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LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

Reported by HERBERT COWELL, Esq.,
Of the Middle Temple, Barrister-at-Law.

VOL. VIII.—1880-81.

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PEDDA RAMAPPA NAYANIVARU . . . DEFENDANT; J. C.*
AND
BANGARI SESHAMMA NAYANIVARU . . PLAINTIFF. 1880
Nov. 11.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Inheritance—Rights of Sons by different Wives—Priority.

An elder-born son though of the junior wife is entitled to succeed to the father’s estate in preference to the younger born son of the elder wife.

Ramalakshmi Ammal v. Sivanantha Perumal (1) approved.

A first-born son, though by the fourth wife, is entitled to succeed to the father’s estate in preference to a younger son born of the third and senior wife, whose marriage was subsequent to the deaths of the first two wives.

Quære, where the wives are of a different class or caste.

Quære also, whether the third wife who was not married till after the deaths of the two former wives, stands in the position of a first-married wife.

APPEAL from a decree of the High Court (Nov. 8, 1877) affirming a judgment and decree of the district Judge of the Court of


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North Arcot (March 29, 1877) whereby it was decided that the Respondent was entitled to recover possession of the Bangari polliam.

The facts appear in the judgment of their Lordships.

Leith, Q.C., and Bowring, for the Appellant, contended that by the custom of the family and caste, which on the evidence must be held to be established, he and Chandrasekhara, as the sons of the first or royal wife of Ramadasappa and his surviving widow, were entitled to succeed to the polliam in preference to the Respondent, who though elder in age was the son of a younger wife. The custom is in accordance with the general Hindu law; and even if the evidence fails to support the custom the Appellant is by that law entitled to succeed. As to the position of the first wife by Hindu law, and the priority which ordinarily obtains among wives and their sons, see Ramalakshmi Ammal v. Sivanantha (1); Bhujangraw D. Ghorpade v. Malojirav D. Ghorpade (2); Rajah Bughonath Singh v. Rajah Hurrehur Singh (3); Menu, c. ix. sl. 106, 107, 123, 124, 168, 169.

Mayne, for the Respondent, relied upon the concurrent findings in his favour of the Courts below, as to the custom. The claim under the general Hindu law was not put forward then, and is not established by the authorities cited.

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

Sir Montague E. Smith:—

This appeal arises in an action brought by Bangari Seshamma against his half-brother, Pedda Ramappa, to recover possession of the important polliam of Bangari. Several points, which resulted in issues in the Courts below, have been disposed of in a manner which does not render them the subjects of appeal. The facts which relate to the question which alone has been argued before

their Lordships are few. It appears that Ramadasappa was the poligar of this pollam. It had been for several centuries in his family, had been resumed by the Government, and had been restored to him, but nothing turns on that resumption and restoration. Ramadasappa married four wives; the first two wives died, without issue, before his marriage with his third and fourth wives. The marriage with Subbama, his third wife, and with Venkatamma, his fourth wife, took place on the same day. There is now no dispute that the marriage with Subbama was prior in point of time. The Appellant, Pedda Ramappa, is the son of the third wife; the Respondent, Seshamma, is the son of the fourth wife, Venkatamma, but was born before his half-brother, Ramappa. Ramappa had an elder brother of the whole blood, Chandrasekhara, also junior to Seshamma, who, upon his father’s death in 1866, was put by the Government into possession of the pollam. He died in the year 1876, having retained possession during his lifetime. Upon his death, Ramappa, the Appellant, was put into possession, and thereupon the present action was brought by Seshamma. It is only necessary to mention Chandrasekhara in order to account for the possession between the death of Ramadasappa, the father, and the bringing of the action. It is conceded that this possession is not material to the question which arises in this case, that question being whether the Respondent, who was first-born son of Ramadasappa, though by the fourth wife, is entitled to succeed to the father’s estate, in preference to the Appellant, who was born afterwards, his mother being the third and senior wife, and being, it was contended, in the same position as a first-married wife, by reason of the two former wives having died before her marriage.

The general question as to the right of succession in the case of sons born of different wives was decided by this Committee in the case of Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar (1). It was there held that the elder-born son, though of the junior wife, was entitled to succeed in preference to the younger son born of the elder wife. In that case, however, the question as to the right of a son born of a first-married wife did not arise, for there the mothers were both junior wives, and the first-married

wife was living at the time of the marriages of the two wives whose sons were disputing the inheritance. In the present case, the first two wives having died before the marriage of the third and fourth wives, it is contended that the third wife is in the position of a first or royal wife, and that her son is entitled to succeed in preference to elder-born sons of junior wives. Undoubtedly that question was left open by the decision of their Lordships in the case of Ramalakshmi Ammal. In that case it had been admitted, or was supposed to have been admitted, that in the case of a royal wife the rule might be different from what it would be in the case of wives who were all junior to her. Their Lordships had not to consider that question, and did not think it right to prejudice the decision of it by any premature determination; in fact, the point was not argued. The High Court of Madras, from which the appeal came, and in which the admission had been made, had also declined to decide the point.

Their Lordships have felt some doubt whether they are now called upon to decide this question, for in the Court below the claim of the Defendant was rested, not upon the general Hindu law, but upon a special family custom. The fact that his case was so rested implies an admission that he and his advisers did not consider that by the general Hindu law he was entitled to succeed. The custom was found against him, and he did not, on his appeal to the High Court, insist, as one of his grounds of appeal, that by the general law he was entitled, his grounds of appeal being directed only to the other points which had arisen in the case, and to an allegation that the custom ought to have been found in his favour. Their Lordships, however, have allowed the point to be argued, and are prepared to determine it.

The preference which has been given to the first-born son over his brothers, irrespective of the priority of the marriages of their mothers, mainly depends upon the religious rules which guide the Hindu community. It is said in the judgment in the case of Ramalakshmi Ammal “One great rule of religion binding upon every Hindu is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors, and as a consequence naturally flowing from this law
the first-born son is throughout the books of authority treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges." The principle deduced from the rule above mentioned, and the reasons upon which their Lordships' judgment in the former appeal are founded, apply with equal force to the first-born son of his father, whether born of a first-married wife or of a junior wife; and it certainly lies upon the Appellant to shew some explicit authority to establish the distinction for which he contends.

The argument at the Bar has been rested solely upon some texts in *Menu*, and those texts their Lordships think not only do not support the view contended for by the learned counsel for the Appellant, but are rather opposed to it. The material ones are few. The first to which it is necessary to refer is in chap. 9, sect. 106: "By the eldest, at the moment of his birth, the father having begotten a son discharges the debt to his own progenitors; the eldest son, therefore, ought, before partition, to manage the whole patrimony." This text simply says "by the eldest" without further description, and it states that the father having begotten him has discharged his debt to his own progenitors. Then the 107th is: "That son alone by whose birth he discharges his duty, and through whom he obtains immortality, was begotten from a sense of duty; all the rest are considered by the wise as begotten from love of pleasure." That section certainly does not help the contention on the part of the Defendant, because in the present case when *Seshamma* was begotten the father had no other son, and his duty was unfulfilled. Two other sections were referred to, which are more immediately applicable to the question under discussion. The 122nd section is, "A younger son being born of a first-married wife after an elder son had been born of a wife last married, but of a lower class, it may be a doubt in that case how the division shall be made." The words printed in italics are found in Sir *William Jones'* translation. The words "but of a lower class" are no doubt inserted by a commentator and are not in the original text which had come down. If the text were read without those words, undoubtedly that and the following sections, 123 and 124, would give some support to the argument of the Defendant. But their Lordships think that
the interpolation of the commentator cannot be disregarded. The early versions of the Laws of *Menu* are very ancient, and it might be doing great mischief to construe the words of the original text literally, unaided by the gloss which has been put upon them by writers and commentators of authority, whose interpretation has been received as authentic. The authority of the commentator who is responsible for the interpolated words is vouched by Sir William Jones in the preface to his translation. He says: "At length appeared *Cullucca Bhatta*, who, after a painful course of study and the collation of numerous manuscripts, produced a work of which it may perhaps be said very truly that it is the shortest yet the most luminous, the least ostentatious yet the most learned, the deepest yet the most agreeable, commentary ever composed on any author, ancient or modern." Sir William Jones, himself a great Oriental lawyer and scholar, says that he had almost implicitly followed the text and interpretation of *Cullucca Bhatta*, and had printed his gloss in italics. It is impossible to have higher authority for an explanation of a text. Then the text as interpreted is merely this, that a younger son being born of a first-married wife after an elder son had been born of a wife last married, but of a lower class, in that state of things it might be a doubt how the division should be made. Subsequent sections would seem to shew that in that case *Menu* thought the son of the first-married wife should have the larger share of partible property. If the interpretation is received, then the very expression "but of a lower class" leads to the implication that if the wives were of the same class the distribution would be equal; and sect. 125 is to that effect:—"As between sons born of wives equal in their class and without any other distinction there can be no seniority in right of the mother, but the seniority ordained by law is according to the birth." That is a distinct text, and the effect of it would only be uncertain if sect. 122 were read without the words added by the commentator. It is not contended that in the present case the wives are not of the same class; and their Lordships do not determine what would be the proper rule of succession where the wives are of a different class or caste. That question does not arise.

The only other authority which has been referred to is one
which certainly does not support the Defendant's case, if it does not establish that of the Plaintiff. It is the case of Rajah Rughonath Singh v. Rajah Hurrehur Singh (1). The marginal note correctly states what the case decides: "In the case of an estate in Manbhoom in the jurisdiction of the Governor-General's agent at Hazareebaugh it was held that the succession is vested in the eldest son of the deceased Rajah born of any of his wives in preference to the eldest son of the paâôt or first Ranee." It would seem that that case was decided not upon the general Hindu law, but upon the law prevailing in Manbhoom, and that there was no custom to the contrary. The Judges who formed the majority of the Court in their judgment say, "The ordinary course of succession is certainly shewn by the evidence to be that stated by the Plaintiff"—that is, the order stated in the marginal note. "To establish a contrary practice so as to assume the force of family custom requires the strongest evidence." Therefore the ordinary course of succession in the district of Manbhoom was in accordance with what their Lordships find to be the general Hindu law.

The question really comes to this: although it was not necessary to decide in the former case before this Board what was the right of a son of a first-married wife, yet the principles upon which their Lordships held that the first-born was entitled to succeed apply equally to a son of such wife and sons of other wives; and that being so, it lay upon the Defendant to shew some positive rule of Hindu law, supported either by ancient text or modern decision, to the contrary effect. Their Lordships think that no sufficient authority for such a rule has been produced. They would observe that the reasons on which the precedence and privileges of the first wife over her co-wives are founded are scarcely pertinent to the succession of sons to their father, which is governed by other considerations, as already explained.

The ground on which this appeal has been decided renders it, of course, immaterial to consider whether the third wife, who was not married until after the deaths of the two former wives, stood in the position of a first-married wife.

On the whole their Lordships are of opinion that the Courts

(1) 7 S. D. A. Rep. 126.
below, who concurred in their judgments, have come to a correct conclusion, and they will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss this appeal, with costs.

Solicitors for the Appellant: Gregory, Rowcliffes, & Rawle.
Solicitors for the Respondent: Burton, Yeates, & Hart.

J. C.
1880
Pee🔥
Ramappa
Nayanivaru
v.
Bangari
Seshamma
Nayanivaru.

1880
Nov. 23.

BABOO KAMESWAR PERSHAD . . . . PLAINtIFF ;

AND

RUN BAHADOOR SINGH . . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Widow, Execution of Deeds by—Rights of Creditor—Onus probandi.

 Held, that there being a total failure of proof as to the proper explanation of a deed of mortgage to a Hindu widow at the time of her execution thereof, and therefore as to her intention to transfer thereby her husband’s estate, the deed was inoperative in that respect. Otherwise, in order to bind the husband’s estate the mortgagor is bound at least to shew 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 necessities recognised by Hindu law as justifying such transactions.

Huncooman Persaud Panday v. Mussumat Baboece Munraj Koonwarree (1) approved.

APPEAL from a decree of the High Court (July 2, 1878), varying a decree of the Subordinate Judge of zillah Gya (Dec. 6, 1876).

The facts of the case appear in the judgment of their Lordships.

Doyne, and C. W. Arathoon, for the Appellant.

The Respondent did not appear.


The judgment of their Lordships was delivered by

Sir James W. Colvile:—

The only material point to be decided upon this appeal arises in a somewhat peculiar manner. The suit was originally brought by the Plaintiff, Appellant, who is a mahajun carrying on business in the city of Benares, and also at Gya, to enforce a bond and mortgage against the late Rani Asmedh Konwar, the instrument being dated the 1st of March, 1872. It appearing, however, that the next reversionary heir was in possession of the property alleged to have been mortgaged under an ikramnamah executed by the Rani putting him in possession, apparently, of the whole of her husband's estate, he was joined as a party Defendant in the suit; and it was prayed that a decree might be made for the amount sued for, with costs and interest, and that it might be awarded "by sale of the mortgaged and hypothecated properties, and in case the same do not cover the amount by the sale of other properties, and from the person of the debtor." The suit, therefore, was framed for the purpose of obtaining, in case of need, an absolute decree for the sale of the property alleged to have been mortgaged, including the reversionary interest of the second Defendant therein; and, accordingly, the second issue was settled so as to raise the question how far the reversionary estate was bound by the widow's disposition. It is in these words: "Whether or not was the amount claimed taken for a legal necessity; and whether or not is the amount of debt repayable by the property left by the husband of the widow, Musummat Asmedh Konwar, who contracted the debt."

The Subordinate Judge, who tried the case in the first instance, found wholly in favour of the Plaintiff, and gave a decree for the amount sued for, and a further direction that in case it was not paid, the mortgaged properties should be sold out and out. The High Court, upon appeal, so far confirmed the decree of the Subordinate Judge, that it left the widow bound to the extent of being a debtor on the bond for the amount stated on the face of the bond to be due, but determined that the deed had not been properly explained to her; that she did not understand, or was not properly informed, that it was a deed mortgaging the property;
and, consequently, that all that could be given against her was a decree in the nature of an ordinary money decree.

The appeal to their Lordships is against the decree of the High Court, so far only as it was adverse to the Plaintiff. After the decree was pronounced, and before the appeal was presented here, the widow died, and the second Defendant, the only Respondent upon the record, became the absolute owner of the property in question.

Their Lordships concur with the High Court in thinking that, upon the evidence, there was a total failure of proof as to the proper explanation of this deed to the lady. It is not necessary for them to say whether, that being so, they should have gone so far as to make the money decree which was made against her. That is not the subject of appeal, and they must assume that so far the decree was properly made. Nor do they think it necessary to express any opinion whether in point of fact the bond sued upon, upon the face of it, purports to pledge more than the widow's interest. They will assume that it was intended by those who prepared it to be a pledge of the mouzahs and property which she had inherited from her husband. The only question to be decided on this appeal is, whether the transaction created a charge on the inheritance; whether it made the property in question when in the hands of the Respondent liable to satisfy the bond debt for which a decree has been made against the widow.

In order to establish the affirmative of this proposition, it is necessary, in the first place, to shew that the widow intended to do that which the law allows her to do in certain specified cases; viz., to make a pledge of her husband's estate. But if the High Court was right in supposing that the document was not properly explained to her, there is a failure of proof that she did really intend to do that. The question whether the property was mortgaged at all depends upon the fact whether she intentionally executed a deed containing such a stipulation; and their Lordships have already intimated that, in their judgment, the High Court, dealing as it did with the evidence of Bishen Sahi and the other evidence in the cause, was right in coming to the conclusion that there was no such proper explanation of the bond as would bind her in respect of that stipulation.
Again, if this were otherwise, there would remain the question whether the Plaintiff had satisfied the burden of proof which every Plaintiff who seeks to charge the inheritance after the death of a widow, by virtue of a security executed by her, has to sustain. Their Lordship in no degree depart from the principles laid down in the case of Hunooman Persaud Panday v. Mussunat Baboos Munraj Koonwaree (1), which has been so often cited. 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 ancestral family estate. 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. The words of the judgment in that case are: “Their Lordships think that the lender is bound to inquire 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 inquire 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.” And the judgment ends thus: “Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived.”

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 shew 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.

In this case there is hardly any evidence on the part of the Plaintiff to shew what negotiations took place with him, and what representations induced him to advance the money; still less is there any proof that, having those representations before him, he made the necessary and proper inquiries. The chief witness that has been called, Fakir Chand, says of himself, that, although he is a village wasil-baki-nuvis and writes certain zemindary books, he has nothing to do with the books relating to the mahajani business. It is true that he speaks to having been present when persons purporting to come from the Rani asked for a loan of money for payment of Government revenue and the like; but one would expect in such a case as this that the gomashta, who had the management of the books, and who was responsible for lending money from the kooti, would be the person to come forward and shew upon the faith of what representations and after what inquiry he advanced the money. There is no evidence at all of that kind.

Then, again, the servants who are called from the Defendant's establishment give evidence which cuts both ways, because, although Dost Mahomed, calling himself one of the dawns of the Rani, professed to have gone to the Plaintiff and to have taken money from him, he shews prima facie that there was no real necessity for the Plaintiff to borrow money under the power which she could exercise only in the case of certain necessities. His evidence goes to shew that the lady was in fact in very easy circumstances, and that she had a net revenue of about Rs.130,000. He says: "The amount of collections used to remain in the custody of the dewan. A certain amount, when required, used to be paid to the Rani. I cannot say off-hand what amount of collection comes to my hands. The expenses of the Rani, whatever they may be, are restricted to charitable and pious purposes and distribution to people, &c. Besides this, she does not spend anything with a lavish hand." So again Mahadeo Lal, who was called on the part of the Defendant, puts her income at even a larger amount, and says: "The balance, exceeding a lac and thirty thousand, used to be a saving to the Rani as profit. This amount used to be lodged in the custody of the dewan. The necessary expenses used to be supplied to the Rani. The money would not be lodged in the cutcherry."
The evidence of those two persons seems to their Lordships to be consistent with this state of things; that the Rani's servants, the dewans, chiefly managed her affairs; that if they had immediate occasion for a sum of money they may have gone to the Plaintiff's kooti and got a temporary loan, but it fails to prove a necessity so serious as would justify a pledge of her husband's estate in excess of the ordinary powers of a Hindu widow, or reasonable grounds for the belief of such a necessity.

Then as to the latest transaction there is little or no evidence at all given by the Plaintiff as to the settlement of the former accounts or the circumstances under which he advanced the small sum which made up the amount sued for upon the last bond. All that the witnesses state is that one Baboo Ram Coomar, who is said to be also a dewan of the Rani's, told the moonshi to get this bond signed, some speaking to the making of the bond; but as to the part taken by the Plaintiff in making the last bond, or as to any inquiries made on that occasion, there is no evidence whatever.

It appears to their Lordships that the High Court was right on both grounds in treating the transaction as not binding upon the estate; and they will, therefore, humbly advise Her Majesty to affirm the decree of that Court and to dismiss this appeal.

RANI ANUND KOER AND ANOTHER . . DEFENDANTS;
AND
THE COURT OF WARDS ON BEHALF OF
CHUNDRA SHEKAR AN INFANT . . } PLAINTIFF.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF
SITAPUR, OUDH.

Hindu Law—Hindu Widow—Suit by remote Reversioner—Extent of Reversionary Heir's Right to sue.

In a suit by the deceased's father's brother's daughter's son against the widow of the deceased and her alleged adopted son, to set aside the adoption, and a decree declaratory thereof alleged to have been obtained by the Defendants by fraud and collusion:—

 Held, overruling the decision of both the Courts below, that the suit must be dismissed; Plaintiff being a contingent remote reversionary heir who had neither alleged nor proved that there were no nearer reversionary heirs in existence, or that they had precluded themselves from suing.

The right to bring such a suit is limited, and, as a general rule, belongs to the presumptive reversionary heir.

If such nearest heir refuses without sufficient cause to sue, or has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would, on proof thereof, and subject to the discretion of the Court, be entitled to sue.

Brikaji Apaji v. Jagannath Vithal (1) approved.

Quere, whether the nearer reversioner would not in such suit be a necessary party.

It appearing that the Plaintiff was an Oudh talookdar, and that the widow was entitled to an under proprietary tenure upon his estate, and by her adoption had purported to transfer such undertenure, held, that Plaintiff had not by virtue of his talookdary such a reversionary interest in the undertenure as would entitle him to bring this suit.

APPEAL from a decree of the Officiating Commissioner of Sitapur (June 15, 1877), affirming a decree of the Deputy Commissioner of Bari Banki, in the province of Oudh, in favour of the Respondent.

The facts are stated in the judgment of their Lordships. The previous history of the circumstances relating to the property


(1) 10 Bomb. H. C. R. 351.
in dispute will be found in _Shunkur Sahai v. Bajah Kashi Pershad_ (1). The material portion of the judgment of the Commissioner, after referring to Act I. of 1869, ss. 3 and 4, to the letter of the 10th of October, 1859, scheduled thereto, and to the recitals (2) in the sanads, is as follows:—

"This language is tolerably comprehensive; the 'only' of the letter of the 19th of October, and the 'all' of the sanad appear to me, when read together, and with their context, to give the estate absolutely to the talookdars, and to include the position that when he became no longer bound to maintain any of these subordinate rights by reason of a failure of heirs, the land as a matter of course reverted to him. That the law of Oudh is not the same as the law of Bengal in this matter may be shewn by referring to sect. 52 of the _Oudh Revenue Act_, an Act (see preamble) to consolidate and define the law, not to extend or amend it, in which power is given to the talookdar absolutely to resume such a tenure as that of Sharfunissa in the case of _Sonet Kooer v. Himmat Bahadur_ (3); and in sect. 9 of the _Oudh Laws Act_, and sect. 128 of the _Oudh Rent Act_, the right of pre-emption is specially given to the proprietor, when under-proprietary rights are either sold or foreclosed, the former generally and the latter in the execution of decrees for rents. These provisions shew an extraordinary care upon the part of the Legislature to give extended reversionary rights to the talookdars of Oudh in under-proprietary estates in their own talookas.

"I think, moreover, that the status of an under-propriator is not absolute is equally clear. It is true he can sell his property to the person whom he finds most obnoxious to the talookdar, but he can only sell the under-proprietary right. That right is subject in the last resort for the revenue on the land, even if the rent for it has been already paid. It is liable to be suspended under sect. 125 and sold under sects. 132 and 133 of the _Revenue Act_ for the arrears of the talookdar. It is true that under sect. 134 the


(2) The recitals were, "do by this sanad give and transfer to you all proprietary rights, title, interest in, and possession of the estate, &c. Another condition of this sanad is that you will to the best of your power try to promote the agricultural resources of your estate, that whatever holders of subordinate rights may be under you will be preserved in their former right."

Chief Commissioner may exempt it from sale, but the very fact that this depends on the will of an executive officer shews the dependent nature of the tenure, and, under sect. 158 of the Revenue Act, if a sub-settlement tenure is in arrears of rent it may be annulled for fifteen years under the orders of the Chief Commissioner. It may be argued that the sub-settlement of the Defendant Anund Koer having been decreed by the Privy Council is not an ‘incumbrance’ as defined by sect. 2 of the Revenue Act. But this appears to me to be doubtful, and at any rate it does not exempt the tenure from its ultimate liability to the Government for the revenue of the talooka, or from the provisions of sect. 152 of the Revenue Act, should the rent fall into arrear.

"I am therefore of opinion that a talookdar has a reversionary interest in every under-proprietary tenure in his estate, and that the right to the land having been transferred to the Defendant, Radha Kishen, by the legal declaration of his adoption by the Defendant Anund Koer, in the Plaintiff's talooka, he had a right to bring this suit; I am also of opinion that under the custom of the Oudh Courts, the Plaintiff had a right to a declaratory decree defining the Defendant Radha Kishen's status as soon as the declaration of the adoption transferred the sub-settlement tenure within the Plaintiff's estate from Anund Koer to him. So well recognised is this right that Government Notification, No. 801, dated the 30th of January, 1874, exempted such a plaint from the payment of more than an eight anna Court fee."

Leith, Q.C., and Doyne for the Appellants, contended that the infant Plaintiff had no locus standi or cause of action which entitled him to maintain the suit. The Plaintiff was only uncle's daughter's son to the deceased, and during the lifetime of the deceased's male cousins, the sons of Seetaram Pathak and their sons, i.e., Sheo Rutton and Ram Rutton, and the possibility of an adoption being made by any of them, was not the next nearest reversionary heir to the deceased. As the adopted son of Kashi Pershad, himself a stranger to the family, he did not become a member of Shunkur Sahai's family. Nor did he acquire any right of succession through Omaid Koer, his so-called adoptive mother. It was then contended that, as the finding of the lower Court that the Respondent was not an heir at all had not been cross-appealed from by
the Respondent, he could not now claim as heir. [Cowie, Q.C., was heard upon this preliminary objection, and their Lordships decided against it.] The Commissioner was wrong in holding that a talookdar, as such, has a reversionary interest entitling him to maintain a suit like this, by reason of a failure of heirs in the under proprietary tenures within his talook. [Cowie, Q.C., admitted that he could not sustain this portion of the judgment.]

As to his title by adoption, an adopted son is heir to his adoptive father, not preferentially or at all to the collateral relations of his adoptive mother, as in this case to Shunkur Sahai: see Sham Kuar v. Gaya Din (1); Chinmara Makristna Ayyar v. Minatchi Ammal (2); Gunga Moya v. Kishenkishore (3). [SIR JAMES W. COLVILLE referred to Gungapersad Roy v. Brijessuree Chowdhraim (4).] Assuming the Plaintiff to be an heir, he cannot be placed higher than a remote bandhu. The presumptive reversionary heir can alone maintain a suit like this, unless in case of collusion or negligence, where the remoter heirs may, on making a case to that effect, with the presumptive reversionary heir as a party Defendant, be allowed to sue. This Plaintiff belongs to another gotra. See Mitakshara, c. ii., sec. 2, verses as to daughters and daughters' sons. [SIR BARNES PEACOCK referred to c. i. sec. xi.] Mora Moe Debeab v. Bijoy Kishito (5); judgment of Sumbhoonath Pundit, J., showing that an adopted son does not succeed to the collateral relations of his adoptive mother's family.

Cowie, Q.C., and Mayne, contended that the infant Respondent had such an interest as entitled him to the relief prayed for. Admitting that the presumptive reversionary heir has a better right than a more remote reversioner, still the right of the latter becomes absolute to question an adoption, for instance, whenever the nearer heirs have precluded themselves from doing so, or have in any way waived their right. In such case a remote reversioner becomes protector to the estate and can sue. Reference was made to Balgobind Ram v. Hirusrani (6); Bhikaji Apaji v. Jagannath

(1) Ind. Law Rep. 1 Allah. Series 255.  
(2) 7 Madras H. C. R. 245.  
(3) 3 Sel. Rep. 128.  
(4) S. D. A. (Beng.) 1859, p. 1091.  
(6) 2 Suth. W. R. 253.
Vithal (1); Koore Golab Singh v. Rao Kurun Singh (2); Hurrydoss Dutt v. Rungunmony Dossees (3); Mitakshara, c. i., sec. xi., vv. 30, 31; Dattaka Mimansa (Stokes, p. 612), sec. vi., v. 50; Dattaka Chandrika, sec. 3, v. 14 (Stokes, p. 649). As regards the question whether the Plaintiff is a reversionary heir at all, i.e., whether he was entitled to succeed ex parte materna or only in his adoptive father's family, it was contended that he could have offered spiritual benefit to the father and grandfather of his adoptive mother, and therefore was connected with Shunkur Sahai by funeral oblations. He was a bandhu to the deceased, the Mitakshara list of bandhus not being exhaustive. The course of decisions as to the right to succeed through a female has gone through three successive stages. In 1821 there was the case of Gunga Meenah v. Kishenkishore (4), in which case the pundit, referring to Dayabhaga, c. x., vv. 7 and 8, ruled against the adopted son's benefiting or succeeding to his mother's father or grandfather. That view cannot now be said correctly to represent the law of Bengal. See Morun Mose Debeah v. Bejoykisto (5). The second stage was in 1859: see Kishennath Roy v. Huroogobind Roy (6); Gourhuree Kubraj v. Runaswree Debia (7). For the third stage, see Gunagapersad Roy v. Brijessuree Chowdhtrain (8). Reference was made to Teencourie Chatterjee v. Denonath Bonnerjee (9); Menu, c. ix., v. 183; Dattaka Mimansa, sec. ii., v. 69, sec. vi., vv. 50, 52; Dattaka Chandrika, c. i., vv. 23–26; c. iii., vv. 16, 17; Mitakshara, c. i., sec. xi., vv. 30, 31; Sutherland's Synopsis (Stokes, p. 668) 2 Macnaghten's Hindu Law, p. 88; 1 Strange's Hindu Law, p. 249. An adopted son does succeed to his adoptive mother's relations under certain circumstances. It was supposed that in the Dayabhaga his right to succeed to cognates was denied; in reality the opinion that he did not succeed to collaterals has been overruled: see Chinna Makriska Ayyar v. Minatchi Ammal (10); Amrita Kumari Debi v. Luckinarayan Chuckerbatty (11); Guru Gobind Shaba Mandal v. Anandoll Ghose Mozumdar (12).

(3) 2 Taylor & Bell, 279.  (9) 3 Suth. W. R. 49.
(12) 5 Beng. L. R. 15.
Doyne replied.

Nov. 19. The judgment of their Lordships was delivered by

Sir Robert P. Collier:—

The suit out of which this appeal arises was instituted in the
Court of the Deputy Commissioner of Lucknow, in the province
of Oudh, by the Respondent, the Superintendent of the Court of
Wards, on behalf of Rajah Chundra Shekhar, a minor, against
Rani Anund Kunwar and Radha Kishen, the Appellants, to set
aside an adoption set up by them, by which, as they alleged, the
first Defendant had adopted the second Defendant as the son of
her deceased husband, Shunkur Sahai.

The suit was transferred to the Court of the Deputy Commiss-
ioner of Bari Banki in the district of Sitapur.

The minor on whose behalf the suit was instituted is the
talookdar of Sessendi, the talook having descended to him as the
adopted son of Rajah Kashi Pershad, the former talookdar.

By an order of Her Majesty in Council made in the year 1873,
in pursuance of a report of the Judicial Committee in an appeal
in which the first Defendant was Appellant and the aforesaid
Rajah Kashi Pershad was Respondent, the first Defendant was
declared to be entitled, as the widow and heiress of the aforesaid
Shunkur Sahai, to a Hindu widow's estate of inheritance in four
of the mouzahs and to a one-third share of the profits of seven
others of the mouzahs comprised within the said talook of Sessendi,
and to a sub-settlement of the said four mouzahs: see the case of
the widow of Shunkur Sahai v. Rajah Kashi Pershad (1).

The plaint in the present suit, which was filed on the 8th of
July, 1875, stated that the suit was brought to set aside the so-
called adoption of the second Defendant, and also to set aside a
decree given under sect. 15, Act VIII. of 1859, declaratory of the
so-called adoption, obtained by the Defendants by fraud and
collusion. It alleged that the said Rajah Chandra Shekhar was
talookdar of Sessendi; that, at the time of the said decree, the
Defendant No. 1 was a sub-proprietor of the said talooka, and
liable to him for the Government revenue demand plus a certain

percentage; and that the effect of the so-called adoption and decree, so long as they were not set aside, was to put the so-called adopted son of the first Defendant in her place as sub-proprietor, and thus to thrust upon the talookdar, in a method contrary to law, an obnoxious sub-proprietor.

The plaint further stated that the said Rajah Chandra Shekhar was entitled in reversion to the sub-proprietary estate so held by the Defendant No. 1, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion; that the said Rajah Chandra Shekhar was further entitled immediately in reversion to the sub-proprietary estate so held by the Defendant No. 1 as aforesaid, by right of purchase under a deed of sale bearing date the 7th day of November, 1862, and that the effect of the so-called adoption and of the decree declaratory of it was illegally to injure and postpone that reversion.

