestral property in their hands were held to be liable for the debt. In delivering the judgment of their Lordships Sir James W. Colvile remarked that "the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered) and the fact that the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether in order to bind adult coparceners, their express consent is not required." His Lordship then referring to the case of Girdharee Lall v. Kantoo Lall(1) observed:—"This case is undoubtedly an authority for these propositions. First, that where joint ancestral

property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off antecedent debt, or under a sale in execution of a decree for the father’s debts, his sons by reason of their duty to pay their father’s debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.”

The first of these propositions it will be observed deals with cases where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father’s debt. It deals with cases in which ancestral property has passed out of the family and with no other cases and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons.

The next case to which I would refer is that of Munsamul Nanomi Babuasin v. Mohdun Mohun (1). In that case the suit was instituted by the widow of a Hindu on behalf of her minor sons and herself to set aside a sale made in execution of a personal decree obtained against the father and husband, at which the defendant had become the purchaser and had as such obtained possession not only of the father’s interest but also that of his sons. In this case, it will be observed, the ancestral property had passed out of the joint family under a sale in execution of a decree for the father’s debt and therefore it fell within the propositions laid down in Suraj Bansi Koer’s case. In delivering the judgment of their Lordships Lord Hobhouse made the following pronouncement:— “There is no question that considerable difficulty has been found in giving full effect to each of two principles

of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable for the father's debts and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor’s remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.”

This pregnant statement of his Lordship has created much misconception, and it is upon the meaning intended to be conveyed by his Lordship that the Judges in the various courts in India have differed. On the one hand it has been held that this dictum is an authority for the proposition that a Hindu father in a joint Mitakshara family can give a valid mortgage of the joint ancestral property as security for an advance made to him at the time not to satisfy an antecedent debt or a family necessity but not made for an immoral purpose. On the other hand the view taken by other Judges is that this interpretation is too wide and that a mortgage to be valid must have an antecedent debt or some family necessity to support it or at least the mortgagee must after reasonable inquiry have satisfied himself as to the existence of an antecedent debt or a family necessity for the loan.

In the leading case of Hanoomanpersaud Panday v. Mussumat Babooce Munraj Koonwarce (1), in which the powers of a

(1) (1866) 6 Mcq. I. A., 393
manager for an infant heir to charge ancestral property by loan or mortgage were dealt with, the question was considered as to the party upon whom the onus of proof lay to prove that the alienation of a manager was bona fide. Their Lordships remark that the question on whom such onus lay was not capable of a general and inflexible answer, and then they observe (at page 419 of the report):

"Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan," and they later on observe as follows:—"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient, and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." Their Lordships were dealing in this case with the powers of the manager of an Hindu family, but the rule laid down by them is equally applicable to transactions in which a father in derogation of the rights of his sons under the Mitakshara law has made an alienation of ancestral family estate.

In the case of Kameswar Pershad v. Run Bahadur Singh, (1) it was held by their Lordships that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate, was bound at least to show the nature of the transaction and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities; that the principle was that the lender, although he is not bound to see to the application of

(1) (1890) I. L. R., 6 Calc., 843 817
the money and does not lose his rights if upon bond fide enquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still it is under an obligation to do certain things, namely, to inquire into the necessity for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the borrower is acting in this particular instance for the benefit of the estate. Their Lordships referred to the principles laid down in the case Hanoomanpersaud Panday v. Mussuman Babooes Munraj Koonwaree and observed:—"They have applied those principles in recent cases not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely alienations by a widow, and to transactions in which a father in derogation of the rights of his son under the Mitakshara law, has made an alienation of the ancestral family estate. (The italics are mine.) The principle broadly laid down is that, although the lender is not bound to see to the application of the money, and does not lose his rights if upon a bond fide inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things, and then their Lordships specify what was required of the creditor in the case to which we have referred. This decision is in consonance with the provisions of section 38 of the Transfer of Property Act which are quoted in the Bombay case to which I shall presently refer. Their Lordships, it will be observed, did not in the case of Nanomi Babuasin v. Medhun Mohun profess to state any principle of law which had not been previously enunciated. The question determined in it was whether the entirety of a family estate, including the shares of minor sons had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit nor in the execution proceedings.

The case of Jamna v. Nain Sukh is on all fours with the case before us. The learned Judges who decided it drew a distinction between it and cases in which a decree had been obtained against the father and the joint property sold or cases in which the sons come into Court to ask for relief against a sale effected by their
father for an antecedent debt. Is it the case then that this ruling can no longer be considered as law in view of the ruling in Nanomi Babusia v. Madhun Mohun? It will be noticed from the judgment that the learned Judges who decided it had in view and considered the rulings of their Lordships of the Privy Council.

Let us see how what has been the trend of the rulings of this and other High Courts upon the question before us since the decisions of the Privy Council in the cases to which I have referred. I have already mentioned the cases of Debi Dutt v. Jada Rai (1), and Bubu Singh v. Bihari Lal (2). In the case of Ram Dayal v. Ajudhia Prasad (3), my late brother Sir William Burkitt and myself, adopting, as I have said, the view of the law expressed in Manabhaul Rai v. Gopal Misra, held that a sale of ancestral property by a father in a joint Hindu family might be set aside on a suit by the sons, so far as it affected their interests, if there was no antecedent debt or valid necessity to support the sale, although the transaction might not be shown to be tainted with immorality. In Maharaj Singh v. Balwant Singh (4) the question now before us was discussed in the judgment of myself and Sir William Burkitt and the authorities were referred to. It was not necessary in that case to determine the point which is for determination in this appeal but an expression of our view of the law is to be found at page 541.

In the case of Jamsetji N. Tota v. Kashinath Jivan Manglia (5), the facts were these. By a written agreement of the 9th of March 1900, the first two defendants, a mother and a son, contracted to sell to the plaintiff certain ancestral property. The plaintiff discovered that the first defendant had a minor son and he instituted a suit against the first and second defendants and the minor son for specific performance of the agreement, contending that the minor’s interest was bound inasmuch as the property was sold in order to pay family debts. It was held that no decree could be made against the minor defendant; that in order to satisfy such of his debts as would be binding on his

(1) (1902) I. L. R., 24 All., 459.  (3) (1903) I. L. R., 23 All., 322.
(2) (1903) I. L. R., 30 All., 155.  (4) (1906) I. L. R., 23 All., 463.
(5) (1901) I. L. R., 25 B. Cm., 326.
heirs a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, but in the case before the Court there was no evidence of doubts which justified the sale, and that it lies on the party who seeks to bind an infant to prove justifying circumstances and thus the plaintiff had failed to do. The case came before Sir Lawrence Jenkins, C. J., and Stirling J., on appeal from Russell, J. The learned Chief Justice in delivering the judgment observed as follows:—

"The cases have now established that to satisfy such of his debts as would be binding on his son a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, while section 33 (in error described as section 31) of the Transfer of Property Act provides that 'where any person authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall as between the transferee on the one part and other persons (if any) affected by the transaction on the other part, be deemed to have existed if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith." The learned Chief Justice then remarks:—"This statutory provision is substantially a statement of the principle deducible from the cases on this point. But this principle obviously has no application where the transaction is still incomplete; for it presupposes an actual transfer for consideration. Here there has been no transfer, nor has the consideration for the transfer been performed. Therefore the declaration sought in this suit against the infant defendant must be supported on some other basis. But the only basis suggested is the analogy of this very rule; for it is argued that as the completed transaction would have been supported and sanctioned against the infant son, so ought the incomplete transaction to be enforced against him. True, there is a superficial resemblance between the two positions, yet it is but superficial: the essential basis of the rule is absent. The duty to discharge the father's debts justifies the acquisition of the money required for that purpose even though it be by sale of the ancestral immovable land. But the existence or a reasonable belief by the purchaser
in the existence of those debts is a necessary condition. Now it is quite clear that the plaintiff's agents by whom alone the negotiations were conducted made no inquiry as to the existence of justifying debts." Then later on he observes:—"We therefore, have to see whether there are now debts that call for or at any rate justify the conversion of the ancestral immovable property into money. On the evidence before us I am not satisfied of this, and it follows as a necessary consequence that in my opinion the declaration should not be made." This ruling supports the appellant's contention.

The ruling of Boddam and Bha-lyam Ayyangar, J.J., in the case of Chudambara Muduliar v. Koothaperumal (1) on the other hand supports the respondent's contention but it was overruled by the Full Bench of the Madras High Court in the case of Venkataramanaya Pantulu v. Venkataramana Doss Pantulu (2). In the first mentioned case it was held that a debt incurred by a Hindu father, which was not shown to be illegal or immoral, was, even during the lifetime of the father, binding on the son's interest in the family property, and that in the case of a mortgage debt incurred by the father, the mortgage was binding on the son notwithstanding that there was no debt anterior to the mortgage but only the debt incurred at the same time as the mortgage, the mortgage being executed as security therefor. The learned Judges observed that "on principle it is difficult to make any distinction between mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son for his share in the mortgaged property can as a general rule be seized and brought to sale, even in the latter case for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage) unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment." This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the

(1) (1903) 1 L.R., 27 Mad., 326. (2) (1905) I.L.R., 29 Mad., 509.
creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this province is well known. Money lenders are ever ready to advance money to thriftless or extravagant land owners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. Money lenders are chary of making large advances to landowners on personal security. Now if in negotiations for a loan on a mortgage lenders are obliged to make inquiry and satisfy themselves that the loan is required to meet a legal necessity this will afford some protection to the other members the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection. A father of extravagant habits might on the security of the ancestral property borrow large sums to satisfy extravagant fancies. He might emulate the folly of the eccentric king of whom we have lately read, who expended the treasure of his kingdom in building a castle on airy heights, and so strip his posterity of their ancestral possessions. The question is not one of mere academic interest but one of substance. The decision in Chidambaram Mudaliar v. Koothaperumal was overruled, as I have said, by Sir Arnold White, C. J., and Justices Subramania Ayyar and Davies in the latter case which I have already cited, in which it was held, following the earlier decision in Sami Ayyangar v. Ponnammal (1) that a sale or mortgage of joint family property by a father is binding on

(1) (1897) I, L. R., 21 Mad., 28.
the son's share only when there is an antecedent debt that is a
debt existing prior to and independently of the sale or mortgage.
In the course of their judgment the learned Judges remark that
"there does not appear to be any decision either of the Privy
Council or of the Courts of this country that a sale is binding on
the son's share when the debt was not antecedent in the sense that it
existed prior to, and independently of the sale." This is a direct
authority in support of the contention advanced by the appel-
lants.

Of the cases in the Calcutta High Court the first to which I
shall refer is that of Luchman Dass v. Giridhar Chowdhry (1),
which came before a Full Bench consisting of Sir Richard Garth,
C.J., and Jackson, Pontifex, Morris, and Mitter, JJ. In this
case the manager of a joint Mitakshara family consisting of a
father and a minor son, raised money on the mortgage of family
property. It was not proved on the one hand that there was
legal necessity for raising the loan, nor on the other that the
money was raised or expended for immoral purposes or that the
lender inquired as to the purposes for which the money was
required. It was held, amongst other things, that the mortgagor
itself, upon which the money was raised could not be enforced,
but the debt contracted by the father being itself an antecedent
debt within the rules of the Privy Council, and the son being a
party to the suit, the mortgagee, notwithstanding the form of the
proceedings, would be entitled to a decree directing the debt to
be raised out of the whole of the ancestral estate inclusive of the
mortgaged property. This is an important decision which
supports the view contended for by the appellants.

Next come to the case of Surja Prasad v. Gobind Chand
(2). In that case a father in a joint Mitakshara family raised
money on a mortgage hypothecating ancestral property and it
was not proved that the money was required for payment of any
antecedent debt, or that the money was raised or expended for
illegal or immoral purposes or that any inquiry was made on
behalf of the mortgagee as to the purpose for which the debt
was incurred. The facts are on all fours with those in the case
before us. It was there contended that in view of the later

(1) (1890) I.L.R. 5 Cal., 853. (2) (1900) I.L.R., 27 Cal., 763.
decisions of the Privy Council a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception, and that there was no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons, that the sons are bound to pay all debts whether secured or unsecured provided they were not incurred for illegal or immoral purposes. On the other side the argument was that the bond could only be enforced against the sons as a simple money bond if a suit were instituted within six years from the due date of the bond and that as the suit was instituted after the expiry of six years from the due date, it was barred by limitation. Ghose, J., (now Sir Chunder Madhur Ghose) an eminent authority on Hindu Law, and Harington, J., held that the mortgage was not binding on the sons, but that the debt not having been proved to have been incurred for illegal or immoral purposes the mortgagee would be entitled to money decree against the defendants, not upon the mortgage security but upon the simple obligation created by the bond, and that a suit for such a relief must under the Limitation Act be instituted within six years from the due date of the bond. The decision in Luchmun Dass v. Girdhur Chowdhry, to which I have referred, and also in Khalibul Rahman v. Gobind Pershad (1) were relied on.

In the later case of Maheswar Dutt Tewari v. Kishun Singh (2) Brett and Starfudder, JJ., dissenting from the decision in Luchmun Dass v. Girdhur Chowdhry and Surja Prasad v. Golab Chand, held that a mortgage by a father in a joint Mitakshara family, composed of father and sons on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the sons and that the limitation applicable to a suit on the bond against the sons as well as the father was that provided by article 132, schedule II of the Limitation Act. The learned Judges decided this case on the assumption that the law as laid down in the case of Luchmun Dass v. Girdhur Chowdhry could not be held to be any longer binding in view of the later decisions of the Privy Council.

The same question came before another Bench of the Calcutta High Court, consisting of Mookerjee and Holmwood, JJ., in the

(2) (1907) I.L.R., 34 Cal., 184.
case of Kishun Pershad Chowdhry v. Tipan Pershad Singh (1). In that case a father in a joint Mitakshara family consisting of a father and his minor son, mortgaged property belonging to the joint family. It was not proved that there was any legal necessity for the loan, or any inquiry by the lender, nor that the loan was contracted for illegal or immoral purposes. It was held in a suit by the mortgagee to enforce his security that he was entitled to have the security enforced as against the share of the mortgagor and also to a decree which would enable him to realize the debt by the sale of the share of the son in the ancestral property. The learned Judges held that the decision in Luchmun Dass v. Giridhur Chowdhry had not been overruled by the Privy Council and was binding upon them and pointed out the distinction existing between the position of a son in a suit in which the mortgage by his father is sought to be enforced against his share in the property and his position after the alienation has been completed by an execution sale. They dealt with the question at considerable length and pointed out that the Judges who decided the case of Maheswar Dutt Tawari v. Kishun Singh not only extended the principle laid down by their Lordships of the Judicial Committee in connection with a case where property has passed out of the family to cases where the security given by the father is sought to be enforced against his sons and also extended the rule laid down by the Judicial Committee as applicable to cases of complete alienation to cases of partial alienations such as mortgages. They point out that their Lordships limited their observations in Girdharee Lal v. Kantoo Lal to cases of conveyance executed by the father in consideration of an antecedent debt and sales in execution of decrees for the father's debt.