The first Defendant filed a written statement, in which she set up the adoption as having been made in 1851, in pursuance of the verbal and written authority of her deceased husband. She also set out a genealogical tree of the family, which both parties admitted to be correct so far as it goes, and of which the following is a copy:

\[
\begin{array}{|c|c|c|}
\hline
\text{Imrit Lall Pathuk.} & \\
\text{Koom Dun Lall.} & \text{Mohun Lall.} & \text{Seetarum.}^* \\
\hline
\text{Shankur Sahai,} & \text{Mussumat Omasid} & \\
\text{married to} & \text{Koer, married} & \\
\text{Mussumat Anund Koer.} & \text{to Rajah Kasheepsahad.} & \\
\hline
\text{Radha Kishen,} & \text{Chandra Shaker,} & \\
\text{adopted son of} & \text{adopted by Rajah} & \\
\text{Shankur Sahai.} & \text{Kasheepsahad.} & \\
\hline
\text{Adjudhia} & \text{Luchman} & \text{Rughoonath} & \text{Beni Madho,} \\
\text{Pershad,} & \text{Pershad,} & \text{Pershad,} & \text{alive.} \\
\text{alive.} & \text{alive.} & \text{dead.} & \\
\hline
\text{Sheo Kuttan} & \text{Ram Kuttan,} & \\
\text{alive.} & \text{alive.} & \\
\hline
\end{array}
\]

^* Had three daughters who have sons, all alive now.
She further stated that the Plaintiff had no *locus standi*, nor had the Superintendent of the Court of Wards any right to institute the suit.

Further, she alleged that the Plaintiff had no right to sue, because he was only her husband's uncle's daughter's son, and during the lifetime of her husband's male cousins (the sons of *Seetaram Pathak*) and their sons (to wit, *Sheo Bhatt* and *Ran Bhatt*), and the possibility of an adoption of a son being made by any of them, the Plaintiff could not by any means be considered the nearest reversioner to her or to her husband.

The Deputy Commissioner held that the Plaintiff was not the immediate reversioner, either by right of his being the talookdar or by inheritance; but that he was a remote reversionary heir, and was kept out of his rights by virtue of the alleged adoption and declaratory decree, and that he had thereby sustained sufficient injury to entitle him to maintain the suit. Accordingly, he made a decree that the alleged adoption and the decree declaratory of it be set aside so far as the Plaintiff was concerned.

Upon appeal the Commissioner affirmed the decree of the Deputy Commissioner, but on a different ground. He agreed with the Deputy Commissioner that the Plaintiff had not proved the alleged deed of purchase of the 7th of November, 1862, upon which he relied; he held that the Plaintiff was not a reversionary heir of *Shunkur Sahai*, but considered that as talookdar he had a reversionary interest in the sub-proprietary estate which entitled him to maintain the suit.

Their Lordships are of opinion that the first ground upon which reliance was placed on behalf of the Plaintiff, and upon which the Commissioner decided in his favour, viz., that as talookdar he had a right to have the alleged adoption and declaratory decree set aside as against him, is wholly untenable. Indeed, the learned counsel for the Respondent was obliged to abandon it. The last of the three grounds upon which the Plaintiff relied in his plaint, viz., that he was entitled by purchase to the immediate reversion in the said sub-proprietary estate, fails in fact, inasmuch as both the lower Courts concurred in finding that the alleged deed of sale of the 7th of November, 1862, was not proved.

The only remaining question then is, Is the minor a reversionary
heir of Rajah Kashi Pershad, and, if so, is he entitled to maintain the suit?

It appears from the genealogical table above set out, and it is not disputed, that the minor is the adopted son of Rajah Kashi Pershad, who was the husband of Omaid Koer, the daughter of Mohun Lall, who was a brother of Koondul Lall, the father of Shunkur Sahai. It is unnecessary to determine whether he could, under any circumstances, succeed by inheritance to the property of Shunkur Sahai, and their Lordships abstain from expressing any opinion upon that point. Admitting, however, for the sake of argument, and only for the sake of argument, that, as an adopted son, he had the same rights as a naturally born son, and that, as a naturally born son of Omaid Koer, he would have been entitled, in default of nearer relations, to succeed by inheritance to the property of Shunkur Sahai, it could only have been in the character of a distant bandhu. It is clear that a son of a daughter of a father's brother is much farther removed in the order of succession than a son of a father's brother, or a son of such a son. In any view of the case, the minor had not a vested, but at most a contingent, interest in the property of Shunkur Sahai during the lifetime of his widow: see Hurrydoss Dutt v. Rungummony Dossees (1).

The question then arises, Is the contingent reversionary interest which the minor has, if he has any, sufficient to enable him to maintain the action which is brought to impeach the adoption of the second Defendant?

Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in Brikaji Apagi v. Jagannath Vithal (2), is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow

(1) 2 Taylor & Bell, 279. (2) 10 Bomb. H. C. R. 351.
can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct, from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue: see Kooer Golab Sing v. Rao Kurun Sing (1). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.

In the present case, the Superintendent of the Court of Wards claims in the plaint a right to sue on behalf of the minor as a reversionary heir, without alleging that there are no others nearer in the line of succession, or that those who are nearer have precluded themselves from suing.

In the course of the argument before their Lordships, it was contended that Adjudhia Pershad and Luchman Pershad, two of the sons, and Sheo Rutton and Ram Rutton, the two grandsons of Seetaram, had precluded themselves from suing to set aside the adoption and declaratory decree mentioned in the plaint; but no such allegation was made in the plaint, nor does the point appear to have been taken in the Courts below.

No issue was raised, nor was there any finding of either of the Lower Courts, in support of that view of the case. The point is not even expressly alluded to in the Respondent's case or reasons. Their Lordships cannot, at this stage of the case, give any effect to the contention.

Even if it were allowed to prevail, it would not apply to Beni Madho, who was stated to be alive, but not to have been heard of for some time. It does not appear that he had been unheard of for a length of time sufficient to warrant a presumption of his death. Moreover, there was no allegation of his death, and no issue whether he was alive or dead, nor any evidence of an

attempt to ascertain the fact. It must, therefore, be taken that
there may be a son of a brother of Shunkur Sahai's father in
existence who is not precluded from suing. Consequently, the
minor, who is merely the son of a daughter of a brother of the
father, is not, under the rule applicable to such actions as the
present, entitled to maintain the present suit.

It must further be remarked that it appears from the genea-
logical table that Seetaram had three daughters who have sons
living. They would be as near in succession to Shunkur Sahai
as the minor Plaintiff would have been, even if he had been a
naturally born son.

It must also be borne in mind that even if Adjudhia Pershad,
Luchman Pershad, Sheo Rutton, and Ram Rutton have precluded
themselves from suing to set aside the adoption, the minor Plaintiff
could not, even if he were a naturally born son, and the adoption
of the second Defendant should be set aside, succeed to the pro-
property of Shunkur Sahai if either of the sons or grandsons of
Seetaram should survive the first Defendant. The minor, admit-
ting him to be a bandhu, has merely a very remote possibility of
ever succeeding to the property of Shunkur Sahai. Their Lord-
ships will, therefore, humbly advise Her Majesty to reverse the
decisions of both the Lower Courts, and to dismiss the suit, with
costs, in both the Lower Courts. The Appellants' costs of this
appeal must be paid out of the estate of the minor Chundra
Shekhar.

HAJI MAHOMMED FAIZ AHMED KHAN. DEFENDANT; J. C.*
AND
HAJI GHULAM AHMED KHAN AND ANOTHER PLAINTIFFS. 1881

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD. Jan. 27.

Mahomedan Law—Gift—Ariat—Construction.

A Mahomedan deed after providing for the absolute gift (hibeh-bil-ewas) of two mouzahs, proceeded:

"I do declare and record that the aforesaid sister-in-law (i.e., the donee) may manage the said village for herself, and apply the income to meet her necessary expenses, and to pay the Government revenue":—

Held, that, under Mahomedan law, these words did not necessarily cut down or limit the operation of the absolute gift otherwise effected either to a gift for life or to an ariat or resumable loan. In this case they were descriptive of the motive of the donor, and ineffectual to control the operation of the technical words of gift.

APPEAL from a decree of the Allahabad High Court (July 11, 1877), affirming that of the Subordinate Judge of Agra (May 25, 1876).

The question in this appeal was as to the meaning and construction to be put upon two documents (sufficiently set out in their Lordships' judgment), the one a deed of gift dated the 1st of January, 1867, executed by the Appellant, granting the two villages in suit to Wali-un-nissa; the other a deed of agreement, dated the 3rd of January, 1867, executed by Wali-un-nissa accepting the gift, and giving up her claim to any movable or immovable property constituting the ancestral estate of her husband.

Both Courts found that the gift was an absolute gift, and therefore decreed the suit, which the Respondents, as heirs of Wali-un-nissa, had brought to recover possession of, inter alia, the two villages in question. The defence was that the gift had been by way of ariat or commodate loan to the deceased, in order that she might use the profits for her maintenance and other necessary expenses, and that there had not been any absolute gift.

The material passages of the judgment of the Subordinate Judge (approved and confirmed by the High Court) were as follows:—

"The material point to be decided is, whether the villages of Sahauli and Kamalabad were given to the Musummat as ariat or as a gift, and whether the Defendant is entitled to take them back. Along with the above it will also be necessary to decide the nature of the gift, whether it was with or without consideration. The Court shall first define hiba and ariat, and detail the circumstances thereof as far as they are applicable to, and bear upon, the present case.

"To make a person the owner of the substance of a thing without consideration is a hiba (gift), while to make him the owner of the profits only without consideration is an ariat or commodatum (vide Durra Mukhtar, Kitab-ul-hibeh) (1). In a gift it is essential that the donor should be sane, owner, and of age, that the thing given be not undivided (mushaa), and be in possession of the donor, and that there be proposal and acceptance. A gift is not void for invalid conditions; on the contrary, the conditions are void. For example, if a slave be made a gift of, with the condition that the donee should set him free, the condition is void but the gift is valid. (Durra Mukhtar, Kitab-ul-hibeh (2).)

"In an ariat it is not necessary that the donor should be of age, nor that the thing given should not be undivided, nor is acceptance after proposal a condition. (Alamgiri (3).)

"'In the Imadia it is explained, that the ariat of a joint property is valid, and so are its deposit and sale.' (Duarr Mukhtar, Kitab-ul-ariat.)

"The words by which an ariat is constituted have a special

(1) "‘It is the tamlik (making one the proprietor) of the substance for nothing, i.e., without consideration. Arit. It is the tamlik of profits for nothing (without consideration)."

(2) "The conditions of its validity in the donee are sanity, majority, and ownership. The conditions of validity in the subject of the gift are that it be possessed and not joint. Its pillars are proposal and acceptance. Its effect is that it is not rendered void by invalidating conditions. Accordingly, the gift of a slave, on condition of his being set free, is correct, and the condition is void."

(3) "As to acceptance by the person to whom anything is given in ariat, it is not one of the conditions according to the approval of our three doctors. "As to majority, it is not one of the conditions, so much so, that it is valid from an authorized child."
chapter assigned to them in the Alamgiri, and I shall copy it in this place to shew what words are used in giving a thing in ariat, and of what signification. (Second chapter, Kitab-ul-ariat, Alamgiri): If he said, 'I have made thee owner of the profits of this house for a month,' or, without saying 'a month,' 'without a consideration,' it will be an ariat. This is in the Fatawas of Kasi Khan.

"And it is valid by the words—'I lent thee this robe, thou mayest wear it for a day, or I lent thee this house, thou mayest live therein for a year.'—(Tatarkhana).

"If he said, 'I make this house of mine thy residence for one month,' or, if he said, 'thy residence for my lifetime,' this will be an ariat. (This is in the Zahiria). And if he said, 'I made thee be borne on her for God's sake,' it is an ariat. (Fotawi Kazi Khan). And if he said, 'my house is for thee a gift by way of residence,' or, 'a residence by way of gift,' it is an ariat. This is so in the Hidaya. And if he said, 'my house is for thee given by way of a residence,' or, 'a residence by way of sadqa (alms),' or, 'a sadqa by way of ariat,' or, a 'loan (ariat) by way of gift,' all this is ariat. This is so in the Kafi. And if he said, 'my house is for thee, if thou survivest me, and for me if I survive thee,' or, 'for thee a wakf,' it is an ariat according to Abu Hanifa and Muhammad, but a gift according to Abu Yusuf, and the words 'Rakba and Habas' are void. This is so in Badaya. If he said, 'my house is for thee if thou outlive me, and for me, if I outlive thee,' or, a 'wakf for thee,' it will be an ariat according to all. This is so in Yanabi. 'I made over this ass to thee, so that thou mayest use it and feed him with grass at thy own cost,' this will be an ariat. This is so in Kania. If he said, 'I have given thee this tree for eating the fruit thereof,' it is an ariat, unless he intends a gift by it. This is so in Tamar Tashi.

"These are the words from which an ariat is construed, and it will also appear from looking at all of them, that the words 'wahabto' (I made a gift) is not found anywhere among them. The words 'Hibehtun Suknah' or 'Suknah Hibehtun,' which are used above, do not mean a gift of the substance of the thing. They are only an elucidation of 'Dari laka,' so that the meaning is, that the house which is given, is given for residence. I shall
now give those words which constitute a gift, and they are of three kinds. First, those which are specially made (adapted) for a gift; secondly, those which denote a gift metaphorically or by implication; and thirdly, those which import hibeuh or ariat equally. I copy the following from the Alamgiri Kitab-ul-Hibeuh, chap. i.:—'The words by which a gift is made are of three kinds; first, those which are specially adapted or made for hibeuh; secondly, those which denote hibeuh by implication or metaphorically; and thirdly, those which may import hibeuh or ariat equally.' Of the first kind there are such as these—'I made a gift of this thing to thee,' or 'I made thee owner of it,' or 'I made it for thee,' or 'this is for thee,' or 'I bestowed upon thee or gave thee this.' All this is hibeuh.

"Of the second description are such as these—'I clothed thee in this garment,' or 'I gave thee this house for thy lifetime.' This is gift. In the same way, if he said, 'this house is for thee for my age,' or 'for thy age,' or 'for my lifetime,' or 'for thy lifetime, so that when thou art dead, it will revert to me,' then the gift will be valid and the condition void.

"But the third kind are such as these—Should he say, 'this house is for thee if thou survivest me, or for me, if I survive thee, or a wakf for thee, and make it over to him,' it is an ariat according to the two (Abu Hanif and Muhammad) and a hibeuh (gift) according to Abu Yusuf.

"The above quotation shews that the word 'wahabto,' the meaning of which is, 'I made a gift of,' is a word specially adapted for gift (hibeuh), and is not used to denote a loan (ariat). And this is the word which has been used in the document entitled hibehname (deed of gift). None of the doubtful words have been used in this document, and the words used after it are by way of advice (mashvara). There is an example in the law-books eminently applicable to the present case, which makes it clear that the transaction in dispute was one of hibeuh and not of ariat (commodatum). This example is to be found in all the books in Hidayat, in Durra Mukhtar, and in Alamgiri 'Darilaka hibatun taskunahu.'

"'My house is for thee by way of gift that thou mayst live in it.' It is a rule in Arabic that a verb sentence is never used as
explicative (tafsir) of a noun sentence. 'Darilaka hibatun' is a noun sentence, and 'taskunahu' a verb sentence; 'taskunahu' cannot therefore be explicative of the preceding sentence. On the contrary, the donor, by way of advice, counsels the donee to live in it; and the latter is free to adopt the counsel or not. Among the sentences by which a valid gift may be made the following appears in the law books:

"DURRA MUKHTAR.

"'My house is for thee that thou mayest live in it.' Because the words 'that thou mayest live' (taskunahu) are an advice, and not an explanation, for a verb is not adapted to be explicative of a noun. So then he counsels him in the mode of his proprietorship by telling him to live in it. So, if he likes, he can accept the advice, or he may not accept it. But if it be said 'Darilaka hibatun sukna,' or 'Sukna hibatun,' as mentioned in the words used to describe an ariat, there 'hibatun sukna' is a tafsir or explanation of ownership, contrary to 'Darilaka hibatun taskunahu,' where it is not a tafsir.

"HIDAYA.

"If he said, 'by way of gift, that thou mayest live in it,' then it is a gift, for his saying taskunahu, that thou mayest live in it, is an advice, and not an explanation, and it is an index of the object, unlike his saying, Hibatun sukna, for it is a tafsir to it. In the deed of gift the words, 'made a gift of,' and, 'put her in possession,' are followed by the direction, that 'the sister-in-law may manage the villages, and apply their income to meet her necessary expenses and to pay the Government revenue;' this is all by way of advice, and the transaction of gift concluded with the preceding words.

"The words 'hibeh kya' (made a gift of) denote their real meaning, and are made use of with reference to two villages.

"It is a rule, in every language, that a word is always understood to be used in its literal meaning, though, of course when the literal meaning is not applicable, the metaphorical one may be understood. It is not necessary to refer to Arabic books alone for further corroboration of this fact. The word 'gift' is perfectly applicable in its literal sense in the document, where these words are used. The donor was not a minor, nor the subject of gift
mushaa (undivided). There is no reason why the word hibeh should be held to mean an ariat (loan), and why, when it is clearly stated that the mouzahs of Sahouli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mouzahs Kamalabad and Sahouli were given as ariat. On a perusal of the words of the whole document it clearly appears that Fais Ahmad Khan never even thought of effecting an ariat. He has used sufficient words by which nothing but a gift could be intended. The whole manner is that of a gift, and there is not even the trace of an ariat. The value of the property was fixed, the full stamp duty was paid, and, lest the property should be suspected to be mushaa (or undivided), and the gift vitiated on that account, he stated that both villages are owned by me without the partnership of any one else. Then using the word 'hibeh,' he declared, that he had made a gift and confirmed it, so far as to write that neither he nor his heirs shall have any claim. At the conclusion, he expressed the nature of the document, by saying that he had written it by way of a deed of gift. He also stated in the document that he had made over the possession to the Mussummat, which is the completion of the gift (but which is not necessary in an ariat or loan). He made the Mussummat execute a document in the way of kabuliat (acceptance), which was necessary for the validity of the gift (not necessary in an ariat). After the conclusion of the words of the document and writing, 'fakt' (end), the words headed 'P.S.—I promise,' used by the Defendant, further elucidated the nature of the gift, and showed that it was a hibeh-bil-ewas (gift for consideration). There is no reason why all the words should not be understood in their literal sense, and why the transaction should be considered as ariat (commodatum), about which there is no word at all in the whole document. The transaction cannot be considered to be an ariat, unless all the words be construed in a sense other than literal; but for this there must be a very strong reason, which the Court thinks does not exist.

"Passing from this document, several passages in the ikramnamah (agreement) too, are worth consideration. In this document great care has been taken to use such words as would indicate the dispossessing from, and absence of, right of Wali-un-nissa to her
husband's estate, and would serve as a protection from future claims on her part.

"The following sentence in that document is worth consideration: 'I am now satisfied and contented with this said property. I declare that I shall have no claim in future respecting the estate of Datauli Khas, the villages of the talooka Datauli, &c., constituting the ancestral estate of Fais Ahmed Khan.' There are several points worthy of notice here: first, 'no claim in future,' which shows that there was a claim formerly; second, 'now contented with this said property.' Here we have the words, 'this said property,' which was the villages and not the profits thereof. The words 'satisfied and contented' are also not to be overlooked. Is it necessary to take such precautions in the case of an ariet, which is merely a favour? What would be the use of an agreement (ikramnamah) from the person taking the loan? What is his satisfaction and contentment? What is his forbearing to make any claim?

"Now apart from the above, let us look to the state of the transaction between Mussummat Wali-un-nissa and Fais Ahmed Khan, with reference to the actual state of things, and see whether the transaction was accepted as a gift or as a loan (ariet). From the evidence of Mustafa Khan, own nephew of Fais Ahmed Khan, it is proved that Wali-un-nissa made proprietary appropriations, and that Fais Ahmed Khan admitted that Mussummat Wali-un-nissa made a gift of a garden at Datauli to this very Mustafa Khan, who is still in possession of it. Mustafa Khan informed Fais Ahmed Khan of the gift, and he admitted it. Can a person in whose favour an ariet is made make such transfers according to the Mahomedan law, and can they be held valid by the lender? The Mussummat caused the wajib-ul-arz for both the villages to be prepared, and has declared her future heirs as her successors after her. This was done long ago, and Fais Ahmed Khan never took any objections thereto. Technically, it may be argued that Fais Ahmed Khan was no party to the attestation, or he did not take part in it; but it is improbable that a great talookdar, several of whose agents and mooktars are always present in the Revenue Courts, should remain unaware of this fact. The simplest conclusion that can be drawn from this is that Wali-un-
nissa thought herself to be owner and possessor under the hibehnama, and not one to whom a loan had been given.

"Besides this, the Mussummat made the gift of a grove to Mustafa Khan, and had the wajit-ul-arz compiled as proprietor. She built a house in the village given to her, planted a garden, erected a mosque, and constructed a well, all of which were proprietary appropriations. And all these things were done when the family was joint and living together, which would render it difficult to believe that the Defendant was ignorant of, and had no information about them.

"Considering all these circumstances, the opinion of the Court is that both the villages were given to the Mussummat as a gift, and not as an ariat (loan); that the document is clearly a hibehnama (deed of gift), and not an ariatnama (deed of loan); that both the villages were Mussummat Wali-un-nissa's property by reason of the gift and heritable. According to the Mahomedan law in an unconditional (mahz) gift, a donor is no longer competent to recede from the gift on the death of the donee, or, in other words, to get the property back, and in hibeh-bil-ewaz (gift for consideration) the doctrine is clearer. Therefore, whatever be the description of this gift, the Defendant is not entitled to get the estate back. The Plaintiffs, who are the legal heirs of Wali-un-nissa, deceased, have a right, according to Mahomedan law, to bring the claim.

Graham, Q.C., and Woodroffe, for the Appellant, contended that the deeds taken together did not constitute a valid hibeh-bil-ewas, otherwise, that the donee acquired thereunder no heritable estate but only a life estate, in the villages. The rule as to absence of words of inheritance is laid down in Baboo Lekraj Roy v. Kunhiya Singh (1). The transaction here was an ariat or commodate loan of the profits, passing the usufruct for life, irrevocable during the life of the donee: Bailie's Digest Mahomedan Law, 1st part, p. 515, book viii., ch. 1, on Gifts; and p. 799, note, Supplement, c. iii. on Kurz; Grady's Hedayat, p. 478, book xxix., on ariat or loans.

Leith, Q.C., and C. W. Arathoon, for the Respondents, were not called on.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This suit was brought by the two Respondents, Haji Ghulam Ahmed Khan and Haji Inayatullah Khan, claiming as heirs of their sister, Mussummat Wali-un-nissa, to recover two villages, mouzah Sahauli and mouzah Kamalabad, in zillah Aligarh. The original Defendant and Appellant here was Faiz Hamed Khan. He has died since the appeal to Her Majesty, and is now represented by his sons, who are his heirs. The question in the appeal turns upon the construction of two instruments. A third was executed to carry the transaction into effect; but the case really turns upon the construction of two instruments, one a deed of gift, and the other an agreement in which the gift is accepted.

In order to understand the position of the parties, who are Mahomedans, it will be necessary to refer to a few facts. Murad Khan, who was the talookdar of Datsauli and the owner of several villages, having died, his grandsons, Mohammed Hussain Khan and the Defendant Faiz Ahmed Khan, succeeded to his estates; their father, Abdulrahman Khan, having died in the grandfather's lifetime. Abdulrahman Khan left a widow, Mussumut Wazir-un-nissa, the mother of his two sons, who is still living. Hussain Khan, the elder grandson, died on the 31st of August, 1838, leaving as his widow Mussumat Wali-un-nissa, the sister of the two Respondents, who now, as her heirs, claim the mouzahs in question.

On the death of Hussain Khan his share in the estates which descended from his grandfather would fall, according to Mahomedan law, to his brother, Faiz Ahmed Khan, his mother, Wazir-un-nissa, and his widow, Wali-un-nissa, as co-sharers; the latter, as widow, being entitled to a fourth. The estates had stood in the register in the name of Hussain Khan, his brother Faiz Ahmed Khan being a minor; but after Hussain's death they were placed in the names of his mother, his widow, and his brother, Faiz Ahmed Khan. Although the estates were so placed in the names of the mother and widow, the two ladies did not enter into possession or receipt of the profits of them, but received allowances of money and grain. Wali-un-nissa, the widow, received
annually Rs.500 and 100 maunds of grain. In 1856 the two ladies executed a power of attorney authorizing a mooktar to expunge their names from the register; and in 1857 the power of attorney was acted upon, but partially only. Their names were expunged from the register with regard to the greater part of the estates, but two villages were left standing in their names, namely, Datauli Khas and Deosaini; and these villages remained in their names down to the time of the transaction which is in question.

On attaining his majority Fais Ahmed made a pilgrimage to Mecca. During his absence there appears to have been some dispute between the manager of the estates and the ladies or those acting for them, and some contest took place during the Government settlement which was then being prosecuted. It is not immaterial to refer to these proceedings, which shew that, though the two ladies were receiving an allowance in money and grain, they had not given up their claim to a share of the estates. What took place is shortly stated, in the judgment of the Subordinate Judge, as follows:—"The revision of the settlement in this district commenced in 1863; and Wali-un-nissa then, probably with the advice of Mohammed Inayat-ul-lah Khan (the cause of which, perhaps, might have been those very disputes), presented applications through her agent for entry of her name in respect of the villages of the estate. But those applications were withdrawn about ten or twenty days after, on the 27th of May, 1863 (as proved by the evidence of Farzand Ali, mooktar). The disputes were prolonged regarding Datauli Khas, in respect of which Wali-un-nissa’s name had continued to be entered. The cause of this appears to have been that in the wajib-ul-urz Fais Ahmed Khan had caused the name of Wali-un-nissa to be entered in regard to a 1½ biswa share with receiving Rs.500 cash and 100 maunds of corn." The Mussummat applied for entry of her name in respect of a 2-anna share, and also stated that the agents of Fais Ahmed Khan had wrongly stated her right to 1½ biswas and her receipt of Rs.500 cash and 100 maunds of corn. It thus appears that, although an allowance in money and grain was made, Fais Ahmed or his agents admitted that the widow was entitled to 1½ biswas; and there is no satisfactory evidence to shew that by
taking the allowance she had relinquished her right to a share if she chose to insist upon it. These proceedings occurred in the absence of Faiz Ahmed at Mecca. After the discussion before the Deputy Collector the case was brought before the Collector, who very properly said that the Collectorate had nothing to do with the rights of the parties, and that the whole matter had better stand over until Faiz Ahmed returned.

Faiz Ahmed returned from Mecca in the year 1866; and steps were then taken to come to an arrangement with his brother’s widow, which was carried into effect by the documents which are now to be construed.

The instrument executed by Faiz Ahmed Khan bears date the 1st of January, 1867. It states that he intended again to go to Mecca, and goes on thus:—“The karindas cannot properly meet the requirements of the services due to Bibi Wali-un-nissa, my sister-in-law (brother’s wife); and whereas from before Rs.500 cash and 100 maunds of grain were fixed on my part for necessary purposes, by way of rendering service to her, therefore I have now, with great pleasure, willingly and voluntarily made a gift of mouzah Sahauli, assessed at Rs.1310. 5a. 1p., and of mouzah Kamalabad, assessed at Rs.281. 11a. 3p., villages appertaining to pergunnah Atauli, in the zillah of Aligarh, valued altogether at Rs. 10,000, and owned by me without the partnership of any other person, for all the expenses of the said sister-in-law, and put in her possession.” If it had stopped here, there could be little doubt that the instrument would contain an absolute gift of the two mouzahs. It goes on:—“I do declare and record that the aforesaid sister-in-law may manage the said villages for herself, and apply their income to meet her necessary expenses and to pay the Government revenue.” Those words, it is contended, cut down the previous words of gift, not even to a gift for life, but to what in Mahomedan law is called an ariet or loan, which would seem to be no more than a licence to take the profits of the land, revocable by the donor. Undoubtedly, those words require consideration. They may have been inserted either to shew that an ariet was intended, or merely to shew the motive and consideration of the gift. In order to ascertain which of those two meanings the words properly bear, the rest of the document is material
to be considered. It goes on:—"And that I and my heirs shall make no objection or opposition." These words seem to be entirely opposed to the view that an ariat in the sense of a resumable loan or licence was intended. It goes on: "I therefore have written these few words as a deed of gift,"—the grantor here distinctly describes the deed or instrument he is signing as a deed or instrument of gift,—"that it may serve as evidence." Then, written by way of postscript, he says:—"I declare that these villages have been given in lieu of the former Rs.500 cash and 100 maunds of grain, and that henceforth the said money and the grain shall not be given." This, taken in its plain sense, is a statement of one of the considerations for the gift; and it was necessary to be stated, otherwise a claim might have been made for a continuance of the allowance of the rupees and grain in addition to the benefit which the donee took under the deed.

The Mussummat executed an ikramaham, dated on the 3rd of January, 1867, but which was, in fact, executed on the same day as the deed of gift; and the two instruments evidently form but one transaction. It contains a recital of her having received the money and grain, and of some of the facts relating to the register and to her name having been upon it and expunged; and then it proceeds thus:—"Mohammed Fais Ahmed Khan has now returned from Arabia, but notwithstanding that I had caused my name to be expunged, he gave me mouzahs Sahauli and Kamalabad, in talooka Datauli, for my maintenance and support. I am now satisfied and contented with this property." The word "property" surely implies that she had the estates. The mere right to take the usufruct so long as the grantor pleased could hardly be described as property, nor would it be a provision with which she was likely to be satisfied and contented. Then there is this important relinquishment of claim on the part of the Mussummat: "I do declare that neither I have nor shall have any claim in future respecting the estate of Datauli Khas, the villages of the talooka Datauli, Burhansi, Deosaini, the villages in talooka Malakpur, and Rahwara, and other detached villages, and also respecting the movable and immovable property constituting the ancestral estate of Mohammed Fais Ahmed Khan;" that is, she disclaims and relinquishes all her right as a co-sharer to the
whole of the ancestral estate; and it is plain that not only had her name remained up to this time on the register in respect of the two villages, Datauli and Deosaini, but that she had done nothing which would have amounted to a release of her right as co-sharer in the ancestral property. It is evident that Fais Ahmed, in obtaining from the widow this release of her right, considered that he was getting something valuable; and undoubtedly she was giving up a valuable right for that which, according to the Appellant's present contention, would not be a fair or reasonable equivalent for it.

The question upon these instruments, as already stated, is whether, read together, as their Lordships think they must be, they constitute a gift by Fais Ahmed Khan to Wali-un-nissa, or amount only to an ariat or loan. The allegation in the Appellant's pleading below is that the latter is the true construction. Upon this question their Lordships have the benefit of an able and learned judgment from a Mahomedan Judge, of whom the High Court says that he enjoys a high reputation as a Mahomedan lawyer. This learned Judge has referred to many books of authority on Mahomedan law, from which he has given extracts and also instances in his judgment. He is clearly of opinion that this instrument contains words which in Mahomedan law have a technical signification as words of gift, and which, when used as they are in it, do by law constitute a gift. He also thinks that the words "that she might maintain herself out of the estates" describe one of the objects of the gift, and do not limit or cut down its operation.

Their Lordships do not think it necessary to discuss the authorities cited, but there are two short passages in the judgment of the learned Subordinate Judge that may be usefully referred to. He says:—"There is no reason why the word hibeh should be held to mean an ariat (loan), and why, when it is clearly stated that the mouzahs of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mouzahs Kamalabad and Sahauli were given as ariat." It may be observed that if it had been meant to give the profits only the deed might have been so expressed, but the mouzahs themselves are given. Then he concludes his judgment in this way:—
"Considering all these circumstances, the opinion of the Court is that both the villages were given to the Mussummat as a gift, and not as an ariat (loan); that the document is clearly a hibehnama (deed of gift) and not an ariatnama (a deed of loan); that both the villages were Mussummat Wali-un-nissa's property by reason of the gift, and inheritable. According to the Mahomedan law, in an unconditional (mahz) gift a donor is no longer competent to recede from the gift on death of the donee, or, in other words, to get the property back, and in hibeh-bil-ewaz (gift for a consideration) the doctrine is clearer." The gift in this case appears to their Lordships to be a hibeh-bil-ewaz.