Now I do not profess to have exhausted the authorities on the question before us, but I think that the cases to which I have referred fairly illustrate the contending views expressed on that question. My learned brothers who decided the cases of Debi Dat v. Judu Rai and Babu Singh v. Bihari Lal treated the case of Jamma v. Nain Suhk as overruled, contenting themselves by stating that, having regard to the Full Bench ruling in Hadri

(1) (1907) L.L.R., 34 Cal., 725.
Prasad v. Modan Lal and the ruling of the Privy Council in Nanomi Babuasin v. Modhun Mohun, the ruling in Jamna v. Nain Sukh can no longer be considered as law.

Is there any solid foundation for the contention that their Lordships of the Privy Council overruled in the cases which I have cited the clear and definite rule of the Mitakshara? According to that rule it is a settled point that property in ancestral estate is by birth, and that the father is subject to the control of his sons in regard to that estate, it being ordained that a gift or sale of such should not be made without the concurrence of all the sons, this being the only exception that "a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes" A son being under a pious obligation to pay his father's debts, an alienation by the father has been held to be binding on him in view of this obligation, but only, as I think, so binding where the debt is an antecedent debt. The rule of the Mitakshara it is said must be deemed to have been modified by the rulings of the Privy Council, but admittedly it has not been expressly overruled. The dictum in Nanomi Babuasin v. Modhun Mohun which I have quoted, namely:—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality" is relied on as establishing this proposition. It appears to me to do nothing of the kind. That the sons cannot set up their rights against their father's alienations for an antecedent debt I admit, but that they cannot resist the enforcement of a mortgage made by their father alone to secure money borrowed at the time and not proved to have been borrowed to meet a family necessity or to satisfy an antecedent debt I deny. It is contended that their Lordships words that the sons cannot set up their rights against their father's "creditors' remedies for their debts, if not tainted with immorality," justifies the view that a Hindu father can create a valid mortgage of the joint family property which will be binding on his
sons for a debt which is not antecedent. It seems to me that the interpretation of the dictum is too wide and that the words “against his creditors’ remedies for their debts” refer to those remedies only which legally the creditors of the father possess, for example in the case of an ordinary debt a right to sue the son for the recovery of the debt on the basis of his pious obligation to satisfy that debt and on obtaining a decree to attach and sell the joint family property. This interpretation my brother Aikman suggested during the argument. The two principles of the Hindu Law are not antagonistic, the one being that a Hindu father can create a valid mortgage of the joint family property to satisfy an antecedent debt or a family necessity, but only to satisfy such debt or necessity, the other being that a Hindu son is bound under a pious obligation to satisfy his father’s debt if it be not tainted with immorality. The right to maintain a suit in each case is of course controlled by the law of Limitation. In the one case there is a secured debt. In the other case there is merely a personal liability. According to the law as administered by the courts of this Province, a member of a joint family cannot validly mortgage his undivided share in ancestral property established in coparcenary on his own private account without the consent of the co-sharers in that estate. Kalgobind Das v. Narain Lal (1). It follows from this that if the mortgage in suit is not binding in toto it is not binding as to the mortgagor’s share in the mortgaged property.

I have examined the later decision of the Judicial Committee with a view to ascertain if there be any pronouncement which supports the broad interpretation of the ruling in Suraj Bansi Koer’s case for which the plaintiffs respondents contend, but without success. On the contrary their Lordships express their indisposition to extend the doctrine of the alienability by a coparcener even of his undivided share without the consent of his co-sharers beyond the decided cases. In Laksman Dada Naik v. Ramchandra Dada Naik (2) Sir James W. Colville, v.s delivered the judgment in Suraj Bansi Koer’s case, referring to the principle that the coparcener’s powers of alienation is founded on his right to a partition, pointed out that Suraj Bansi Koer’s

(1) (1839) I. L. R., 15 All., 359. (2) (1860) L. R., 7 I. 4, 192.
case was one of an execution against a mortgaged share and was decided "on the ground that the proceedings had then gone so far in the lifetime of the judgment debtor (in report 'mortgagor') as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers." He then remarks:—"Their Lordships are not disposed to extend the doctrine of the alienability by a coparcener of his undivided share without the consent of his co-sharers beyond the decided cases." In the case of Kameswar Prasad v. Run Bahadur Singh (1) it was held by the Judicial Committee that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, a creditor seeking to enforce a charge on such an estate is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities. Sir James W. Colvile again commented upon the decision in Hanoomanpersaud Panday's case and to the law as therein laid down, and then observes:—"It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities." This was, it will be observed, the case of a mortgage. In the case of Madho Parshad v. Mehrban Singh (2), in which it was held that where a Hindu without the consent of his co-parcener had sold his undivided share in the family estate for his own benefit and received the purchase money to his own use, his surviving co-parcener was entitled on his death under the Mitakshara law by survivorship to recover the share so sold from the purchaser, and that the latter had no equity or charge thereon against such survivor in respect of his purchase money. Lord Watson, who delivered the judgment of their Lordships, commented upon the decision in Suraj Bansi Koer's case and pointed out that the right of the purchaser in that case was affirmed on the ground that before the death of the judgment-debtor execution proceedings had gone so far as to constitute in favour of

(1) (1880) I. L. R. 6 Calc., 643. (2) (1890) L. R., 17 I. A. 10
the judgment creditor a valid charge upon the joint estate to the extent of the undivided interest of the deceased which could not be defeated by that event, but at the same time observed that "if no proceedings had been taken to enforce the debt in the lifetime of the judgment-debtor, his interest in the property would have survived on his death to his sons so that it could not be afterwards reached by the creditor in their hands". Then again in the case of Balgobind Das v. Narsim Lal (1), it was held to be the settled law of the Mitakshara as administered in Bengal and the North-Western Provinces, that a Hindu cannot without the consent of his co-parceners sell or mortgage his undivided share in ancestral estate for his own benefit. Sir Richard Couch in delivering judgment approved of the passage in the judgment in the case of Lalshman Dada Naik v. Ramchandra Dada Naik, which I have quoted, and also the judgment in Madho Prasad v. Mehrban Singh. In regard to the judgment in the last mentioned case he observes: "In the judgment delivered by Lord Watson it is said that the counsel for the appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate, and that he likewise conceded that the sales being without the consent of the co-parcener, and justified by legal necessity, were according to that law invalid; but he maintained that the transactions being real and the prices actually paid, respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase money. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold except on condition of its being made at once available for the repayment of the price which he received but that the respondent who took by survivorship was not affected by any equity of that kind and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving co-parcener, except by repeating the rule of the Mitakshara laws. In view of these rulings it seems to me impossible to hold that their Lordships..."
have extended the principle which underlies the decision in Suraj Bansi Koer's case. On the contrary they seem to me to have guarded themselves against the suggestion that the clear and explicit rule of the Mitakshara which precludes the alienability of immovable property by a coparcener without the consent of his coparceners had been repealed or might be treated as a dead letter.

For the foregoing reasons I am of opinion that the Court below was wrong in treating the ruling in Jamna v. Nain Sukh as no longer binding, and that the appeal should therefore be allowed as regards the first plea.

Knox, J.—The question submitted to us for our consideration in this second appeal is whether a father, the head and managing member of a Hindu family, can mortgage the family property and exclude his sons from questioning the transaction, when it is not proved that the mortgage was executed on account of an antecedent debt. It has been found, and we must accept the finding, that (1) there is no evidence to show that the money which formed the consideration of the mortgage was borrowed or applied to the discharge of any antecedent debts. (2) The appellants, who are sons and grandsons of the mortgagor, who died before the institution of the suit, have not alleged, much less proved that the debt secured by the mortgage was tainted with immorality.

The text of Hindu law which bears upon the question is to be found in the Law of Inheritance from the Mitakshara, Chapter I, section I, paras. 27, 23 and 29. I give the translation as it occurs in the edition by Mr. Girish Chandra Tarkalankar (1870). So far as I can judge the translation is accurate, sufficiently accurate at any rate for the present purpose and so far as I can find the text under consideration has, with one exception, not been doubted. That exception is the passage in para. 27, which runs “no gift or sale should be made.” The words न दान किले विनियम: used in the passage are read by Raghunandana as विनियमपालितः.

According to him the correct reading in place of “no gift or sale should be made” is “the cutting off or the expenditure of the means of livelihood is censured.” The only interest that
attaches to this reading is that apparently any tendency there has been to question the text is in the direction of widening, not of narrowing its meaning. The passage then runs as follows:—

"27. Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects; other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, "Though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made.""

23. An exception to it follows:—"Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family and especially for pious purposes."

29. The meaning of the text is this:—While the sons and grandsons are minors, and incapable of giving their consent to a gift, and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

So far as this passage can be any guide it lays down (1) the broad rule that though the power of a father in respect of movable property is ultimate, in the case of immovable property it is limited and he is with regard to it subject to the control of his sons, (2) an exception to that rule, viz., that even a single owner may conclude a donation, mortgage or sale of immovable property under certain stated circumstances.
There is no longer any question that it is a duty of a son to pay the debts contracted by his father unless they are tainted with immorality. This text of the Mitakshara, Chapter VI-47 is almost too well known to need reproduction:—“A son is not bound to pay, in this world, his father’s debts if they are incurred for spirituous liquor, or for gratification of lust, or in gambling nor is he bound to pay any unpaid fines or tolls, or idle gifts.”

Viewed from the standpoint of Hindu text writers it seems obvious that a creditor who claims that he has lent money to the father of a Hindu family and then presses that father to charge immovable property with that debt has to follow the general rule and principle which applies to the proof of exceptions to a rule. On him lies the burden of proving that the father was by reason of a pious purpose empowered to conclude a mortgage. If he fails, his claim to enforce the charge fails. This principle is entirely in accord with the principles laid down for evidence in Hindu Law: Mitakshara on the Administration of Justice—Chapter I, section 6.

I do not propose to deal with the difficulties that have sprung from the case law that has risen round these texts. I have had the advantage of reading and carefully considering the exhaustive judgment of the learned Chief Justice on this point, and I can add nothing to it with advantage. I would therefore, quoad the first plea, allow the appeal and set aside the decrees of both the Courts below.

Banerji, J.—This appeal arises out of a suit for the enforcement of a simple mortgage by sale of the mortgaged property. The mortgage was made by one Ram Narayan Kalwar and the property mortgaged is the joint ancestral property of the family. Both the mortgagor and the mortgagee are dead. The plaintiffs are the son and the grandson of the mortgagee. The defendants are the sons and grandsons of the mortgagor. The suit was defended by some only of the defendants, who denied the mortgage and urged that even if it was made by their ancestor it was not for a family necessity and was not therefore binding on them and their interests in the mortgaged property. The Court
below has found, in concurrence with the Court of first instance, that the mortgage was executed by the defendants' ancestor for valuable consideration, that it was not proved that the money borrowed had been applied to the payment of an antecedent debt, and that it had not been alleged or proved that the debt secured by the mortgage was tainted with immorality. Accordingly a decree has been passed for sale of the mortgaged property. A question of limitation was raised but the lower appellate court did not try it in view of the conclusion at which it had arrived. From this decree the present appeal has been preferred and the two pleas set forth in the memorandum of appeal are:—(1) “The mortgage being not one for payment of an antecedent debt nor for family necessity was not binding on the appellants” and (2) “The claim based on the pious duty of sons to pay their father’s debt was barred by time.”

Upon the findings of the court below the position is this. The father and manager of a joint Hindu family consisting of father, sons and grandsons contracts a debt for such purposes as would make it the pious duty of the sons to pay the debt and as collateral security for it, mortgages joint ancestral property. The question is, can such a mortgage be enforced against the interests of the sons in the mortgaged property unless the mortgagee can show that the debt was incurred for family necessity? The question is really one of the burden of proof, that is, whether it is for the mortgagee to prove affirmatively that the loan was incurred for the necessities of the family or whether the sons must prove, in order to avoid liability for the debt, that it is tainted with immorality.

In my judgment, both upon principle and upon authorities, the onus is on the sons. The following propositions may be regarded as established beyond controversy:—

(1) It is the pious duty of a Hindu son to pay his father’s debt if not tainted with immorality.

(2) In the case of a personal debt of the father the sons are liable, if they cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge”; and “it is not necessary in order to establish a son’s liability for his father’s debt that it
should be shown that the debt was contracted for the benefit of the family." [See the Full Bench case of Karan Singh v. Bhup Singh (1).] For the realization of such a debt the joint ancestral property of the family is liable to be sold by auction and the burden of proof is solely on the son.

(3) If a mortgage is made by the father to pay an antecedent debt or if part of the consideration for such a mortgage is an antecedent debt due to the mortgagee himself, the mortgage may be enforced against the son even in the life-time of the father. The onus in such a case is on the son to prove that the debt was of such a nature that it was not his pious duty to pay it. This was held by the Full Bench of this Court in Badri Pershad v. Madan Lal (2).

(4) If joint ancestral property has been sold by the father for the payment of his debt or if it has been sold in execution of a decree for a mortgage debt or a simple debt of the father the son cannot recover the property unless he can show that the debt was contracted for immoral purposes. This has been held by their Lordships of the Privy Council in numerous cases commencing with the case of Girdharry Lal v. Kanteo Lall (3).

(5) Where a son comes into court to assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the onus is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it. See Beni Madho v. Basdeo Patak (4), approved of in subsequent cases.

What we have to consider is whether the burden of proof is shifted where a creditor of the father seeks as plaintiff to recover his debt by enforcement of the mortgage security given to him by the father.

The liability of a son to pay his father's debt arises, as pointed out by Mr. Mayne (Hindu Law, section 303, 7th edition) "from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts." This obligation has been held by their Lordships of the Privy Council

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(1) (1884) I. L. R., 27 All., 15. (2) (1874) I. L. R., 1 I.A., 321. (3) (1923) I. L. R., 15 All., 75. (4) (1950) I. L. R., 13 All., 92.
of the son for his father's debts arises. The amount of consideration paid down at the time of the sale is not a debt of the father though it may, in some cases, subsequently become a debt of the father. Therefore, a sale by the father must, in order to bind the son, be a sale for the necessities of the family or a sale for a consideration which consists of an antecedent debt of the father or of money received for the payment of the father's debts provided of course that the debt is not tainted with immorality. In the case of a mortgage, however, there is primarily a debt incurred by the father and the mortgage is only, as I have said above, collateral security for the debt. By reason of the son's pious duty he is liable for the father's debt and, therefore, for the mortgage made to ensure the recovery of the debt. In my judgment the case of a mortgage is not similar to that of a sale and the argument based on the analogy of a sale is fallacious. The distinction in this respect between a mortgage and a sale is often overlooked.