Some difficulty was felt by the learned counsel for the Appellant in condescending upon the definition of an ariat. It was pointed out to them that in the written statement of the Appellant the contention was this:—"This mode of giving, where the word acceptance (ejab) denotes the proprietorship of the profits, and not the proprietorship of the area, is called ariat (commodatum) in the Mahomedan law; that is to say, the proprietary right of the person who gives is not extinguished, and he can resume (the estate) at any time. It is therefore not valid, according to the Mahomedan law, to claim by inheritance to the said Mussummat an estate which she herself did not own." This statement is in accordance with what is said of ariat in the Hedaya, Book 29.

The learned counsel, Mr. Graham, at first adopted this statement; but feeling how difficult it was to support the instrument as an ariat having this effect, both the learned counsel for the Appellant afterwards endeavoured to construe it as being something intermediate between an absolute gift and an ariat. This was obviously a departure from the view originally taken by those who advised the Appellant in the Courts below, and no authority in Mahomedan law for holding that any such construction could be given to the document has been shewn. Their Lordships are satisfied, as the High Court below was satisfied, that the Mahomedan Judge has come to a correct conclusion that the transaction was a gift for a consideration, and that the words relied on to cut it down to an ariat have not that effect. It is to be observed that the Subordinate Judge cites various instances from books on Mahomedan law in which very similar words, used after words
of absolute gift, have been read as being descriptive of the motive or consideration of the gift, and ineffectual to control the operation of technical words of gift.

For these reasons their Lordships think that the judgments below are right; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Solicitors for Appellant: Barrow & Rogers.

SUDISHT LAL . . . . . . . . PLAINTIFF; J. C.*
AND
MUSSUMMAT SHEOBARAT KOER . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Execution of Deeds by Purdanushin Lady—Evidence of Agency—Construction of Mooktarnama.

In the case of deeds and powers executed by purdanushin ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who execute them.

In a suit to recover moneys lent against a purdanushin lady upon an account settled by her husband under a mooktarnama, which besides conferring ordinary powers authorized "all acts done by the said mooktar, such as giving and taking loans to and from others":—

Held, that in the absence of evidence that the moneys had been borrowed by the husband on behalf of the wife, or that he was her agent carrying on business by her authority, the suit must be dismissed.

According to the construction of the mooktarnama the husband had no authority to bind the wife by a mere statement of account.

APPEAL from a judgment and two decrees of the High Court (June 25, 1878), reversing that of the Second Subordinate Judge of Mossurerpore (Dec. 23, 1876).

The main question in the suit, as to which the Courts in India

differed, was as to whether the Appellant had established the authority alleged by him to one Ajudhya Pershad Sahool, the husband of the Respondent, to admit her liability on an account stated to pay the amount sued for.

The facts of the case and the material portions of the mooktarnama relied upon by the Appellant are stated in the judgment of their Lordships.

The Subordinate Judge held that the husband had admitted the debt, and that he had authority under the mooktarnama, a copy of which was admissible as secondary evidence, to state the account in question.

The material portion of the High Court's judgment was as follows:

"Now a very important matter for consideration in this case is whether the Defendant ever executed the mooktarnama referred to by the Plaintiff; and, if so, whether she authorized her husband, Ajudhya Persad, to do that which he did in signing the settlement of account. Strictly speaking, the execution of that mooktarnama is not proved in this case; but there can be little doubt, from the fact of its having been registered and having been used frequently on various public occasions before various public officers, that Ajudhya Persad really had such a mooktarnama from his wife. Whether that instrument authorized him to take without her authority so serious a step as to sign an acknowledgment of indebtedness of nearly Rs.30,000, is an entirely different question. It appears to us that the mooktarnama itself does not authorize such a proceeding. It does not differ very much from the formal power of attorney which mooktars generally use for the purpose of representing their principals in formal proceedings. It makes no reference whatever to any banking business, nor does it contain any authority to sign such a document as that produced. There is not so much as a suggestion that the Defendant was ever informed what the consequence of her authorizing a separation of her account from that of Sheoraj would be, or that she ever had the least notion that so large a liability as this was to be passed over to her. Considering that the Defendant was a purdanushin lady, that she is still young, that at the time of her
father and her mother's death she was an infant, that her affairs, during her minority, were managed ostensibly by her sister, but in reality by a person who has since been dealt with by the Criminal Court and sentenced to transportation, that when she came of age her affairs were taken into the hands of her young husband who was only eighteen years of age, I think the Court would be justified in requiring the strictest proof and observance of all formal precautions before it holds the Defendant answerable. There appears to be the strongest reason to believe that, throughout his dealings, Ajudhya Persad has not had the Defendant's interest at heart. He has been making use of her property without the least regard to her benefit, and with a view to his own advantage. It appears, in fact, that he is actually in partnership with the Plaintiff in one branch of business, viz., that relating to saltpetre; and it is actually stated that the funds for carrying on that business in partnership with the Plaintiff were put down to the debit of the Defendant's account. It may be that, in respect of an ancestral banking business carried on not very prudently or successfully during the Defendant's minority, by her sister or in her sister's name, some liabilities did arise; and if those liabilities had been fairly and properly brought before the Court, and the Defendant had been shewn that she did owe something to the Plaintiff, the Court would have assisted the Plaintiff in recovering that amount. In fact, it is more than probable that the Defendant herself would not have resisted. But looking at the shape in which the Plaintiff's suit was brought before the Court, considering the very large sum demanded from the Defendant on the strength of a document executed without sufficient authority in favour of the husband, it seems to us that the subordinate Judge ought not to have given the Plaintiff the decree which he has given, that that decree ought to be set aside, and the appeal allowed with costs."

Leith, Q.C., and C. W. Arathoon, for the Appellant, contended that the agency relied upon was fully established by the mooktanama and other evidence in the case.

Doyne, for the Respondent, was not called on.
The judgment of their Lordships was delivered by

Sir Montague E. Smith:—

This is an action brought by Sudish Lal, a mahajun carrying on his business at Mozufferpore, against Mussummat Sheobarat Koer, to recover a sum of Rs.23,470 and interest upon the footing of a stated and settled account. The plaint is based entirely upon an account which, it alleges, had been settled, not by the Defendant herself, but by her husband, Ajudhya Pershad, who, it is said, had authority from her to state and settle accounts. In the outset it may be noticed that no evidence was given of the items of the account so as to establish an indebtedness independently of the account stated. This omission seems to have been intentional, for the Plaintiff himself, and two of his gomah-tas, who might have given evidence if a debt really existed, were called.

The circumstances which preceded the action may be shortly stated. Ram Dyal Misser, who is now dead, carried on a banking business in the same place as the Plaintiff, at Mozufferpore. He died in the year 1857, leaving a widow and two daughters, of whom the Defendant is one. His widow died in the year 1860. The elder sister, whose name is Sheoraj Koer, had married Durga Persad Tirbaidi. The Defendant had married the person already named, Ajudhya. The banking business of Misser was carried on by the widow during her lifetime, and there is some evidence that it was also carried on after her death by the two daughters, the Defendant being at her mother's death a minor, and the husband of the elder sister, Sheoraj, carrying on the business on her behalf and on that of her infant sister. The Defendant, Mussummat Sheobarat, became of age in February, 1869, and shortly after her coming of age it appears that the banking account was separated; whatever may have been due at that time from the two sisters to the Plaintiff's firm was divided, and one half carried to the debit of each of the sisters. Although there is some evidence that the sisters carried on banking business, there is really no satisfactory evidence that such a business was carried on by the Defendant after the separation, and certainly none that it was carried on with her knowledge and authority. However, it is alleged on the
part of the Plaintiff that such a business was carried on, and was managed by Ajudhya, her husband, and the account which is sued on is said to have been signed by him as the adjustment of a banking account. The account so signed is set out at length in the record, and begins with this item: "Credit. Former balance, principal and interest, as per former chitta, for the year 1280, Rs.21,933. 14a. 0p." There are other items and interest, and some items on the other side of the account, resulting in a balance of Rs.23,405. 13a., the amount for which the action is brought, plus a sum of Rs.50, as to which no evidence whatever exists. The Plaintiff's claim to recover this sum rests entirely upon the admission which was made by Ajudhya, the husband, in settling this account. Not only is there no proof of indebtedness independently of the account, but there is not sufficient evidence to satisfy their Lordships that a banking business was carried on by the Defendant; whilst there is some evidence that Ajudhya was carrying on business with the Plaintiff's firm on his own account, and that he had purchased with the Plaintiff a saltpetre property which they were working together.

In this state of the evidence it is plain that no authority can be inferred from the fact that a banking business was carried on to the knowledge of the Defendant. The authority, therefore, upon which the Plaintiff must rely as having been supplied to Ajudhya, depends entirely upon the mooktarnama which has been given in evidence; indeed, that is the authority on which his case has been rested. This mooktarnama is said to have been executed by the Defendant shortly after her coming of age. Their Lordships desire to observe that there is no satisfactory evidence that this mooktarnama was explained to the Defendant in such a way as to enable her to comprehend the extent of the power she was conferring upon her husband. In the case of deeds and powers executed by purdanushin ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who execute them. There is a want of satisfactory evidence of that kind in the present case. But their Lordships do not desire to rest their decision upon this ground. They are disposed to look at the mooktarnama which was received by the Subordinate Judge, and was construed by the
High Court, although that Court expressed some doubt as to whether, if it ought to have been construed differently from the view they took of it, they should have acted upon it. This instrument is said by the High Court to be very nearly in the terms of the ordinary mooktarnama given to mooktars to transact business and to bring and defend suits. Undoubtedly there is much in its language which is of the ordinary kind; but there are some special powers conferred by it, and it is upon them that the Plaintiff most relies for the authority of the husband. The document begins with a recital:—"Whereas often cases connected with monetary transactions, as loans, purchase and sale of properties,atanamas, hebanamas, ticea pottahas with zurpeshgi and without zurpeshgi, and realisation of decretal money, in which sometimes I, the declarant, am Plaintiff, and sometimes Defendant, remain pending decision, and may be instituted in future in the Civil, Revenue, and Criminal Courts, as well as in the Calcutta High Court; that is, whereas I, the declarant, am under the necessity to attend to all business, such as monetary transaction, purchase and sale of property, preparation of deeds of gifts and grants, leases with or without zurpeshgi, and execution of deeds of absolute sale and recovery of decretal money, viz., all the village and court affairs—filing answers in appeal cases and taking out execution of decrees in the Courts"—enumerating them—"by engaging pleaders and mooktars when required in the cases instituted in the Civil Courts,"—this is very much the language of an ordinary mooktarnama. It goes on:—"As also realizing decretal money, and the money covered by bonds from debtors, by executing receipts and acquittances on behalf of me, the declarant, according to the account of the mahajuni shop, saltpetre godown, and zemindari villages." The words, "according to the account of the mahajuni shop," do not necessarily import a statement that she was then carrying on that business. She was entitled to a share of whatever was due to the old business, and if it became necessary to sue for such debts the mooktar would be empowered to sue for them and to give discharges to the debtors. Then the operative part of the instrument is:—"I, the declarant, therefore, of my own free will and accord, appoint my husband, Ajudhya Persad Sukul, my general mooktar,"—the
generality of that language, "appoint my husband my general mooktar," must be construed, and if necessary controlled, by what comes afterwards,—"and declare to the effect that all acts done by the said mooktar, such as giving and taking loans to and from others; executing on my behalf, getting executed in my favour, deeds of absolute sale," and so on, "shall be accepted by me." The words that are most relied on are:—"and declare to the effect that all acts done by the said mooktar, such as giving and taking loans to and from others." If it had been proved that the husband had contracted loans and obtained advances on behalf of his wife, it may be that under this power of attorney she would be bound by his acts, as being within the scope of his authority. But it would have to be shewn, not only that he borrowed the money, but that it was borrowed for her. If it had appeared that it was taken for his own purposes and the Plaintiff who advanced the money knew it, the wife could not be charged with it. In the present case, without any proof that money had been borrowed at all, and certainly with none that it had been borrowed on her account, the Defendant is sought to be fixed with a large debt by a mere statement of account. Their Lordships think upon the construction of the mooktarnama that the husband, Ajudhya, had no authority to bind her by such a statement, whatever authority he might have had to bind her by an actual borrowing of money on her account. This is the view taken by the High Court.

Their Lordships must not be supposed to lay down that, when an agent is appointed to manage a banking business, and is invested with the powers of a manager of that business, a statement of account made by him in the regular and ordinary way of business would not be evidence against his principal; that question does not arise on this record. It is enough for them to say that, in this case, there is no sufficient proof that the business was carried on with the Defendant's knowledge and by her authority, and therefore no implication founded on the course of business can arise. The evidence of express authority also fails.

Their Lordships will humbly recommend Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Solicitors for the Respondent: Barrow & Rogers.
RAM LAL MOOKERJEE . . . . . APPELLANT;

AND

THE SECRETARY OF STATE FOR INDIA } RESPONDENTS.
IN COUNCIL AND OTHERS . . . . .

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Will—Construction—Putra poutrādi kramē—Conditions subsequent.

A Hindu died leaving a widow, a daughter's daughter, and a brother. His will, after providing that his widow should take an ordinary Hindu widow's estate in the whole of his property (subject to certain bequests), directed as follows:—

7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my granddaughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation.

8. If the death of my wife should take place before my granddaughter (daughter's daughter) arrives at majority, and bears a son, then the whole of the estate shall remain in charge of the Court of Wards until she arrives at majority and bears a son.

9. If my granddaughter (daughter's daughter) should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs.300 per mensem for life.

20. If no son or daughter should be born to me, or if my granddaughter (daughter's daughter) should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed, shall be employed by the Government as it thinks proper, in the improvement of the school and dispensary and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village and of the neighbouring villages.

In an administration suit by the Secretary of State against the brother, the widow, and granddaughter, it was contended by the brother that no part of the will was effectual except that which gave the estate to the widow for life:—

Held, that clause 7, if it stood alone, would confer an absolute estate on the granddaughter upon the death of the widow.

The words putra poutrādi kramē (from generation to generation), though

* Present:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.
importing the male sex in their primary signification, apply also to the
female heirs of a female where by law the estate would descend to such
heirs; and are apt for conferring an estate of inheritance upon either male
or female. Clauses 8 and 9 may be read together, and the disqualification
must operate at the death of the widow.

Clause 20 should be read as supplementary to clause 9, and under it the
gift over to the Government takes effect, if at all, at the death of the widow,
in the event of the granddaughter predeceasing her before bearing a son or
being disqualified at such death.

Quere, whether the disqualifications, if they had been conditions subse-
quent to the vesting of the estate in the granddaughter, would or would not
have been in violation of Hindu law.

The case of the granddaughter predeceasing the widow and having borne a
son not being provided for by the will, their Lordships declined to declare the
rights of the parties in such contingent event, no judgment which they could
give being able to affect the rights, if any, of such unborn son.

Lady Langdale v. Briggs (1) as explained in the Tagore Case approved.

APPEAL from a decree of the High Court (March 3, 1879),
setting aside the decree of the District Judge of Hooghly
(March 29, 1877).

This was an administration suit, and involved the construction of
a Hindu will.

The facts of the case, the contentions of the parties, and the
material passages of the will are set out in the judgment of their
Lordships.

The judgment of the High Court (L. S. Jackson and McDon-
nell, JJ.), so far as it related to the construction of the will, was
as follows:—

"When Behari Lal made the will in question he was a man
scarcely passed the prime of life, quite capable of leaving further
issue, but, for the moment, having no living child, nor any living
descendant, except a daughter’s daughter of very tender years.

"If he then died intestate, his estate would go to his widow, and
on her death, his daughter’s daughter would not take, but his
brother Ram Lal, if then living, would be the heir. This he was
determined to prevent by the exercise of testamentary power.

"In carrying out this purpose, he provided, firstly, for the
possible case of issue being born to himself.

"In that event, he directed that such sons, son’s son or son’s

(1) 8 D. M. & G. 391.
grandsons surviving him, should take according to Hindu law (clauses 2 and 4).

"On failure of them, he directed that his wife should take, according to Hindu law, and enjoy the profits for life (clause 5).

"If daughters should be born, they, or, on their death, their sons were to take, after the death of the widow, according to Hindu law (clause 6).

"Here, on failure of the heirs above mentioned, the brother, if he survived, would have come in, had the testator so willed; according to Hindu law, the daughter's daughter being no heir, but a stranger.

"But at this point the testator interposes his will, and directs that the estate shall go specially to his daughter's daughter Hori Dasi Debi, the disposition being literally in these terms: 'Srimoti Hori Dasi Debi shall be owner of my property, and without dispute shall enjoy and possess the same to her sons and son's sons in succession' (clause 7).

"If, however (at the death of the widow), Hori Dasi should be barren, or a widow with no living son (avirá) or otherwise disqualified (referring evidently to the circumstances in which a daughter would not take by the Hindu law) she was not to become the owner, but was to receive Rs.300 per mensem for her life (clause 9).

"In the event of the failure of heirs previously mentioned, and of the disqualification of Hori Dasi, the whole of the property was to pass to the Government for charitable purposes (clause 20).

"The District Judge, upon the 7th clause above referred to, says that he finds 'no difficulty in giving effect to the succession of Hori Dasi under the will'; and a little lower down he says: 'It seems, however, to have been the intention of the testator that Hori Dasi should have only a life interest in his estate, for he sets forth in his will that she shall, at her death, transmit the estate to her descendants, 'putra poutrádi' being the expression used. This term, in my opinion, refers to male descendants, and in thus attempting to regulate the succession, it appears to me that the will is bad, and opposed to the rule laid down in the Tagore Case (1). This provision is, therefore, of no effect and void.'

(1) 9 Beng. L. R. 377.
"Having so decided as to that point, he proceeds to consider the effect of clause 20, and having set out the terms of it, he says:—That is to say, that in the event of failure of any male heir, to whom Hori is to transmit the estate at her death, the Government is to become the trustee for certain charitable purposes. Inasmuch, however, as it has been held that the will, so far as it goes beyond the gift of the life interest to Hori Dasi, is bad, this further provision is also null and void.'

"Now, in the first place, the Government was not to take only, or at all, in the event of the failure of any male heir of Hori, but, in certain circumstances, was to take instead of her. There is no direction whatever that the Government should take on failure of Hori Dasi's line, but only that the estate should go to Government in the event of her being disqualified. The words of the original literally mean, as we understand them:—'If no son or daughter be born to me, and if my daughter's daughter's (i.e., Hori Dasi's) decease occurs before she brings forth a son, or she be (when the succession falls in) barren or otherwise disqualified, then my whole estate shall go to the Government.' The words in parenthesis are not in the original, but we consider them to be meant, because this view harmonizes with the 9th clause—the word become, which the translation in the paper book contains, is not used,—and we see no reason to suppose that Behari Lal, who, in general, desired to follow the law, would have departed from the established rule as to a daughter, that an inheritance once vested would not be afterwards divested by reason of her becoming avirá, or otherwise.

"The only case not clearly provided for in the will seems to be this: If Hori Dasi had a son who survived her, but herself died before the widow, was it intended that the Government should take, or was that son to take? On the one hand, neither of the further events contemplated in the 20th clause would have arisen, i.e., Hori Dasi would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification; nor, on the other hand, could Hori Dasi's son easily succeed, being a stranger, and not provided for in the will.

"But we need not occupy ourselves with a case not before us.
We have stated our impression as to what Behari Lal intended, and we proceed to consider whether effect can be given to his intentions, and whether the Court below has decided correctly.

"We dissent entirely from the learned Judge, when he holds that the words 'putra poutradi kramé' denote an attempt to limit the succession to Hori Dasi's male descendants in any manner opposed to the decision in the Tagore Will Case (Tagore v. Tagore) (1). The devise and bequest to her are contained in the words 'adhikáriní haibek,' and the words added are merely usual words, implying an absolute and heritable estate.

"If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to show that the estate is to go beyond the life; and in this particular case, the significance of it is apparent on comparison between the devise to Hori Dasi and that to the wife. Of the latter, it is said: She shall become owner according to the Shastras, and shall enjoy the profits for her life. Of Hori Dasi,—she shall become the owner and shall enjoy it to her latest posterity, that is, for ever.

"Putra and poutra, no doubt, mean, son and son's son; but these two persons are always the first in the category of heirs, and, therefore, putra poutradi may well be taken to mean heirs generally. Indeed, the Judge's construction was not supported in this Court by Mr. Montriou.

"The facts of the Tagore Case (1), well summarized by Mr. Mayne in his exceedingly valuable work 'Hindu Law and Usage,' were as different from those of the present case as it is possible to conceive. In that case, the testator contemplated, not merely the disinheriting of his son, but the creation of a highly complex and artificial system of succession, embracing a number of persons not in being, and who, very probably, might never exist. In fact, he sought to create a 'kind of estate tail' wholly unknown and repugnant to Hindu law.

"In the case before us, the testator, after giving the widow's (or life) estate to his wife, gave the reversion to another person

(1) 9 Beng. L. R. 377.
then in being, though not in the line of succession. Thus far it is clear he could go. The Judicial Committee in *Srimoti Soorfomoni Dasi v. Dinobundhoo Mullick* (1), say: 'Whatever may have formerly been considered the state of that law as to the testamentary power of Hindus over their property, that power has now long been recognised, and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist.' Mr. Montrieu, however, contends that this bequest is bad, not by reason of the alleged limitation to male heirs, but because it is imperfect and invalid as a gift, and is not in truth a gift at all, but an ineffectual attempt to alter the rule of succession and convert a stranger into an heir.

"There was some discussion at the Bar as to whether this was a gift subject to be divested, or a gift burdened with conditions. We have already intimated our opinion that it was not Behari Lal's intention that the estate once vesting should afterwards be divested. Is the gift, then, subject to conditions, or in other words, subject to the donee having fulfilled, or being in a condition to fulfil, certain qualifications, repugnant to Hindu law? We think not.

"Mr. Montrieu, with the assent of opposing counsel, put in, as part of his argument, a printed paper said to be the composition of a native gentleman learned in the Shastras.

"I confess that it seems to me to be among the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights and their status, have passed into the domain of lawyers instead of pundits and casuists; and, in my opinion, the case before us may

(1) 9 Moore, P. C. 135.
very well be decided on the authority of cases, without following
Srinath, Achyatanund, and others, through the mazes of their
speculations on the origin and theory of gift.

"But viewed merely as a case of gift interpreted by such light
as those commentators afford, it seems to me that Hori Dasi's
position may be perfectly well supported.

"The owner, Behari Lal, having to dispose of the ownership of
this property for all time, bestowed it in two parts, on his widow
for her own life, and on Hori Dasi thereafter, provided that she
answered certain stipulations, and if not, on the Government.
Now, it might be uncertain, during the continuance of the widow's
life estate, whether Hori Dasi would answer the conditions or no;
but the uncertainty would be unimportant, because the ownership
would be for the time in the widow. At her death the ownership
would have to vest in some one; but at that moment there need
be no uncertainty whether Hori Dasi was within the prescribed
conditions; if she was, she would take; if not, then the other
person indicated, namely, the king, of whom there is never a
failure, would take. But, moreover, the conditions themselves,
far from being repugnant to Hindu law, are in entire accord with
it, being, in fact, those which that law itself expressly imposes on
a daughter, and which are not laid down as to the daughter's
dughter, only because the law does not make her an heir. But
now that the power of disposing of property by will, founded on
established custom, recognised first by judicial authority and
since by Legislation, enables a Hindu to bequeath his property to
a person whom the Shastras would not have made his heir, surely
the bequest cannot be the worse because the testator, in elevating
the taker to the position which her mother would have occupied if
she had lived, imposes the same qualification as the Shastras
would have imposed on the mother.

"This view of the matter coincides with the rule as laid down
in Mr. Mayne's work already referred to, page 340 ($ 350); and
seems to us reasonable and right. The conditions imposed are
neither in violation of the fundamental principles of the Hindu
law, nor inconsistent with the nature of the estate given.

"We see no indication of a desire to introduce a new principle
or rule of succession, but, on the contrary, the testator's desire
being to benefit a particular person, depriving another, he sought to assimilate the position of the person preferred as closely as possible to that of the person through whom, if she had survived, the desired object would have been effectuated.

"We think, therefore, that Behari Lal's intention was to confer on Hori Dasi, if she lived and was qualified, an absolute estate, and that this object has been effectuated; and we also think that the gift over to the Government, in the case of Hori Dasi not surviving, or being disqualified, is perfectly good and valid.

"We have, next, to consider the Judge's order touching the trust fund, and we find that the District Judge, without assigning any reason for it, has directed the Collector to be trustee for the carrying out of the charitable purposes specified in the 13th and following clauses of the will. On the other hand, he has refused to frame any scheme for the administration of the trust. This is simply to deprive the persons who may be supposed to have a personal interest in carrying out the wishes of the testator, without any misconduct imputed to them, and to place the trust in the hands of a public servant, who can have little leisure to attend to it, without the protection of any rules framed for his guidance. We can see nothing in the conduct of the widow which proves her to be undeserving of confidence; and with reference to any supposed general want of capacity for such business on the part of females, we observe that provision has been made by the husband, who has associated with her two persons whom he considered capable.

"We think this part of the Judge's order should be set aside, that a scheme should be framed for the administration of the trust, that the management should be intrusted to the widow assisted by the persons named, and with a power of inspection reserved to the Collector.

"It was contended by Mr. Montrich, that making a declaration as to the rights of parties in such a case as the present, was in the discretion of the Court, and that we should not make such declaration where the obvious intention of the testator was to pervert the rules of succession. We see, however, nothing in the will beyond a simple and valid exercise of testamentary power, and we think the case a proper one for a declaratory decree."
The decree, which purported to be in pursuance of the judgment, was, so far as is material, in these terms:

"It is ordered and decreed, that the decree of the Lower Court be set aside, and, in lieu thereof, it is hereby declared that the will executed by Behari Lal Mookerjee, and bearing date the 9th of August, 1870, is a genuine and valid instrument. And it is further declared, that under the said will Srimoti Komoleh Kamini Debi, widow of the said Behari Lal Mookerjee, deceased, is entitled, as a Hindu widow, to enjoy the profits of the estate left by the said Behari Lal, subject to the payment of Rs. (100) one hundred per mensem to Srimoti Hori Dasi Debi for life as in the said will mentioned, and that on her death the said Srimoti Hori Dasi Debi, granddaughter (daughter's daughter) of the said Behari Lal Mookerjee, if she be living at the time, and is not barren or without a living son, or otherwise disqualified, will be entitled to succeed to the estate left by the said Behari Lal Mookerjee, deceased, absolutely: and further, that the gift over to the Government for purposes mentioned in the said will, in case of the said Hori Dasi not surviving, or being otherwise disqualified, as in the said will described and mentioned, is good and valid. And it is further declared, that in the event of the said Hori Dasi being disqualified as aforesaid to succeed to the said estate, she shall be entitled to a monthly allowance of Rs. three hundred (Rs.300) only out of the proceeds of the said estate."

Montague Cookson, Q.C., and O. C. Macrae, for the Appellant, contended that on the death of the widow, who admittedly took a widow's estate, there was an intestacy, and that therefore the succession fell to the Appellant as next heir in reversion. Otherwise that the granddaughter took at most a life estate on the death of the widow. In that case the intestacy arose at the granddaughter's death. It was admitted that an ulterior estate might be created at the close of a life in being in favour of a person in esse at the death of the testator: Soorjemony Dasi v. Denobundhoo Mullick (1); The Tagore Case (2): Mayne's Hindu Law, s. 350. But as to the nature of the gift to Hori Dasi, see clauses 7, 8, 9,

(2) 4 Beng. L. R. O. C. 103; 9 Beng. (Sup. Vol.) 47.
of the will. The High Court took the general intent as they conceived it, and then made the particular clauses square with it, which was wrong: *Abbots v. Middleton* (1). Clause 8 limits estate given by clause 7, cuts it down, and prevents her taking anything, being a gift which Hindu law does not recognise, and therefore void. Besides the gift under clause 7 is not absolute, the limitation is in terms to male heirs, and therefore there is an ineffectual attempt to vary the order of succession as prescribed for stridhan: see *Tagore Case* (2); *Bernal v. Bernal* (3); *Mainwaring v. Beevor* (4). The rules of construction cannot be strained to bring a bequest within a rule of law: *Leake v. Robinson* (5); *Green v. Angus* (6); *Holmes v. Dickinson* (7). The death of the widow is not the punctum temporis under clause 9; and it is wholly uncertain when the disqualifications mentioned therein are to operate. The executory gift under clause 20 at a time wholly uncertain, is void in Hindu law. Words cannot be supplied or altered even if intestacy results: *Chapman v. Brown* (8); *Driver v. Frank* (9). An estate once vested cannot be divested: *Moniram Kolita v. Kerry Kolitany* (10). [Cowie, Q.C.:-That is so by operation of law, not so by direction in a will.] An absolute gift cannot be divested by a subsequent direction on an uncertain event as here contemplated: *Amirtolall Bose v. Rajoneekant Mitter* (11); *The Tagore Case* (12); Vyavasthana Darpana, p. 606; *Macn. Hindu Law*, vol. ii. case 15, pp. 221, 222; *Sowdamiini Dasi v. Jageshunder Dutt* (13).

Woodroffe (Cowie, Q.C., with him), for the Secretary of State, contended that there was no intestacy, but that the testator had adequately expressed his meaning. If the 7th clause stood alone *Hori Dasi* would take an absolute estate of inheritance on the death of the widow. The words "poutra poutradi" are adequate for that purpose; they do not necessarily exclude female line of

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(2) 4 Beng. L. R. O. C. 182.  
(3) 3 My. & Cr. 559.  
(4) 8 Hare, 48.  
(5) 2 Mer. 363.  
(6) 8 H. L. 183.  
(7) 8 D. M. & G. 159.  
(8) 3 Burrow, 1634.  
(9) 3 M. & S. 36.  
(12) 4 Beng. L. R. O. C. 192.  
succession, but are words of general inheritance importing an absolute estate: see the Tagore Case (1); Kistore Kishore Bhattacharje v. Seetamony Bhattacharjee (2); Bhoodunmohini Debya v. Hurrish Chunder Choudry (3). But the absolute estate so given is subject to the widow's estate, is conditional upon Hori Dasi not becoming disqualified during the widow's life, and on the due construction of clauses 7, 9, and 20, is subject also to being divested in favour of the Secretary of State upon the happening of any of the conditions expressed. Such a direction does not contravene the Hindu law of gift, as applied to testamentary dispositions. The conditions are not impossible, or inconsistent with the estate given. Reference was made to Soorjeemony Dossee v. Dunobundhoo Mullick (4).

Graham, Q.C. (Cowell with him), for the Respondents Komoleh Kamini Debi and Hori Dasi Debi, also contended that the estate given to Hori Dasi by the 7th clause was an absolute estate, and referred to Rajah Nursing Debi v. Roy Koylasnath (5). By the later clauses a gift in substitution to the Secretary of State was made on the happening of the conditions expressed; the punctum temporis being the death of the widow. But the will did not contemplate the divesting of an estate once vested. The decree did not properly express those conditions; it agreed, in that respect, neither with the will nor with the judgment. As to the declaration of future rights arising upon a contingency which may never happen, see The Tagore Case (6).

Cookson, Q.C., replied, and as regards declarations of future rights, referred to Hampton v. Holman (7).