The view I have taken above is not only consistent with Hindu law and legal principles but is also supported by authority.

In the well known case of Hanoomanpersaud Panday v. Museumut Babooee Munraj Koonwarre (1) Lord Justice Knight Bruce, in delivering the judgment of their Lordships, said (at p. 421) :— "Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt by the father. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate." In the case of Girdharee Lall v. Kantoo Lal (2) their Lordships, after quoting the above observations, remarked :— "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the

(1) (1858) 6 Mo. I. A., 393. (2) (1874) L. R., 1 I. A., 531.
pious duty of the son to pay his father’s debts, the ancestral property in which the son as the son of his father, acquires an interest by birth, is liable to the father’s debts. The rule is, as stated by Lord Justice Knight Bruce, ‘the freedom of the son from the obligation to discharge the father’s debt has respect to the nature of the debt, and not to the nature of the estate’, whether ancestral or acquired by the creator of the debt.” Their Lordships then proceeded to consider what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the ancestral property.

In Suraj Bansi Koer v. Sheo Persad Singh (1), their Lordships formulated the propositions which were deduced from the earlier rulings and stated the first of these propositions in the following terms:—“Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father’s debt, his sons, by reason of their duty to pay their father’s debts, cannot recover the property unless they show that the debts were contracted for immaterial purposes, and that the purchasers had notice that they were so contracted.” Relying upon the words “antecedent debt”, as mentioned in the judgment of their Lordships, it has been contended in this case, and held in some cases, that a mortgage is not binding on the sons unless it was made for an antecedent debt. In my humble judgment it would be placing too strained a meaning on the decision of their Lordships to hold that they intended to lay down the general rule that in every case of a transfer by the father, whether it was a sale or a mortgage, the transfer would not be binding on the son unless it was made for an antecedent debt. In the particular case before their Lordships a sale had taken place for an antecedent debt and, therefore, in formulating the rules applicable to such a sale, reference seems to have been made to an antecedent debt. As I have pointed out above, a sale by the father not made for a family necessity, would not be binding on the sons unless it was made for an antecedent debt which was binding on them by reason of their pious liability to pay their

(1) (1878) I. L. R. 5 Cal., 119.
father’s debts. In the absence of an antecedent debt the consideration for the sale cannot itself be deemed to be a debt of the father and no question of pious obligation would arise. It was therefore necessary, in the cases before the Judicial Committee, to refer to antecedent debts. But I fail to find anything in their Lordships’ judgment to show that they held or intended to hold that in the case of a mortgage too it must have been made by the father for an antecedent debt.

The most important decision of the Privy Council, which in my opinion concludes the matter, is that in the case of Nanomi Babnasin v. Modhun Mohun (1). After referring to the fact that the decisions either in India or in the Privy Council were not in harmony, Lord Hobhouse, in delivering the judgment of their Lordships, laid down the law in the following terms, apparently with a view to settle all controversy in future:—“Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father’s alienation for an antecedent debt, or against the creditors’ remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.” That by the above pronouncement Lord Hobhouse intended to decide the matter conclusively and to bring into harmony all conflicting rulings is manifest from the remarks made by him in the later case of Mahabir Pershad v. Moheswar Nath Sihat (2) wherein he expressed the hope that recent decisions of the Committee would lessen the difficulties which had been felt before. “The words or against his creditors’ remedies for their debts” do not, in my opinion, leave any room for doubt. What are a creditor’s remedies for his debt? His remedies are a suit, a decree in the suit and a sale in pursuance of the decree. In the case of a mortgage his remedy by decree is a decree for the sale of the mortgaged property. According to their Lordships, the sons cannot set up their rights against the remedies to which I have referred, if the debts are not tainted with immorality. There is no reason to assume that their Lordships

(1) (1889) I. L. R., 13 Cal., 21: (2) (1890) I. L. R., 17 Cal., 551 (553).
confined their remarks to the remedies of an unsecured creditor and did not intend them to apply to secured creditors also. In my judgment the words quoted above contemplate every one of the remedies open to every class of creditors whose debts are not of an immoral nature. This is further evident from the following observations of their Lordships:—

"If his (the debtor’s) debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit." It would surely be putting too limited a meaning on the words of their Lordships to hold that these remarks do not apply to the case of a mortgagee. Upon the authority of this ruling of the Privy Council it is no longer open to a son to resist the claim of a mortgagee from his father, except on the ground that the debt was not incurred at all or that it is tainted with immorality or that it has been barred and it is not incumbent on the mortgagee to prove that the debt was contracted for the benefit of the family. In view of this ruling of their Lordships the dictum contained in the decision in Kameswar Pershad v. Run Bahadur Singh (1) on which Mr. Gokul Prasad relied, cannot be followed. If it be assumed that the question now before us is not concluded by the ruling in Nanomi Babuasin’s case that question has never yet been decided by their Lordships in any other case. It is, therefore, open to us to consider it on its own merits. The question did not arise, and was not decided, in the case of Suraj Bansi Koer, which was a case of a sale in execution of a decree passed upon a mortgage given by the father for an antecedent debt. And I am not aware of any other ruling of the Privy Council on the subject.

Turning now to the decisions of the different High Courts in this country, I shall first consider those of our own Court.

In Sita Ram v. Zalim Singh (2) a mortgagee from the father and head of a joint Hindu family sued the mortgagor for sale of the joint ancestral property mortgaged by him. During the pendency of the suit the mortgagor died and his son was brought on the record as his legal representative. It

was found that the money was not borrowed to meet any family necessity and on this ground the Court below made a decree for the sale of the father’s interest only and exempted the share of the son. Petheram, C. J., and Tyrrell, J., held, following the case of Nanomi Babuvasin v. Modhum Mohun, that the mortgagee was entitled to a decree for the sale of the whole of the joint ancestral property, it not being proved that the loan was taken for immoral purposes. The decree of the Court below was set aside and a decree was made enforcing the mortgage against the entire family property.

In Kishan Lal v. Garuruddhawaje Prasad Singh (1) the Court below found that the mortgagor had taken the loan for his own private purposes and dismissed the suit against his minor son. Blair and Burkitt, J.J., held that this was not a sufficient reason for exonerating the son from the pious duty of paying his father’s debt and made a decree for sale of the son’s interests comprised in the mortgage. Burkitt, J., who delivered the judgment of the Court, said:—“It is now settled law in this Court since the case of Badri Prasad v. Madan Lal (2) that a son can be sued jointly with his father to recover a debt contracted by the father, if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father’s debt.”

In Badri Prasad v. Madan Lal (2) which is a decision of a Full Bench of the whole Court, the father mortgaged joint ancestral property, the consideration for the mortgage being some money advanced at the time and some personal debts due by the father to the mortgagee himself by which the family did not benefit, but which were not tainted with immorality. It was held that the matter was concluded by the decision of their Lordships of the Privy Council in Nanomi Babuvasin’s case, and that the sons’ interests were liable under the mortgage. A decree was made for sale of the mortgaged property including the interests of the sons, in enforcement of the mortgage. In considering the effect of this decision the learned Judges who decided the case of

(1) (1899) I. L. R. 21 All. 239. (2) (1823) I. L. R. 15 All. 75.
Maharaj Singh v. Balwant Singh (1), to which I shall refer hereafter, expressed the opinion that according to this decision "no obligation lay on the plaintiff to prove that any inquiry was made by the lenders as to the necessity of the loans when money was advanced" by them and also the burden of proving that the debts were tainted with immorality lay upon the son.

In Debi Dat v. Jadu Rai (2), Chail Behari Lal v. Gulzari Mal (3), Kallu v. Fateh (4), and Babu Singh v. Bihari Lal (5), it was held that it is not necessary for the mortgagee to prove that the debt secured by the mortgage was incurred for the benefit of the family and that the burden of proof lies on the son and not on the mortgagee, plaintiff. To the first two of these cases my brother Aikman was a party. In Maharaj Singh v. Balwant Singh (1) the question was not decided, but the learned Judges (Staunley, C. J., and Burkitt, J.) observed "in passing" that in their opinion it would be "not unreasonable to require proof on the part of the creditor that before he entered into the transaction he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family." (p. 541)

The only case in which the point was decided and the contrary view was held in this Court is that of Jamna v. Nain Sukh (6). The reasoning by which the judgment in that case is supported was criticised and dissented from by the Bombay High Court in Chintamanrao Mehendale v. Kashinath (7). With much of that criticism I agree. For the reasons I have already stated, I am, with great respect, unable to concur in this ruling. Furthermore, one of the cases from which the rule of law laid down in that case was deduced is that of Lal Singh v. Deonarain Singh (8) decided by Straight and Tyrrell, JJ. With reference to that case the same learned Judges said, in the later case of Bhawani Baksh v. Ram Dai (9), that upon further consideration they had come to the conclusion that "so far as it laid down that the onus rested

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(1) 1908 L. L. R., 29 All., 503.
(2) 1904 L. L. R., 24 All., 459.
(3) 1903 C. A. L. J., 18, 143.
(4) 1904 L. L. L. J., 316.
(5) 1907 L. L. R., 9 All., 423.
(6) 1889 L. L. R., 14 Bom., 320.
(7) 1889 L. L. R., 8 All., 279.
(8) 1889 L. L. R., 13 All., 216.
(9) 1889 L. L. R., 13 All., 216.
upon the creditor the case had been wrongly decided, having regard to the decisions of the Privy Council." I see no reason to alter the opinion expressed by me in other cases that the ruling in Jamna v. Nainsukh can no longer be regarded as good law.

I may mention that since the hearing of this appeal I have come across an unreported case decided by the learned Chief Justice and Mr. Justice Burkitt, the principle of which supports the view taken above. It is the case of Lala Sobha Ram v. Ran Singh, P. A. No. 70 of 1905, decided on the 20th of April 1907, after the decision of the case of Miharaj Singh v. Balwant Singh (1). The facts of the case are set forth in the judgment of those learned Judges in Ran Singh v. Sobha Ram (2), which was a cross appeal from the same decree. The claim was to recover the amount due on a mortgage of the 24th of August 1893, executed by Badan Singh the father of the defendants, and for sale of the 4th interests of the defendants in the mortgaged property. The amount secured by the mortgage was Rs. 2,000 of which Rs. 900 had been paid in cash on the date of the bond. The Subordinate Judge dismissed the claim for the amount of the bond on the finding that the debt was incurred for purposes of immorality, and also because the bond "was not executed by Badan Singh on account of any legal necessity or for the benefit of the joint family." On appeal by the plaintiff the learned Chief Justice and Mr. Justice Burkitt said in their judgment:—“We do not propose to consider, was the debt contracted for any legal necessity or for the benefit of the joint family. These matters appear to us to be immaterial.” (The italics are mine.) The learned Judges then proceeded to consider the evidence as to the nature of the debt and came to the conclusion that the defendants had failed to prove that it was tainted with immorality. They accordingly made a decree for sale of the interests of the sons in the mortgaged property. It was clear from the judgment that the learned Judges were of opinion that the question of necessity did not arise in a suit by the mortgagee against the sons and was immaterial for the purposes of the suit. The necessary

(1) (1906) I. L. L.R., 23 All, 523.  (2) (1907) I. L. L.R., 23 All, 514.
inference is that the learned Judges considered that the burden did not lie on the plaintiff in such a suit to prove necessity.

It is thus manifest that, with the exception of the solitary case of Jamna v. Nain Sukh, the rulings of this Court so far from bearing out the contention of the appellants are against it.

The decisions of the Bombay High Court fully support my view. In Chintamanrao Mahendale v. Koshinath (1), Sergeant, C. J. and Nanabhai Haridas, J., held, in concurrence with West and Birdwood, JJ., that the effect of the decision of the Privy Council in Nanomasi Babuasin v. Modhun Mohun (2), was that “the father’s disposition of the family estate . . . is made to affect the sons’ as well as the fathers’ interest, except so far as the son can establish that the voluntary disposal was made under circumstances which deprived the father of the disposing power.” They further held that “this view of the power of the father to bind the sons’ interest in the family estate, except in certain special cases, necessarily throws the onus on the sons of defeating his creditors’ remedies against the ancestral estate by establishing the existence of those circumstances.” Following this ruling it was held by Paiseas and Ranade, JJ., in Ramchandra v. Fakirappa (3), that “ancestral property is available for the payment of the debt of the father, unless the son can prove that the debt was contracted for an immoral or illegal purpose.” The suit in that case was brought by a mortgagee to enforce two mortgage bonds against the father the mortgagor, and his sons. The District Judge dismissed the claim in respect of one of the bonds on the ground that it had not been proved to be for family necessities. The High Court reversed the decision of the Judge and decreed the claim for sale.

The decisions of the Madras High Court are conflicting. In Chidambara Mudaliar v. Kothaperumal (4), to which I have already referred, Boddam and Bhashyam Ayyanar, JJ., held that a mortgage made by the father for a debt then incurred is binding on the sons’ interest if not tainted with immorality. This ruling was reversed by a Full Bench of three Judges (White, C.J., and Subrahmanya Ayyar and Davis, JJ.,) in

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Venkataramanaya Pantulu v. Venkataramana Doss Pantulu (1). The learned Judges said that having regard to the word "antecedent," as used in the judgment of the Privy Council in Suraj Bansi Koer's case, they were unable to adopt the view taken in Chidambaram Mudaliar v. Kothaperumal, "although on principle they might be disposed to do so." For the reasons I have given in an earlier part of this judgment I feel myself unable to take the same view of the effect of the decision in Suraj Bansi Koer's case as the learned Judges of the Full Bench.

As for the rulings of the Calcutta High Court they also are not in harmony. The first case on the point is that of Luckmun Dass v. Giridhur Chowdhry (2), decided by a Full Bench. In that case it was held that "the mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property." In Gunga Prosad v. Ajudhia Pershad Singh (3), however, Mitter and Maclean J.J., made a decree for the sale of the mortgaged property both against the father and the son. In Khalil-ul-Rahman v. Gobind Pershad (4), the Full Bench ruling referred to above was followed and a decree made in the terms laid down in that ruling. The same was the case in Surja Prasad v. Golub Chand (5), decided by Ghose and Harington, J.J. These cases were dissented from by Brett and Shafiuddin, J.J., in Makeshwar Dutt Tewari v. Kishun Singh (6), and it was held that a mortgage made by a father on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the son. The learned Judges considered that in view of the decisions of the Privy Council in Nanoni Babuasin v. Modhun Mohun (7), and Bhagut Pershad Singh v. Girja Koer (8), the law laid down by the Full Bench.

in *Luckmun Dass v. Giridhur Chowdhry* (1), could not be held to be binding. All these decisions were discussed by Mookerjee and Holmwood, J.J., in *Kishun Pershad Chowdhry v. Bipin Pershad Singh* (2), and the learned Judges held that the Full Bench ruling mentioned above was still binding on the Court, apparently on the ground that it had not been expressly overruled by the Privy Council. They were of opinion that as the decision of the Full Bench was binding on them it was "unnecessary to inquire whether it is well founded on reason and principle," but they added "that the matter, if it were res integras, might not be free from considerable doubt and difficulty." With regard to these rulings I may quote the following opposite remarks of Mr. J. C. Ghose in his Principles of Hindu Law, 2nd edition, page 445:—"The rule that if the debt is antecedent, say by a day, to the mortgage, it binds the estate, but that it does not do so if the consideration for the mortgage is paid at the time, is certainly based on the earlier rulings of our Courts, but it is difficult to say that it is based on reason or on any principle of law. The distinction is so fine that for practical purposes it might have been disregarded. The rule of Hindu Law is clear that the sons cannot even take ancestral property without paying the father's debts, for on partition the father's debts, which are not improper, should be first paid."