The judgment of their Lordships was delivered by—

SIR ROBERT P. COLLIER:—

This was an administration suit for the purpose of carrying into effect the trusts of the will of one Behari Lall Mookerjee, instituted by the Secretary of State for India, in which Komoleh Kamini

(7) 5 Ch. D. 183.
Debi, widow of the testator, Mani Lal Bandopadya, father and guardian of a minor, Hori Dasi Debi, daughter's daughter of the testator, and Ram Lal Mookerjee, a brother of the testator, were made Defendants. Two other Defendants were afterwards added, described in the will as advisers of the widow. The plaintiff concludes in these terms:

"But as the Defendant No. 3, Ram Lal Mookerjee, has impeached the will as a forgery, and as Defendant No. 1, the widow, who has the management of and is in the enjoyment of the profits of the estate under the provisions of the aforesaid will, has omitted to take any action to have the validity of the will determined, or to carry out the charitable bequests therein contained, though the period for carrying out such bequests has expired, and as the rights and interest of this Plaintiff, as well as of other persons interested in the above will, are thereby seriously endangered, it is therefore prayed that the authenticity and validity of the said will may be declared, and that the said Komoleh Kamini Debi, Defendant No. 1, be directed and enjoined to make over to the Collector, or such other trustee or trustees as the Court may appoint, the sum of Rs. (1,50,000), one lac and fifty thousand, in Government securities, for the establishment of the aforesaid school and hospital, and a further sum of Rs.1000 (sic) for the furnishing of the said school and dispensary; and, further, that the rights of the several parties under the will may be ascertained and determined, and that a scheme for the due administration of the trust under the will may be propounded, with such other relief as the Court may think fit to grant."

Behari Lal Mookerjee, a wealthy Hindu, made the will in question on the 9th of August, 1870. He had then a wife living. He had never had a son, but had had a daughter, who had died, leaving an infant daughter, Hori Dasi Debi. As he was then not passed middle age, he may have reasonably contemplated having further issue. He died on the 12th of August, 1874, without sons or daughters, leaving his wife and granddaughter him surviving, and a brother, Ram Lal Mookerjee, the Defendant, with whom he had not been on good terms. The material parts of the will for the purposes of the present appeal are as follows:

"2. I have no son at present. If one or more sons should be-
born to me hereafter, and should have arrived at majority at the
time of my death, then he or they shall be entitled to my proper-
ties according to the Shastras.

"3. If my son or sons, or any son (of mine), should be a minor
at the time of my death, then the whole of my properties shall
remain under the Court of Wards until my son, or, in the case of
of my having more sons than one, until the youngest son has
attained majority.

"4. If grandsons or great grandsons of mine should be living
at the time of my death, they shall be the owners of my property
according to the Shastras.

"5. If no sons, grandsons, or great grandsons of mine should
be living at the time of my death, then my wife, Srimoti
Komolch Kamini Debi, shall be proprietress of the whole of
my properties, according to the Shastras, and shall enjoy the
profits thereof during her lifetime.

"6. If one or more daughters should be born to me, then, on
the death of my wife, she or they, and, on the death of her or
of them, my grandsons (daughter's sons), shall be the owners
of my property according to the Shastras.

"7. If no daughter or daughter's son of mine should be living
at the time of the death of my wife, then my granddaughter
(daughter's daughter) Srimoti Hori Dasi Debi, shall become the
proprietress of my property, and shall remain in undisputed pos-
session thereof from generation to generation.

"8. If the death of my wife should take place before my grand-
daughter (daughter's daughter) arrives at majority and bears a
son, then the whole of the estate shall remain in charge of the
Court of Wards until she arrives at majority and bears a son.

"9. If my granddaughter (daughter's daughter) should be
barren, or a sonless widow, or if she should be otherwise dis-
qualified, she shall not become entitled to my property, but shall
receive an allowance of Rs.300 per mensem for life."

Here follow bequests for the purposes of establishing a school
and dispensary, with respect to which no question now arises.
Clause 20 is in these terms:—

"If no son or daughter should be born to me, or if my grand-
daughter (daughter's daughter) should die before she bears a son,
or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate, which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed, shall be employed by the Government, as it thinks proper, in the improvement of the school and dispensary, and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village, and of the neighbouring villages."

After some previous proceedings, which it is not now necessary to refer to, the present suit was instituted on the 19th of May, 1876. All the Defendants, except Ram Lal, supported the will, and the widow submitted that she had carried out its directions to the best of her ability.

Ram Lal disputed the factum of the will. He also maintained that no part of it was effectual except that which gave the estate to the widow for life.

On the cause coming on for hearing before Mr. Prinsep, the Judge of Hooghly, he was of opinion that the making of the will was fully proved; that under its provisions, and subject to the payment of an immediate legacy of Rs.150,000 for charitable purposes, the widow took a life interest in the estate; that on her death, Hori Dasi, if not disqualified, would succeed and take a life interest, but that after the death of both ladies, or on the death of the widow, if Hori Dasi should be then disqualified, the estate would pass to the next legal heir of Behari Lal Mookerjee, a supposed devisee to the male descendants of Hori Dasi being, in the Judge's view, opposed to the rule laid down in the Tagore Case (1), and ineffectual, and the devise to Government coming after it being thus defeated. He also directed that the fund created by the legacy should be vested in the Collector as trustee, but declined to propound any scheme for the management, and he ordered that the costs of all the parties should come out of the estate.

Against this decision Hori Dasi appealed on the ground that her interest had been unduly curtailed.

Ram Lal, on the ground that Hori Dasi took nothing under the will, he no longer disputed its factum.

(1) 9 Beng. L. R. 377.
The Secretary of State, on the ground that the gift over to the Government, in certain events, ought to have been held good.

The High Court held that Behari Lal's intention was to confer on Hori Dasi, if she survived, and was, on the widow's death, not disqualified, an absolute estate, and that his intention was effectuated; also that the gift over to the Government, which they interpreted as taking effect in the event of Hori Dasi not surviving the widow, or being disqualified at the time of the widow's death, but not in the event of her becoming subsequently disqualified, was good.

The High Court, indeed, observed:

"The only case not clearly provided for in the will seems to be this: If Hori Dasi had a son who survived her, but herself died before the widow, was it intended that the Government should take, or was the son to take? On the one hand, neither of the further events contemplated in the 20th clause would have arisen, i.e., Hori Dasi would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification; nor, on the other hand, could Hori Dasi's son easily succeed, being a stranger, and not provided for in the will. But we need not occupy ourselves with a case not before us."

A decree was drawn up, which in some points which will be subsequently referred to is not in conformity with the judgment.

No argument has been addressed to their Lordships founded on the first six clauses of the will, which are no more than bequests in accordance with what the testator conceived to be the rules of the ordinary Hindu law of succession. All of these, except the 5th, refer to possible events which did not happen. The 5th describes an ordinary Hindu widow's estate, which would take effect on the death of the testator by operation of law. The argument in favour of the Appellant has been founded on the 7th, 8th, 9th, and 20th clauses.

It was not, and could not be disputed, that since the case of Srimoni Soorjemoni Dasi v. Denobundho Mullick (1) recognised and confirmed as that case has been in the case commonly called the Tagore Case, Juttendro Mohun Tagore and Another v. Ganendro

Mohun Tagore (1), and in Bhoobun Mohini Debya v. Hurrish Chunder Chowdry (2), a gift by will upon an event which is to happen, if at all, immediately on the close of a life in being, to a person in existence, and capable of taking under the will at the testator’s death, was good and valid under Hindu law, and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow. But it was argued that the words “putra pountrádi kramé” (translated in the Record “from generation to generation”), expressed in their etymological sense an intention on the part of the testator to limit the succession to the heirs male of Hori Dasi; that the gift, being “stridhan,” would descend by law, in the first instance, to her unmarried daughters equally with her sons, and that in its further descent females would have peculiar rights; that, therefore, the testator had endeavoured to create an estate of inheritance in her inconsistent with the general law of inheritance, which endeavour, under the authority of the Tagore Case, would render his gift to Hori Dasi void, or, at the least, would prevent its operating further than to give her an estate for life. This latter view was adopted by the Judge of first instance. Upon this question the High Court observe,—

“We dissent entirely from the learned Judge, when he holds that the words ‘putra pountrádi kramé’ denote an attempt to limit the succession to Hori Dasi’s male descendants in any manner opposed to the decision in the Tagore Will Case, Tagore v. Tagore (3). The devise and bequest to her are contained in the words ‘adhikárini haibek,’ and the words added are merely usual words, implying an absolute and heritable estate.

“If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to shew that the estate is to go beyond the life.”

The effect of these words is thus spoken of by Sir Barnes Peacock in delivering the judgment of the High Court in the Tagore Case (4):

“A gift to a man and his sons and grandsons, or to a man and

(3) 9 Beng. L. R. 377.
(4) 4 Beng. L. R. 182.
his sons' sons, would, in the absence of anything shewing contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in Bengal are 'putra poutrdi kramé,' and in the Upper Provinces 'naslan baad naslan,' the literal meaning of the former being to sons, grandsons, &c., in due succession, and of the latter in regular descent or succession."

The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the bar that these words, though undoubtedly importing the male sex in their primary signification, would, in the case of a gift to a male, be read as words of general inheritance, and would include female as well as male heirs where, by the law, his estate would descend to females; their Lordships feel no greater difficulty in applying them to the female heirs of a female where by law the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognised in India and by this Board as apt for conferring an estate of inheritance. They are of opinion that clause 7, if it stood alone, would confer an absolute estate on Hori Dasi upon the death of the widow.

Clause 8 has been relied upon for enforcing the argument that the testator's object was to benefit the sons of his granddaughter, an object which their Lordships think he might reasonably suppose best effectuated by giving complete power over the estate to his granddaughter. The provision for management by the Court of Wards obviously does not affect Hori Dasi's estate.

But it has been further contended that the conditions under which by clause 9 Hori Dasi is to take, or, more properly speaking, under which she is not to take, are so uncertain as to render the gift to her void. It has been argued that no time is fixed at which the disqualifications are to operate, that she may become a sonless widow at any period of her life, and that, therefore, it must always remain uncertain whether or not she is capable of taking the gift. In their Lordships' opinion all difficulty as to the question of time is got rid of by reading the clause in conjunction with that which precedes it, and treating the death of the widow as the time when it is, if at all, to take effect. This natural interpretation of the clause gives effect to it, and
their Lordships are by no means disposed to give it a forced construction which would defeat its operation. The death of the widow is, in their opinion, the point of time when it is to be ascertained once for all whether Hori Dasi takes, or is disqualified from taking.

More difficulty arises in the construction of clause 20. It has been argued that the words "if my grand-daughter should die before she bears a son" are not limited to any point of time, that if this be so, the other disqualifications mentioned in that clause (which are repetitions of those in clause 9) are not limited either, and may take effect at any period of Hori Dasi's life, that they are in effect conditions subsequent upon the happening of divested. It has been further argued that the gift over of an estate on events which may happen, not upon the close of in being, but at some uncertain time during its continuance, void, as contrary to Hindu law.

If, as the High Court have found, their Lordships think that one main object of the testator was to prevent taking his property in any event, it is obvious that creating the incapacity, under certain circumstances, of daughter to take upon the widow's death, required the mentioned by another directing on whom the estate, if happened, should devolve. This is the purpose which should be read as supplementary to construction that the gift over was to take widow's death. When providing for the on Hori Dasi's being disqualified to take the testator should also provide (which for its devolution in the event of her dying this provision is, by implication, intended to have effect may be given to every part of (what their Lordships agree with improbable) that the testator intended his granddaughter, should be viewed in this light the section "If no son or daughter is
death, my granddaughter should have died before bearing a son, or should be barren, or become a sonless widow, or otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

This construction, which their Lordships adopt, makes it unnecessary to discuss whether the disqualifications, if they had been conditions subsequent, would or would not be in violation of Hindu law. It has not been disputed that, if they are to be ascertained on the widow's death, the gift over to the Government is good.

One possible event undoubtedly is unprovided for, viz., the granddaughter predeceasing the widow, having borne a son.

Their Lordships do not deem it necessary to decide what would happen on the occurrence of this event—indeed, no judgment which they could give would affect the rights, if he should have any, of a son yet unborn, in the case supposed. In declining to declare the rights of the parties in this contingent event they are acting in conformity with the rule laid down in the case of Lady Langdale v. Briggs (1), explained as it was in the Tagore Case.

It follows that the decree of the High Court must be amended by substituting for the words "not surviving" as italicized (see supra, p. 54), "having died during the lifetime of such widow without bearing a son."

It is further necessary that for the words "or without a living son" as italicized (see supra, p. 54), there should be substituted the words "or a sonless widow." The decree as it stands is neither in accordance with the will nor the judgment.

Subject to these variations, their Lordships will humbly advise Her Majesty that the decree be affirmed. The costs of all the parties to the appeal should be paid out of the testator's estate.

Solicitors for the Appellant: Barrow & Rogers.
Solicitor for the Secretary of State: H. Treasure.
Solicitors for the other Respondents: Watkins & Lattey.

(1) 8 D. M. & G. 391.
DINENDRONATH SANNYAL AND OTHERS. APPELLANTS;

AND

RAMCOOMAR GHOSE AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Sale of Property attached in Execution—Distinction between private Sale and Sale in Execution—Incumbrances subsequent to Attachment.

Under a private sale by a judgment debtor of property attached in execution, a purchaser acquires no better title than his vendor possesses, that is, he buys subject to any alienation or incumbrance effected since the date of the attachment. Under an execution sale a purchaser acquires title by operation of law adversely to the judgment debtor, and freed from such subsequent alienation or incumbrance.

The Respondent having obtained judgment against B. attached, in May, 1863, B.'s decree against the Appellants for mesne profits; in May, 1865, obtained an order for sale thereof; and on the 27th of March, 1866, by private deed of sale, purchased the same; B. having meanwhile, on the 14th of September, 1865, consented to an order of that date (to which the Respondent was no party), whereby his decree for mesne profits was set off pro tanto against a much larger money decree by the Appellants against him:

Held, overruling the decision of the High Court, that such private sale, though it satisfied the Respondent's judgment, only operated to pass such title as B. had in the decree for mesne profits; that is, a title subject to the order of the 14th of September, 1865.

Even if the sale had been in execution, queris as to the effect of the attachment having been issued pendente lite in regard to the right of set-off.

APPEAL from a decree of the High Court (March 16, 1877), reversing the judgment of the First Subordinate Judge of zillah Rajshahye (July 10, 1875).

The decree was made in an execution suit in which the Respondent, Ramcoomar Ghose, jointly with certain others, called the Bhuttacharjees, sought to execute against certain persons called the Sannyals a decree for mesne profits which the Respondent, Ramcoomar Ghose, claimed to be entitled to execute under the circumstances hereinafter mentioned.


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The Appellants resisted in the Courts below the execution of that decree by the Respondent, Ramcoomar Ghose, on two grounds: firstly, that it was barred by limitation; and, secondly, because, as they contended, Ramcoomar, a purchaser from the Bhuttacharjees of the right which he claimed, was precluded from executing the decree by an arrangement entered into between the Sannyals and Bhuttacharjees prior to Ramcoomar's purchase, whereby the former had become entitled to set off a cross decree against the latter and thereby extinguish the decree now sought to be enforced.

The Lower Courts concurred in holding that there was no bar of limitation, but differed as to whether Ramcoomar was affected by the arrangement above referred to.

The judgment of the High Court (Kemp and Ainalis, JJ.) was as follows, so far as is material:—

"The only question we have to deal with is, whether Ramcoomar Ghose, by purchasing the Bhuttacharjees' claim to mesne profits on the 27th of March, 1866, after their agreement with the Sannyals to have their decree adjusted by set-off, recorded in the order of this Court of the 14th of September, 1865, is bound by that order, and, consequently, loses the advantage which he had gained by attaching the Bhuttacharjees' decree. It has been decided that as against him, as a rival decree-holder, no right of set-off under the law (sect. 209, Act VIII of 1859), existed; and it is admitted that, if he had proceeded on his attachment and caused the Bhuttacharjees' decree to be sold, and had himself become the purchaser, the Sannyals could not have resisted his claim to put that decree into execution without reference to their cross-decree. But it is contended that his decree has been satisfied, and that the attachment thereby came to an end, and that he stands in precisely the same position in respect of the Sannyals as any third party wholly unconnected with this litigation, who might have acquired by private purchase the Bhuttacharjees' rights at a date subsequent to September, 1865.

"There are several reported decisions, of which it is only necessary to mention the judgment of the Privy Council in Anund Lal Dass v. Jullodhur Shah (1), which point out that the object of

section 240 is to secure the rights of an attaching decree holder; these, however, do not carry us very far; but there is a Madras case in 6 Madras High Court Reports, p. 65, which is in many respects analogous to this case. In that case, the Plaintiff having sued on a bond by which property was hypothecated, obtained a decree establishing his rights under the hypothecation, and attached the property in execution. Eventually, the judgment debtors, in 1868, sold the property to the Plaintiff while still under attachment for the amount decreed. The Defendant set up various claims arising out of an alleged mortgage and sale to his vendor, and subsequent agreement in 1857; but these had already been rendered fruitless by the result of a suit instituted in 1862. He further relied on an agreement made in 1866 while the property was under attachment, but not made with him with the consent of the Plaintiff for the satisfaction of his decree. The Court held the Plaintiff entitled by sect. 240 to recover on his purchase unincumbered by the prior agreement between his vendor and the Defendant.

"If, then, a private sale of the attached property with the consent of the attaching creditor for the satisfaction of his decree, whether to the creditor himself or to a third person, is protected by sect. 240 from any incumbrances imposed on the property subsequent to attachment as much as if it was a sale effected under the orders of the Court, Ramcoomar Ghose, who purchased the property attached by him in satisfaction of his own decree, is entitled, so far as may be necessary to secure his own rights, to hold it clear of the incumbrance created by the consent decree between the Sannyals and the Bhattacharyees recorded behind his back, while the property was subject to his attachment. It is evident that that consent decree was made with full knowledge that it might not be operative against Ghose; for six days after it was accorded, the Sannyals commenced their suit for the express purpose of preventing Ghose from interfering with this arrangement. Failing on the ground first taken, that they were by law entitled to take the amount of the Buttacharyees' decree in satisfaction pro tanto of their own by set-off, they then tried to secure their end by putting forward a right by prior attachment: this was more than a year after the purchase by Ghose. This having
failed, they now contend that the benefit of the attachment was waived by the private purchase, but, as it seems to us, with equal ill success. But while we hold that we are not at liberty to close our eyes to the result of the Sannyals' suit of 1865, which was, that, as against Ghose, they had no right to touch the decree obtained by the Buttacharjees against themselves until Ghose's claim should be satisfied, we do not think we are bound to extend the protection claimed by Ghose under sect. 240, Act VIII of 1859, further than is necessary for the purpose of satisfying his decree. What would be the consequence? That the Sannyals having a decree of 1828, which, with the accumulated interest, was calculated by the Judge to have amounted to Rs.497,612 on the 3rd of August, 1872, and, assuming the correctness of that calculation is now nearly 5½ lacs, would have nothing to recover from except such interests of the Buttacharjees as may exist other than the decree in dispute; while Ramcomar Ghose, with a decree obtained in 1858 for Rs.67,000 and odd, which may be roughly estimated as now amounting with accumulated interest to Rs.230,000, would be enabled to execute against them the decree of the Buttacharjees, whose claim, assessed in 1862 as something over Rs.211,000, must now, with interest, come to about Rs.591,000.

This is a result so disastrous to the Sannyals and the Buttacharjees, and so unduly favourable to Ghose, that we think we are bound in equity to see whether some relief cannot be given against it. We think this case may be distinguished from the Madras case cited above, in which the Court refused to allow the first purchaser to retain his claim to the land subject to payment of the sum due to the Plaintiff under his decree. The subject of sale in that case was land valued and sold for a certain sum, which may be taken to have been a fair, though probably not a maximum, value: at any rate, the thing sold was certain, and capable of immediate valuation. In the present case, the subject of sale was a claim to money, and the actual value of it was and still is uncertain. The purchase was effected at a time when a settlement had been arranged between the Sannyals and the Buttacharjees, and while the former were prosecuting a suit against the purchaser for the purpose of giving effect to that settlement. It may be that, under these circumstances, the price was as much as there was
any prospect of the vendors then realizing; but, unquestionably, the transaction was a speculative one so far as the purchaser was concerned: to the vendors (who apparently were insolvent) it seems to have been of no great consequence whether the money due under their decree went to Ghose or was retained by the Sannyals.

"If, instead of attempting to sell the Bhuttacharjees' decree, the Court had, under sect. 243, done what we think it ought to have done, namely, appointed a manager to put the decree into execution so far as was necessary to satisfy the claim of the attaching creditor, Ghose's interest would have been duly protected without any avoidable sacrifice of the interest of the Sannyals.

"We should now, we think, deal with this case as if this course had been adopted. The result will be, that while Ghose is enabled to recover that which he might claim under his decree against the Bhuttacharjees unfettered by any agreement between them and the Sannyals, the balance of the decree will be subject to that agreement.

"The decree of the Sannyals must be calculated with simple interest from the date of the decree to the 14th of September, 1865, and that of the Bhuttacharjees from the date of the ascertainment of mesne profits to the same date. The amount of Ghose's decree with interest as therein awarded, must also be calculated to the same date. After deducting Ghose's decree from the Bhuttacharjees' decree, the balance of the latter must then be set off against the Sannyals' decree; the Bhuttacharjees' decree, so far as they are concerned therewith, must be declared finally satisfied. Satisfaction will be entered on the Sannyals' decree, taking effect from the 14th of September, 1865, to the extent of this balance; and for the remainder, with the subsequently accruing simple interest, they will be at liberty to proceed in execution against the Bhuttacharjees, while Ramcomar Ghose is declared entitled to proceed against them (the Sannyals) upon the unsatisfied portion of the Bhuttacharjees' decree with interest on the principal sum of his own decree. The order of the Subordinate Judge in execution suit No. 69, is set aside, and the case remanded to him with instructions to proceed at once upon
these orders and wind up the accounts with as little delay as
may be."

Leith, Q.C., and C. W. Arathoon, for the Appellants, contended
that this judgment was wrong, and that Ramcoomar Ghose was
bound by the agreement made between the Bhuttacharjees and
the Sannyals, and by the order of the 14th of September, 1865,
made in pursuance of it. The purchase by Ramcoomar of the
Bhuttacharjees' claim to mesne profits was made from them by
private sale and not by sale in execution. There is a distinction
between such private sale and a public sale in execution, even
though such private sale is of attached property; and it is only
in sales in execution that the purchaser obtains protection against
incumbrances effected by the judgment debtor subsequent to the
attachment, or under sect. 240 of the Code.

Doyne, and Mayne, for the Respondent, Ramcoomar Ghose,
contended that his right to satisfy his decree out of the Bhutta-
charjees' claim for mesne profits against the Sannyals had already
been conclusively established in litigation between him and the
Sannyals. The purchase by the Respondent of his judgment
debtors' rights under their decree previously to the final adjudica-
tion of his own suit against the Sannyals did not affect that
right to satisfaction. As to the effect of the attachment, reference
was made to Ihatu Sahu v. Ramacharan Lal (1), Kalee Coomar
Chatterjee v. Siddhessur Mundul (2), and Puddomonee Dossee v.
Roy Mothooranath Chowdhry (3). With regard to the set-off,
which it was contended on the other side had been validly effected,
notwithstanding sect. 240, between the Bhuttacharjees and the
Sannyals, to the detriment of the Respondent, an execution set-
off is a different thing from equitable set-off. The one is in
execution under a section of the Code by a Court which has to
know what stands recorded and to be guided by it. The other
is a general matter which has to be equitably allowed in a regular
suit, not in a mere execution proceeding under the Code.

Leith, Q.C., replied.

(1) 3 Beng. L. R. App. 68, see also p. 134.
(2) 11 Beng. L. R. 256.
(3) 12 Beng. L. R. 411, 414, n.
1881. Jan. 26. The judgment of their Lordships was delivered, after the death of Sir James W. Colvile, by

SIR BARNES PEACOCK:

This is an appeal from a judgment and decree of the High Court at Calcutta, dated the 16th of March, 1877, which reversed an order of the Subordinate Judge of Rajshahye, dated the 10th of July, 1875, by which he ordered, amongst other things, that an Execution Case, No. 69 of 1875, instituted by the Respondents against the Appellants should be postponed until further orders.

At the close of the arguments on the hearing of the appeal their Lordships, after deliberation, stated that they would humbly advise Her Majesty by their report to reverse the decree of the High Court and to affirm that of the Subordinate Judge of Rajshahye so far as it related to the Execution Case, No. 69 of 1875, and that the Respondents must pay the costs of the appeal. They, however, reserved the statement of their reasons for this report until after the argument of another appeal in some respects connected with this case, in which Taruck Chunnder Bhuttacharjya is the Appellant and Bycowntnauth Sannyal and others are the Respondents.

Their Lordships will now proceed to give their reasons for the report in the first appeal, which will be submitted to Her Majesty at the next Council.

The history of the case is stated by the learned Judges in the judgment under appeal. It appears that in the year 1828 certain persons who are now represented in estate by the Appellants, and whom, as well as the Appellants, it will be convenient to speak of as the Sannyals, obtained a decree against certain other persons who, as well as the Bhuttacharjee, Respondents, may be called the Bhuttacharjees, for a sum exceeding Rs.82,000. It was subsequently held that the judgment carried interest at 12 per cent. from the date of the decree until the realisation thereof. In execution of the decree the Sannyals attached, sold, and became the purchasers of certain immovable properties of the Bhuttacharjees, and obtained possession thereof, which they retained for many years. After considerable delay the Bhuttacharjees instituted proceedings to set aside the sale in execution, and on the 10th of
November, 1857, obtained a decree of the Principal Sudder Ameen of Rajahahye setting aside the sale and declaring the right of the Bhuttacharjees to be restored to possession of their property with mesne profits. That decree was affirmed on appeal by the late Sudder Court on the 23rd of May, 1860.

In the interval between the date of the decree of the Principal Sudder Ameen and the affirmation thereof by the Sudder Court, viz., on the 17th of May, 1858, Anund Mohun Ghose, the father of the Respondent, Ramcoomar Ghose, and who is now represented by him, obtained a decree against the Bhuttacharjees for a sum exceeding Rs.67,000. In execution of that decree Anund Mohun Ghose attached, in May, 1863, the Bhuttacharjees' right to mesne profits under their decree against the Sannyals of the 10th of November, 1857, and on the 26th of May, 1865, an order was issued by the District Court for sale of the decree for mesne profits.

The sale in execution of the Sannyals' decree of 1828 having, as before stated, been set aside, they took fresh proceedings to have the decree again executed for the amount of principal and interest due thereon. Numerous conflicting judgments were from time to time given by different Courts as to the amounts due to the Sannyals and to the Bhuttacharjees respectively on their respective decrees, and as to the right to set off one judgment against the other. The amount due to the Sannyals under their decree exceeded the amount due by them to the Bhuttacharjees under their decree for mesne profits. It is unnecessary, and it certainly would not be profitable, to point out in detail the effect of the several conflicting judgments which were delivered in the course of the litigation between the Sannyals and the Bhuttacharjees. It is sufficient to say that, on the 14th of September, 1865, upon an application for a review of a judgment which is not set out in the record, a judgment was given by Justices Kemp and Campbell, stating that it had been arranged, by consent of both parties, that the Sannyals should have simple interest only on their original decree from the year 1828 to the date of payment, it being understood that the cross decree of the Bhuttacharjees for mesne profits should also bear simple interest from the date of ascertainment only. The learned Judges, having then proceeded
to modify an order which had been previously made, declared that simple interest only should be calculated on the Sannyals' decree from 1828, and that then the decree of the Bhuttacharjees should be set off against the gross amount of the Sannyals' decree once for all.

It is not clear that the operative part of the order was made by consent, but the fact has not been disputed, and it may be taken to have been so. The judgment was given in a proceeding, in which the Sannyals were petitioners, and the Bhuttacharjees were judgment debtors. Ramcoomar Ghose was not a party to the proceeding. He did not, however, proceed to a sale under the execution against the Bhuttacharjees of the decree for mesne profits which he had attached, but he entered into a private arrangement with them, by which they sold to him the whole of the mesne profits due to them under their decree against the Sannyals, together with all interest due thereon, in lieu of the sum of Rs.74,506 due to him upon the decree obtained against them by Anund Chunder Ghose, his father. The arrangement was carried into effect by a deed of sale, dated the 15th of Cheyt, 1272, corresponding with the 27th of March, 1866. It was correctly stated by the High Court that the only question they had to deal with was whether Ramcoomar Ghose, by purchasing the Bhuttacharjees' claim to mesne profits on the 27th of March, 1866, after their agreement with the Sannyals to have their decree adjusted by set-off, recorded in the order of the 14th of September, 1865, was bound by that order, and consequently lost the advantage which he had gained by attaching the Bhuttacharjees' decree.

The Subordinate Judge had held that Ramcoomar Ghose, by privately purchasing the mesne profits from the Bhuttacharjees, had destroyed the right which he possessed under his attachment as a decree holder, and stayed his execution against the Sannyals. The High Court reversed that decision, and held that the benefit of the attachment was not affected by the private purchase, and that Ramcoomar Ghose was entitled, so far as might be necessary to secure his own rights, to hold the decree clear of the incumbrance created by the consent decree between the Sannyals and the Bhuttacharjees which had been recorded behind his back while the property was subject to his attachment. They, however,
limited the right of Ramcoomar Ghose to avail himself of the mesne profits freed from the Sannyals' right of set-off to the extent of satisfying the amount of his decree against the Bhuttacharjees with simple interest to the 14th of September, 1865, the date of the consent order.

Their Lordships are of opinion that the private sale to Ramcoomar Ghose was not tantamount to and had not the same effect as a sale in execution of Ramcoomar Ghose's decree, under which the mesne profits had been attached, and that Ramcoomar Ghose, by virtue of his purchase, acquired no greater interest than the Bhuttacharjees had in the decree for mesne profits, and consequently that he was bound by the order of the 14th of September, 1865.

By sect. 201 of Act VIII. of 1859, it is enacted that if the decree be for money (which Ramcoomar Ghose's decree was), it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both if necessary. By sect. 205 debts due to the judgment debtor may be attached and sold as property in execution of a decree. By sect. 236, where the property shall consist of debts not being negotiable instruments or shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever until the further order of the Court; and then, by sect. 240, in the case of an attachment by written order, any payment of the debts to the judgment debtor after the order shall have been made known in the manner in the said Act mentioned and during the continuance of the attachment, shall be null and void.

It is not necessary to decide whether, if Ramcoomar Ghose had purchased at a sale, under his execution, the attachment would have protected him from the effect of the order of the 14th of September, 1865, the attachment having been issued pendente lite, that is to say, pending the proceedings between the Sannyals and the Bhuttacharjees, in which the question was raised as to the right of set-off. It may be admitted for the sake of argument, but only for the sake of argument, that the order of the 14th of
September, 1865, made by consent of the Sannyals and of the Bhuttacharjees, directing the set-off, amounted to a payment of the mesne profits by the Sannyals to the Bhuttacharjees, and a receipt thereof by the Bhuttacharjees within the meaning of sect. 240. The effect of that section, however, is not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void so far as may be necessary to secure the execution of the decree. The principle is clearly laid down in the case of Anund Loll Doss v. Jullochur Shaw (1). The private sale, pending the attachment, was binding upon Ramcoomar Ghose, and also upon the Bhuttacharjees. Ramcoomar’s decree was satisfied by the sale to him of the mesne profits in lieu of the sum due to him under his decree. He never afterwards could have proceeded to execute that decree or to sell under the attachment. By privately purchasing the mesne profits which he had attached he abandoned his execution, and also the attachment, which was a part of the execution.

There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment debtor, acquires that title by operation of law adversely to the judgment debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution.

The High Court relied upon a case in 6 Madras High Court Reports, p. 65. But there is a distinction between that case and the present, for there the property sold was hypothecated to the Plaintiff by the bond for which the decree was obtained. The case, however, is of no greater authority than the decision under

consideration, and their Lordships are not prepared to say that it
would have been affirmed on appeal.

Their Lordships cannot but regard as lamentable the long,
harassing, and expensive litigation to which the Sannyals have
been subjected in endeavouring to obtain the fruits of their
decree of 1828, an object which, although upwards of half a
century has elapsed since the date of the decree, they have not as
yet attained. It is indeed a subject of deep regret that in the
course of that litigation so many contradictory and conflicting
judgments have been delivered, sometimes on appeal from an in-
ferior to a Superior Court, and sometimes even by the same
Judges in reviewing their own judgments.

Solicitors for the Appellants: Wrentmore & Swinhoe.
Solicitors for Ramcoomar Ghose: Oehme & Summerhays.
MAHARAVAL MOHANSINGJI JEYSINGJI . PLAINTIFF ;

AND

THE GOVERNMENT OF BOMBAY . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Pensions Act of 1871—Hukk—Jurisdiction.

The Pensions Act of 1871 applies to grants of money in respect of or in substitution for some right, privilege, perquisite, or office.

To date garas hukks which the Garasiás used to collect from the villages before the establishment of British rule are a recognised species of property, capable of alienation, and therefore a right within the meaning of the Act:—

 Held, that an allowance of money by the Government under an arrangement with Plaintiff's ancestors in lieu of a hukk theretofore received by them falls within the Act, and that accordingly the Civil Courts cannot take cognizance of a suit relating thereto.

APPEAL from a decree of the High Court (Oct. 10, 1877) affirming a decree of the District Judge of Surat (Dec. 1, 1876) by which the Appellant's suit was dismissed.

The proceedings in the suit and the facts of the case are sufficiently set out in their Lordships' judgment.

The question decided in the appeal was whether the Courts below were prohibited under the provisions of the Indian Pensions Act (XXIII. of 1871) from entertaining and trying this suit in the ordinary course and without receiving from the Collector of the district the certificate required for the institution in Civil Courts of claims falling within that Act.

The High Court's judgment, so far as it related to the argument that the case did not fall within the provisions of the Indian Pensions Act, was as follows:—

"The learned counsel for the Plaintiff, however, endeavouring to take this case out of the scope of the term, 'a grant of money,' as defined or described in the Indian Pensions Act, contended at the hearing of the appeal before us that Government merely

filled the position of agent to collect to dá garas from the villagers on behalf of the Plaintiff, and assumed that position for the purpose of recovering that black-mail, or whatsoever else it may be, in an orderly and peaceable manner, and preventing the riotous and violent mode of levy by the Garasias themselves, which had preceded the intervention of Government. Assuming that argument to be historically true, it presents a case quite different from that stated in the plaint, which contains no allegation of agency on the part of the Government. The plaint neither avers that Government ever promised to collect to dá garas on behalf of the Plaintiff, or asserted that it would collect it on its own behalf, nor does it aver that the Government has hitherto collected to dá garas from the villagers, or that any moneys of that nature have, since the death of Jeysingji in 1865, as heir to whom the Plaintiff claims, been received by Government from the villagers on behalf of and to the use of the Plaintiff. It was not very clear in the argument on behalf of the Plaintiff whether the agency contended for was a perpetual agency or an agency determinable at the pleasure of either party or of Government alone on reasonable notice; but whichever species of agency it be, if agency at all, it is manifest that if the Plaintiff seriously intended to rely upon such a case, it was incumbent on him to have amended—in fact, reframed—his plaint. An application for liberty so to do ought to have been made to the District Judge. The Plaintiff had, from the written statement in defence filed by the Collector on behalf of Government, timely notice that, at the hearing before the District Judge, the Indian Pensions Act would be relied on as a bar to the maintenance of this suit in a Civil Court, so there cannot have been any surprise in the matter. It does not appear that even when the District Judge announced his opinion that the case comes within the prohibition contained in the Indian Pensions Act the Plaintiff made any application for leave to amend. Even here on appeal the amendment of the plaint was rather suggested than formally applied for. Looking, however, at what was said as intended to amount to an application, we could not perceive any good ground for allowing an indulgence of that nature to the Plaintiff at so advanced a stage of the litigation. Ten years have elapsed since the death of Jeysingji, who of his
branch of the family was the last recipient of the Government commutation for to dá garas. If the Plaintiff's claim be regarded as a hukk or other immovable property, it may not be barred by the Law of Limitation (see Act IX. of 1871, Schedule II., Arts. 131, 132, 145, and Law Rep. 1 Ind App. 34; S. C. 10 Bomb. H.C. Rep. 281). But if it be a hukk it would seem to come within the Indian Pensions Act. If the true nature of the claim be a contract for a perpetual agency, and we were asked to permit the plaint to be converted into a suit for a specific performance of such a contract, we not only doubt that a suit for its specific performance would lie (Fry on Specific Performance, pp. 242-245; Fitzpatrick v. Nolan (1)); but we doubt that any such contract could be proved. So far as we can perceive, it has not been alleged in any of the to dá garas cases hitherto decided that Government was bound, perpetually, to act as agents for collection of to dá garas. In the Collector of Surat v. Pestonjee Buttonjee (2), where the history of to dá garas was examined very fully by Mr. W. E. Frere, then zillah Judge of Surat, who had considerable experience in Gujarat, he seems to have thought that Government could only be liable when it had collected the garas, and the case of Sambhoolall Girdhurlall v. The Collector of Surat (3) does not seem to go beyond that Lord Kingsdown said (page 40): 'The question here is, not whether the Government can be compelled to receive and hand over these sums, but whether actually receiving them and having been in receipt of them for very many years, it is entitled to say that it will not pay them to the alinee of the person to whom, but for the alienation, they would have been paid.' Agencies alleged to be undeterminable have been discountenanced by the Court: Rhodes v. Forward (4); Cowasjee Nanabhoi v. Lallbhoy Vullubhoi (5); Shaw v. Lawless (6). To a suit for specific performance, the period of limitation would be three years from the denial of the right (Act IX. of 1871, Schedule II., Article 113). Again, if the suit be converted into an action for the recovery of damages for misconduct as an agent in ceasing to make the collection of to dá garas, the period of limita-

(1) 1 Ir. Ch. Rep. 671. (4) 1 App. Cas. 256.
tion would be three years from the time when the neglect or misconduct occurs (Act IX. of 1871, Schedule II., Art. 91). Lastly, if the suit was transformed into an action for money had and received to the use of the Plaintiff, it is manifest from an exhibit put in evidence by the Advocate-General on behalf of the Government, with the consent of counsel for the Plaintiff, that such an action must fail, inasmuch as Government has since the introduction of the survey into Gujarat declined to collect to ðá garas from the villages.

"In Sambhoosal Girdhurlall’s Case (1) it was established, to the satisfaction of Her Majesty’s Privy Council, that the to ðá garas had been collected by, and was in the hands of, Government. In Umedsangji v. The Collector of Surat (2), the High Court limited its decree against the Collector to the to ðá garas admitted to have been collected by Government, i.e., up to 1862, the date of the survey, and Couch, C.J., said:—‘We cannot declare the Plaintiff to be entitled in perpetuity, because if Government were to cease to collect the garas it might be that his remedy would not lie against the Government but against the villagers.’ We have not any doubt that in the case before us the plaint was filed in its present form without any averment that Government had collected the to ðá garas sued for, because it is notorious that Government had long since ceased to collect to ðá garas in Gujarat, and that although payments are made out of the Government Treasury to many of the ancient recipients of to ðá garas there is not since the new revenue survey any assessment in respect of to ðá garas in Government villages made upon the villagers or their lands, and accordingly no collection made by Government in that respect. The exhibit to which we have referred, as put in by consent, contains extracts (paragraphs 17 to 19 inclusive) from a resolution, No. 4309, dated 27th November, 1862, of the Government of Bombay, and is as follows:—

"‘17. Government did not initiate these payments, but found them on obtaining possession of the country, generated by the disorder of the previous rule. The holders were treated with unexampled indulgence, but the peace of the country called for the policy then adopted, and faith should now be kept with their
descendants although they are no longer dangerous to the state. This the Governor in Council is prepared in the strictest sense to do, but he cannot allow that a tax, at first so irregularly imposed on the community, should now be extorted by the aid of legal proceedings from the public purse by others than those in whose favour the original arrangements were made, or that Government should be compelled to continue its good offices between the Garasiás and the village communities in a manner to which it never pledged itself. It should therefore be publicly declared in every talooka, as the Revenue Survey Settlement is introduced, that the new rules of assessment do not include any such collections, and that Government will, in future, not aid or take part in the collection of garas.

" 18. In thus placing the Garasiás in the same position with respect to the village communities which they originally held, the Governor in Council cannot allow them to resort to other than legal means to enforce their claims, and if any village communities decline to accede to the Garasiá's demands the latter must resort to the Civil Courts. At the same time the Governor in Council is not unwilling to make some sacrifice of revenue in order to relieve the Garasiás from the necessity of resorting to law, and he is prepared, whenever the Garasiá may be willing to receive from Government his present income instead of collecting it direct from the villagers, to continue that income to him under such reasonable rules and restrictions as may seem fit to Government to impose.

" 19. The conditions on which the arrangement will be entered into are that the Garasiá shall consent to abandon for the future his claims against the village communities, and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who received the garas from the British Treasury. The garas or any portion of it may further be continued to the lineal male issue of a brother of the first British recipient in any case in which on inquiry the Revenue Commissioner may find that hardship would be felt by the discontinuance of the garas. If in any case, however, the allowance has been enjoyed on condition of service, that condition will not be abandoned, although it
is not expected that such service can now be taken with advantage to the public."

"For the reasons which we have above assigned, we think it is doubtful whether we should confer any benefit upon the Plaintiff by granting to him permission to amend his plaint. Whether, however, those reasons deserve much weight or not, we are of opinion that we ought not to grant to him any such permission, he not having made any application for leave to amend in the Court of first instance, although he had timely warning before the hearing of the cause there, that the Indian Pensions Act would be pleaded as excluding the jurisdiction of that Court.

"We affirm the decree and direct the parties respectively to bear their own costs of this appeal."

Leith, Q.C., and Doyne, on behalf of the Appellant, contended that this decision was wrong. They submitted that the Act did not contemplate the bringing of any suits, even under a certificate, hostilely to the Government. It related to such suits as might be necessary for deciding conflicting claims, to receive payment from Government in respect of pensions or grants admitted by the Government. As regards the origin and meaning of the term "To dá garas hukk," and the rights of persons entitled thereto; reference was made to Sumbhoolall Girdhurlall v. The Collector of Surat (1), and to Maharana Fatehsingji Jaswatsanji v. Dessai Kallianraji Hekoomutrai (2). As regards this particular suit it was contended that being one to enforce a contract entered into by the Government to pay to the predecessors in estate of the Appellant an equivalent for the to dá garas hukk previously levied by them in consideration of their ceasing for the future to do so, it did not fall within the language and meaning of the Pensions Act, 1871. The arrangement made by the Government under the resolution of 1862 was not a grant. But the construction of the Pensions Act, 1871, must be limited to suits in respect of rights of the same nature as pensions, and that Act being in restraint of the ordinary right to resort to the Civil Courts for redress against the State (a general right conferred by the regulations and confirmed by statute) should receive a strict construction.

Reference was made to *Shahzadee Hazara Begum v. Collector of Burdwan and another* (1); and to *Vasudev Sadashiv Modak v. Collector of Ratnagiri* (2).

*Scoble, Q.C., and Mayne,* for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

**Sir Montague E. Smith:**

This is a suit brought by the Appellant in the District Court of *Surat*, claiming, as the adopted son of *Maharaval Jeysingji Bhagvansingi*, to recover from the Government of *Bombay* certain payments in respect of *dā garas hukk*, formerly levied by his ancestors upon certain villages in the *Surat* district. It appears that the Government has for many years made payments on account of this *dā garas hukk* (divided into three parts) to three different branches of the Appellant’s family; his adoptive father, through whom he claims, being paid one-third. The father died in 1865, and upon his death the Government either refused to recognise the Plaintiff as the adopted son, or considered that, as an adopted son, he was not entitled to receive the payments, and discontinued them. The action is brought, in consequence of that discontinuance, to recover the arrears from the time of the father’s death.

The Government denied the right of the Appellant to bring this suit in the Civil Courts, relying upon the *Pensions Act* of 1871. The Courts below, both the District Judge of *Surat* and the High Court on appeal, have held that the Government is entitled to rely upon that Act, and that the Civil Courts can take no cognisance of the suit.

It is unnecessary to inquire at any length into the origin of these *dā garas hukks*. It would appear that they had their origin in arbitrary exactions made by strong and powerful persons, who obtained the name of Garasiás, upon the village communities; that those arbitrary exactions were in some way commuted into fixed payments by the villagers, in consideration of which the

Garasiás gave up their claim to make arbitrary exactions, and also undertook to defend the villagers against the exactions of others. The nature of these hunks has been defined in two cases by this Board, the latter of which only it will be necessary to refer to. In the case of Maharana Fatehsangji Jaspatsangji v. Dessai Kallianraiji Hekoomutrai ji (1), there is this description of them:—The determination of this question "involves the consideration of the nature of a to dá garas hukk. A good deal of learning on this subject is to be found in the case of the Collector of Surat v. Pestonjee Buttonjee (2), and in the case of Sumbhoodall Girdhurlall v. Collector of Surat (3), to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the Garasiás from the village communities in certain territories in the west of India by violence and wrong in the nature of blackmail, had, when those territories fell under British rule, acquired by long usage a quasi legal character as customary annual payments; that as such they were recognised by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by inam villages to fall on the inamdar. And since the decision of the before-mentioned case in the 8th volume of Moore, page 1, it cannot be questioned that the to dá garas hukks of the former class constitute a recognised species of property capable of alienation, and of seizure and sale under an execution." It must therefore be taken, after the two decisions of this Board, that these hukks have been recognised as a species of property, however unlawful their origin may have been. The Plaintiff bases his claim upon that view of the hukk. The plaint states that his ancestors had certain lands, and "likewise there has continued to us from ancient times the yearly cash hukk (right) of to dá garas as our private property." Then it goes on: "Sometime after the introduction of the English Government the Government made an arrangement (bandobast) to pay from the Government Treasury in lieu of the to dá garas hukks which the

Garasiás used to collect or levy directly from the village.” It seems that there was a resolution of the Government of Bombay in 1862, which described the position of the Garasiás at that time, and gave them the option of resuming the collection of the former hukks from the villages, or of receiving from the Government allowances of an equivalent amount, the Government in that case discontinuing the further receipt of the hukks. The resolution says:—“It should therefore be publicly declared in every talooka, as the Revenue Survey Settlement is introduced, that the new rates of assessment do not include any such collections, and that the Government will in future not aid or take part in the collection of garas. In thus placing the Garasiás in the same position with respect to the village communities which they originally held, the Governor in Council cannot allow them to resort to other than legal means to enforce their claims, and if any village communities decline to accede to the Garasiás’ demands the latter must resort to the Civil Courts. At the same time the Governor in Council is not unwilling to make some sacrifice of revenue in order to relieve the Garasiás from resorting to law; and he is prepared whenever the Garasiá may be willing to receive from Government his present income, instead of collecting it direct from the villagers, to continue that income to him, under such reasonable rules and restrictions as it may seem fit to Government to impose.” Then:—“The conditions on which this arrangement will be entered into are that the Garasiá shall consent to abandon for the future his claims against the village communities; and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who receives the garas from the British treasury.” The arrangement with the Plaintiff’s ancestors, stated in the plaint, is of the kind described in this resolution, though it appears to have been made before 1862. Payments of money in lieu of the hukk were made before that year, and were continued by the Government down to the death of the Plaintiff’s father, with regard to the three shares, and since that time the Government has apparently continued to pay the two other sharers, though they have discontinued the payment to the Plaintiff.
The nature of to dá garas hukk having been adverted to, their Lordships have now to refer to the statute upon which the question, and the only question, in the appeal turns. The 4th section is this:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may be the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." It has been shewn that this hukk, whatever it originally was, had acquired the character of a right, and the plaint bases the claim of the Plaintiff upon its being a right. That being so, it appears to their Lordships that the present suit is one of those which fall directly and plainly within the language of this clause. It is a suit relating to a grant of money conferred by the British Government; and the Civil Courts are prohibited from entertaining any suit relating to such a grant, whatever may have been the consideration for it, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted. There is in this case a grant of money by the Government, and a right for which it was substituted. It, therefore, falls within the language of the fourth clause. The right of the Garasiás was of a peculiar and precarious kind; and allowances in respect of rights of this nature are clearly contemplated by the Act, and intended to be included in it. If there were any doubt the previous clause, the third, which is explanatory of the expression "grant of money or land revenue," may be looked at. It is as follows:—"In this Act the expression 'grant of money or land revenue' includes anything payable on the part of the Government in respect of any right, privilege, perquisite, or office." Even if the arrangement made by the Government was not strictly a grant, the suit relates to money payable by the Government in respect of a right. It was argued that the construction should be limited to rights ejusdem generis with pensions. But there is no sufficient ground for so limiting the language; and it is to be observed that the words of the Pensions Act of 1871, which include this case, are not found in the former regulations relating to pensions. There is no reason, therefore, either
in the language of the Act itself or in the antecedent legislation, for construing these words as applicable only to rights of the nature of pensions.

It was contended further that this case is founded upon a contract, and it was said that if it is embraced by the Act all contracts for the payment of money must be held to be included in it. But that is not so. The Act applies to grants of money in respect of or in substitution for some right, privilege, perquisite, or office. Undoubtedly, in some sense it may be said that the arrangements made between the Government and the Garasiás were in the nature of contract; but that contract, if it were one, resulted in the abandonment on the part of the Garasiás of their claim to make collections from the villagers, and in the allowance of money by the Government in lieu of them. It is that allowance which falls within the operation of the statute.

It was contended in the Courts below, and appears to have been the principal contention there, that the Government were in the position of agents for the Appellant to receive the collections, and were therefore bound to pay over to him the amount of the former hukk. But this argument entirely fails of foundation, for the Government, since 1862, have abandoned the collection of the hukk from the villagers; therefore, having received no money, they have nothing to account for to anybody. Their Lordships think it right to observe that this argument was not pressed at the bar to-day, though it appears to have been very strongly relied upon in the Courts below.

This is not the first time that the Pensions Act of 1871 has come before this Board. In the case of Vasudev Sadashiv Modak v. The Collector of Ratnagiri (1), an action was brought to recover certain payments on account of a grant which had been made to a deshmukh in consideration of some ancient dues which his ancestors had received. It seems that the deshmukh was a collector of Government revenue, the office being hereditary, and that the deshmukhs had been accustomed to receive a certain share of the revenue which they collected. The suit was brought against the Government for payments representing the old allowances, which it appears the native Government undertook to

make; but the Board held that, by the terms of the Act in
question, the Civil Courts were prevented from taking cognizance of
the suit. It is said in the judgment:—“Their Lordships are of
opinion that whatever the foundation of the deshmukhs’ rights
originally was, the sunnud must now be treated as the foundation
of those rights as they exist. At the date of that document the
receipt of the old allowances had long been interrupted. The
whole of what was received from ryots went into the coffers of the
State, which paid its collectors by salaries; and consequently the
restoration of the old allowances by the Peishwa was, in substance,
a grant by him of part of his land revenue, and therefore falls
within the terms of the 4th section, without the aid of the 3rd,
as a grant of money or land revenue conferred by a former
Government.” It seems to their Lordships that this decision
very nearly governs this case, if any authority were wanted for an
interpretation of the plain language of the Act.

Their Lordships find that the High Court of Bombay, in the
case of Parhudas Rayaji v. Motiram Kalyandas (1), give a like
construction to the Act. The observations, however, of the Judges
can only be treated as dicta, since they decided the case upon
the ground that, the suit having been brought upon a decree
obtained before the Act had come into operation, it was not a bar
to the suit.

The only case which at all looks the other way is one in the
High Court of Bengal: Shahzades Hazara Begum v. Collector of
Burdwan and another (2). The head-note is:—“One Rhajah Aowar
Shahad, a servant of the Delhi emperor, having been killed in
Burdwan while fighting for his master, the emperor built a tomb
over his remains and made a grant of land (five mouzahs) to his
family for the purpose of maintaining it in the manner usual
amongst Mahomedans. This grant was subsequently confirmed
to a descendant of Shahad and his heirs. Some years later the
land came into the possession of the Rajah of Burdwan, who paid
to the grantees a certain sum of money annually. When the
perpetual settlement was made the British Government continued
the payment on account of the Rajah, in whose zemindary four of
the five mouzahs were incorporated.” It seems that the yearly

payment was a sum of Rs.3690. Mr. Justice Glover says:—"It is an admitted fact that this annual payment was made by the Rajah on account of these mouzahs,"—that is, the five mouzahs referred to—"and it seems to us that such payment was, to all intents and purposes, the rent of the land transferred." After the permanent settlement the Government continued this payment, whether as of right or as an act of generosity may be a question. However, supposing the payment to have been obligatory, the nature of the obligation is treated by Mr. Justice Glover as an obligation to pay rent. He says: "And if the Rs.3690 paid to the family of Anwar Shahad by the zamindar of Burdwan was the rent of the five mouzahs, how was the payment changed in its nature by being made through the British Government?" Their Lordships cannot help saying that it was a violent assumption that the Government were paying rent for these mouzahs. However, having made that assumption, the learned Judge decided that the payments were not within the Act. The decision, thus explained, does not affect the question in the present appeal.

For these reasons their Lordships think that the judgments below are correct; and they will humbly advise her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Solicitors for the Appellant: West, King, Adams, & Co.
RAJAH NILMONI SINGH . . . . . PLAINTEEF;
AND
RAM BUNDHOO ROY AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Land Act X. of 1870, ss. 38, 39, 40—Compensation and Distribution—Finality.

The provisions in Act X. of 1870, for the settling of compensation for land taken for public purposes, are intended to be final; where its amount and distribution have been settled by a competent Court, the decision not having been appealed against, the settlement is final, and cannot be questioned in a suit brought by a person whose claim has been so adjudicated upon. The proviso in sect. 40 applies only to persons whose rights have not been adjudicated upon under sects. 38 and 39.

APPEAL from a decree of the High Court (June 6, 1878), affirming a decree of the Judge of East Burdwan (May 12, 1877), which dismissed the Appellant’s suit with costs.

The facts are stated in the judgment of their Lordships.

Doyne, for the Appellant, contended that it was not intended by Act X. of 1870 (see sects. 38, 39, and 40) to deprive a Plaintiff of the right to institute a regular suit in order to have his title to land adjudicated upon in due course of law. In this case the decision of the Judge relied upon by the High Court as a final adjudication was not on the face of it, or intended to be, a final adjudication on the Appellant’s title.

Leith, Q.C., and Cowell, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The history of this case, as far as it is material to the judgment, is as follows: The Government of India, requiring land for a

* Present:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.
public purpose under the provisions of Act X. of 1870, gave the requisite notices, and proceeded to take fifty-eight bighas of land within the zamindary of the Rajah of Pacheta. These fifty-eight bighas were occupied by persons who held under the title of jagirdar, but were undoubtedly subject to the superior tenure of the Rajah, and may be described as mal lands of his zamindary. The Act referred to, No. X. of 1870, contains a number of elaborate provisions applicable to the acquisition of lands and the payment of the purchase-money for them. Under the circumstances of this case it will be enough to refer to three of the clauses. It appears that in certain cases an award of compensation may be made by the Collector, as between the Government and the claimants. Sect. 14 is in these terms: “If the Collector and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same;” and there follow provisions that it shall be final. Clause 38 is in these terms: “When the amount of compensation has been settled under sect. 14, if any dispute arises as to the apportionment of the same, or any part thereof, the Collector shall refer such dispute to the decision of the Court.” Sect. 39 goes on to say: “When a reference to the Court has been made under sect. 38, the Judge sitting alone shall decide the proportions in which the persons interested are entitled to share in such amount.” It further provides that: “An appeal shall lie from such decision to the High Court, unless the Judge whose decision is appealed from is not the District Judge, in which case the appeal shall lie in the first instance to the District Judge.”

The proceedings in this case were under these sections. Under sect. 14, the Collector made an award for the whole amount of the compensation, which was, in round numbers, Rs.15,000. There was a dispute between the Rajah and the tenants, as they may be called, with reference to the apportionment of the amount between them. The question was duly referred to a Judge sitting alone to decide the proportions in which the persons interested were entitled to share, and that Judge made a decision in pursuance of such reference, whereby he awarded to the Rajah Rs.84, and to the other claimants, of whom there are a great number, the rest of the compensation money. The Rajah did not appeal from this
decision, as he had a right to do, but he brings the present suit for the purpose of in effect setting it aside. In his plaint he characterises his suit as—"A suit to recover Rs.13,000, in deposit in the collectorate of this district, on account of compensation for fifty-eight bighas five cottas," and he contends that he is entitled to a far larger amount than that which has been awarded to him. In other words, he brings the suit for the purpose of determining the very question which had been determined according to special statutory process by a Judge from whose decision he did not appeal.

It has been very fairly admitted by Mr. Doyne that, unless he can avail himself of sect. 40, the proceedings which have been taken are conclusive as to the amount and apportionment of the compensation. Sect. 40 is in these terms: "Payment of the compensation shall be made by the Collector, according to the award, to the persons named therein, or, in the case of an appeal under sect. 39, according to the decision on such appeal; provided"—and this is the part of the section on which he relies—"that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under this Act to pay the same to the person lawfully entitled thereto." He contends that, under that proviso, the Rajah is entitled to bring this suit. It appears to their Lordships that the proviso has no such effect. Such a proviso, which appears to have been but a repetition of a provision in a previous Act in pari materia, is necessary in this, as in almost all Acts of a similar character. It is necessary for the Government, or the persons or company entitled to take property compulsorily, to deal with those who are in possession or ostensibly the owners; but it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance: and therefore a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money.

Their Lordships are of opinion that the Courts in India, who both concur on this point, have rightly held that this proviso applies only to persons whose rights have not been adjudicated
upon in pursuance of the sections 38 and 39, and that it has not
the effect, which it would certainly not be reasonable to attribute
to it, of permitting a person whose claim has been adjudicated
upon in the manner pointed out by the Act, to have that claim
reopened and again heard in another suit. Their Lordships are
of opinion that the provisions in this Act for the settling of com-
pensation are intended to be final; and that the amount and dis-
tribution of the compensation having been settled in this case by
a competent Court, and the decision not having been appealed
against, the settlement is final, and the present suit cannot be
maintained. They will, therefore, humbly advise Her Majesty
that this judgment be affirmed, and the appeal dismissed with
costs.

Solicitors for the Appellant: Lambert, Petch, & Shakespear.
Solicitors for the Respondents: Barrow & Rogers.

DOOLI CHAND . . . . . . . DEFENDANT; J. C.

AND

RAM KISHEN SINGH AND OTHERS . . . PLAINTIFFS. 1881

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Involuntary Payment—Money paid to prevent a compulsory Sale.

Where the purchaser of a mouzah paid money into Court to prevent the
sale thereof in execution of a decree which had already been satisfied:—

Held, that such payment was involuntary, and that an action lies against
the decree holder to recover back the money, on the ground that it was in-
equitable that the decree holder, whose claim had been previously satisfied,
should retain it.

APPEAL from a decree of the High Court (July 20, 1878)
confirming a decree of the Judge of Patna (July 29, 1876).
The Respondents sued to obtain a refund of a sum of Rs.78,393
with interest, from the Appellant, which they had paid to him to

* Present:—Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P.
Collier, and Sir Richard Couch.

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prevent the sale in execution of a mouzah called Korina, in which they were interested as purchasers.

The facts of the case are stated in the judgment of their Lordships.

Leith, Q.C., and C. W. Arathoon, for the Appellant.

Cowie, Q.C., and Doyne, for the Respondents.

The judgment of their Lordships was delivered by Sir Montague E. Smith:

This is a suit brought by the Respondents, Ram Kishen and others, against Dooli Chand, the Appellant, to recover back a sum of Rs.78,393 which the Respondents had paid to the Appellant to prevent the sale of a mouzah called Korina, which had been attached and put up for sale in execution of a decree obtained by the Appellant against one Neogi. The suit claimed, in the alternative, that the amount of Rs.78,393 should be apportioned between Korina and another mouzah of the name of Nandan. The point, upon the facts found in the Courts below, is a short and plain one, but in order to make it intelligible, it is necessary to refer to the transactions which took place between the parties, though not at great length.

Ram Button Neogi, a zamindar, was the owner of several mehals, and amongst others of two mouzahs called Korina and Nandan. These mouzahs were mortgaged in the way which will be hereafter described. The first mortgage which appears is of the date of the 3rd of July, 1865, and is a mortgage of Korina made by Neogi to the Land Mortgage Bank of India to secure a lac of rupees. In January, 1867, Neogi borrowed from one Lhf Ali Khan a sum of Rs.10,000, and gave as security a mortgage bond on certain mouzahs, not including either Korina or Nandan. It is only necessary to refer to this mortgage bond for the purpose of explaining the next mortgage transaction, and also of explaining a reference which is made in the course of the proceedings to the debt due to Lhf Ali Khan. It appears that Lhf Ali Khan obtained a decree upon his bond for Rs.19,416. He did not, apparently, attach the properties included in his mortgage bond,
but he attached and was about to sell Nandan. In order to prevent the sale of Nandan, on the 8th of January, 1870, Neogi mortgaged to the Appellant, with several other mouzahs not material to be mentioned, the two mouzahs, Korina and Nandan, to secure Rs.38,000. The mortgage of Korina was a second mortgage, it being subject to the prior mortgage to the bank; that of Nandan was apparently a first mortgage. The next transaction is a mortgage by Neogi of Nandan and other mouzahs to the Respondents for Rs.5500. The bank brought a suit on their mortgage and on the 17th of April, 1871, they obtained a decree for the sale of Korina and other mouzahs to realise the debt due to them. On the 29th of July, 1872, Korina was attached by the bank, and also by another decree-holder creditor, one Chuttun Singh. On the 16th of December, 1872, mouzah Korina was sold under Chuttun Singh's decree, but subject to the bank's mortgage, to the Respondents, for Rs.115. Shortly after the sale the Respondents paid into Court Rs.58,719 to satisfy the mortgage and decree of the bank against Korina, and in the following October (1873), were put into possession of that mouzah. They, therefore, were the purchasers of Neogi's interest in Korina, which had been sold by Chuttun Singh, and paid off the prior mortgage to the bank, and the amount so paid is found by the Courts below to have exceeded the value of Korina.

Concurrently with these proceedings affecting Korina, others were going on with regard to Nandan. The Respondents, on the 29th of February, 1872, obtained a decree in a suit which they had brought on their mortgage of Nandan, and attached it and other mouzahs. On the 5th of August, 1872, the Appellant intervened in the execution proceedings in this suit. He gave notice of his mortgage, and required that it should be notified at the time of the sale; and it was so notified. The sale was made subject to that notification, and of course subject to the mortgage to the Appellant, upon which he at that time claimed that a sum of Rs.151,239 was due. It is plain what the effect of such a notification upon the sale must have been, and the biddings were only for the equity of redemption, which was of small value. The sale took place in August, 1872, and the purchaser was one Dindyal, the Appellant's brother, the price being Rs.11,710. A certificate
of sale and possession were obtained on the 11th of September, 1873. It has been found by both Courts that Dindyal purchased benami for the Appellant. The Appellant, therefore, having given notice of his mortgage, purchased the equity of redemption subject to his own debt, and thus became both owner of the equity of redemption and mortgagee. In that state of things it became material to inquire what was the value of Nandan. It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the Appellant's mortgage, and was sufficient to cover not only that amount but the Rs.18,800 due to Luft Ali Khan, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage debt was satisfied by the purchase of Nandan and the value of that estate. The Appellant, having thus obtained the full amount of his debt, could no longer avail himself of any other part of his security. The mortgage was only a security for the debt, and when it was satisfied there was an end of any right to resort to the further securities he held. What gives occasion to the present action are the circumstances which will now be stated.