For the reasons stated above the conclusions at which I have arrived are that as regards a Hindu son's liability to pay his father's debt not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt, that unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property, whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage; and that in a suit brought against the son to enforce the mortgage the onus is not on the plaintiff to prove that the debt was incurred for the benefit of the family but that

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(1) (1899) I. L. R. 5 Cala. 835. (2) (1907) I. L. L. 31 Cala. 121.
it is for the son to prove that having regard to the nature of the debt it was not his pious duty to discharge it.

I would, therefore dismiss the appeal.

AIXMAN, J:—The question which has to be decided by this Full Bench is one upon which great conflict of opinion has prevailed. This conflict of opinion has long existed. So far back as 1835 Lord Hobhouse in delivering judgment in the case Nuniomi Babuasin v. Modhum Mohun (1) said:—"It is impossible to say that the decisions on the subject are on all points in harmony either here or in India." The numerous cases of more recent date cited by the learned counsel on each side in their able argument before us, show that great divergence of opinion still prevails. I do not propose to enter on a review of the mass of authorities cited to us. The most important of these have been set forth by the learned Chief Justice in his judgment, which I have had the advantage of reading. The question we have to decide is whether a mortgage of joint family property executed by a Hindu father as security for money advanced to him can be enforced as a mortgage after his death against his sons and grandsons there being on the one hand no suggestion that the mortgage debt was tainted with immorality, whilst on the other there is nothing to show that the money was taken either to discharge an antecedent debt, or to meet family necessities. In deciding this question we have to bear in mind two great principles of Hindu Law, one being that sons by birth have an equal ownership with the father in respect of ancestral immovable property; the other that so long as a father’s debts are not tainted with immorality, sons are under a pious obligation to discharge them. The question is whether the liability of a son for his father’s debts overrides the principle of the son’s co-partnership rights to such an extent as to enable a Hindu father, as long as in incurring obligations he avoids the taint of immorality, to deal with the joint family property as if he were the full owner of the property in which Hindu Law declares he has only a limited interest. In my opinion the question must be answered in the negative. A son may be liable to discharge his father’s debts, and the father’s creditor by taking proper steps may be

able to sell up the son’s interests in the family property which has passed to the son on his father’s death. But in my judgment, it does not follow from this that, unless under special circumstances which are not shown to exist in this case, a Hindu father can make a mortgage of his son’s interests in the family property which can be enforced against the sons as a mortgage after the father’s death.

It is now settled by decisions of the Privy Council that a father can make a mortgage of the joint family estate in order to discharge an antecedent debt, and that such a mortgage can be enforced as a mortgage against the sons. At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property.

In the judgment in the case referred to above, Nanomi Babuasin v. Modhan Mohun, there occurs the often quoted passage:—“Destructive as it may be of the principles of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle, that the sons cannot set up their rights against their father’s alienation for an antecedent debt, or against his creditors’ remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think there is now no conflict of authority.”

It will be noted that their Lordships here admit that the decisions referred to are destructive of the principle of independent co-parcenary rights which the sons undoubtedly possess.

In my opinion we should not go further in destroying the important principle of the sons’ co-parcenary rights than we are compelled by authoritative decisions to do. We have not been referred to any decisions binding upon us as a Full Bench which compel us to hold that the plaintiffs respondents who have not succeeded in showing that the mortgage upon which they come into court was either for an antecedent debt, or to raise money
for the necessities of the family can enforce their hold as a mortgage, against the defendants.

I was a party to one of the decisions relied on by the courts below, i.e., Delhi Dist. v. Jada Rai (1). In that case it was taken for granted that the decision of this court in Jamna v. Nain Sukh (2) could no longer be considered as law. After having the question more fully argued, I am not prepared to adhere to the view then expressed.

In the present case the mortgagee took a mortgage from one whom he must be deemed to have known to possess only a limited interest in the property mortgaged and according to the law as laid down by the Privy Council in Kameswar Prasad v. Rani Bahadur Singh (3) and in Jamna v. Nainsukh, as well as the principle embodied in section 38 of the Transfer of Property Act it was for him to show that he had taken reasonable care to satisfy himself that circumstances existed which would justify the father in mortgaging the joint family estate in derogation of his sons’ rights. This burden the plaintiffs-respondents have failed to discharge. I therefore concur with the learned Chief Justice in thinking that the first plea in the memorandum of appeal must succeed, and in the order proposed by him.

RICHARDS, J.—This appeal arises out of a suit to realize the sum of Rs. 976 principal and interest alleged to be due on foot of a mortgage dated the 4th of September 1888 and made by one Ram Narain Singh in favour of one Ram Narain Kalwar. The plaintiffs are the son and grandson of Ram Narain Kalwar and the defendants are the sons and grandsons of Ram Narain Singh, who constituted a joint Hindu family. It was alleged in the plaint that the mortgage was executed by Ram Narain Singh as manager of the family for the benefit thereof. In the written statement it was not admitted that the mortgage was executed by Ram Narain Singh, as manager, or that the family were benefited, and it was alleged that the loan was simply the recent and personal debt of Ram Narain Singh. It was not alleged that the money was raised for immoral purposes.

The courts below have found that the mortgage was executed for good consideration. The court of first instance found that

(1) (1862) I.L.R. 429.
(2) (1897) I.L.R., 0 All., 493.
(3) (1).

429. — (2) (1897) I.L.R., 0 All., 493.
Rs. 6 Calo. 643, (817).
It was not proved that the creditor made reasonable inquiries such as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family. The lower court of appeal also found that it was not proved that the money was borrowed to pay off an "antecedent" debt. On the other hand both courts found that the defendants had not proved that the debt was tainted with immorality. On these findings both the courts below concurred in granting the usual decree for the sale of the mortgaged property under section 88 of the Transfer of Property Act, 1882. Hence the present appeal. The defendant's counsel in opening his argument admitted that if the plaintiffs had sued for a simple money decree they would on the findings (subject to the law of limitation) have been entitled to such a decree against the defendants and that the ancestral property and all other property acquired from Ram Narain Singh, would have been liable to be sold in execution of such a decree. Mr. Dillon also admitted that if the plaintiffs had proved that the mortgage had been made to secure a prior debt (even the prior private debt of Ram Narain Singh himself) the mortgage would have been a good mortgage and the defendants could not have resisted the sale of the ancestral property. It is contended however that the plaintiffs in the present suit were not entitled to a decree for sale of the property comprised in the mortgage because they failed to prove that there was an "antecedent" debt. The plaintiffs on the other hand say that once it was proved that the mortgage was made for valuable consideration the defendants as sons and grandsons of Ram Narain Singh are liable for his debts and that the property can and should be sold under the mortgage created by him and that the only defence open to the defendants was to prove that the debt was tainted with immorality. There are two principles of Hindu law which both plaintiffs and defendants admit to be applicable in the present case. The first principle is that no single member of a joint Hindu family can sell or mortgage the family property without the consent of the other members of the family save for legal necessity or for pious purposes. I may here say that for the purposes of this principle Ram Narain Singh must be looked upon as
simply a member of the co-parcenary body without any reference to his powers as father or manager of the family. The second principle is that if a Hindu incurs debts his sons and grandsons are liable to pay these debts unless they are tainted with immorality. It is not surprising that the attempt to give effect to each of these principles has given rise to much difficulty and confusion. There is much conflict in the decisions, not only in this Court but also in other Provinces of India and their Lordships have recognized that even in the decisions in the Privy Council there is not complete harmony. It seems to me after hearing the arguments in the present case, in the course of which we were referred to a vast number of judicial decisions, that it would be well if the Legislature would step in and settle the matter once and for all. I confess myself quite unable to reconcile the conflict even in the more recent decisions. In the absence of authority I should feel much inclined to hold that where a plaintiff claims under a deed executed by a member of a joint family alienating absolutely or partially (that is by sale or mortgage) the family property, the onus should lie upon him of showing the existence of circumstances which alone under Hindu law would justify the alienation, that is to say, "legal necessity" or a pious purpose. In cases where the alienation was made to meet an old or what might be called an "ancestral" debt I think that the Court would be justified in holding that proof of this fact would be at least prima facie sufficient evidence of legal necessity. Again, in the absence of authority, I should also be inclined to hold that under no circumstances could a member of a joint family alienate (wholly or partially) the family property for his own private debt, whether antecedent or otherwise. The creditor could, no doubt, sue the sons or grandsons and obtain a simple money decree and sell the property, in execution, but he would not acquire the priority and other rights that a mortgage gives. Were it possible so to hold, it seems to me that effect could be given in a measure at least to the two admitted principles of Hindu law stated above. It is however impossible having regard to the ruling of their Lordships in the case of Nanomi Babuasin v. Modhun Mohun (1)

(1) (1835) I. L. R., 13 Cal., 21.
to hold that under all circumstances it is necessary for the creditor to prove legal necessity. At page 35 of the report of the case of Nanomi Babuasin v. Medhun Mohun their Lordships say:

"Destructive as it may be of the principle of independent coparcenary rights in the sons the decisions have for some time established the principle that the sons cannot set up their rights against the father’s alienation for an antecedent debt or against his creditors’ remedies for their debts if not tainted with immorality."

Unfortunately it is not very clear what their Lordships meant by the expressions “antecedent debt” or “creditors’ remedies for their debts.” Possibly their Lordships meant by “antecedent debts” ancestral debts and by “creditors’ remedies for the debts” their Lordships meant the creditors’ remedies for such debts, i.e. ancestral debts. The meaning of the expression “antecedent debt” has led to a conflict of decision between this Court and the Calcutta High Court. If the expression “antecedent debt” is to be construed literally, it would follow that a Hindu father might incur a debt for a private purpose and a few days after, mortgage the family property to secure that debt and the mortgage would be a good mortgage according to the judgment of their Lordships and binding upon the sons and grandsons. In the case of Badri Prasad v. Madan Lal (1), a mortgage of the family property was made to secure moneys advanced antecedently to a Hindu father, not as manager or for family purposes, yet it was held that the mortgagee was entitled to have the property sold, the debts not being tainted with immorality. This was the unanimous decision of a Bench of six judges of this Court, and it is binding upon us. It is probable that the advances in this case were made a considerable time before the mortgage, but once we hold that a private personal debt of a Hindu father can be an “antecedent” debt within the meaning of the expression in their Lordships judgment it is very difficult to understand on what principle money advanced a year or a week before (or even simultaneously with) the mortgage is not an “antecedent” debt. In the usual form of a mortgage in this country there is a recital that the mortgagor has taken a loan from the mortgagee and an hypothecation of the property follows; a mortgage in
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A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage

So held by STANLEY, C.J., KNOX, J. and AXMAN, J., concurring.

A mortgage of joint family property was executed by the father of a joint Hindu family who had sons living at the time. The mortgage was for valuable consideration but it was not shown that it was executed to meet any antecedent debt or for any family necessity, on the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality.

Held by STANLEY, C.J., and KNOX and AXMAN, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BANKS, J., RICHARDS, J., concurring:—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son made by the father and his interest in the mortgage was incurred at some date anterior to the execution of the mortgage it is not for the son to enforce the debt, but it is for the son to prove that the debt was not his.

The following cases were referred to:—Deva Dat v. Jodha Rai, I. L. R. 24 All., 659; Jatana v. Nan Singh, I. L. R., 8 All., 493; Balbir Prasad v. Radhakrishan Lal, I. L. R., 15 All., 76; Lal Singh v. Deo Narain Singh, I. L. R., 8 All., 779; Mandovat v. Gopal Muria, Weekly Notes, 1901, p. 57; Harunam Ram v. Paulat Munder, I. L. R., 10 Calc., 525; Ram Dayal v. Ayukhina Prasad, I. L. R., 25 All., 926; Surja Prasad v. Golab Chandra, I. L. R., 27 Calc., 782.
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committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff's claim as against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff's claim against the other defendants could not be sustained. Reliance was placed upon the leading case of Brinsmead v. Harrison (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of Brinsmead v. Harrison, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit.

(1) (1872) L. R., 7 C. P., 547.
and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for the appellants is the case of Thurman v. Wild (1). This case does not appear to us to assist the appellants. In it an action was brought for damages for a trespass committed by the defendant as servant and by command of his master. It was held that the acceptance of satisfaction by the plaintiff from the master was a good defence to an action against the servant. The ground upon which this decision was arrived at is to be found in the judgment of Lord Denman at page 461 of the report. The passage runs as follows:—"He (i.e. the plaintiff) has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties, and whether this was rendered with or without the consent of some of them he is equally barred as against all." The ground, therefore, of this decision was that the plaintiff had accepted complete redress from one of two joint tort-feasors; and having done so he could not sustain a suit against the others. As Lord Denman says:—"He had accepted a compensation for the whole trespass and in discharge of all parties." We think under the circumstances that the learned Judge of this Court was perfectly right in dismissing the appeal to him and we accordingly dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knott, Mr. Justice Banerji, Mr. Justice Askman and Mr. Justice Richards.

Chandradeo Singh and Others (Defendants) Appellants v. Mata Prasad and Another (Plaintiffs) and Sheno Baboo Singh and Others (Defendants) Respondents.*

Hindu law—Hindu law—Joint Hindu family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

* Second Appeal No. 1028 of 1907.

(1) (1841) 11 A. & E., 453.
A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage was taken to satisfy an antecedent debt or was justified by some family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt.

So held by STANLEY, C. J., Knox, J., and Aikman, J., concurring.

A mortgage of joint family property was executed by the father of a joint Hindu family who had sons living at the time. The mortgage was for valuable consideration but it was not shown that it was executed to meet any antecedent debt or for any family necessity. On the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality.

Held by STANLEY, C. J., and Knox and Aikman, JJ., that the mortgage in question could not be enforced against the sons' interests in the joint family property.

Per BAKER, J., Richards, J., concurring.—

As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage. In a suit brought against the son to enforce the mortgage the onus is not on the plaintiff to prove that the debt was incurred for the benefit of the family, but it is for the son to prove that, having regard to the nature of the debt, it was not his pious duty to discharge it.


(1) [1903] 24 All. 439.
(2) [1887] I. L. R., 9 All., 493.
(3) [1903] I. L. R., 15 All., 75.
(4) [1886] I. L. R., 8 All., 279.
(5) Weekly Notes, 1901, p. 57.
(6) [1831] I. L. R., 10 Calc., 525.
(7) [1903] I. L. R., 29 All., 328.
(8) [1900] I. L. R., 27 Calc., 762.
(9) [1905] I. L. R., 29 Mad., 200.
(10) [1878] I. L. R., 5 Calc., 143.
(11) [1909] I. L. R., 30 All., 156.
(12) [1904] I. L. R., 27 All., 16.
(13) [1874] I. L. R., 1 I. A., 321.
(15) [1855] 6 Mop. I. A., 393.
(16) [1839] I. L. R., 5 Calc., 843.
(17) [1903] I. L. R., 29 All., 503.
(18) [1901] I. L. R., 25 Dom., 325.
(19) [1901] I. L. R., 37 Mad., 326.
(20) [1897] I. L. R., 21 Mad., 23.
and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for the appellants is the case of Thurman v. Wild (1). This case does not appear to us to assist the appellants. In it an action was brought for damages for a trespass committed by the defendant as servant and by command of his master. It was held that the acceptance of satisfaction by the plaintiff from the master was a good defence to an action against the servant. The ground upon which this decision was arrived at is to be found in the judgment of Lord Denman at page 401 of the report. The passage runs as follows:—"He (i.e. the plaintiff) has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties, and whether this was rendered with or without the consent of some of them he is equally barred as against all." The ground, therefore, of this decision was that the plaintiff had accepted complete redress from one of two joint tort-feasors; and having done so he could not sustain a suit against the others. As Lord Denman says:—"He had accepted a compensation for the whole trespass and in discharge of all parties." We think under the circumstances that the learned Judge of this Court was perfectly right in dismissing the appeal to him and we accordingly dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Askman and Mr. Justice Richards.

CHANDRADEO SINGH AND OTHERS (DEFENDANTS) APPELLANTS V. MATA FRASAD AND ANOTHER (PLAINTIFFS) AND SHEO BABU SINGH AND OTHERS (DEFENDANTS) RESPONDENTS.

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

(1) (1840) 11 A. & E., 453.
that the father in a joint Hindu family can mortgage family property, there being no legal necessity shown for the mortgage. The limitation prescribed by law for recovery from the sons of a debt due by a Hindu father is six years. See article 120 of the Limitation Act, No. XV of 1877 and the case of Narsing Misra v. Latji Misra, (1). If, therefore, the appellants are right in contending that a Hindu father, in the absence of legal necessity, has no power to mortgage or sell ancestral family property, any claim to recover the amount from the sons quad debt is barred by limitation.

For the decision of this case two principles of Hindu law require consideration. The first is that Hindu sons are under a pious liability to pay their father's debts, if not tainted with immorality. The second is that a Hindu father has no higher powers than any other member of a joint co-parcesary body. These are two distinct principles and in no way dependent upon each other. The first principle, that of the pious liability is not involved in this case and is fully admitted by the appellants. The second principle is still good law and has not been departed from in subsequent decisions. When a person under a disability creates a charge (a Hindu father is under such a disability), it is for the person enforcing a charge so created to prove that the person who created the charge was acting within his powers. In the present case, therefore, the burden lies upon the plaintiffs-mortgagees to prove that the money was borrowed for a legal necessity or to liquidate an antecedent debt. The expression "antecedent debt" nowhere occurs in the Hindu Law. The earliest cases before the Privy Council, on this branch of Hindu law, were the cases of Girdharoo Lal v. Kantoo Lal (2), and Suraj Banso Koer v. Sheo Purshud Singh (3). In those cases fathers of Hindu families had become indebted. Being pressed by their creditors they had executed mortgages of ancestral property. Suits had been brought on those mortgages, decrees obtained against the fathers, and sales had taken place in execution. After sales in execution, sons had brought suits to recover their shares in the property sold. Their lordships of the Privy Council held that "where joint ancestral property has passed out

of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a father's debts, his sons by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes." In other words, they laid down that a Hindu father to liquidate his antecedent debts could mortgage and sell joint family property and that such payment came within the expression "pious purpose."

He submitted that these cases did not in any way enlarge the father's powers.

The lower courts relied on Debi Dat v. Jadau Rai (1). That case it was submitted was not rightly decided. In Manbahlal Rai v. Gopal Misra (2), it was held that when a father executed a sale-deed of the family property for his own debt and not for a legal necessity or to pay off an antecedent debt, the sale was not binding on the sons. In Kallu v. Fateh (3), the same view was taken as in Debi Dat v. Jadau Rai, but the case of Manbahlal Rai v. Gopal Misra was not considered. In the later case of Ram Dial v. Ajudhia Prasad (4) Manbahlal Rai v. Gopal Misra was followed.

The Full Bench case, Karan Singh v. Bhup Singh (5), was not a case of mortgage but of a simple money debt. The difference is this. In the one case the father is contracting a debt, in the other he is hypothecating family property which he cannot do.

The Mitakshara lays down that the father in a joint Hindu family has no higher powers of alienation than any other member. (Mitakshara, chapter 1, section 1, verses 27, 28) When a son claims exemption on the ground of the immoral nature of the debt, it is for him to prove the immorality, but the creditor had first to prove that a transfer was made for a legal necessity or to pay off an antecedent debt.

The case of Naromi Bahaiusin v. Madhun Mohan (6), relied upon in Debi Dat v. Jadau Rai was not a case of a mortgage at

(1) (1902) I. L. R., 24 All., 429.
(2) Weekly Notes, 1901, p. 57.
(3) (1901) I. A. L. J. R., 316.
(4) (1909) I. L. R., 23 All., 223.
(5) (1904) I. L. R., 27 All., 16.
all but one of debt. Therefore the question could not arise in that case and the observations of their Lordships were obiter.


In all cases before the Privy Council from 6 I. A. onwards the suit had been brought after the property had been sold in execution of a decree.

The general principle of Hindu law is that every member of a joint Hindu family stands on an equal footing with and has the same powers as the others. The Privy Council have guarded this principle of Hindu law with great jealousy. Lakshman Dada Naik v. Ram Chandra Dada Naik (19), Madho Parshad v. Mehrban Singh (20), and Balgovind Das v. Narain Lal (21).

In the case of father and son the Privy Council safeguarded this principle by the theory of antecedent debt and in the case of others by holding that no member can transfer even his own share without the consent of others, although at the suit of a creditor they allow such undivided share to be attached and sold.

(12) (1897) I.L.R., 21 Mad., 28.
(13) (1903) I.L.R., 27 Mad., 320.
(14) (1905) I.L.R., 29 Mad., 220.
(15) (1884) I.L.R., 2 All., 163.
(16) (1884) I.L.R., 2 All., 493.
(17) (1893) I.L.R., 15 All., 75, p.n.
(18) (1905) I.L.R., 28 All., 608.
of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a father's debts, his sons by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes." In other words, they laid down that a Hindu father to liquidate his antecedent debts could mortgage and sell joint family property and that such payment came within the expression "pious purpose."

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(1) (1902) I. L. R., 21 All., 459.  
(2) Weekly Notes, 1901, p. 57.  
(3) (1904) I. A. L. J. R., 316.  
(4) (1903) I. L. R., 23 All., 328.  
(5) (1904) I. L. R., 27 All., 16.  
Ramchandra Mahadev Nadgir v. Fakirappa (1), and Govindkrishna Gujar v. Sukharam Narayan (2) were referred to.

The rulings of the Allahabad High Court also have been, except for two decisions and an obiter dictum, uniformly in favour of the creditor, irrespective of the fact whether he comes as a plaintiff or as a defendant. Sita Ram v. Zulim Singh (3), Kishan Lal v. Garuruddhwaia (4), Debi Dat v. Jadu Rai (5), Kalu v. Patil (6), and Babu Singh v. Behari Lal (7). The only direct ruling against the respondent is, Jamna v. Nain Sukh (8). In this case it was held that the onus of proving legal necessity lay upon the creditor. This case was decided on the strength of Lal Singh v. Deo Narain Singh (9). But the judgment in that case was disavowed in a later case, Bhawani Bakhsh v. Ram Dai (10), by the judges who delivered the former judgment. Therefore the judgment in 9 All., 493, being based on 8 All., 279, is, it was submitted, incorrect.

In Manbhahal Rai v. Gopal Misra (11), the remarks made with regard to antecedent debts were not necessary for the decision of the case. There is a passage in Karan Singh v. Bhup Singh (12), which taken by itself is in favour of the respondent. The passage includes mortgage debts as well as simple money debts.

As to Maharaj Singh v. Balwant Singh (13), the remarks in it as to the burden of proof being on the creditor were not necessary for the decision of the case. The immoral nature of the debt was proved in this case and the question did not, therefore, arise at all as to whether the burden of proving legal necessity lay on the creditor: Basa Mal v. Maharaj Singh (14), Beni Mudho v. Basdeo Pathak (15), Bhawani Bakhsh v. Ram Dai (16), Pem Singh v. Partab Singh (17), and Lal Singh v. Pulandar Singh (18), were referred to and it was urged that

(1) [1900] 2 Bom., L.R., 450.
(3) [1905] I.L.R., 2 All., 235.
(4) [1900] I.L.R., 21 All., 299.
(5) [1902] I.L.R., 24 All., 490.
(7) [1908] 5 A.L.I.B.R., 173.
(8) [1907] I.L.R., 9 All., 433.
(9) [1906] I.L.R., 8 All., 279.
(10) [1901] I.L.R., 13 All., 216.
(12) [1904] I.L.R., 27 All., 16, 18.
(13) [1903] I.L.R., 23 All., 506.
(14) [1898] I.L.R., 8 All., 205.
(15) [1899] I.L.R., 12 All., 99.
(16) [1908] I.L.R., 13 All., 316.
(17) [1909] I.L.R., 14 All., 172.
(18) [1904] I.L.R., 29 All., 162.
in *Girdharree Lal v. Kantoo Lal* (1), their Lordships of the Privy Council were in doubt as to whether sons could question alienations made by the father, except on the ground of immorality, but in the later case of *Nanomi Babuasin v. Modhun Mohun* (2), their Lordships held that sons could not set up their right against the remedies of the creditor. This High Court has made observations on this ruling favourable to the creditor in *Lachman Das v. Khumnu Lal* (3) and *Karan Singh v. Bhup Singh* (4). The Privy Council clearly lay down in 13 Calc., 21, that a creditor can pursue any remedies open to him against the son which he could have pursued against the father unless the debt is tainted with immorality. This view has been followed in *Bhagbut Pershad Singh v. Girja Koer* (5) and *Mahabir Pershad v. Maheswar Nath Sahai* (6).

It was submitted that from 1836 to 1903 there was a uniformity of decisions in this High Court that the onus lay on the son. The principle of *stare decisis* should not be departed from.

Munshi *Gobul Prasad*, in reply referred to the principle of Hindu law that no member of a joint Hindu family can alienate family property without necessity. *Hal gobind Das v. Narain Lal* (7). *Mitakshara*, Chapter I, section 1, verses 27, 28. The power of the father is not greater than that of any other member except that he is the natural manager of the family and that sons have a pious duty to pay the debts of their father. The reason why the father is unable to transfer family property is given by the Privy Council in *Sartaj Kuari v. Deoraj Kuari* (8).

The power of the father to alienate family property should not be confused with the liabilities of the sons to pay their father’s debts. The Privy Council have applied two different rules of evidence to the two classes of cases, viz., those in which a creditor sues to enforce a charge against joint family property created by a Hindu father who has only a limited power of disposal, and those in which the sons come in as plaintiffs to set aside sales in execution of decrees obtained against the father.

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1. (1874) 1 L. R., 1 I. A., 321.
2. (1885) 1 I. R., 13 Calc., 21, P. C.
3. (1893) 1 I. R., 19 All., 26, 51, F. B.
4. (1901) 1 I. R., 37 All., 16, 18, F. B.
5. (1888) 1 I. R., 15 Calc., 17, P. C.
6. (1893) 1 I. R., 17 Calc., 894, F. O.
7. (1893) 1 I. R., 15 All., 23, P. C.
8. (1898) 1 I. R., 17 All., 19, 232, 235.
In the former class of cases they have applied the general rule that a plaintiff seeking to enforce a charge created by a person with limited powers must show that under the circumstances that person was competent to charge the property. This general rule is laid down in the well-known case of Hanoomanpersaud Panday v. Babooes Munraj Koonworee (1). The same rule has been applied to cases of transfers by a father where in derogation of the rights of his son, under the Mitakshara, he has made an alienation of the family property. Kameshwar Pershad v. Run Bahadur Singh (2). In the latter class of cases they have applied the rule that when the sons sue to recover property which has passed out of the family by sale in execution of a decree obtained against the father, they must prove that the sale took place under such circumstances that they were not bound by it. The Privy Council case in I. L. R., 13 Calc., 21, is a case of that kind. In Nanomi Bubuasin v. Modhun Mohun (3) the Privy Council never said that the sons could not plead limitation; what they said was that sons could not set up their right against the remedies of the creditor, but that implies that there must be in existence some remedies open to the creditor and not barred by time.

As regards the meaning of the phrase 'antecepred debt' it has been held by this court that antecedent debt means a debt contracted before the sale or the mortgage sought to be set aside by the son, and other courts have, in many cases, expressed the same view. The cases of Lal Singh v. Dee Narain Singh (4), Manbahl Rai v. Gopal Misra (5), Ram Dayal v. Ajudha Prasad (6), Hanuman Kamat v. Daulat Mundar (7), Surji Prasad v. Gulab Chand (8), Chinnayy v. Perumas (9), Sami Ayyangir v. Ponnammal (10), and Venkitaramanayya Pantulu v. Venkataramana Doss Pantulu (11) were referred to.