On the 1st of July, 1872, the Appellant sued Neogi on his mortgage for principal and interest. The claim he then made was the same he had notified in the suit brought by the Respondents as mortgagees of Nandan, to which reference has been already made, namely, Rs.151,239. It appears that sum included penal interest, and the Courts reduced it to a sum of Rs.78,393. In June, 1873, he obtained a decree, and on the 7th of January, 1874, an order to attach Korina. At the time he obtained that order he had become the purchaser of Nandan, under the circumstances which have been stated; and his obtaining it after his mortgage debt had been thus virtually satisfied was clearly inequitable. Korina being attached, the Respondents intervened, as the purchasers of that mouzah, and as representing the first mortgagees of it, the bank, and filed objections to the attachment and sale. The Respondents in this way made the strongest protest that they could against the sale, but their objections did not prevail. The Judge of Patna disallowed them, and the High Court upon appeal affirmed the decision of the Judge, stating that the Petitioner must be left to his remedy, if any, in a regular suit. The result was
that the sale of Korina was ordered to take place; and to prevent that sale, and to protect the property which they had purchased, the Respondents paid into Court the sum of Rs.78,393 to satisfy the Appellant's decree. They at once gave notice in writing that they should seek a refunding of that money in due course of law, and the present suit was brought for that purpose.

It is only necessary to refer shortly to the judgments. Both the Courts have concurred in holding that the Plaintiff is entitled to recover. Certain facts are found clearly and succinctly by the Judge of the District Court. His findings are these: "I find, therefore, that the following facts are established: (1) that mouzahs Korina and Nandan are both made subject to a lien of Rs.78,393 by the mortgage of January, 1870"—that is, the Appellant's mortgage; "(2) that Plaintiffs have, as owners of mouzah Korina, paid off a lien of a date prior to 1870 on mouzah Korina"—that is, the bank's mortgage—exceeding in amount the estimated value of mouzah Korina as estimated by Defendant himself; (3) that the whole amount of the lien of Rs.78,393 therefore falls upon mouzah Nandan, if its value is equal to the amount of the lien; (4) that the value of mouzah Nandan is equal to the amount of such lien even if Rs.18,393 paid by the Defendant be deducted"—that is, the amount said to have been paid to Lutf Ali; that Plaintiffs, having paid this lien, are entitled to recover the amount so paid from the auction purchaser of mouzah Nandan; that Defendant No. 1 is the auction purchaser of mouzah Nandan." It has been shewn that at the time that this payment of Rs.78,393 was made by the Respondents to the Appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that in such a case it is inequitable that he should hold the money paid to him, under compulsion, by the Respondents. It is to be observed that the Appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case it is unnecessary to go into the question of marshalling the securities.

The arguments at the bar were not directed to shew that there is any equity upon which the Appellant could retain this money; but the objections taken to the action were that the payment was
voluntary, and that the remedy, if any, was in the execution proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouzah which the Respondents had purchased, and was made therefore under compulsion of law; that is, under force of these execution proceedings. In this country, if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the Defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary: see Valpy and Others v. Manley (1).

It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit; but none were pointed out by Mr. Arathoon which would afford a suitable remedy or which would preclude such an action as the present.

Their Lordships think the decree of the Judge of Patna is incorrect in declaring that the Plaintiffs are entitled to realize the decretal money by auction sale of mouzah Nandan; and that it ought to be amended by striking out that declaration. In the view they take of the case the decree should be a simple money decree. On the whole case, they agree with the Courts below, though not altogether on the same grounds, that the Plaintiffs are entitled to succeed in the action; and they will humbly advise Her Majesty, subject to the amendment above indicated, to affirm the decrees appealed from. The Appellant must pay the costs of the appeal.

Solicitors for Respondents: Barrow & Rogers.

(1) 1 C. B. 594.
MUTTA VADUGANADHA TEVAR, AND
OThERS, Son AND Daughters OF RANI DEFENDANTS;
KATTAMA NATCHIAR . . . . .
AND
DORASINGA TEVAR . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Mitakshara — Inheritance — Daughter — Impartibility — Madras
Regulation XXV. of 1862.

Under the Mitakshara law, as applied in the Carnatic, a daughter takes by
inheritance a limited estate in her father's property, and on her death his
heirs succeed.

Chotay Lall v. Chunno Lall (1) approved:—

Hold, on the evidence with regard to the zemindary in suit that it was
impartible.

Although in the Nuzvid Case (2) it was held that a zemindary created by
sunnud in 1803, in accordance with Regulation XXV. of 1802, was a
partible property; yet in this case the zemindar was reinstated by Procla-
mation in 1801 in his previously impartible zemindary, and the quality of
impartibility was not transmuted by the Regulation (which was framed
merely with a view to land revenue), and could not be and was not trans-
muted by the sunnud of 1803.

Hold, further, that a mode of acquisition which constitutes a property as
self-acquired in the hands of a member of an undivided family and thereby
subjects it to rules of devolution or disposition different from those appli-
cable to ancestral property, does not thereby destroy its character of impar-
tibility.

The Hunsapore Case (3) approved.

APPEAL from a decree of the High Court (Jan. 31, 1879),
affirming a decree of the District Court of Madura (Dec. 3, 1877).
The decrees appealed against declared the Respondent entitled
to the whole zemindary of Shivaungga, and the main question in
the appeal was whether the Respondent was so entitled by primogeniture as the eldest grandson (by a daughter) of the istimrar

* Present: — SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD
COUCH, and SIR ARTHUR HOBHOUSE.

zemindar in existence at the death of the last zemindar Rani Kattama Natchiar. The first Appellant also claimed the entire zemindary.

The circumstances of the case are sufficiently stated in the judgment of their Lordships and in the case reported in 9 Moore, Ind. App. Ca. 539.

The suit was brought by the Respondent on the 14th of July, 1877, to recover sole possession of the impartible zemindary of Shivagunga, together with mesne profits for the period of his unjust dispossessions, on the ground that he, the Plaintiff, on the death of Rani Kattama Natchiar, who, as daughter of Gouri Vallabha Tevar, the last zemindar and full proprietor, had possessed the zemindary for her life, and died on the 24th of May, 1877, was entitled to succeed thereto as eldest male heir of Gouri Vallabha Tevar, according to Hindu Law and the custom of primogeniture governing the succession, in preference to the Appellants, of whom the first named was the son, and the other three the daughters of Rani Kattama, but who ranked lower than the Respondent, as heirs of Gouri Vallabha Tevar.

The Appellants, daughters of the Rani, contended, inter alia, that as the zemindary of Shivagunga was of the nature of an impartible raj, it therefore vested absolutely in their mother, from whom, and not her father, the right of succession should be traced, and that if it were to be regarded as ordinary ancestral property, in such case, under the terms of the decree of Her Majesty in Council made in 1863, and also under the Hindu Law relating to the succession of daughters, it became the stridhanam of their mother, from whom it would on her death have descended to her daughters by law, but that they in her lifetime had conveyed to their brother, the first Appellant, all their reversionary interest in their mother's estate.

The first Appellant claimed the zemindary as heir and also as devisee of his mother, who, he contended, took an absolute estate therein, for four reasons, viz.: firstly, because at her father's death she was his only unmarried daughter; secondly, because, at the death of her father's last surviving widow, she (the Appellant's mother) was the only married daughter with issue; thirdly, because she was the only surviving daughter when possession was
given under the decree of Her Majesty in Council; and, fourthly, because the zemindary should be regarded as her self-acquisition, inasmuch as she had recovered it from third parties, usurpers, by defraying the costs of litigation out of her own and her husband's funds.

He, the first Appellant, also relied on the conveyance from his sisters referred to by them, and he further, and as a bar to the Plaintiff's suit, relied on the fact, alleged by him, that the Respondent had in the lifetime of an elder brother, Mutta Vaduga Tevar (who died before Rani Kattama), executed an instrument by which the Respondent renounced and conveyed to his brother and his sons all his interest in the zemindary, and that the sons of Mutta Vaduga had after Rani Kattama's death conveyed to him, the first Appellant, the interest so acquired by them.

The findings of the Judge of Madura were as follows:—

"1. That the zemindary is and had been admitted by Rani Kattama Natchiar, under whom he claimed, to be impartible, and that the succession to it is therefore governed by the law of primogeniture.

"2. That the right to the succession should be traced from the istimrar zemindar, i.e., from Gouri Vallabha, the grantee: see 9 Suth. W. R. 505.

"3. That Kattama Natchiar did not take the zemindar as full owner or by way of stridhanam on any of the grounds contended for by the Defendants, and therefore could not alienate or devise it."

The High Court (Morgan, C.J., Innes and Mutthusami Aiyar, J.J.) confirmed this judgment. Mr. Justice Innes was of opinion, first, that according to the Hindu law which governed this case, the zemindary of Shivagunga did not constitute the stridhanam of Kattama, and that "the conclusion was therefore that the estate on her demise did not devolve in her line, but in the line of the nearest heirs of her father, who in the present case are the surviving sons of his daughters." Secondly, that the custom of impartibility and primogeniture had not been made out, and that "what was said by the Judicial Committee as to the character of
the estate, was mere obiter dictum." But he added, that, in his opinion, if impartibility were made out, the rule of primogeniture should be followed.

Mr. Justice Mutthusami Aiyar held, first, that the zemindary was and had been admitted by the first Appellant to be impartible; second, that, as a necessary consequence, the succession to it was governed by the law of primogeniture; third, that, according to Hindu law, the estate taken by the daughter as her father's heir, is no higher than that taken by the widow, that it does not constitute her stridhanam, and that on her death, not her, but her father's heirs succeed, and that on none of the special grounds relied on by the Appellants had the character of the estate descended to Kattama been so altered as to become her own property and to descend to her heirs. It was stated that the Chief Justice, who did not deliver a separate judgment, concurred generally with Mr. Justice Mutthusami Aiyar.

Scooble, Q.C., and Mayne, for the Appellants, contended that by the Mitakshara law, as applied in the Carnatic, a daughter took an absolute estate in succession to her father, and that in her hands the ancestral property ranked as stridhanam, and descended accordingly. In the Mitakshara no express text is to be found which limits the daughter's estate. With regard to the case of Chotay Lall v. Churno Lall (1), that did not proceed upon the footing of any course of decisions recognised in Madras, in which Presidency at least there is no sufficient authority for controlling the text of the Mitakshara. Reference was made to Mitakshara, chap. II. sect. 1, par. 1; the Shivagunga Case (2); Strange's Hindu Law, vol. i. pp. 130, 137 [1830 ed.]

Assuming Kattama Natchiar to have taken absolutely, whether by inheritance or as having recovered the estate as self-acquired, the first Appellant as her son and heir and devisee and assignee of the rights (if any) of her three daughters (Appellants) is entitled to the entire zemindary. If, on the other hand, the title is to be traced from the istimrar zemindar as the last full owner, according to the rule of primogeniture the Respondent had not proved a custom or shewn a rule of Hindu law whereby grandsons,

through daughters, could claim on that footing. Hindu primogeniture is of and through males exclusively.

Upon the question of the impartibility of the zamindary, it was contended that the onus of proof had been cast upon the wrong party. The Respondent should have been required to prove the impartibility of this estate and its descent by the law of primogeniture to grandsons by daughters. In effect, the Appellants were put to proof of its impartibility, notwithstanding that an issue had been framed at the instance of the Respondent as to whether he was entitled to recover the whole or any part of the property in dispute. Upon the evidence the Respondent had not discharged that onus.

The Hunsapore Case (1) is distinguishable from this. There the estate had been confiscated, but there had not been, as here, a new grant. It was there decided that if you derive title under a grant you must shew something beyond the grant to raise any presumption of partibility or impartibility. The only effect of taking an istimmar sunnud is to settle the terms of the holding as between the taker and the Collector: Collector of Trichinopoly v. Lekkamani (2). The presumption of Hindu law is heavily in favour of partibility: Nusvid Case (3). The object of Madras Regulation of 1802 was to prevent the system of impartibility from being continued. This is the case of a person who has never had an impartible estate, and the terms of his tenure are to be gathered only from the sunnud and the generally prevailing law. There is no estoppel, no judicial decision, and no binding admission that impartibility exists. The admissions made in this case ceased with the purposes for which they were made, and must be taken in reference to the issues in the suit in which they were made. They only amount to reputation of a fact, and the value of reputation is nil without other evidence. They were a mistake, and can be accounted for on that hypothesis.

SIR BARNES PEACOCK:—Their Lordships do not think it necessary to call upon counsel for the Respondent except upon the issue of partibility or impartibility.

Leith, Q.C., and Cowie, Q.C. (Doyne with them) for the Respondent, relied upon the concurrent judgments of the Courts below as to the impartibility of the estate. Those judgments were in accordance with the evidence, the admissions of Rani Kattama Natchiar, and of the Appellants, as well as with previous judgments of the Privy Council. As to a new tenure having been created to which the incident of impartibility did not attach, the foundation of the title to the zemindary was not the sunnad of 1803, but the Proclamation of 1801. There are many considerations which show that Regulation XXV. of 1802 and the sunnad were not intended to do more than disable the Government from nominating a successor on the death of one of the holders. This Act had as one of its objects that the Government should not interfere. Its second object was financial, and was, that the amount of Government revenue should be fixed.

With regard to the terms of the proclamation. The term “zemindar” therein denotes proprietor, and is not used in the Bengal sense of taxgatherer. In some respects there is a close analogy in this case to that of the raj of Hunsapore (1), where a reference was made to the Shivagunga decision as bearing on the effect of the regrant in the Hunsapore case, which was held to be that the right of succession from the new grantee was to be governed by the law or custom which regulated its descent in the time of his ancestors. There the intention was not to create a new tenure, but a new tenant; consequently the old tenure, in the absence of an intention to the contrary, continued. Here also there was no intention to change the tenure but the tenant. The proceedings in 1801 and 1803, broke the old line of descent, and the only question is how far. The Proclamation shews clearly that this zemindar was, in fact, created a poligar of an impartible polliem, i.e., was in the position of the holder of an impartible raj. Reference was made to Periasami v. Periasami (2). Though this was self-acquired property in the grant, the new zemindar was in of the old estate. The evidence of admissions as to impartibility in this and former suits was then referred to, and in particular to that of Counsel in the case reported 9 Moore, Ind. Ap. Ca. 575.

Scoble, Q.C., replied, contending that the Proclamation of 1801 must not be taken as the title to the zemindary. All that the Government did thereby was to announce that they had selected a zemindar, the elder branch of the family being set aside. The Government abolished the old zemindars, and being in possession they had a favourable opportunity of carrying out their policy in regard to the proximate enactment of 1802—a policy which appears in the preamble of Regulation XXV, of that year. They contemplated introducing the permanent settlement into Shivagunga. The grantee was not the lineal heir of the last holder. He was to be the present zemindar, not a word being said about heirs, or future enjoyment by an heir. The Proclamation was addressed to the inhabitants of a disturbed district previously to the complete establishment of British authority therein, and contemplated the subsequent issue of a sunnud which was to form the root of his title. The Shivagunga zemindary was thus the creation of the British Government and the zemindar was put into possession upon their terms. He was in of the old zemindary in one sense in respect of the old lands, and was the person to pay revenue for the old lands. He was originally put in for a temporary purpose, and his title was not complete till the issue of the sunnud, which must be read with the Proclamation. With regard to the admissions relied upon on the other side, they did not amount to an estoppel, and were binding only for the purposes for which, and with reference to the circumstances in which they were made. See Evidence Act, 1872, sect. 115.

The judgment of their Lordships was delivered by

Sir Arthur Hobhouse:—

The appeal relates to the zemindary of Shivagunga, an estate situate in the polygar countries of the Carnatic, which for fifty years has been the subject of almost incessant litigation in India and before this Committee. The judgments delivered here will be found in 3 Moore, Ind. App. Ca. p. 278; 9 Moore, Ind. App. Ca. p. 539; 11 Moore, Ind. App. Ca. p. 50, and L. R. 2 Ind. App. p. 169. The only one which directly bears on the present questions is that which was delivered in the month of November, 1863, and is reported in 9 Moore.
The zemindary appears to have been created in or about the year 1730. At that time, Kurta Tevar, Rajah of Ramnad, having received valuable services from one of his family, Sasivarna Tevar, granted to him two-fifths of the Ramnad estate, calling the granted portion a distinct zemindary of Shivagunga. Sasivarna's position as zemindar must have been recognised by his sovereign the Nabob, who is stated to have established his widow in the zemindary after some disturbance of her possession. Sasivarna's lineal descendants became extinct in or shortly before the year 1801. It was in that year that the East India Company assumed the actual and direct sovereignty of the Carnatic, though for some years before they had undertaken to protect it, and had on that account received peishcush or tribute, and powers of management in case of war. On the failure of Sasivarna's line, certain ministers, who it seems had for some time before had the management and control of the zemindary, maintained their position there by force, and broke out into open rebellion. Upon this the Madras government issued a Proclamation, dated the 6th of July, 1801, by which they appointed one of the Tevar family, a collateral relative of Sasivarna, to be zemindar. On the 22nd of April, 1803, a sunnud was issued by the same Government, fixing the assessment of the zemindary in accordance with the permanent settlement effected by Madras Regulation XXV. of 1802. It will be necessary hereafter to refer more closely to the tenor of these documents. Their immediate effect was, that the grantee of the Government, who may conveniently be called the istimrar zemindar, was installed into the zemindary, which he appears to have held peaceably during his life.

In the year 1829 the istimrar zemindar died, and the succession to the zemindary was disputed between his immediate family and his collateral relations. He had no son, but left widows and daughters surviving him. His elder brother, however, one Oiya Tevar, who held another family zemindary, called Padamatoor, and who died in the year 1815, had sons who survived the istimrar zemindar. The eldest of these, representing the Padamatoor or elder branch, alleged that the family was undivided, and that he as the eldest nephew of the istimrar zemindar, was the heir to Shivagunga. The widows and daughters alleged that the
family was divided, and that the heir was the senior surviving
wife.

From this dispute sprang up a perfect jungle of lawsuits, into
which it would not now be profitable to enter. The way out of it
was found by the decision of this Committee in the year 1863 (1).
They held that the family was still undivided, but that the
zemindary was to be taken as self-acquired property in the hands
of the istimrar zemindar, and that the widows being at that time
dead, and also all the daughters except one named Kattama, the
zemindary devolved upon her. After this decision the elder
branch made one attempt to reopen the question, which was
finally defeated by this Committee in the year 1866 (2). From
that time the younger branch of the Tewar family have remained
in possession of the zemindary, without disturbance by the Pad-
matoor or elder branch.

In the year 1877 Kattama died, and then disputes among the
members of the younger branch came to a head. The state of the
family with respect to the succession at that time was as follows:—
Dorasinga Tewar, the Respondent, was the eldest surviving
grandson of the istimrar zemindar, by his daughter Vella, who
was the daughter of his second wife Bakoo. Mutta Vaduganadha,
the Appellant, was the grandson of the istimrar zemindar by his
daughter Kattama, who was the daughter of his third wife Vailoo.
The three other Appellants are the sisters of Mutta Vaduganadha.
These were all the grandchildren of the istimrar zemindar who
were living at the time of Kattama’s death. And with his great-
grandchildren we need not now concern ourselves.

The dispute arises in this way. The Respondent says that
Kattama’s interest in the zemindary endured no longer than her
life, and that on her death it devolved on the heirs of the istimrar
zemindar; that it is an impartible property, which can only be
enjoyed by one person at a time; and that he, being the eldest
surviving grandson, is that person. The children of Kattama say
that she took the zemindary as stridhan, and as a heritage trans-
missible to her own heirs, and then, waiving any question between
themselves, they agree that her son shall be preferred. If how-
ever that question is decided against them, then they say that the

zemindary is not an impartible property, and that at the least Mutta Vaduganadha is co-heir with his cousin Dorasinga.

Even in Kattama's lifetime the nature of her interest in the zemindary did not escape dispute, for a suit was instituted in the year 1869 by Dorasinga to obtain a declaratory decree affirming the same title which he asserts now. The Courts in Madras were unanimous in granting the decree, but on appeal this Committee reversed their action, not pronouncing any opinion on the title, but thinking that the case was not a proper one for a declaratory decree.

Upon Kattama's death Dorasinga instituted the present suit, and obtained a decree in his favour from the District Judge of Madura on the 3rd of December, 1877. The Appellants, being Defendants in that suit, appealed to the High Court of Madras, who on the 31st of January, 1879, affirmed the decree of the District Judge. From the decree of the High Court this appeal is brought.

Other issues were raised in the Courts below and in this appeal, but at the bar the Appellants' counsel practically abandoned all except those which raise the questions above stated. There is another Defendant to the suit, but he is no party to this appeal.

The first question, then, is whether Kattama, the daughter of the istimar zemindar, took the zemindary as her stridhan, and for an interest transmissible to her heirs. At the date of her father's death she was a maiden. She was afterwards married twice, and in the year 1850, when the surviving widow died, she had male issue. These circumstances were relied on as constituting her title to be her father's heir in the year 1863, and it is contended by the Appellants that the same circumstances constitute her a new stock, from whom, and not from her father, the title is now to be deduced.

They rely mainly on the much discussed passage in the Mitakshara (Cap. II., Sec. XI., verse 2), where its author, Vijnanesvara, adds to the text of Yajnavalkya by declaring that the character of stridhan attaches not only to the acquisitions by a woman which the text specifies as such, but also to property which she acquires by inheritance, or in fact by any other mode. It is not necessary now to state in any detail how impossible it is, whether with
regard to the authority of other commentators or to other parts of the Mitakshara itself, to construe this passage as conferring upon a woman taking by inheritance from a male a stridhan estate transmissible to her own heirs. The point is now completely covered by authority. In the case of Mussamat Thakoor Deyhee v. Bai Baluk Ram (1) such an interest was claimed on behalf of a widow in her husband’s immoveable property. In the case of Bhugwandeo Doobey v. Myna Beebee (2), such an interest was claimed on behalf of a widow in her husband’s moveable property. In the case of Chotay Lall v. Chunno Lall (3) such an interest was claimed on behalf of a daughter in her father’s property. All these cases were governed by the Mitakshara law. And in all it was held that the woman took only a restricted interest, and that on her death the property devolved on the line of the last male owner.

No attempt has been made to distinguish this case from that of Chotay Lall, except the suggestion that decisions upon the Mitakshara, as applicable to Benares, are not decisions upon the Mitakshara as applicable to the Carnatic. But if there be any ground for taking such a distinction it would be favourable to the restriction of Kattama’s interest in her father’s property. For there are two commentaries which are received as authority in the Carnatic, the Smriti Chandrika and the Daya-vibhaga by Madhvariya, neither of which follow the cited passage of the Mitakshara in assigning to a woman as her stridhan property inherited by her. Their Lordships think then that the Judges of the Courts below were quite right in holding that Kattama’s interest ceased with her life, and that on her death the root of title is to be sought not in herself but in her father.

That leads to the question whether the zemindary is a partible or an impartible estate. If impartible, the Respondent Dorasinga is entitled as sole heir of the istimrar zemindar. If partible, he and his cousin Mutta Vaduganadha are joint heirs.

It was much debated at the Bar whether or no the Appellants had formally bound themselves in this suit by agreeing to admit the impartible character of the estate. What they did agree to

was, "that all statements and admissions made in original suit No. 2 of 1869, are to be taken as made in this suit also," unless a certain notice to the contrary was given. The statements and admissions made in suit No. 2 of 1869 are to be found in the Record. They embrace a number of family events, such as births, deaths, and marriages, and an agreement "that the judgment in the Shivagunga Case, as reported in 9 Moo. Ind. Ap., should be admitted as to the facts set forth in that judgment."

The impartible nature of this zemindary was admitted by the parties to the litigation closed by the judgment of this Committee in 1863, and it is so stated in the judgment, though nothing then actually turned on the admission. But their Lordships do not think it necessary for the present purpose to criticise closely the language used in the judgment of 1863. For they think that the question of partibility is a mixed question of law and fact, and therefore does not fall within the terms of the agreement for admissions. Moreover the agreement in this suit was made simultaneously with the settlement of issues, and one of those issues, which oddly enough was proposed by the Respondent who now seeks to exclude it, and was objected to by the Appellant who now insists upon it, was this, "whether the Plaintiff is entitled to recover the whole or any part of the property in dispute."

But though the question must be decided upon its merits, it is impossible to disregard what has passed, whether in this suit or in others. For half a century this zemindary has been under the harrow of litigation; for many years between the elder and younger branch of the Padamattur Tevar family, and again for many years between separate scions of the younger branch. During this long period of discussion and examination, up to the settlement of issues in this suit, everybody has concurred, whether by statement, admission, or assumption, in ascribing to the zemindary an impartible character. Even in the pleadings in this suit partibility is not alleged, and, as already stated, an issue implying partibility was granted against the wish of the Appellants. Against all this family belief is only to be set an extremely ambiguous and evasive answer given by the istimmar zemindar in the year 1822 to some questions put to him by the Collector of the district. Being asked whether it is customary for the zemindar to divide the
estate between his children, what would be his motives, and what his authority for a division, he does not answer the first or third questions at all, and merely says that, "from motives of regard to the children, the zamindar divides the estate between them." Nothing can be built on such an answer as this. It is at the utmost a contention that the estate is alienable by the zamindar, and that he has a discretion to divide it; not that it is partible if not divided by him. Since the litigation began it would seem that no definite idea of contending that the zamindary was partible occurred to any one's mind till the parties found themselves face to face before the district Judge in this suit.

That the actual enjoyment of the property has been in accordance with the stream of family tradition is not disputed. It is explained away by reference to the state of the family, which is said to have presented no occasion for partition; but that is not the case with the elder branch, who were in possession for thirty-two years, during which time three descents occurred. There were coparceners in that branch who would have taken shares if the zamindary had been considered as partible; but in fact it was always taken entire by the eldest male representative. It is true that the elder branch were ultimately held to be in wrongful possession, and are now called usurpers. All the same, their dealing with the estate while they held it is evidence of the family traditions and of their practical operation.

Moreover it is certain that other zamindaries closely allied to this are impartible properties. Such is the case generally with the polyams in the polygar countries, as was laid down in the Naraguntty Case, reported in 9 Moore's Ind. Ap. Ca. 66. It is agreed that the zamindary of Ramnad, from which Shivagunga is derived, is impartible, and it has been held (1) that the zamindary of Padamattur, which is derived by grant from Shivagunga, is also impartible.

It was not proved that the grant of Padamattur was made by the istimrar zamindar himself, as he on one occasion alleged, and there is reason to suppose that the grant was of earlier date; but, taking it to be so, the evidence that we have of the nature of the Shivagunga zamindary is this: that it belongs to a class of posses-

sions which are in the nature of chieftainships, and impartible; that the great zamindary of Ramnad out of which it was taken is impartible; that the small zamindary of Padamattur which was taken out of it is impartible; that, according to family tradition and belief, it is impartible; and that from its first creation until now it has passed from hand to hand as if it were impartible.

This evidence is irresistible, unless it can be avoided by shewing some dealing with the zamindary which has transmuted its ancient qualities. The Appellant endeavours to find such a dealing in the transactions of 1801 and 1803, which have been above referred to; and he relies upon the case of the Nuzvid zamindary (1), in which this Committee, differing from the Courts below, held that a zamindary created by sunnud in accordance with Regulation XXV. of 1802 was a partible property.

The estate constituting the Nuzvid zamindary was formerly part of an old military jagheer in the nature of a raj, and impartible. In the year 1783 the jagheer was confiscated for rebellion, and the next year it was restored on its old footing to the eldest son of the rebel zamindar. In the year 1793 it was resumed by Government for default in payment of revenue; and in that state was it when the permanent settlement of 1802 was enacted. It was never again granted out entire or on its old tenure as a jagheer, but in the year 1803 two new zamindaries were made out of it. The larger of these new zamindaries, called Nidadavolu, was granted to the eldest son of the rebel zamindar, and Nuzvid, the smaller, was granted to his younger brother. Under these circumstances, it was held that the Nuzvid zamindary could not be identified with any estate or title existing prior to the sunnud of 1802, which put it on the same footing with ordinary estates.

But in this case the istimrar zamindar was put in his place by the Proclamation of 1801, and it is to the terms of that document that we must look in order to find the quality of his estate. The Madras Government were no doubt in a position to grant out the estate on other than the old terms. The question is, whether they did so.

The Proclamation sets out by stating the creation of the zamindary and the failure of Sasivarna's line. It asserts that the

zemindary "has positively escheated to the State from which it derives its protection." It asserts that Sasivarna was appointed by the Nabob, and advanced by him "to the rank of a feudal lord;" that he owed allegiance to the Nabob; and that the East India Company had then become the lawful sovereign of the polygar countries. It then goes on to describe the disturbed state of the district, imputing it to the misconduct of the ministers of a female zemindar, which it thus describes:—"On the return of that Princess they became her principal ministers in the administration of the affairs of Shivagunga, and availing themselves of the disqualifications attendant on a female government, established in their own hands an entire despotism and tyranny, as well over the Princess's lineal descendants of the house of Nalkudi, as over the collateral branches of that family, and over the inhabitants of Shivagunga." Nalkudi appears to be a polyam appertaining from ancient times to Sasivarna's branch of the Tevar family.

The fifth paragraph of the Proclamation runs as follows:—

"Wherefore, the Right Honourable Edward Lord Clive, Governor in Council of Fort Saint George and all its dependencies, having judged it expedient at this time to exercise the legitimate powers acquired to the Honourable Company in settling the affairs of the zemindary of Shivagunga upon a permanent foundation, has been pleased to nominate, to appoint, and constitute Padamattar Udaya Tevar, collaterally descended from the progenitors of Sasivarna Tevar the first zemindar of Shivagunga, to be the present zemindar of Shivagunga; and the said Governor in Council hereby requires and commands all the inhabitants of Shivagunga to respect the rights and authority of the said Padamattar Udaya Tevar as the true and lawful zemindar of Shivagunga."

The next paragraph weighs the claim of another collateral relation of Sasivarna, whom it alleges to be in rebellion against the Company, and of whom it "publicly and formally proclaims the disqualification now and in all times to come to the possession of the zemindary of Shivagunga."

The rest of the Proclamation is addressed to the inhabitants of Shivagunga, whom it warns of the approach of a large army under Colonel Agnew, and exhorts "while the time yet allows them, to
retract their error," and "to acknowledge their allegiance to the lawful zemindar of Shivagunga."

The accuracy of some of the remarks in this Proclamation is open to question; but the object of examining it is to get at the intention of the Madras Government, which depends upon the impressions they had, and not upon the accuracy of those impressions. It is impossible to doubt what that intention was. From the beginning to the end the zemindary is referred to, not in its proprietary and private, but in its political and public aspect. Sasivarna is a feudal lord. He owes allegiance to the State. The troubles are due to the weakness of a female government. The late zemindarni is a Princess. Her agents are Ministers. The Governor in Council intends to settle the affairs of the zemindary on a permanent foundation. For that purpose he nominates one to the post of zemindar, another is rejected for all time to come. The inhabitants are called on to respect the rights and authority of the appointed zemindar, and to acknowledge their allegiance to him.

Everything then points to the installation of the istimar zemindar not merely as proprietor but as ruler of the district. The policy of the Government clearly was to appoint a ruler whom the rebellious inhabitants would obey. And we are told by Mr. Hughes, who was attached to Colonel Agnew's force, that the appointment completely answered its purpose.

The istimar zemindar, Mr. Hughes says, was installed in state in Colonel Agnew's camp, when a hundred head inhabitants, including his elder brother Oiya Tevar, held up their hands in homage to him. And he adds that it had the effect of restoring peace and order almost immediately. The whole population turned to the zemindar, and entirely abandoned the rebellious ministers, so a most arduous service was quickly brought to a conclusion. This installation was effected in August, 1801, the month after the Proclamation.

Now the istimar zemindar having thus been placed in the old position of dignity and authority which his predecessors occupied, it is difficult to see how the Madras Government could, by any executive act, alter that position. Whether they had exercised an act of paramount power on the footing of reconquest after
rebellion, or whether they were merely supplying a vacancy caused by escheat, they had in July, or at latest in August, 1801, perfected the act of appointment, and they could not undo it. And whether they could or not, there is no evidence that they ever wished to undo it.

It is suggested, indeed, that as early as the year 1795 the directors of the East India Company commended to the Madras Government the principles of land settlement introduced into Bengal by Lord Cornwallis, and that one ingredient in that policy was the partibility of estates, as is shown by Regulation XI. of 1793. The answer is, that the policy of the permanent settlement was applied to Shivagunga as well as to other estates; but that if there were any general intention of introducing the principle of partibility, it was certainly not followed in the present instance. Here the policy of the Government required the appointment of a ruler with authority in his hands, and that was accordingly done.