The following judgments were delivered:

**STANLEY, C.J.**—This second appeal was directed to be laid before a Full Bench in consequence of a conflict in the decisions

(1) (1856) 6 M. & A. 393, 418-9.  
(2) (1856) I. L. R., 6 Calc., 843, 847-3.  
(3) (1855) I. L. R., 12 Calc., 21.  
(4) (1833) I. L. R., 8 All., 279.  
(5) (1901) A. W. N., 57.  
(6) (1902) I. L. R., 22 All., 323.  
(7) (1834) I. L. R., 10 Calc., 693.  
(8) (1900) I. L. R., 27 Calc., 762.  
(9) (1839) I. L. R., 13 Mad., 51.  
(10) (1907) I. L. R., 21 Mad., 23.
of this and the other High Courts upon the main question involved in it. The suit is one to enforce payment of a mortgage by sale of the mortgaged property. The mortgage was executed by the late Ram Narain Singh, who was the head of the defendants' family on the 4th of September 1883 to secure a principal sum of Rs. 400 in favour of Ram Narain Kalwar, the father of the plaintiff respondent Sheo Babu Singh and the grandfather of the appellant Chanderdeo Singh. The parties are governed by the law of the Mitakshara. It was found by the Court of first instance that the mortgage was not executed for the purpose of satisfying any antecedent debt and there was no evidence that the consideration was required for the legal necessities of the family, or that the lender made any inquiry as to the purposes for which the money was borrowed. On the other hand it was not proved, or even alleged, that the debt was tainted with immorality. On these findings the court mainly relying on the decision in the case of Debi Datt v. Jadu Rai (1), decreed the plaintiffs' claim. Upon appeal this decision was upheld by the learned officiating District Judge. He held that the money advanced to the mortgagor could not be said to have been applied to the discharge of any antecedent debt, but at the same time that the debt was not tainted with immorality and consequently the appeal was without any force. A second appeal was preferred, the first ground of appeal being that the mortgage not being one for the payment of an antecedent debt, nor for family necessity, was not binding on the appellants. There is a second ground of appeal, namely, that the claim of the plaintiffs so far as it is based on the pious duty of sons to pay their fathers' debt is barred by time. In view of the pious obligation of Hindu sons in a Mitakshara family to pay their father's debts, the learned counsel for the appellants did not for a moment contend that this pious duty did not lie upon his clients. He admitted that they were so liable, but he contended that the mortgage of the 4th of September 1883, not having been made to satisfy an antecedent debt, or for family necessities, was not binding upon the

(1) (1903) I. L. R., 24 All., 450,
appellants. The sole question then for the court is whether a father of a Hindu family governed by the Mitakshara law, can execute a mortgage which will be binding upon his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

The rule of the Mitakshara is to be found in Chapter I, section 1, clause 27. Clause 27 runs as follows:—Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father, or other predecessor; since it is ordained though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten and they who are yet still in the womb require the means of support, no gift or sale should therefore be made;” and then follows in clause 28 an exception to this rule. It runs as follows:—“Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress for the sake of the family, and especially for pious purposes.” This means, I take it that a donation, mortgage or sale cannot be made except for the purposes named or one of them. This is the foundation of all the decisions governing the competency of a Hindu father in a family governed by the Mitakshara to dispose of the joint property of the family. He can dispose of it during a season of distress, for the sake of the family or for pious purpose.

Until recently the decision of this High Court in the case of Jamna v. Nain Suttk (1) was regarded as a binding ruling. In that case Sir John Edge, C. J., and Mahmood, J., held that as a general rule a creditor endeavouring to enforce his claim under an hypothecation bond given by a Hindu father against the estate of

(1) (1887) I. L. R. 9 All., 493.
a joint Hindu family in respect of money lent or advanced to the father, should prove either that the money was obtained by the father for a legal necessity, or that he (the creditor) made such responsible enquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family. In that case in a suit against the members of a joint Hindu family upon a bond given by their father by which family property was hypothecated no evidence was given on either side, as here, as to the circumstances under which the bond was given. It was held that the burden of proof lay upon the plaintiff to show that either the money was obtained for legal necessity or that he had made reasonable inquiries and had obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family.

In the case of Badri Prasad v. Madan Lal (1), a Full Bench of this Court consisting of all the Judges held that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the birth of the sons, which purported to mortgage the joint family property, the consideration having been money advances antecedently made by the mortgagee to the father, not as manager of the family, or with the authority of the sons, or for family purposes, but not for purposes of immorality or for purposes which if the father were dead would exonerate the sons from the pious obligation of paying such debts of the father. In this case, as appears from the judgment of Edge, C.J., the consideration for the bond in suit was a sum of Rs. 1,157-3-0 due under a prior bond of the 7th of October 1881, Rs. 181-4-0 interest due under this bond and a present advance of Rs. 11-9-0. The money was borrowed to pay off an antecedent debt. The present advance of Rs. 11-9-0 being regarded as a negligible quantity. The decision therefore gives no support to the contention of the respondents.

In the case of Manbhal Rai v. Gopal Misra (2) Sir Arthur Strachey, C.J., and my brother Banerji expressed the view that a sale of ancestral property by a father in a joint Hindu family

(1) (1903) I. L. R., 15 All., 75. 
(2) Weekly Notes 1901, p. 57.
may be set aside on suit by the sons so far as it affected their interest in the property if there were no antecedent debt or valid necessity to support it, although the transaction was not shown to be tainted with immorality. In his judgment Sir Arthur Strachey, C.J., commenting upon the view expressed by the learned Judge of this Court from whose decision the appeal had been preferred observed as follows:—"The learned Judge held that the plaintiff was entitled to no relief whatever, inasmuch as he was "a Hindu son impeaching the sale of ancestral property of a joint family made by his father" and it had been "constantly held that when the vendor is the father in a joint family the son can impeach the sale only on the ground that the money was raised for debauchery and other immoral purposes." In my opinion that proposition is too broadly laid down by the learned Judge. The doctrine limiting the son's power to impeach an alienation of joint family property made by his father is based solely on the pious duty which the Hindu law recognises as incumbent upon a son to pay his father's debts not tainted with immorality. The true rule is that the son cannot impeach an alienation of ancestral joint family property made by a father, for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a debt. That this is the true scope of the doctrine is shown by the numerous decisions, of which it is sufficient to refer to Lal Singh v. Deo Narain Singh (1) the decisions of the Privy Council cited in the judgment in that case, and the judgment of the Full Bench in Badri Prasad v. Madan Lal (2). These cases show that the doctrine has no application to a case in which no antecedent debt of the father, that is a debt antecedent to the alienation in question is concerned as the consideration or object of the alienation. In the present case the deed does not state any antecedent debt of the father as the consideration or the object of the sale. (The italics are mine.) Nothing can be clearer than this language of the learned Chief Justice. In his judgment my brother Banerji endorsed the view expressed by Sir Arthur Strachey in the following language:—"According to the well known rulings of the Privy Council,
an alienation of joint family property made by the father of a joint Mitakshara family cannot be impeached by his sons, if such alienation has been made in lieu of an antecedent debt or for the payment of the father’s debt, unless the son can prove that the debt was incurred for an immoral purpose, the reason for the rule being that it is the pious duty of the son to pay his father’s debt not tainted with immorality. Had the transaction in the present case been that of a sale made in lieu of an antecedent debt, or for the payment of a debt due by the father, the principle which the learned Judge of this Court has applied would have been applicable. But in this case there was no allegation that the consideration for the sale was an antecedent debt of the father or that it was taken for the purpose of paying off the father’s debt.” Now in that case it was found that there was no consideration at all for the sale. Consequently the suit was bound to succeed; but I cite the case as showing the view of the law which was entertained at this time by the learned Judges who decided it. This was the case of a sale, but it is obvious that no distinction can be drawn between alienation by out and out sale and alienation by mortgage. A mortgage is a sale sub modo. The word ‘alienation’ frequently met with in the textbooks and judgments embraces both sale and mortgage.

In the case of Ram Dayal v. Ajudha Prasad (1) my late brother Burkitt and myself adopted the view of the law expressed in Manbhabal v. Gopal Misra.

Now by the expression antecedent debt I understand a debt which is not for the first time incurred at the time of a sale or mortgage that is presently incurred but a debt which existed prior to and independently of such sale or mortgage. It must be a bona fide debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object. This was the interpretation placed upon the expression by the Calcutta High Court in the case of Hanuman Kamat v. Dowlat Mundar (2), in which it was held that although no member of a joint Hindu family governed by the Mitakshara or Mithila law has the authority, without the consent of his co-sharers, to sell or mortgage even his own share.

(1) (1903) I. L. R., 23, All, 323. (2) (1881) I. L. R., 10 Calc., 523.
in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of his own and his sons in order to pay off antecedent personal debts, the sons cannot avoid such alienation unless they prove that the debts were immoral; that to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not merely in consideration of a loan or a payment made to the father on the occasion of his making the alienation; and that in the case of a voluntary sale the purchase money does not constitute an antecedent debt such as to render that sale binding on the sons unless they prove the transaction to have been immoral.

Again in the same High Court in the case of Surja Prasad v. Golab Chand (1) Ghose and Harington, JJ., held that in a case of a joint Mitakshara family where the father raised money on a mortgage hypothecating ancestral family property and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgage as to the purpose for which the debt was incurred, the mortgage security could not be enforced against the son (the father having died) unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question and that under the circumstances the mortgage was not binding upon the son, but that the debt not having been proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money decree against the sons, not upon the mortgage security, but upon the simple obligation created by the bond, and that a suit for such a relief must, under the Limitation Act, be instituted within six years from the date of the mortgage bond.

In the Madras High Court in the case of Venkataramanayy Pantulu v. Venkataramana Doss Pantulu (2) Sir Arnold White, C. J., and Subramania Ayyar and Davis, JJ., held, following several decisions of that High Court, that when a debt was incurred at the time of sale or mortgage, it was not an

(1) (1900) I. L. R. 37 Cal. 762.  
(2) (1905) I. L. R. 29 Mad. 293.
antecedent debt within the meaning of those words as used in the judgment of the Privy Council in Suraj Bansi Koer v. Sheo Persad Singh (1). In their judgment the learned Judges observe:—"As regards the question of sale there does not appear to be any decision, either of the Privy Council or of the Courts of this country, that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to and independently of the sale." I think it to be beyond question that the expression "antecedent debt" means what it expresses, namely a debt incurred prior to and independent of the sale or mortgage sought to be enforced.

The propriety of the decision in the case of Jamna v. Nain Sukh (2) was questioned in the two cases of Debi Dat v. Jadas Rai (3) and Babu Singh v. Bahari Lal (4). In the first mentioned case my brother Banerji seems to me to have resiled from the view laid down by him in Manbahul Rai v. Gopal Misra. He and my brother Aikman held in a suit for sale on a mortgage of joint family property executed by a father and three of his sons that the fourth son, who was a minor and four grandsons, also minors who were not executants of the mortgage, were properly arraigned as defendants, inasmuch as their own interests in the joint family property would be liable under the mortgage unless they could show that either the mortgage debt was never incurred or that it no longer subsisted or that it was tainted with immorality. The learned Judges delivered a very short judgment holding that the ruling in the case of Jamna v. Nain Sukh was overruled by their lordships of the Privy Council. They say:—"It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in Badri Prasad v. Madan Lal, and to the ruling of the Privy Council in Nanomis Babuasin v. Modhuin Mohun, it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred, or is no longer in existence or that it was tainted with immorality. I may here again point out that in the case of Badri

(1) (1878) I. L. R., 5 Cal., 148. (2) (1887) I. L. R., 9 All., 493. (3) (1902) I. L. R., 24 All., 453. (4) (1908) I. L. R., 30 All., 356.
Prasad v. Madan Lal, the consideration for the mortgage which formed the basis of the suit was with a trifling exception money advances antecedently made by the mortgagee to the father.

In the case of Babu Singh v. Bihari Lal (1), which was a suit for sale upon a mortgage my brothers Banerji and Richards held that the decision in the case of Jamuna v. Nain Sukh, could no longer be supported and that it was sufficient in order to establish the liability of a son to pay the personal debt of his father, if the debt be proved and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. In that case my learned brothers quoted with approval my words in the Full Bench case of Karan Singh v. Bhup Singh (2), as follows:—"It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes, or was such a debt as does not fall within the pious duty of the sons to discharge." Now the suit of Karan Singh v. Bhup Singh was not a suit to enforce payment of a mortgage debt. It was a case in which a creditor obtained a decree for profits against the lambardar of a village and in execution of that decree attached immovable property belonging to a joint family of which Tota Ram, the lambardar, was the head. The sons and grandsons of the lambardar were the plaintiffs in the suit, and in it they sought a declaration that their interests in the property attached were not liable to attachment and sale in execution of the decree against their father. As pointed out in the judgment there was no allegation that the debt in respect of which the execution proceedings were had was for immoral purposes or such a debt as the sons and grandsons were relieved from their pious obligation to satisfy. This being so, and the sons being liable to satisfy the debt the joint family property was liable to attachment and sale in execution of the decree. The claim was in fact enforced against the sons by reason of their pious obligation to pay their father's debts. My brothers Banerji

(1) (1903) I. L. R. 30 All. 153. (2) (1901) I. L. R. 27 All. 15.
and Richards seem not to recognize any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father’s debts, and a case in which a mortgagor of the father seeks to enforce a mortgage against the son by sale of the mortgaged property.

In the case before us, as I have said, it is not denied that sons in a Mitakshara family are liable to pay their father’s debts, provided those debts be not tainted with immorality. What is denied is that a mortgage by a father in such a family is binding upon his sons if that mortgage had not been executed to satisfy an antecedent debt or a family necessity and the mortgagee has failed to show that he made any reasonable inquiry as to the necessity for the loan. A son admittedly may be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father’s debts provided that the suit be not barred by limitation and a decree passed in such a suit may be enforced in execution by sale of the ancestral property of the family.

Now let me turn to the decisions of their Lordships of the Privy Council which have been relied upon as supporting the view that a mortgage executed by a Hindu father in a Mitakshara family not shown to have been made to satisfy an antecedent debt or a family necessity but not shown to have been for a debt tainted with immorality, is binding upon his sons. The first to which I shall refer is the case of Suraj Bansi Koer v. Sheo Persad Singh (1). In that case an ex parte decree for money had been obtained against a Hindu governed by the Mitakshara Law upon a bond, whereby he had mortgaged his ancestral immovable estate and the estate was attached and sold. Prior to the sale in execution the judgment debtor died and his infant sons and co-heirs on filing a petition of objections, were referred to a regular suit. They instituted a suit after the sale against the execution creditor and the purchasers for a declaration of their right to the property sold and to have the mortgage bond, the ex parte decree and the execution sale set aside. It appeared that the father’s debt had been incurred without justifying necessity and it was held that as between the infants and

(1) (1878) I L.R., 5 Cal., 119; L.R., 6 I., 69.
the execution creditor neither they nor the ancestral immovable property in their hands was liable for the father's debt, but that as regards the judgment debtor's undivided share in the estate sold whether or not his own alienation was valid by the law as understood in Bengal it was capable of being seized in execution and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceeding having at the time of the judgment debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale. It will be observed that as between the infants and the execution creditor neither they nor the ancestral property in their hands were held to be liable for the debt. In delivering the judgment of their Lordships Sir James W. Colvile remarked that "the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered) and the fact that the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether in order to bind adult coparceners, their express consent is not required." His Lordship then referring to the case of Girdhara Lall v. Kantoo Lall,(1) observed:—"This case is undoubtedly an authority for these propositions. First, that where joint ancestral

(1) (1874) L. R., 1 I. A., 521.
property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off antecedent debt, or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

The first of these propositions it will be observed deals with cases where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases and the words antecedent debt, seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons.