Moreover though the quality of the estate might doubtless be altered by a law, it was not within the scope of Regulation XXV. of 1802 to effect any such alteration. It was framed with a view to the land revenue, and not otherwise to infringe on or limit the rights of anybody. And in Regulation IV. of 1822 there is a declaration to this effect.

Again, it is said that we must take the Proclamation of 1801, the Regulation of 1802, and the sunnud of 1803, as together constituting one transaction. Reading then the whole together, the Proclamation only designates the individual zemindar, while the Regulation and the sunnud indicate the policy of the Government and the quality of his estate.

If this question was untouched by authority it would be sufficient to answer this argument by reference to what has already been said on the intention and effect of the Proclamation. But on this part of the case there is an authority very closely in point (1). The Hunsapore zemindary, situate in Behar, was an ancient partible estate in the nature of a raj. In the year 1767 it was confiscated upon the rebellion of its owner. From that time till the year 1790, it was let out to farm by the Government. In the year 1790, when the decennial settlement was in contempla-

tion, or in course of being made, Lord Cornwallis granted the property to a younger branch of the family which had been dispossessed twenty-three years previously. It seems that no sunnud was issued, and though the decennial settlement, shortly afterwards effected under the Regulations of 1793, proceeds on the footing of certain rights and obligations subsisting between the zemindar and dependent talookdars and ryots, he does not appear to have been appointed a ruler or chieftain as was the case in Shivagunga. He did not receive the title of rajah till the year 1837, when the title of maharajah was conferred upon him. Under those circumstances this Committee held that as there was nothing to shew that the quality of the estate was altered by the grant of 1790, it must be taken to possess its old quality of impartibility, and that the Regulations of 1793 could not be imported so as to control the grant of 1790, or to indicate the intentions of Government in making that grant.

The Hunsapore case is also an authority for holding that a mode of acquisition which constitutes a property as self-acquired in the hands of a member of an undivided family, and thereby subjects it to rules of devolution or disposition different from those applicable to ancestral property, does not thereby destroy its character of impartibility.

The result is that their Lordships agree in the views taken by the Civil Court of Madura and by the High Court; that the appeal fails, and should be dismissed; and that their Lordships will humbly report to Her Majesty accordingly. The Appellants must pay the costs of the appeal.

Solicitors for the Appellants: Gregory & Co.
Solicitors for the Respondent: Lawford, Waterhouse, & Lawford.
PRINCE SULEMAN KADR . . . . . DEFENDANT.  
AND 
DARAB ALI KHAN . . . . . . . . . PLAINTIFF.  

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF LUCKNOW.


The testatrix directed: "I direct S. under this will to pay every month Rs.644. 1a. 7p. (being one-third of Rs.1933. 5a. 4p., my monthly pay allowed by Government for Government promissory notes which are deposited) to my dependents and personal servants as detailed below; and they will give their receipts for the same. . . . Be it known that the expenses of imambars, &c., will be continued for ever, and also the pay of G. and A. will be defrayed for ever, i.e., generation after generation. The rest of the servants will be paid for life only":—

Held, that these words constitute a bequest, and are not merely the expression of a wish or direction, and also that payment thereof is not limited to the specific fund mentioned.

The title of the testatrix to the Government promissory notes being under a gift subject to a condition that she was to have the interest only for life, and that after her death there was to be a trust in perpetuity for all her heirs for all time; quere, whether under Mohomedan law such gift was not in its legal effect a gift to her absolutely, the condition being void.

APPEAL from a decree of the Court of the Commissioner of Lucknow (June 20, 1876) reviewing a former decree of the same Court (Dec. 3, 1875), and affirming a decree of the Court of the Civil Judge of Lucknow (April 13, 1875), which decreed the Respondent's suit with costs.

The Respondent claimed as a legatee under the will of Nawab Mulka Ahud (widow of the late King of Oudh) to enforce against the Appellant, her son and executor of her will, the payment of Rs.3700, on account of an annuity of Rs.100 per mensum, said to have been bequeathed to him thereby, and which had been unpaid from the 15th of December, 1871, to the 15th of December, 1874. The material passages of the will of Nawab Mulka Ahud are set out in their Lordships' judgment.

With regard to the Government promissory notes specially referred to in the will, the title of the testatrix arose in this way. On the 25th of September, 1842, the Governor-General, anxious to accede to the wishes of the King of Oudh, notified to the British Resident at Lucknow that he was "prepared to authorize the issue of Government notes in the names of the parties for whose benefit His Majesty intends the interest to be appropriated; these notes to be kept in the British Treasury, so that the principal sums cannot at any time be squandered; and the interest will be paid monthly to the parties, as is now the case in regard to the notes issued in favour of His Majesty's mother and two of his Begums."

In further pursuance of the King of Oudh's directions, and in order that his object might be effected "in securing monthly pensions to the individuals in question, or their heirs, both during his own life and after his demise," the Government notes were enfaced as follows:

"This note is not negotiable, and is to remain in deposit with the Resident at Lucknow. The interest accruing on it is to be paid to (the name of the party) during her lifetime, and after her decease to her heirs."

The Government note issued in the name of Nawab Mulka Ahud was for Rs.480,000, which, at 5 per cent. interest, was sufficient to yield the said monthly pension of Rs.2000. In 1854 it was exchanged for two notes of Rs.480,000 and Rs.100,000 at 4 per cent. interest, which together yielded interest to the amount of Rs.1983. 5a. 4p. per mensem.

The decree appealed from was in favour of the Respondent's claim. The present case (which was one of ten similar cases) was accepted as a test case, the final decree therein being passed in accordance with the decree of the Judicial Commissioner which had been made in another of the cases.

Graham, Q.C., and Cowell, for the Appellant, submitted that by virtue of the transaction between the King of Oudh and the British Government, the testatrix had no power of disposition over the corpus of the fund represented by the notes, nor over the monthly pension which would be payable after her death out of the interest thereon. On the contrary, the notes were held by the
Government in trust, so far as the testatrix was concerned, for her life only, and after her death the Appellant derived title thereto from the king and not from the testatrix. The words in the will relied upon as giving legacies, did not amount to a gift or the mention of a trust; they were precatory and not imperative, and related to a fund over which the testatrix had no disposing power. See Jarmán on Wills, vol. i. [ed. 1881], p. 404; Shepheard v. Beetham (1); In re Hutchinson & Tenant (2). Moreover, the bequest, if any, was specific, and failed when the specific subject was found not to belong to the estate of the testator: Morley v. Bird (3); Hosking v. Nicholls (4); Bothamley v. Sherson (5).

C. W. Arathoon, for the Respondent, was not called on.

The judgment of their Lordships was delivered by

Sir Robert P. Collier:—

This is one of many actions brought by servants and retainers of one of the widows of the late King of Oudh, asserting their right to certain legacies under her will. The Defendant is her only son, and the principal devisee under that will. This may be considered a test action, inasmuch as it is understood that upon its decision the other actions pending, to the number of ten, will depend.

In order to make the case intelligible, a short statement of the facts is necessary. It appears that the late King of Oudh desired to have a Government guarantee for the payment of annuities to many persons, and for that purpose he deposited a large sum of money with the Government, obtaining from the Government promissory notes in favour of these persons. It becomes, however, necessary in this case only to refer to the principal of those persons, namely, his Queen. He obtained from the Government a promissory note for four lacs and Rs.80,000 for the purpose of securing her an annuity of Rs.2000 a month. Subsequently, upon the rate of interest being lowered from 5 per cent to 4 per

(1) 6 Ch. D. 597.  
(2) 8 Ch. D. 540.  
(3) 3 Ves. 628.  
(4) 1 Y. & C. 478.  
(5) Law Rep. 20 Eq. 304.
cent., he deposited the further sum of a lac of rupees, and received a note corresponding in value. He died, and subsequently, the Queen died, having made a will on the 24th of August, 1866, which is in these terms:—“Whereas the life of mankind is altogether uncertain,”—and so on,—“after my death my son, Mirza Suleman Kadr Sahah Alam Bahadur, will be my sole heir and proprietor of all my assets, including movable and immovable property, groves, company’s promissory notes, &c., without there being a participator thereof, and all my relations and Government officers are to recognise him as my son and heir after my death. No one but Sahah Aham Bahadur has any right to be my heir after my death.” Then comes the important bequest—now in question:—“I desire Mirza Suleman Kadr Sahah Alam Bahadur, under this will, to pay every month Rs.644. 1a. 7p. (being one-third of Rs.1933. 5a. 4p., my monthly pay allowed by Government for Government promissory notes which are deposited) to my dependents and personal servants as detailed below; and they will give their receipts for the same. It will also be the duty of Mirza Suleman Kadr Sahah Alam Bahadur to defray the expenses of the inambara, of mourning assemblies, of illumination of inambara during the Moharram, and of monthly assemblies. Sahah Alam Bahadur and all Government officers are to hold this my last will to be of sufficient force for ever, and to carry out its provisions without any alterations. They will not, in the least, contravene the provisions of this will. Sahah Alam Bahadur will treat all the dependents and servants with such kindness and affability as will secure him fame and good name, and give satisfaction to the soul of his deceased father, King Amjad Ali Sahah. I have, therefore, executed this will,”—and so on. “Be it known that the expenses of inambara, &c., will be continued for ever, and also the pay of Guman Khanam and Mir Amjad will be defrayed for ever, i.e., generation after generation. The rest of the servants will be paid for life only.” At the end of the will there is a detail of expenses, and first we have:—“Expenses of inambara, assemblies, Koran readers, &c., to be continued for ever under the management of Dorab Ali Khan, Rs.214. 7a. 1p.” Then there is:—“Guman Khanam Sahaba, my sister, to be paid” Rs.20 per month; then comes the present Plaintiff, who was the
principal eunuch, **Mahomed Darab Ali Khan**, Rs.100, and then come the rest of the servants.

The case has been before three Courts. The first and the last Court, that being the Court of the Judicial Commissioner, have held that the legacy sued for was payable out of the whole estate of the deceased Queen, including the Government promissory notes. The second Court held that she had only a life interest in the promissory notes, and therefore it was not payable out of that fund; but, nevertheless, that it was payable out of her general estate.

This appeal has been preferred by her son **Mirza**. The main grounds which have been contended for are, first, that there is no absolute bequest, but a mere expression of a wish that **Mirza** shall pay the legacies; secondly, that, if there is a specific bequest of the legacies, it is a bequest of legacies to be paid out of a certain specified fund, and no other, viz., Rs.1933, which was the actual amount which the lady received from her Government promissory notes; that the lady had only a life interest in that fund, and therefore could not exercise any testamentary power over it. It was contended further that the legacies were only to be paid during the continuance of the services of the servants, but that point has been abandoned.

With respect to the first question their Lordships have no doubt that the words, “I desire **Mirza** to pay, every month, my dependents and personal servants,” coupled with the statement at the end, “Be it known that the expenses of imambars, &c., will be continued for ever,” and “the pay of Gumani Khanam and **Mir Amjad** will be defrayed for ever, i.e., generation after generation; the rest of the servants will be paid for life only,” constitute a bequest, and not merely the expression of a wish or a direction.

The next question is whether these legacies are to be paid solely out of this fund of Rs.1933, the income of the Government promissory notes. If the paragraph which has been read had stood alone, viz.: “I desire Rs.644 (being a third of Rs.1933) to be paid to my dependents and personal servants,” there might have been a question whether it was not a legacy to be paid only out of a specific fund; but when their Lordships proceed further, and find that the Queen desires that the expenses of the imambara
shall be paid, without specifying out of what fund—and indeed it is but natural to suppose that for a purpose of that sort she would be disposed to appropriate her general estate—and when it is found that the sum of no less than Rs.214. 7a. 1p. is part of this Rs.644 which has been mentioned as being a third of the Rs.1933, it appears to their Lordships that, taking these portions of the will together, the bequest of the Rs.644. 7a. 1p. cannot be treated as appropriated entirely, as far as payment is concerned, to that particular sum of Rs.1933. The mention of its being a third of Rs.1933 appears to their Lordships on the whole to amount to no more than a statement of her belief that that was the proportion which all the sums mentioned in the schedule bore to her annuity from the Government notes, but did not amount to a specified limitation of the payment from that sum.

This being so, and the rest of the estate being admittedly sufficient to pay all these legacies, the case is disposed of in favour of the Plaintiff. At the same time, their Lordships think it right to guard themselves against it being supposed that they assent to the proposition that, even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Mahomedan law, in its legal effect a gift to her absolutely, the condition being void. However, without determining a point which is not necessary for the decision of the case, their Lordships think it enough to say that, for the reasons which they have given, they will humbly advise Her Majesty that this judgment should be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellant: Watkins & Lattee.
MUNGUL PERSHAD DICHIT AND ANOTHER APPELLANTS;

AND

GRIJA KANT LAHIRI CHOWDHRY . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Limitation Act IX. of 1871—Act XIV. of 1859, sect. 20—Application for Execution—Effect of striking off a Case in the Execution Department.

As regards suits instituted before the 1st of April, 1873, all applications in them are excluded from the operation of Act IX. of 1871.

An application for execution of a decree is an application in the suit in which the decree was obtained.

Such application is not barred by sect. 20 of Act XIV. of 1859, if made within three years from the date of a proceeding within the meaning of that section.

Assuming that a decree is barred at the date of some order made for its execution:

Held, that such order, though erroneously made, is nevertheless valid, unless reversed upon appeal.

Where a sale of attached property is stayed on the application of the judgment debtor on condition that the attachment should remain in force, held, that the subsequent striking off of the case from the Judge's file does not affect the rights of the decree holders.

APPEAL from a decree of the High Court (Jan. 6, 1879), dismissing an appeal from an order of the Second Subordinate Judge of Mymensing (May 9, 1878), whereby the Appellants' application for execution of a decree made in suit No. 26 of 1851 was rejected and the proceedings relating thereto quashed.

The principal question decided in this appeal was whether the Appellants' rights as decree-holders to proceed in execution of the decree were barred by limitation.

The Appellants in the first suit sought, on the 22nd of September, 1877, to recover Rs.40,873, as the growth of a decree for Rs.9858, obtained on the 8th of July, 1851, by their father against the Respondent's father upon a bond of the year 1848.

The intermediate proceedings in the suit, between the 8th of

* Present:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR ARTHUR HORHOUSE.
July, 1851, and the 22nd of September, 1877, are set out in their Lordships' judgment.

The Respondent contended that the Appellants, having never taken any bona fide proceedings from the beginning, or from period to period of each formal application, the execution of the decree was barred by Act XIV. of 1859, and Act IX. of 1871.

On the 6th of May, 1878, the Subordinate Judge held the execution asked for to be barred by limitation.

First, because the present application had been made when more than three years had elapsed from the service of notice on this Respondent on the 10th of September, 1874, and the applicants were not relieved from the bar, either by the acknowledgment of debt made on the 25th of January, 1875, the 20th section of Act IX. of 1871 not being applicable, or by the fact of their having applied on the 8th of October, 1874, for the attachment of further properties, inasmuch as that application was not made in accordance with the Code of Civil Procedure.

And, secondly, that when the application was made on the 5th of September, 1874, the right to execute was already finally barred and could not be revived, as had been decided in Bissesshur Mullick v. Maharajah Mahatab Chunder (1).

The judgment of the High Court (Morris and Prinsep, JJ.) was as follows:—

"Several questions have been raised arising out of proceedings taken between the last and the next preceding application for execution—that is, between the 5th of September, 1874, and the 22nd of September, 1877. But the determination of these is unnecessary, if, as been pointed out, the decree which it is sought to execute was dead on the 5th of September, 1874, by reason of the previous application having been made on the 26th of July, 1871. It is, however, pointed out, that the Respondent, debtor, made an acknowledgment of the judgment debt on the 30th of November, 1871, when he asked for two months' postponement of the sale in execution; and a contention is raised that this is such an acknowledgment in writing of the debt as is contemplated in sect. 20, Act IX. of 1871; and that, consequently, a new period of limitation runs from the date on which it is signed. The

application for execution, made on the 5th of September, 1874, brings this case under the provisions of Act IX. of 1871 (see sect. 4 of that Act). This being so, the acknowledgment, in writing, of the judgment debt, dated the 30th of November, 1871, is not sufficient to save limitation. A consideration of the terms of Act IX. of 1871, with the light thrown upon them by Act XIV. of 1859, which precedes it, and by Act XV. of 1877, which succeeds it, leads to the conclusion that the debt referred to in sect. 20, Act IX. of 1871, is not a judgment debt, but, as explained in the judgment of a Division Bench of this Court in Kally Prosunno Hazra v. Heera Lal Mundul (1), ‘a liability to pay money for which a suit can be brought.’

"An objection is taken, that the Court cannot look behind the application of the 5th of September, 1874, as that was a bona fide application, made as provided for in Article 167 of Schedule 2, Act IX. of 1871, and was accepted and acted upon by the Court. But this objection is disposed of by the Full Bench ruling in Bisessur Mullick v. Maharajah Mahatab Chunder Bahadoor (2). A decree having been once dead, no proceeding by means of an application out of time could revive it."

Graham, Q.C., and Woodroffe, for the Appellants, contended that the decree of 1851 was still in force. Notice and process had been issued in pursuance of the application of the 5th of September, 1874, and the Respondent had obtained a stay of sale of property admittedly then under attachment, on his undertaking to pay the decreed amount. Even if the Court could look behind the application of the 5th of September, 1874, that proceeding was in substance a mere continuation of the proceedings in execution. It was not an application within the meaning of Article 167 of Schedule 2, Act IX. of 1871. As to "proceeding," see Dheeraj Mahatab Chund v. Brikram Singh (3). The same argument applies to the proceeding of the Appellants, dated the 16th of September, 1877, and bearing an order of the 22nd of that month. It was in reality an application to continue the proceedings in execution previously commenced. In both cases it fell within the 4th

clause of the 3rd column of the Schedule 2, Art. 167, Act IX: of 1871. As to the acknowledgments of liability in respect of his judgment debt made by the Respondent by his petition in writing dated the 30th of November, 1871, signed by his agent duly authorized in that b-half, and again on the 25th of January, 1875, see sect. 4, of Act XIV., of 1859, and sect. 20 of Act IX. of 1871. Reference was made to Crowdie v. Kullar Chowdhry (1); Jamnadas v. Lalitaram (2); Digumbarsee Debia v. Sharodapershad Roy (3); Prosunno Coomar Roy Chowdhry v. Khashe Kant Bhuttacharjee (4); Joteeram Doss v. Shaikh Huruf (5); Chunder Kant Mitter v. Ramnarain Dey Sircar (6). See also Hurro Chunder Roy Chowdhry v. Shoorodhoonee Debia (7). As regards the meaning and effect of striking a case off in execution, see Chummun Lall Chowdhry v. Domun Lall (8). Such a process does not necessitate a new application for execution. See Mussamut Zahoorun v. Tayler (9); Jhoboo Sahoo v. Ramchurn Roy (10). A new notice under sect. 216 of Act VIII. of 1859, gives a new starting point under schedule 2 of Act. IX. of 1871, art. 167, and the new period will run not from the date of the issue of such notice, but from the date upon which it is served. The notice relied upon in this case was ordered to be issued on the 10th of September, 1874, in pursuance of a petition of the 5th of that month. It was actually issued on the 14th, and served upon the Respondent on the 23rd. See Koonj Beharee Lal v. Girdharee Lal (11); Moshesh Chunder Sein v. Mussamut Tarines (12); Norendernarain Singh v. Dwarko Lal Mundur (13). As to bona fide proceeding, see Eshanchunder Bose v. Prannath Nag (14).

Doyne (Leith, Q.C., with him) for the Respondent, contended that when the last application for execution was made the decree

(1) 21 Suth. W. R. 309.
(2) 2 Ind. L. R. (Bombay) 294, 296.
(3) 3 Suth. W. R. (Misc.) 27.
(6) 8 Suth. W. R. 63.
(7) 9 Suth. W. R. 402.
(8) 9 Suth. W. R. 205.
(9) 10 Suth. W. R. 380.
(12) 10 Suth. W. R. (F. B.) 27; Ind. L. R. 3 Cal. 397.
(13) Law Rep. 5 Ind. App. 18.
of 1851 was barred by limitation. According to the old rule of
procedure which existed before Act XIV. of 1859 came into
force, no order for execution was granted after twelve years from
the date of decree had expired. See Jugganath Pershad Sircor v.
Radhanath Sircor (1). The Act was passed before the expiration
of twelve years from Plaintiff's decree. But it came into operation
one year and-a-half before the decree would have expired. There
was no legislative enactment as to the twelve years. Reg. 3 of 1793
furnished a rule by analogy. Under the old practice, to which the
twelve year rule applied, where execution had been sued out it
was treated as a fresh departure. On the 1st of January, 1862,
Act XIV. of 1859 came into force generally, though it was (but
not all of it) postponed. Under sect. 20, the decree-holder had
three years within which to make his application. See Delhi and
London Bank v. Orchard (2). Then followed his first application.
Reference was made to Act XIV. of 1859, sect. 214. On the 27th
of January, 1861, it was struck off, and then came, on the 9th of
February, 1863, an application to restore the case to realize about
Rs.600, i.e., the 50th part of the decretal amount. Such an applica-
tion was illusory. [Sir Barnes Peacock :—There is no finding that
it was illusory?] It is one amongst many circumstances. [Sir
Barnes Peacock :—Do you say it is to be presumed that he knew
of other property?] Yes he sued the Defendant as a zamindar, and
knew of the zemindary. See Mustumut Zahoorun v. Taylor (3). A
decree once dead cannot be revived. [Sir Barnes Peacock :—All
this should have been set up before 1874, when the attachment
was issued. See sect. 11 of Act XXIII. of 1861]. That section
did not repeal sect. 336 of Act VIII. of 1859. We had no mode
of procedure, for there was no order to appeal against. Act XXIII.
of 1861, sect. 11, does not apply to proceedings of this kind. [Sir
Barnes Peacock referred to sects. 336 and 363 of the Act of
1859.] Limitation applied at a much earlier period than 1874.
The Plaintiff was barred in 1863, and all his applications since
are void. See Order of the 31st of August, 1863, 19th of January,
1866, and 19th of August, 1868. There was a complete discon-
tinuance of proceedings. Reference was made to Act IX. of 1871,

(3) 10 Suth. W. R. 380.
sub-sect. A. [SIR BARNES PEACOCK referred to sect. 2. The former law is not repealed as regards suits instituted before 1873.] It cannot be that an old decree is not subject to any limitation.

The Appellants' counsel were not called on to reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

On the 22nd of September, 1877, Ishana Debi, the mother and guardian of the Appellants, presented a petition to the Subordinate Judge of Mymensing, in which she stated that her husband instituted a suit, No. 26 of 1851, against Shama Kant Lahari Chowdry, deceased, and obtained a decree against him on the 8th of July in that year; that, after application to execute the decree, her husband died, and that she, as guardian of the minors, being substituted in the place of her husband, revived the decree against the Defendant, Shama Kant Lahiri, and after his death against his son, who was the owner and possessor of the property left by him, and that the property of the judgment debtor was attached; that after the date of the sale had been fixed the sale was stayed on the application of the judgment debtor with the attachment continuing, and the execution case struck off on Monday, the 9th of February, 1875. She, therefore, prayed that the execution case might be restored, and that notice, being first served on Grija Kant Lahiri Chowdry, the son and heir of the said Shama Kant, the amount due under the decree might be realized, together with interest for the time of pendency and the costs of execution by sale of the property under attachment.

The facts stated in the petition were correct, and were reported to be so by the Amlah to whom the case was referred for report. The judgment debtor, having been served with notice, appeared, and contended, amongst other things, that the application was barred by limitation, that the decree was dated the 8th of July, 1851, and that no proceedings had been bona fide taken from that time to keep the decree alive within the period laid down by Act XIV. of 1859 and IX. of 1871, and he alleged that the decree holder, actuated by mala fides, not having realized the money for such a long time, simply with the desire of increasing
the interest, was not entitled, according to law and justice, to
effect it.

The dates of the several applications and proceedings to enforce,
or keep in force, the decree are, with one exception, correctly
stated in the judgment of the Subordinate Judge. They are as
follows:—

The date of the decree, 8th of July, 1861.
First petition of execution, 3rd of May, 1861.
Notice served, 25th of May, 1861.
Struck off for default of payment of costs of attachment, 27th
of June, 1861.
Second petition, 9th of February, 1863.
Struck off for default of payment of costs, 29th of August, 1863.
Third petition, 19th of December, 1864.
Debtor's property attached, 6th of June, 1866.
Struck off at request of parties, 19th of June, 1866.
Fourth petition against Grija Kant as heir of Shama Kant, now
deceased, 8th of May, 1868.
Notice, attachment, sale proclamation, &c., served, after which
debtor applied for two months' time, and execution struck off,
19th of August, 1868.
Fifth petition, 26th of July, 1871.
Notice served on the debtor, 7th of August, 1871.
Attachment caused, 31st of August, 1871.
Sale proclamation issued, 26th of September, 1871.
Debtor applied for two months' time, 30th of November, 1871.
Struck off for default of payment of sale fee, 31st of January,
1872.
Sixth petition, 5th of September, 1874.
Notice issued, 10th of September, 1874.
Notice served, 23rd of September, 1874.
Decreedar's petition to attach properties, 8th of October, 1874.
Sale proclamation issued, 27th of August, 1281.
Petition of judgment creditor to stop sale for seven days, and
sale stopped, 21st of January, 1875.

Debtor's petition to stop sale for three months, admitting the
debt, and kharijed, 25th of January, 1875.

Seventh, or present petition, 22nd of September, 1877.
Taking those as the correct dates, he held that the application of the 22nd of September, 1877, was barred by limitation, not being within three years from the date of the petition of the 5th of September, 1874, or from the date of the issuing of the notice on the 10th of September, 1874, under sect. 216 of the Code of Civil Procedure (Act VIII. of 1859). In arriving at that conclusion, he treated the case as falling within the Indian Limitation Act, 1871 (Act IX. of that year), and he held, amongst other things, that, under clause 5 in the 3rd column of Art. 167 of the second schedule, the date of the issuing, and not the date of the service of the notice, was the date referred to; and that under clause 4 of the 3rd column of the same article, the date of the 6th petition, and not the dates of the subsequent order or proceedings under it, was the date from which the period of limitation began to run. Both of those dates, it will be observed, were more than three years before the 22nd of September, 1877, the date of the petition under consideration.

It was urged on behalf of the petitioner before the Subordinate Judge that the period of limitation ought to be counted from the 8th of October, 1874, the date on which the execution creditor applied to attach other properties of the judgment debtor, but he held that that application was not in accordance with the Code of Civil Procedure, and that consequently, upon the authority of the case of Gouree Sunkur Trebedee v. Arman Ali Chowdhry (1), it was not an application within the meaning of the 4th clause of Article 167. In that case, however, which is not fully reported, it is to be inferred that no order was made upon the application. In the present case, the Subordinate Judge, upon the petition of the 8th of October, 1874, made an order on the same day that the attachment process do issue.

The effect of that order will be presently considered.

The Subordinate Judge also observed that the sixth application was barred by limitation on the 5th of September, 1874, as it was more than three years even from the 7th of August, 1871, the date on which the notice was actually served, and much more so from the date of the fifth application, which was made on the 26th of July, 1871. In support of that view he referred to the

(1) 21 Weekly Reporter, Civil Cases, p. 309.
case of Biseshur Mullick v. Maharajah Maharab Chundur (1). That case, however, is very different from the present. There was merely the service of a notice on the judgment debtor after the decree was barred; but no order was made. Here an order for attachment was made by the Subordinate Judge on the 8th of October, 1874, after notice served on the judgment debtor on the 23rd of September, 1874, to shew cause why the decree should not be executed against him. The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made.

The Courts below make no reference to the order, or to the attachment under it; and in the list of dates set out by the Subordinate Judge, the order, and the date of it, are wholly omitted. Admitting, for the sake of argument, but only for the sake of argument, that the decree was barred when the sixth application was made; when the notice was served on the 23rd of September, 1874; and when the petition of the 8th of October, 1874, was presented, and that the Subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment debtor, still his order, though erroneous, was valid, not having been reversed.

The applicants appealed to the High Court from the order of the Subordinate Judge rejecting the application now under consideration. The High Court considered it unnecessary to determine the questions arising out of the petition and order of the 8th of October, 1874, or of any of the proceedings between the 5th of September, 1874, and the 22nd of September, 1877, inasmuch as they considered and held that the decree was barred when the petition of the 5th of September, 1874, was presented; the Judges said, "A decree once dead no proceeding by means of an application out of time could revive it." But, as already observed, the Subordinate Judge had jurisdiction upon the petition of the 8th of October, 1874, to determine whether the decree was barred on the 8th of October, 1871, and he made an order that an

attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the Defendant, if it appears that the cause of action is barred by limitation. But if instead of dismissing the suit he decrees for the Plaintiff, his decree is valid, unless reversed upon appeal; and the Defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation. Suppose the order for attachment of the 8th of October, 1874, had been affirmed on appeal by the High Court, upon the ground that it was not barred by limitation, it is clear that the Judge of the original Court, when the application for a sale of the property attached under it was made, could not have rejected the application upon the ground that the decree was barred on the 5th of September, 1874, or on the 8th of October, 1874, when the order was made, upon the ground that the decree was dead when the petition upon which the order was made was presented. Yet the order when affirmed upon appeal could have no greater binding effect than the order itself so long as it remained unreversed. Here the judgment debtor, so far from appealing against the order for the attachment, acknowledged its validity, and presented the petition of the 25th of January, 1875, by which he prayed that the sale under the attachment might be stayed for three months, and the execution case struck off for the present, with the attachment remaining in force. Upon that petition being presented, the creditor agreed to have the execution stayed in accordance with the petition, "the attachment on the property attached continuing." It appears to their Lordships impossible to hold that, if immediately after the expiration of the three months the execution creditor had made the present application, it could, in the face of the order of the 8th of October, 1874, and the subsequent proceedings, have been reversed, upon the ground that the decree was dead on the 5th of September, 1874, or on the 8th of October, 1874. The present application, having been made within three years after the order of the 8th of October, 1874, is as valid as if it had been made immediately after the expiration of the three months.

Their Lordships think it right to observe that, irrespective of
the consideration that the order of the 8th of October, 1874, was binding, the decree was not barred on the 22nd of September, 1877, when the application was made. Both of the Courts below have treated the case as governed by the Indian Limitation Act of 1871, Act IX. of that year. But their Lordships are of opinion that the present case does not fall within it. The Act was to come into force on the 1st of July, 1871, but it was enacted by sect. 1 that nothing contained in sect. 2 or in part ii. should apply to suits instituted before the 1st of April, 1873. By sect. 2, and the first schedule referred to therein, Act XIV. of 1859 was with one exception, which does not affect this case, repealed. By sect. 4 of the Act, which is part of part ii., it was enacted that, subject to the provisions contained in sects. 5 to 26 inclusive, none of which appear to affect this case, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule shall be dismissed, although limitation has not been set up as a defence. One of the applications for which a period of limitation is prescribed by the second schedule is an application for the execution of a decree or order of a Civil Court not established by Royal Charter. It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained, and that as regards suits instituted before the 1st of April, 1873, all applications in them are excluded from the operation of the Act. Nothing therefore contained in sect. 2, or in sect. 4, or in schedule 2, of the Act extends to an application for the execution of a decree in a suit instituted before the 1st of April, 1873. There are many applications mentioned in schedule 2, and for which a period of limitation is prescribed thereby, which are clearly applications in a suit; such, for instance, as those described in numbers 166, 167, and 164. There are also many enactments which show that an application for execution of a decree is an application in the suit in which the decree was obtained. For example, by sect. 207, Act VIII. of 1859, the application may be made by the pleader in the suit. By sect. 212 the application is to contain “the
number of the suit.” By sect. 216, if the enforcement of the decree is applied for against an heir or representative of “an original party to the suit,” a certain notice is to be given. By sect. 15, Act XXIII. of 1861, the application is to be entered “in the register of the suit,” and so forth.