The next case to which I would refer is that of Mussumat Nanomi Babuasin v. Modhun Mohun (1). In that case the suit was instituted by the widow of a Hindu on behalf of her minor sons and herself to set aside a sale made in execution of a personal decree obtained against the father and husband, at which the defendant had become the purchaser and had as such obtained possession not only of the father's interest but also that of his sons. In this case, it will be observed, the ancestral property had passed out of the joint family under a sale in execution of a decree for the father's debt and therefore it fell within the propositions laid down in Suraj Bansi Koer's case. In delivering the judgment of their Lordships Lord Hobhouse made the following pronouncement: — "There is no question that considerable difficulty has been found in giving full effect to each of two principles.

of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father’s debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable for the father’s debts and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father’s alienation for an antecedent debt or against his creditor’s remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.”

This pregnant statement of his Lordship has created much misconception, and it is upon the meaning intended to be conveyed by his Lordship that the Judges in the various courts in India have differed. On the one hand it has been held that this dictum is an authority for the proposition that a Hindu father in a joint Mitakshara family can give a valid mortgage of the joint ancestral property as security for an advance made to him at the time not to satisfy an antecedent debt or a family necessity but not made for an immoral purpose. On the other hand the view taken by other Judges is that this interpretation is too wide and that a mortgage to be valid must have an antecedent debt or some family necessity to support it or at least the mortgagee must after reasonable inquiry have satisfied himself as to the existence of an antecedent debt or a family necessity for the loan.

In the leading case of Hanoomanpersaud Panday v. Mussammat Babooce Munraj Koonwarree (1), in which the powers of a

(1) (1850) C M co. J. A., 393
manager for an infant heir to charge ancestral property by loan or mortgage were dealt with, the question was considered as to the party upon whom the onus of proof lay to prove that the alienation of a manager was bona fide. Their Lordships remark that the question on whom such onus lay was not capable of a general and inflexible answer, and then they observe (at page 419 of the report):—

"Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan," and they later on observe as follows:—"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." Their Lordships were dealing in this case with the powers of the manager of an Hindu family, but the rule laid down by them is equally applicable to transactions in which a father in derogation of the rights of his sons under the Mitakshara law has made an alienation of ancestral family estate.

In the case of Kameswar Pershad v. Bun Bahadur Singh, (1) it was held by their Lordships that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate, was bound at least to show the nature of the transaction and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities; that the principle was that the lender, although he is not bound to see to the application of

(1) (1880) I. L. R., 6 Calc., 843 847
the money and does not lose his rights if upon bona fide enquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things, namely, to inquire into the necessity for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the borrower is acting in this particular instance for the benefit of the estate. Their Lordships referred to the principles laid down in the case Hanoomanpersaud Panday v. Mussumat Babooce Munraj Koonwarree and observed:—“They have applied those principles in recent cases not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely alienations by a widow, and to transactions in which a father in derogation of the rights of his son under the Mitakshara law, has made an alienation of the ancestral family estate. (The italics are mine.) The principle broadly laid down is that, although the lender is not bound to see to the application of the money, and does not lose his rights if upon a bona fide inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things, and then their Lordships specify what was required of the creditor in the case to which we have referred. This decision is in consonance with the provisions of section 38 of the Transfer of Property Act which are quoted in the Bombay case to which I shall presently refer. Their Lordships, it will be observed, did not in the case of Nanomib Babuasin v. Modhun Mohun profess to state any principle of law which had not been previously enunciated. The question determined in it was whether the entirety of a family estate, including the shares of minor sons had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit nor in the execution proceedings.

The case of Jamna v. Nain Suth is on all fours with the case before us. The learned Judges who decided it drew a distinction between it and cases in which a decree had been obtained against the father and the joint property sold or cases in which the sons come into Court to ask for relief against a sale affected by their
father for an antecedent debt. Is it the case then that this ruling can no longer be considered as law in view of the ruling in Nanomi Bhawas in v. Modhan Mohan? It will be noticed from the judgment that the learned Judges who decided it had in view and considered the rulings of their Lordships of the Privy Council.

Let us see now what has been the trend of the rulings of this and other High Courts upon the question before us since the decisions of the Privy Council in the cases to which I have referred. I have already mentioned the cases of Debi Dut v. Jadu Rai (1), and Babu Singh v. Bihari Lal (2). In the case of Ram Dayal v. Ajudha Prasad (3), my late brother Sir William Burkitt and myself, adopting, as I have said, the view of the law expressed in Manabahal Rai v. Gopal Misra, held that a sale of ancestral property by a father in a joint Hindu family might be set aside on a suit by the sons, so far as it affected their interests, if there was no antecedent debt or valid necessity to support the sale, although the transaction might not be shown to be tainted with immorality. In Maharaj Snykh v. Balwant Singh (4) the question now before us was discussed in the judgment of myself and Sir William Burkitt and the authorities were referred to. It was not necessary in that case to determine the point which is for determination in this appeal but an expression of our view of the law is to be found at page 541.

In the case of Jamsetji N. Tota v. Kashinath Jivan Mangalia (5), the facts were these. By a written agreement of the 9th of March 1900, the first two defendants, a mother and a son contracted to sell to the plaintiff certain ancestral property. The plaintiff discovered that the first defendant had a minor son and he instituted a suit against the first and second defendants and the minor son for specific performance of the agreement, contending that the minor’s interest was bound inasmuch as the property was sold in order to pay family debts. It was held that no decree could be made against the minor defendant; that the order to satisfy such of his debts as would be binding on his

1) (1902) I. L. R. 24 All., 459. 2) (1903) I. L. R. 23 All., 323.
3) (1903) I. L. R. 30 All., 156. 4) (1906) I. L. R. 23 All., 503.
5) (1901) I. L. R. 26 Bom., 326.
heirs a Hindu father can sell the entirety of the family property so as to pass even his son’s interest therein, but in the case before the Court there was no evidence of debts which justified the sale, and that it lies on the party who seeks to bind an infant to prove justifying circumstances and this the plaintiff had failed to do. The case came before Sir Lawrence Jenkins, C. J., and Starling J., on appeal from Russell, J. The learned Chief Justice in delivering the judgment observed as follows:—“The cases have now established that to satisfy such of his debts as would be binding on his son a Hindu father can sell the entirety of the family property so as to pass even his son’s interest therein, while section 33 (in error described as section 31) of the Transfer of Property Act provides that ‘where any person authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall as between the transferee on the one part and other persons (if any) affected by the transaction on the other part, be deemed to have existed if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith.’” The learned Chief Justice then remarks:—“This statutory provision is substantially a statement of the principle deducible from the cases on this point. But this principle obviously has no application where the transaction is still incomplete; for it presupposes an actual transfer for consideration. Here there has been no transfer, nor has the consideration for the transfer been performed. Therefore the declaration sought in this suit against the infant defendant must be supported on some other basis. But the only basis suggested is the analogy of this very rule; for it is arguable that as the completed transaction would have been supported and sanctioned against the infant son, so ought the incomplete transaction to be enforced against him. True, there is a superficial resemblance between the two positions, yet it is but superficial: the essential basis of the rule is absent. The duty to discharge the father’s debts justifies the acquisition of the money required for that purpose even though it be by sale of the ancestral immovable land. But the existence or a reasonable belief by the purchaser
in the existence of those debts is a necessary condition. Now it is quite clear that the plaintiff's agents by whom alone the negotiations were conducted made no inquiry as to the existence of justifying debts." Then later on he observes:—"We therefore, have to see whether there are now debts that call for or at any rate justify the conversion of the ancestral immovable property into money. On the evidence before us I am not satisfied of this, and it follows as a necessary consequence that in my opinion the declaration should not be made." This ruling supports the appellant's contention.

The ruling of Boddam and Bha-hyam Ayyangar, JJ., in the case of Chidambura Mudaliar v. Koottaperumal (1) on the other hand supports the respondent's contention but it was overruled by the Full Bench of the Madras High Court in the case of Venkataramanaya Pantulu v. Venkataramana Doss Pantulu (2). In the first mentioned case it was held that a debt incurred by a Hindu father, which was not shown to be illegal or immoral, was, even during the lifetime of the father, binding on the son's interest in the family property, and that in the case of a mortgage debt incurred by the father, the mortgage was binding on the son, notwithstanding that there was no debt anterior to the mortgage but only the debt incurred at the same time as the mortgage, the mortgage being executed as security therefor. The learned Judge observed that "on principle it is difficult to make any distinction between mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son for his share in the mortgaged property can as a general rule be seized and brought to sale, even in the latter case for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage) unless such share has been validly alienated in favor of a third party, since the date of the mortgage but prior to its attachment." This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the

creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this province is well known. Money lenders are ever ready to advance money to thurstless or extravagant land owners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. Money lenders are chary of making large advances to land-owners on personal security. Now if in negotiations for a loan on a mortgage lenders are obliged to make inquiry and satisfy themselves that the loan is required to meet a legal necessity this will afford some protection to the other members the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection. A father of extravagant habits might on the security of the ancestral property borrow large sums to satisfy extravagant fancies. He might emulate the folly of the eccentric king of whom we have lately read, who expended the treasure of his kingdom in building a castle on airy heights, and so strip his posterity of their ancestral possessions. The question is not one of mere academic interest but one of substance. The decision in Chidambaram Mudaliar v. Koothaperumal was overruled, as I have said, by Sir Arnold White, C.J., and Justices Subramania Ayyar and Davies in the latter case which I have already cited, in which it was held, following the earlier decision in Sami Ayyangar v. Ponnammal (1) that a sale or mortgage of joint family property by a father is binding on

(1) (1897) I. L. R., 21 Mad., 25.
the son’s share only when there is an antecedent debt that is a debt existing prior to and independently of the sale or mortgage. In the course of their judgment the learned Judges remark that “there does not appear to be any decision either of the Privy Council or of the Courts of this country that a sale is binding on the son’s share when the debt was not antecedent in the sense that it existed prior to, and independently of the sale.” This is a direct authority in support of the contention advanced by the appellants.

Of the cases in the Calcutta High Court the first to which I shall refer is that of Luchmun Dass v. Giridhur Chowdhry (1), which came before a Full Bench consisting of Sir Richard Garth, C.J., and Jackson, Pontiax, Morris, and Mitter, JJ. In that case the manager of a joint Mitakshara family consisting of a father and a minor son, raised money on the mortgage of family property. It was not proved on the one hand that there was legal necessity for raising the loan, nor on the other that the money was raised or expended for immoral purposes or that the lender inquired as to the purposes for which the money was required. It was held, amongst other things, that the mortgage itself, upon which the money was raised could not be enforced, but the debt contracted by the father being itself an antecedent debt within the rules of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole of the ancestral estate inclusive of the mortgaged property. This is an important decision which supports the view contended for by the appellants.

I next come to the case of Surja Prasad v. Golab Chand (2). In that case a father in a joint Mitakshara family raised money on a mortgage hypothecating ancestral property and it was not proved that the money was required for payment of any antecedent debt, or that the money was raised or expended for illegal or immoral purpose, or that any inquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred. The facts are on all fours with those in the case before us. It was there contended that in view of the later

(1) (1850) I.L.R. 5 Cal. 855. (2) (1909) I.L.R. 27 Cal. 763
decisions of the Privy Council a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception, and that there was no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons, that the sons are bound to pay all debts whether secured or unsecured provided they were not incurred for illegal or immoral purposes. On the other side the argument was that the bond could only be enforced against the sons as a simple money bond if a suit were instituted within six years from the due date of the bond and that as the suit was instituted after the expiry of six years from the due date, it was barred by limitation. Ghose, J., (now Sir Chunder Madhub Ghose) an eminent authority on Hindu Law, and Harlington, J., held that the mortgage was not binding on the sons, but that the debt not having been proved to have been incurred for illegal or immoral purposes the mortgagee would be entitled to money decree against the defendants, not upon the mortgage security but upon the simple obligation created by the bond, and that a suit for such a relief must under the Limitation Act be instituted within six years from the due date of the bond. The decision in Luchmun Dass v. Giridhur Chowdhry, to which I have referred, and also in Khalilul Rahman v. Gobind Pershad (1) were relied on.

In the later case of Maheswar Dutt Tewari v. Kishun Singh (2) Brett and Sharfuddin, JJ., dissenting from the decision in Luchmun Dass v. Giridhur Chowdhry and Surja Prasad v. Golab Chand, held that a mortgage by a father in a joint Mitakshara family, composed of father and sons on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the sons and that the limitation applicable to a suit on the bond against the sons as well as the father was that provided by article 132, schedule II of the Limitation Act. The learned Judges decided this case on the assumption that the law as laid down in the case of Luchmun Dass v. Giridhur Chowdhry could not be held to be any longer binding in view of the later decisions of the Privy Council.

The same question came before another Bench of the Calcutta High Court, consisting of Mookerjee and Holmwood, JJ., in the

(1) (1892) I.L.R., 20 Calc., 328. (2) (1907) I.L.R., 36 Calc., 164.
case of Kishun Pershad Chowdhry v. Tipan Pershad Singli (1). In that case a father in a joint Mitakshara family consisting of a father and his minor son, mortgaged property belonging to the joint family. It was not proved that there was any legal necessity for the loan, or any inquiry by the lender, nor that the loan was contracted for illegal or immoral purposes. It was held in a suit by the mortgagee to enforce his security that he was entitled to have the security enforced as against the share of the mortgagor and also to a decree which would enable him to realize the debt by the sale of the share of the son in the ancestral property. The learned Judges held that the decision in Luchmun Dass v. Giridhur Chowdhry had not been overruled by the Privy Council and was binding upon them and pointed out the distinction existing between the position of a son in a suit in which the mortgage by his father is sought to be enforced against his share in the property and his position after the alienation has been completed by an execution sale. They dealt with the question at considerable length and pointed out that the Judges who decided the case of Maheswar Dutt Tewari v. Kishun Singh not only extended the principle laid down by their Lordships of the Judicial Committee in connection with a case where property has passed out of the family to cases where the security given by the father is sought to be enforced against his sons and also extended the rule laid down by the Judicial Committee as applicable to cases of complete alienation to cases of partial alienations such as mortgages. They point out that their Lordships limited their observations in Giriharee Lall v. Kantoo Lall to cases of conveyance executed by the father in consideration of an antecedent debt and sales in execution of decrees for the father's debt.

Now I do not profess to have exhausted the authorities on the question before us, but I think that the cases to which I have referred fairly illustrate the contending views expressed on that question. My learned brothers who decided the cases of Debi Dat v. Jadu Rai and Babu Singh v. Bihari Lal treated the case of Janma v. Nain Sukh as overruled, contenting themselves by stating that, having regard to the Full Bench ruling in Badri

(1) (1907) I.L.R., 34 Cal., 735.
Prasad v. Madan Lal and the ruling of the Privy Council in Nanomi Babuasim v. Modhun Mohun, the ruling in Jamna v. Nain Sukh can no longer be considered as law.

Is there any solid foundation for the contention that their Lordships of the Privy Council overruled in the cases which I have cited the clear and definite rule of the Mitakshara? According to that rule it is a settled point that property in ancestral estate is by birth, and that the father is subject to the control of his sons in regard to that estate, it being ordained that a gift or sale of such should not be made without the concurrence of all the sons, this being the only exception that "a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes." A son being under a pious obligation to pay his father’s debts, an alienation by the father has been held to be binding on him in view of this obligation, but only, as I think, so binding where the debt is an antecedent debt. The rule of the Mitakshara it is said must be deemed to have been modified by the rulings of the Privy Council, but admittedly it has not been expressly overruled. The dictum in Nanomi Babuasim v. Modhun Mohun which I have quoted, namely:—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father’s alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality" is relied on as establishing this proposition. It appears to me to do nothing of the kind. That the sons cannot set up their rights against their father’s alienations for an antecedent debt I admit, but that they cannot resist the enforcement of a mortgage made by their father alone to secure money borrowed at the time and not proved to have been borrowed to meet a family necessity or to satisfy an antecedent debt I deny. It is contended that their Lordships words that the sons cannot set up their rights against their father’s creditors’ remedies for their debts, if not tainted with immorality, justifies the view that a Hindu father can create a null mortgage of the joint family property which will be binding as
sons for a debt which is not antecedent. It seems to me that this interpretation of the dictum is too wide and that the words “against his creditors’ remedies for their debts” refer to those remedies only which legally the creditors of the father possess, for example in the case of an ordinary debt a right to sue the son for the recovery of the debt on the basis of his pious obligation to satisfy that debt and on obtaining a decree to attach and sell the joint family property. This interpretation my brother Aikman suggested during the argument. The two principles of the Hindu Law are not antagonistic, the one being that a Hindu father can create a valid mortgage of the joint family property to satisfy an antecedent debt or a family necessity, but only to satisfy such debt or necessity, the other being that a Hindu son is bound under a pious obligation to satisfy his father’s debt if it be not tainted with immorality. The right to maintain a suit in each case is of course controlled by the law of Limitation. In the one case there is a secured debt. In the other case there is merely a personal liability. According to the law as administered by the courts of this Province, a member of a joint family cannot validly mortgage his undivided share in ancestral property established in coparcenary on his own private account without the consent of the co-sharers in that estate. Balgobind Das v. Naran Lal (1). It follows from this that if the mortgage in suit is not binding in toto it is not binding as to the mortgage’s share in the mortgaged property.

I have examined the later decision of the Judicial Committee with a view to ascertain if there be any pronouncement which supports the broad interpretation of the ruling in Suraj Bansi Koer’s case for which the plaintiffs respondents contend, but without success. On the contrary their Lordships express their indisposition to extend the doctrine of the alienability by a coparcener even of his undivided share without the consent of his co-sharers beyond the decided cases. In Lakshman Dada Naik v. Ramchandra Dada Naik (2) Sir James W. Colvile, who

case was one of an execution against a mortgaged share and was decided "on the ground that the proceedings had then gone so far in the lifetime of the judgment debtor (in report 'mortgagor') as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers." He then remarks:—"Their Lordships are not disposed to extend the doctrine of the alienability by a coparcener of his undivided share without the consent of his co-sharers beyond the decided cases." In the case of Kameswar Prashad v. Run Bahadur Singh (1) it was held by the Judicial Committee that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, a creditor seeking to enforce a charge on such an estate is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities. Sir James W. Colvile again commented upon the decision in Hanoomanpersaud Panday's case, and to the law as therein laid down, and then observes:—"It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities." This was, it will be observed, the case of a mortgage. In the case of Madho Parshad v. Mehrban Singh (2), in which it was held that where a Hindu without the consent of his co-parcener had sold his undivided share in the family estate for his own benefit and received the purchase money to his own use, his surviving co-parcener was entitled on his death under the Mitak-hara law by survivorship to recover the share so sold from the purchaser, and that the latter had no equity or charge thereon against such survivor in respect of his purchase money. Lord Watson, who delivered the judgment of their Lordships, commented upon the decision in Suraj Bansi Koer's case and pointed out that the right of the purchaser in that case was affirmed on the ground that before the death of the judgment-debtor execution proceedings had gone so far as to constitute in favour of

(1) (1830) 2 L. R. & Cal. 813. · (2) (1830) L. R. 17 I. A. 13
the judgment creditor a valid charge upon the joint estate to the extent of the undivided interest of the deceased which could not be defeated by that event, but at the same time observed that "if no proceedings had been taken to enforce the debt in the lifetime of the judgment-debtor, his interest in the property would have survived on his death to his sons so that it could not be afterwards reached by the creditor in their hands". Then again in the case of Balgobind Das v. Narain Lal (1), it was held to be the settled law of the Mitakshara as administered in Bengal and the North-Western Provinces, that a Hindu cannot without the consent of his co-parceners sell or mortgage his undivided share in ancestral estate for his own benefit. Sir Richard Couch in delivering judgment approved of the passage in the judgment in the case of Lakshman Dada Naik v. Ramchandra Dada Naik, which I have quoted, and also the judgment in Madho Prasad v. Mehrban Singh. In regard to the judgment in the last mentioned case he observes:—"In the judgment delivered by Lord Watson it is said that the counsel for the appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate, and that he likewise conceded that the sales being without the consent of the co-parcener, and justified by legal necessity, were according to that law invalid; but he maintained that the transactions being real and the prices actually paid, respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase money. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold except on condition of its being made at once available for the repayment of the price which he received but that the respondent who took by survivorship was not affected by any equity of that kind and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving co-parcener, except by repeating the rule of the Mitakshara laws. In view of these rulings it seems to me impossible to hold that their Lordships

(1) (1903) L.R. 20 I.A. 116.
have extended the principle which underlies the decision in Suraj Bansi Koer's case. On the contrary they seem to me to have guarded themselves against the suggestion that the clear and explicit rule of the Mitakshara which precludes the alienability of immovable property by a coparcener without the consent of his coparceners had been repealed or might be treated as a dead letter.

For the foregoing reasons I am of opinion that the Court below was wrong in treating the ruling in Jamna v. Nain Sukh as no longer binding, and that the appeal should therefore be allowed as regards the first plea.

Knox, J.—The question submitted to us for our consideration in this second appeal is whether a father, the head and managing member of a Hindu family, can mortgage the family property and exclude his sons from questioning the transaction, when it is not proved that the mortgage was executed on account of an antecedent debt. It has been found, and we must accept the finding, that (1) there is no evidence to show that the money which formed the consideration of the mortgage was borrowed or applied to the discharge of any antecedent debts. (2) The appellants, who are sons and grandsons of the mortgagor, who died before the institution of the suit, have not alleged, much less proved that the debt secured by the mortgage was tainted with immorality.

The text of Hindu law which bears upon the question is to be found in the Law of Inheritance from the Mitakshara, Chapter I, section I, paras. 27, 28 and 29. I give the translation as it occurs in the edition by Mr. Girish Chandra Tarkalankar (1870). So far as I can judge the translation is accurate, sufficiently accurate at any rate for the present purpose and so far as I can find the text under consideration has, with one exception, not been doubted. That exception is the passage in para. 27, which runs “no gift or sale should be made.” The words न दानाधिक विक्रयः used in the passage are read by Raghunandana as विक्रयार्थिलोपणार्थितः.

According to him the correct reading in place of “no gift or sale should be made” is “the cutting off or the expenditure of the means of livelihood is censured.” The only interest that
attaches to this reading is that apparently any tendency there has been to question the text is in the direction of widening, not of narrowing its meaning. The passage then runs as follows:

"27. Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, "Though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

28. An exception to it follows:—"Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family and especially for pious purposes."

29. The meaning of the text is this:—While the sons and grandsons are minors, and incapable of giving their consent to a gift, and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

So far as this passage can be any guide it lays down (1) the broad rule that though the power of a father in respect of movables is ultimate, in the case of immovable property it is limited and he is with regard to it subject to the control of his sons, (2) an exception to that rule, viz., that even a single owner may conclude a donation, mortgage or sale of immovable property under certain stated circumstances.
There is no longer any question that it is a duty of a son to pay the debts contracted by his father unless they are tainted with immorality. This text of the Mitakshara, Chapter VI-47 is almost too well known to need reproduction:—“A son is not bound to pay, in this world, his father’s debts if they are incurred for spirituous liquor, or for gratification of lust, or in gambling, nor is he bound to pay any unpaid fines or tolls, or idle gifts.”

Viewed from the standpoint of Hindu text writers it seems obvious that a creditor who claims that he has lent money to the father of a Hindu family and then presses that father to charge immovable property with that debt has to follow the general rule and principle which applies to the proof of exceptions to a rule. On him lies the burden of proving that the father was by reason of a pious purpose empowered to conclude a mortgage. If he fails, his claim to enforce the charge fails. This principle is entirely in accord with the principles laid down for evidence in Hindu Law: Mitakshara on the Administration of Justice—Chapter I, section 6.

I do not propose to deal with the difficulties that have sprung from the case law that has risen round these texts. I have had the advantage of reading and carefully considering the exhaustive judgment of the learned Chief Justice on this point, and I can add nothing to it with advantage. I would therefore, quoad the first plea, allow the appeal and set aside the decrees of both the Courts below.

Banerji, J.—This appeal arises out of a suit for the enforcement of a simple mortgage by sale of the mortgaged property. The mortgage was made by one Ram Narayan Kalwar and the property mortgaged is the joint ancestral property of the family. Both the mortgagor and the mortgagor are dead. The plaintiffs are the son and the grandson of the mortgagors. The defendants are the sons and grandsons of the mortgagor. The suit was defended by some only of the defendants, who denied the mortgage and urged that even if it was made by their ancestor it was not for a family necessity and was not therefore binding on them and their interests in the mortgaged property. The Court
below has found, in concurrence with the Court of first instance, that the mortgage was executed by the defendants' ancestor for valuable consideration, that it was not proved that the money borrowed had been applied to the payment of an antecedent debt, and that it had not been alleged or proved that the debt secured by the mortgage was tainted with immorality. Accordingly a decree has been passed for sale of the mortgaged property. A question of limitation was raised but the lower appellate court did not try it in view of the conclusion at which it had arrived. From this decree the present appeal has been preferred and the two pleas set forth in the memorandum of appeal are:—(1) "The mortgage being not one for payment of an antecedent debt nor for family necessity was not binding on the appellants" and (2) "The claim based on the pious duty of sons to pay their father's debt was barred by time."

Upon the findings of the court below the position is this. The father and manager of a joint Hindu family consisting of father, sons and grandsons contracts a debt for such purposes as would make it the pious duty of the sons to pay the debt and as collateral security for it, mortgages joint ancestral property. The question is, can such a mortgage be enforced against the interests of the sons in the mortgaged property unless the mortgagor can show that the debt was incurred for family necessity? The question is really one of the burden of proof, that is, whether it is for the mortgagor to prove affirmatively that the loan was incurred for the necessities of the family or whether the sons must prove, in order to avoid liability for the debt, that it is tainted with immorality.

In my judgment, both upon principle and upon authorities, the onus is on the sons. The following propositions may be regarded as established beyond controversy:—

(1) It is the pious duty of a Hindu son to pay his father's debt if not tainted with immorality.

(2) In the case of a personal debt of the father the sons are liable, if they "cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge"; and "it is not necessary in order to establish a son's liability for his father's debt that it
should be shown that the debt was contracted for the benefit of the family." [See the Full Bench case of Karan Singh v. Bhup Singh (1).] For the realization of such a debt the joint ancestral property of the family is liable to be sold by auction and the burden of proof is solely on the son.

(3) If a mortgage is made by the father to pay an antecedent debt or if part of the consideration for such a mortgage is an antecedent debt due to the mortgagee himself, the mortgage may be enforced against the son even in the life-time of the father. The onus in such a case is on the son to prove that the debt was of such a nature that it was not his pious duty to pay it. This was held by the Full Bench of this Court in Badri Pershad v. Mudan Lal (2).

(4) If joint ancestral property has been sold by the father for the payment of his debt or if it has been sold in execution of a decree for a mortgage debt or a simple debt of the father the son cannot recover the property unless he can show that the debt was contracted for immoral purposes. This has been held by their Lordships of the Privy Council in numerous cases commencing with the case of Girdhara Lall v. Kantoo Lall (3).

(5) Where a son comes into court to assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the onus is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it. See Beni Madho v. Basdeo Patal (4), approved of in subsequent cases.

What we have to consider is whether the burden of proof is shifted where a creditor of the father seeks as plaintiff to recover his debt by enforcement of the mortgage security given to him by the father.

The liability of a son to pay his father’s debt arises, as pointed out by Mr. Mayne (Hindu Law, section 303, 7th edition) "from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts." This obligation has been held by their Lordships of the Privy Council.

(1) (1901) I. L. R., 27 All., 16. (2) (1874) I. L. R., 1 I. L., 321.
(3) (1893) I. L. R., 15 All., 75. (4) (1890), I. L. R., 12 All., 58.
of the son for his father's debts arises. The amount of consideration paid down at the time of the sale is not a debt of the father though it may, in some cases, subsequently become a debt of the father. Therefore, a sale by the father must, in order to bind the son, be a sale for the necessities of the family or a sale for a consideration which consists of an antecedent debt of the father or of money received for the payment of the father's debts provided of course that the debt is not tainted with immorality. In the case of a mortgage, however, there is primarily a debt incurred by the father and the mortgage is only, as I have said above, collateral security for the debt. By reason of the son's pious duty he is liable for the father's debt and, therefore, for the mortgage made to ensure the recovery of the debt. In my judgment the case of a mortgage is not similar to that of a sale and the argument based on the analogy of a sale is fallacious. The distinction in this respect between a mortgage and a sale is often overlooked.

The view I have taken above is not only consistent with Hindu law and legal principles but is also supported by authority.

In the well known case of Hanoomanpersaud Pandey v. Mussumat Babooce Munraj Koonwarrer (1) Lord Justice Knight Bruce, in delivering the judgment of their Lordships, said (at p. 421):— "Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt by the father. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate." In the case of Girbhace Lall v. Kantoo Lal (2) their Lordships, after quoting the above observations, remarked:— "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the

(1) (1859) 6 Moo. I. A. 333. (2) (1874) L. R., I I. A. 321.