The reasons which may be presumed to have induced the Legislature not to apply the new rules of limitation to suits commenced before the 1st day of April, 1873, are of equal force with regard to application for the execution of decrees.

It cannot be disputed that in several cases, such as the case reported in 22 Weekly Reporter, Civil Rulings, 155, applications for the execution of decrees in suits instituted before the 1st of April, 1873, have been treated as falling within the provisions of schedule 2 of Act IX. of 1871, but the point was assumed rather than decided.

It was scarcely contended in the argument before their Lordships that the application of the 22nd of September, 1877, was barred, if the case is governed by sect. 20, Act XIV. of 1859. It was within three years from the date of the service of the notice on the 23rd of September, 1874, which was a proceeding within the meaning of the last-mentioned section; also within three years from the date of the petition of the 8th of October, 1874, and of the order of the same date made thereon.

In the face of the applications of the judgment debtor made from time to time to stay the sale of property which had been attached, it cannot be presumed that the decree was ever satisfied, nor was there any finding of either of the Courts below that the several proceedings were not bona fide for the purpose of enforcing the decree or of keeping it in force. It appears from the return of the Amlah of the 12th of November, 1877, that the proceedings under the petition of the 8th of October, 1874, were struck off on the 9th of February, 1875, on account of the decree holders not paying the cost of issuing the notification; but as the sale was stayed on the 25th of January, 1875, for three months upon the application of the judgment debtor, and upon the condition that the attachment should remain in force, the striking off of the case from the Judges’ file on the 9th of February, 1875, did not affect
the rights of the decree holders. Their Lordships have alluded to this fact, as reference was made in the argument to the effect of strikings off.

For the reasons above stated, their Lordships will humbly recommend Her Majesty to reverse the decrees and orders of both the lower Courts, and to order the Respondent to pay the costs of the Appellants in those Courts, and further to order that the prayer of the petition of the 31st of Bhadro, 1284, corresponding with the 22nd of September, 1877, be granted.

The Respondent must pay the costs of this appeal.

Solicitors for the Appellants: Watkins & Lattey.

RAJENDRONATH DUTT AND OTHERS . . . PLAINTIFFS; J. C.*

AND

SHAIK MAHOMED LAL AND OTHERS . . . DEFENDANTS. 1881

ON APPEAL FROM THE HIGH COURT AT BENGAL. May 12, 13.

Practice—Parties—Non-joinder—Suit to set aside Alienation of Endowed Property.

In a suit by three out of four joint sebaits of a certain family endowment to set aside an alienation of the endowed property made by the fourth sebait, under which the Defendants claimed, and to recover possession of the same as debutter:—

Held, that the fourth sebait was a necessary party to the suit, and that as he had not been made either Plaintiff or Defendant it must be dismissed. The objection of non-joinder was not one of form only, the Plaintiffs deliberately abstained from making him a party, and under the circumstances complete justice could not be done in his absence.

APPEAL from a decree of the High Court (Nov. 18, 1878), reversing a decree of the District Judge of East Burdwan (Sept. 8, 1876), and dismissing the suit of the Appellants.

The suit was brought on the 1st of March, 1876, by the representatives of three out of four persons, who were joint sebaits of a

certain family endowment, for the purpose of setting aside an alienation made by the fourth, under which the Defendants (Respondents) held property which was claimed as being trust property, and appropriated to the endowment. The fourth sebait was not a party to the suit either as Plaintiff or Defendant.

The first Court decreed in favour of the Appellants for part of the property claimed. This decree was reversed by the High Court, which decided that the suit was wrongly framed in consequence of the non-joinder of the sebait under whom the Respondents held, and also that the suit was barred by the law of limitation.

The facts of the case appear in the judgment of their Lordships.

O. W. Arathoon, for the Appellants.

Doyne, and Mayne, for the Respondents.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in this appeal was brought by certain persons to recover a mouzah called Kesubpore; and the case stated in the plaint is that the predecessors of the Plaintiffs, being five brothers, had dedicated certain lands to family idols; that Manickram Dutt, the eldest of the brothers, being the sebait, was managing the seba of the idols out of the proceeds of the consecrated properties and was superintending the debutter properties, and that after the death of two of the brothers he acted improperly with reference to the debutter properties, and apportioned out of them a lot called Pukhundl as the share of Gopinath Dutt, one of the brothers, and the mehal Kesubpore, the subject of the present suit, to Bykantnath Dutt, the son of Kasinath Dutt, deceased, another of them. The Plaintiffs sue for possession of the whole as debutter.

The property which had been so dedicated was the subject of a suit which was commenced in 1857, and ultimately came by appeal before this Board. The nature of the suit is stated in the judgment which was then delivered. The plaint in it is set forth in the record in this suit. It appears to have been brought by
Hurninath Dutt, the son of one of the five brothers, against all the other members of the family. Amongst them was Bykaninath Dutt, who is said in the present plaint to have had Kesupores apportioned to him. The judgment (14 Moore, Ind. Ap. Ca. 299) states that the suit was for possession, but not for possession in the ordinary character of proprietor of lands; that the Plaintiff made title to the possession on the ground that the lands had been dedicated to the religious service of the family idols by virtue of two instruments of dedication in the years 1813 and 1820, which still at the time of the suit impressed on the lands a trust which the Plaintiff by the suit sought to have declared. He also asked to be appointed sebait or manager of the lands so dedicated.

It appears from the judgment that, amongst other matters of defence which were set up by the Defendants, was a deed of partition, which was said to have been a deed by which a different arrangement was made of the family property. Certain other property was devoted to the family idols, and the property originally dedicated was divided between the members of the family. Their Lordships, in that case, considered that this was not a genuine deed. They said with regard to it, “The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property. It appoints as a sebait one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindu family having several and more competent members, from the fear of the scrutiny to which it might lead if the creditors of the sebait traced the property to his possession. Again, as a dedication in fact was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which the deed seeks to effect. All comparison, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument:” and they proceeded to say, “A decision against the Plaintiff generally in this suit would be, in substance, deciding against a trust prima facie well established on evidence of a subsequent deed of revocation, not only not proved, but on every examination of it dis-
credited." Their Lordships in the result declared "that the lands specified in the schedule to the plaint"—which included the mouzah Kesupore, and also the lot Pilkhundi—"were and continue dedicated, under the instruments of dedication of 1813 and 1820, to the religious uses specified in those instruments of endowment."

And they added a declaration that the decree was to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper sebait.

A question has arisen as to whether the whole of mouzah Kesupore was dedicated. In the deed of dedication only 11 annas were mentioned. Subsequently 5 annas seem to have been purchased by Manickram the sebait, and it would rather appear to have been assumed that the whole 16 annas had become subject to the dedication. In the view which their Lordships now take of the case, it is unnecessary to determine whether this judgment must be considered as a binding decision upon the parties as to the dedication of the entire 16 annas, or only of the 11. What was contemplated is that, the property being shewn to be debutter property and dedicated to family idols, a proper sebait should be appointed, who might bring a suit, or take other proceedings, to have the trusts so declared enforced, and so this declaration was added.

This judgment was delivered in 1871. The parties appear not to have done anything immediately; but, on the 22nd of August, 1873, they professed to appoint the sebait. They executed what they call a deed of settlement for the management of the seba of the gods, by which, after reciting that Gopinath Dutt had died without any heir, and that as heirs of the remaining four brothers they each held a 4 anna share, they say:—"We do hereby covenant that we, being in possession as sebaits of the properties mentioned in the schedules of the two deeds of endowment aforesaid, and besides [the properties mentioned in] the arpannamas of the properties acquired out of the proceeds of the deb-seba, and which are embodied in the schedule of the plaint of the former suit, No. 6; and, in addition to these, of those properties which are debutter for the expenses of the deb-seba—the whole of these being entered in the schedule
below—will manage the duties connected with the seba of the Jius according to fixed arrangement.” They then make a provision for what is to be done with the different moneys, and give particular directions with regard to the appointment of persons to make collection. The result is that all the members of the family, including Bykantnath, all the persons who had an interest in the property, or would have had an interest in it if there had been no dedication to the idols, are made sebaits. The trust is mixed up with the private interest, and there remains outside no person who would have an interest or duty to see that the trusts were properly executed. All the persons interested are themselves made trustees and managers for the execution of the trusts. That certainly does not seem to have been the kind of appointment which was contemplated by their Lordships.

The objection was taken by the Defendants in the present suit that Bykantnath, who, by this deed of August, 1873, was appointed one of the sebaits, and took a fourth share of the property as sebait, is not a party to it. The Defendants say he ought to have been joined as a Plaintiff, or, if he would not become a Plaintiff, he should have been made a Defendant. The Plaintiffs say that he would not consent to become a Plaintiff with them. If he would not consent to that, they might have made him a Defendant. The objection being taken in the First Court, the Judge overruled it. He does not appear to have said much on the subject, but he held that it was not necessary that Bykantnath should be a party. The Defendants appealed from that judgment, and in their grounds of appeal they distinctly take the objection. The first is:—“For that the Court below ought to have held that there has been no proper appointment of the Plaintiffs as sebaits, and that in any event the present suit could not be successfully maintained by the Plaintiffs on the record in the absence of Bykantnath.” The learned Judge who delivered the judgment of the High Court says with respect to this objection:—“I think that Bykantnath Dutt should certainly be a party to this case. The suit is to do away with a sale effected by him, and for which he received full value of the property in suit. Full justice could scarcely be done without having him before the Court in his personal capacity. The Judge below remarks that Bykant is
substantially a co-Plaintiff, because he is a member of the body of the sebaits; but he ought to be on the record substantially as a Defendant in his personal capacity, and answerable for the costs of the proceedings arising out of his alleged misconduct. As it is, he has been allowed to make away with endowed property, appropriate the value of it, and then to be a substantial, but unseen, co-Plaintiff in recovering it from the purchaser, to whom, however, the Lower Court finds that it can award no compensation, because he should get it, if at all, from the vendor in his private capacity, and not from the Plaintiffs, who sue as sebaits.” The judgment refers to many of the substantial reasons why Bykantnath should have been a party to the suit. Their Lordships will mention presently the transactions which are alluded to. It was evidently the opinion of the High Court that he ought to have been made a party to the suit. The Judges appear to have thought that he might be considered to be a Plaintiff, because he was a member of the body of the sebaits; but although he might indirectly gain benefit from the suit, the fact that the other sebaits were suing did not make him also a Plaintiff. They do not profess to sue on his behalf. He really was not a party to the suit at all; and no decree could be made in it which would bind him. Whatever might be necessary in order to do complete justice between the parties, so far as it would affect Bykantnath, could not be done. It would appear that the Judges of the High Court intended to decide the case in favour of the Defendants upon this objection as well as upon the bar of limitation. They said:—“We are of opinion therefore that, under the circumstances of the case, and regard being had to the sort of debutter which is in question and to the fact that the family generally were parties to the division of the debutter property, Bykantnath Dutt should have been personally a party to the suit; and that if the Plaintiffs be entitled to recover the property from the Defendants, Appellants, they should be required to reimburse them the purchase-money, and that Bykantnath should have been saddled with all the costs. And the same consideration would induce us to refuse any decree for mesne profits.” They then considered the question of the law of limitation, and held that the Defendants were boná fide purchasers, and were, therefore, protected by it.
Under those circumstances, the Respondents say, in support of the decision of the High Court, and in answer to the present appeal, that the nonjoinder of *Bykantnath* is not an objection of form only,—that the Court ought, in a suit of this kind, to have him before it, so as to be able to bind him and to do complete justice. The Appellants have not, on any occasion, sought the assistance of the Court, as they might have done under sect. 73 of Act VIII. of 1859, to make him a party to the suit. It was not the province either of the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, from motives of their own, deliberately abstained from making him a party to the suit. It is certainly not a case in which the Court should make an exception to the general rule which would require him to be a party.

That motives for keeping *Bykantnath* out of the suit existed may be seen from the nature of the previous transactions. He is said in the plaint to have been put in possession of *Kesubpore* by *Manickram*, who was at that time the sebait; but it would seem, from the case made in the former suit, that though the deed of partition was discredited in the former appeal, it was under colour of some deed of partition executed between the members of the family that *Bykantnath* obtained the possession of *Kesubpore* as early as 1841, and so through the act of the very persons who are Plaintiffs in the present suit. Having thus obtained possession, he subsequently made a conveyance to *Anund Gopal*, his nephew, on the 17th of September, 1861. Whether this conveyance was only a benami transaction, and *Bykantnath* continued to be still the owner of the property, or whether, which is possible, *Bykantnath* sold it for a sum much under its value, as an advancement to or in order to benefit his nephew, is not clear; nor is it necessary now to say which was the real nature of the transaction. There is evidence that *Anund Gopal* exercised acts of ownership, that he made leases of and received rent for some portions of the property, and that he was apparently the owner of it. Being apparently the owner, he, on the 8th of March, 1869, sold a moiety of it to some of the Defendants for Rs.5200, and the other moiety to the other Defendants, on the 15th of July, 1871, for Rs.6000. It is clear, and is not disputed, that these prices repre-
sented the full value of the property. The Defendants gave the full value, and held the property for some time. Then came the appointment of sebaits of the 22nd of August, 1873, of the whole family, including Bykantnath, by virtue of which this suit is brought. Now, the Defendants having paid the full value to Anund Gopal, and there being this case with regard to Bykantnath, whose acts could not have been unknown to the Plaintiffs when they appointed him joint sebait, that he had parted with the property, which was debutter, and, through his conduct in so parting with it, it had come to be sold to the Defendants, the Plaintiffs, the other members of the family, seek to set aside the transaction —to recover back the property, it is true as debutter, but under circumstances which raise a considerable suspicion whether the object is to treat it when it is recovered as debutter, or to have the benefit of it for themselves. The whole transaction seems to be of such a character that, if there is a case in which it is just and proper to give effect to the general rule that all the parties interested in the subject-matter of a suit should be joined in it, this appears to their Lordships to be one.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed, and the appeal be dismissed; and the Appellants will pay the costs of the appeal.

Solicitors for the Respondents: Barrow & Rogers.
VENKATESWARA IYAN AND ANOTHER . DEFENDANTS;

AND

SHEKHARI VARMA, VALIYA RAJAH AVERGAL OF PALGHAUTCHERRY . } PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Concurrent Findings of Fact reversed.

Case in which concurrent findings of fact of the Lower Courts in Madras, to the effect that certain lands in suit belong to four devaswams, or religious endowments, were reversed, and the suit which had been decreed by both the Lower Courts against the Appellants was dismissed with costs; the decision, though ultimately one of fact, turning upon the admissibility or value of many subordinate facts, and involving the construction of documents and other questions of law.

APPEAL from a decree of the High Court (July 22, 1878), affirming a decree of the subordinate Judge of South Malabar (Sept. 1, 1877).

The facts appear in the judgment of their Lordships.

The suit was brought on the 9th of January, 1877, by the person holding for the time being the position of Valiya Rajah of Palghaut, substantially to set aside a perpetual lease of land granted by his predecessor in the year 1851 to the ancestor of the Appellants. The genuineness of the lease was admitted by the Plaintiff, but he contended that the lands leased belonged to certain devaswams or pagodas belonging to the Plaintiff's stanom. That the grant was not binding upon the devaswams, and that it was fraudulently concealed from himself and his predecessors, other than the grantor, so as to prevent the Statute of Limitations being a bar. The Original Court found all the above contentions in favour of the Plaintiff, and set aside the deed accordingly. On appeal, the High Court confirmed the decree, agreeing with the Original Court in the opinion that the lease was invalid, as being granted by one who held the lands as trustee for

the devaswams. It also agreed with the Lower Court in finding
that the suit was not barred by lapse of time, but placed its
decision upon this point upon different grounds.

Mayne, for the Appellants.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

This appeal is presented in a suit (No. 1 of 1877) instituted by
the Valiya Rajah of Palghaut in the Subordinate Court of South
Malabar. The Plaintiff in that suit died after obtaining his
decree; his immediate successor has also died, and the existing
Rajah has been substituted as Respondent by order of the High
Court of Madras. He has not thought fit to appear, and the case
has been argued by the Appellants alone.

It appears that in the families of the Malabar Rajahs it is cus-
tomary to have a number of palaces, to each of which there is
attached an establishment with lands for maintaining it, called by
the name of a stanom. The Palghaut family have no less than
nine stanoms. Each stanom has a Rajah as its head or stanomdar.
The stanomdar represents the corpus of his stanom much in the
same way as a Hindu widow represents the estates which have
devolved upon her, and he may alienate the property for the
benefit or proper expenses of the stanom. The Valiya Rajah
appears to be the first in rank of the nine stanomdars, and to be
the head of the Palghaut family.

The Appellants, who represent the Defendants in the suit, are a
branch of the Iyan family, and claim certain interests in land
granted to members of that family by former Rajahs of Palghaut at
intervals of time ranging from the year 1832 to the year 1851.

Inasmuch as between the year 1832 and the present time there
have been eight successive Rajahs, all apparently bearing the same
name, it will be convenient to distinguish them by numbers, be-
ginning with Rajah I. in 1832. It will also be convenient to state
the previous dealings between the Appellants or their predecessors
in title on the one hand and the Rajahs on the other, before coming
to the present suit, which is hardly intelligible without a knowledge of antecedent events.

In the year 1832 Rajah I executed to Chitambara Iyan a kanom of certain lands to secure the sum of Rs.4000. A kanom is a species of mortgage, and it has been stated at the bar that it is usually made to endure for a term of twelve years, at the end of which time the parties would enforce their remedies or make a new contract. On these lands there were prior incumbrances, which were paid off out of the Rs.4000 by Chitambara.

In the year 1833, Chitambara instituted a suit (No. 214 of 1833) against Rajah I and a number of other persons for recovery of the lands included in the kanom of 1832. Of the frame and effect of this suit it will be necessary to say more hereafter. At present it is sufficient to say that the Plaintiff substantially obtained the decree he asked.

In the year 1843, Rajah II executed to a trustee for Chitambara another kanom of other lands to secure another advance of Rs.4000.

The two kanoms in question comprise the whole of the lands which the Rajah seeks in the present suit to recover from the Appellants. The documents themselves are not forthcoming, but their purport, at least to the foregoing extent, is shewn, partly by the allegations of both parties in the litigations prior to the present suit, and partly by the register of Palghaut Cutcherry. The land has been held by the Appellants or their predecessors in title in conformity with the title so conferred. Whether the advances were made to the Rajahs for the expenses of the stanom is a question which does not appear to have been decided, or precisely raised.

On the 15th of June, 1851, Rajah III executed to Sivarama the son of Chitambara, an instrument the validity of which has been the main question in this suit. It commences by stating that, including the transactions of 1832 and 1843, the sum of Rs.12,000 (called 42,000 fanams) has been received. For this sum Sivarama is to hold for ever the lands described. The instrument continues thus:—

"We executed to you a document on the 15th of June, 1851, ordering you and your anandrarvams to hold and enjoy the above
lands . . . for ever, without being called on to surrender and without surrendering the same. Deducting out of the rent payable the interest due on your money, and the Government revenue, you should pay annually 200 paras of paddy for the pooja services of our Simhanada Bhagavathi (pagoda), and sixty-four paras of paddy on account of Annabishekam in the Neerathi-Kulangara Siva temple. In addition to what has been ordered above, we have also given our consent to water being taken, as required for purposes of cultivation, from our Simhanada Bhagavathi's tank."

It is not disputed that the lands comprised in this instrument are the same as those comprised in the two kanoms.

The precise nature of this instrument, whether it is to be called a kanom or by some other name, whether it confers upon Sivarama a redeemable or irredeemable interest, has been a good deal discussed, and in some views of the case the discussion would be very material. For the view now taken it is not material. The material points are: that on the 12th of July, 1851, the instrument was registered as a kanom in the Kanom Registry of the Subordinate Court of the zillah of Calicut; that the Calicut Court gave notice of that fact to the District Moonsiff of Palghaut; and that on the 20th of August, 1851, the Moonsiff registered the instrument thus:—

"Kanom document, dated the 15th of April, 1851, creating a kanom of 42,000 new fanams over the Mangattiari Patam, and other lands in the Patham amshan of Palghaut talook, to be enjoyed without being caused to surrender and without surrendering."

The possession of the Iyan family in accordance with the prior kanoms, is also in accordance with the grant of 1851. The rent of 200 paras of paddy has without doubt been regularly paid to the Simhanada Bhagavathi Pagoda. There is dispute about the rent of sixty-four paras, which the Appellants allege to have been regularly paid to a pagoda called the Tharakat Siva Pagoda.

Rajah III. died at some time not exactly ascertained, but it was not later than the year 1854. In the time of his two successors Rajahs IV. and V., nothing took place to affect the title.
Rajah VL, acceded to the stanom in the year 1862, and it is during his reign that the present disputes arose.

On the 1st of April, 1874, Rajah VL filed a plaint in the Court of the District Moonsiff of Palghaut against the Iyan family, and several other Defendants tenants of the Iyans. He sued for recovery of the lands comprised in the kanom of 1832 on payment of the Rs.4,000 thereby secured, and of Rs.50 for improvements. He took notice that the Iyans claimed what he calls “an irredeemable right for a large amount,” and he sought to set that claim aside. The lands he alleged to appertain to Mangattiiri (the name of a district or estate), which again, in his words, “belonged to our Swarupam or Royal Family.” He complained that since his coming to the stanom, and since 1038 (A.D. 1862-63), no rent had been paid. He alleged as the legal foundation of his case that “No one is entitled to assign lands belonging to the stanom on large rights. Even if such rights have been given, they cannot be valid: they cannot also bind us.”

The Iyans objected to the jurisdiction of the Moonsiff on the ground of value, contending that the suit, though in form only to redeem the kanom of 1832, was necessarily and in substance one to set aside the grant of 1851. They said that the Rajah, having been inactive for twelve years though aware of that grant, was barred by limitation, and that possession had been held and the reserved rents paid in accordance with the terms of the grant.

The issues framed by the Moonsiff did not raise any question as to the precise nature of the grant. It is there called a perpetual lease, and one of the issues was whether it is valid and binding on the Plaintiff.

The Moonsiff dismissed the suit on the first ground of defence, viz., that it was beyond his jurisdiction, but the Subordinate Judge reversed that decision and remanded the suit.

On the 29th of March, 1876, the Moonsiff passed a decree to the effect that the Rajah should redeem on payment of the Rs.4000 and the value of certain improvements. The ground of his decision was that the absolute alienation by a stanom holder of stanom property in such a way that it could not be redeemed, is highly prejudicial to the stanom. It appeared, he said, by the Defendant’s evidence that the Rs.4000 advanced in 1851 was for
the purpose of paying off debts contracted for performing the late Rajah's funeral ceremony, but that, he held, was not a special necessity, and could not be permitted.

On the 1st of July, 1876, Mr. Wigram, the District Judge of South Malabar, reversed the Moonsiff's decree. He refused to re-open the question of jurisdiction. The only question argued before him was whether the grant of 1851 was binding on the stanom. It was not necessary to decide that. It was sufficient for the disposal of the case that the Defendant had in fact held under the grant ever since June, 1851. Instead of suing to set aside the grant of 1851, of which Mr. Wigram held that the Rajah was fully aware, the Rajah sued to redeem only half the lands comprised in it. Mr. Wigram held that the whole lands were held under one title, and that they could not be recovered piecemeal without first setting aside the grant of 1851.

The Rajah appealed to the High Court, but on the 8th of December, 1876, his appeal was dismissed. No written reasons appear to have been given on that occasion.

The suit of 1874 having thus failed, the Rajah instituted the present suit on the 9th of June, 1877. In it he changes his point of attack, and prays for a wholly new kind of relief. He now alleges that the lands in question belong to four devaswams, or religious endowments, belonging to the stanom, viz., Simhanada Bhagavathi, Mangattiri Ayappan, Neerat Ganapathi, and Shekharipuram Emur Bhagavathi. He contends that the stanomdar cannot assign in perpetuity, or for an irredeemable interest, the lands of the devaswam, and that the grant of 1851 was not for devaswam purposes. He accounts for his inaction by saying that the grant was collusively obtained and fraudulently concealed, and that it did not come to his knowledge till January or February 1874. He prays to recover the lands on payment of a small sum for improvements, and without paying what is due on the kanoms of 1832 and 1843. The Defendants named in the plaint are the Iyans and their tenants.

In answer to the Rajah's new case, the Iyans deny fraud and concealment, and challenge the Rajah's allegation of ignorance. They contend that the cause of action arose on the death of Rajah III., which is there stated to have taken place in October or
November, 1853, and they plead the *Statute of Limitations*. They deny that the lands are devaswam property at all.

Among the issues framed by the Subordinate Judge are two to the following effect; whether the Plaintiff was by the fraud of the Defendants kept from the knowledge of the grant of 1851, and whether the land belongs to the devaswams or to the stanom.

On the 1st of September, 1877, the Subordinate Judge decreed that the grant of 1851 should be set aside and the lands recovered on payment of the amount secured by the two kanoms, and of the value of certain improvements. Shortly stated, the grounds of this judgment are, that the land is devaswam property, and that the grant of 1851 was fraudulently obtained and concealed so as to exclude the *Statute of Limitations*.

From this decree both sides appealed, and after some intermediate proceedings, among which was an order for the production of some further evidence, the appeals were heard by the High Court of Madras on the 22nd of July, 1878. The Rajah's claim to have the land without redeeming the kanoms seems to have been given up, and on the appeal of the *Iyans* the decree of the Subordinate Judge was substantially affirmed, but modified in favour of the *Iyans* on some points of detail. Again, no written reasons were given, but the views of the High Court are to be gathered from a memorandum made by Mr. Justice Kindersley on the 30th of November, 1879. From that it would seem that the High Court agreed with the Subordinate Judge that the land was devaswam property, that they did not agree that the grant of 1851 had been fraudulently concealed, but thought that the *Statute of Limitations* would not apply because the *Iyans* were not purchasers *bonâ fide* for value. From this decree the present appeal is brought.

The first question, and in the opinion of their Lordships the governing question, on this appeal, is whether or no the lands in dispute are devaswam property. The object of the Rajah in contending that they are so is clear. In the suit of 1874, when all parties treated them as stanom property, the kanoms and the grant of 1851 were defended on the ground that the advances were made for stanom purposes. But if the land is devaswam property, the clearest proof of an advance for legitimate stanom
purposes would not avail to support the alienation. By the show-
ing of the Iyans themselves the transactions would be void in
their inception, and could only now stand so far as each is pro-
tected by the lapse of time. On the other hand the Rajah, having
elected to rest his case upon the character of the land as devaswam
property, must stand or fall by that election. If the land is not
devaswam property, the groundwork of his suit is cut away, and
he cannot have any decree at all.

It is true that upon this question there are concurrent decisions
of the Courts below. But though the question may be called in
its result one of fact, its decision turns upon the admissibility or
value of many subordinate facts, and involves the construction of
documents and other questions of law. Such was the view taken
by the High Court of Madras when it granted leave to present
this appeal. It is now necessary to examine the principal grounds
on which the Subordinate Judge came to the conclusion that the
property belongs to the devaswam. Whether or no they are the
same grounds on which the High Court rested its opinion, their
Lordships cannot tell for want of a written judgment.

He first says that the very old public documents, being certain
pymash accounts of the years 1798-99 and 1805-6, most satisfac-
torily shew that the lands are the jenm property of the four de-
vaswams named in the plaint. But on looking at these accounts,
two observations at once occur. The first is that, putting them
at the highest, they are only evidence of possession, having been
rendered to Government for the purpose of informing them from
whom they were to demand the revenue. The second is that they
can hardly be said to be public documents at all; for on the face
of them it is stated that they were never confirmed and never
acted on. The person who made these returns may have believed
that the lands were devaswam property, but his statement to that
effect is a mere private opinion, unless and until it is affirmed or
acted on in some public way. It is remarkable that in the suit of
1833 a copy of one of these accounts was refused to one of the
litigant parties, on the very ground that the account had never
been confirmed, and was only granted on its being discovered that
a copy had already been given to his opponent. These documents
should not have been treated as evidence.
The Subordinate Judge then goes on to say that in the suit of 1833 Chitambara Iyan admitted, and indeed maintained, that the land belonged to some devaswam. Now this suit was brought by Chitambara against a prior mortgagee and his tenants for redemption and recovery of the land comprised in the kanom of 1832. Rajah I. was afterwards added as a party, and he supported the Plaintiff. At a subsequent stage of the proceedings three other Defendants were brought before the Court. They represented the Simhanada Bhagavathi devaswam, and in the year 1834 they brought a suit against the Rajah and Chitambara to enforce the claim of their devaswam to the lands. In the record are inserted the answers of the Rajah and of Chitambara in the suit of 1834. It does not appear what was decided in that suit upon the devaswam question. Possibly the parties were satisfied with the issue of the suit of 1833, where the same question was raised after the representatives of the devaswam were made parties. It is clear that the two suits were considered, and must now be considered, in combination with one another.

Nothing can be plainer than that in both suits the Rajah and Chitambara were in the same interest, and were opposing the claim of the devaswam. On the part of the devaswam it is alleged that the Rajah "has no connection with the land." He, on the other hand, says that "the devaswam does not own lands sowing even one para," and that its expenses are met by his own family funds. He sets forth several acts of ownership by the Rajahs, including the kanom of 1832 and previous kanoms. Chitambara alleges that the devaswam itself belongs to the Rajah, and that the lands are not jenm of the devaswam. Admitting that the devaswam is entitled to the rent of 200 paras of paddy under arrangements which the Rajah made with a prior mortgagee, he contends that no claim whatever has thereby been created on the land itself.

Such being the tenour of the pleadings, it is difficult to understand how the Subordinate Judge comes to his conclusion that Chitambara maintained the title of the devaswam.

On the 30th of January, 1837, the Pundit Sudder Ameen passed a decree in the suit of 1833 in favour of Chitambara. On the question raised by the devaswam, his view was that the devaswam
itself belonged to the Rajah, and that the Defendants specially claiming to represent it had no title to the land.

The result of these two suits is certainly not in favour of the Rajah's present contention. It may not precisely decide that the land is not devaswam property. But it decides at least this, that, as between the Rajah's grantee on the one hand and the devaswam claiming independently of the Rajah on the other, the Rajah's grantee is entitled to hold the land. Its effect in binding the Rajah is enhanced by the fact that in the year 1835 Rajah I. died, and that Rajah II. was then made a party, but did not suggest that his predecessor had done wrong, or raise any fresh case at all.

The Subordinate Judge next says that the admitted fact of the rent of these lands having been always made payable to the devaswams, and not to the stanoms, is a piece of very cogent evidence in favour of the devaswams. The kanoms not being in evidence, their precise terms cannot be known. But what is made payable to the devaswams by the grant of 1851 is not the rent, but only the specified and comparatively small portion of it reserved by the Rajah for the benefit of a family idol, and an idol of a neighbouring village.

Then it is said that in the suit of 1874 the Rajah did not claim the land as belonging to his stanom, but that, inasmuch as he styled it property belonging to Mangattiri of my royal family, and as Mangattiri is one of the four devaswams as whose trustee he now sues, he really claimed for those devaswams. Now the pleadings in that suit have been stated above, and, except that the grant of 1851 produced by the Iyans shows the payments reserved to the pagoda, they say nothing about any devaswam. In the issues and the two judgments of the Courts not a word is said about any devaswam. The property is treated as stanom property throughout. Mangattiri is not a devaswam at all, but the name of a locality in which there appears to be a pagoda of the idol Ayappan called in the plaint of 1874 the Mangattiri Ayappan devaswam.

The foregoing is the whole of the Rajah's case, and it certainly does not bear or nearly bear the burden of proof which lies upon him. It is indeed suggested by the Subordinate Judge that if the
kanoms were produced they would shew something in the Rajah’s favour, and he draws very damaging inferences against the Iyans for not producing them. They excuse themselves by saying that the documents were given up to Rajah III. when the grant of 1851 was executed. That seems a very unlikely proceeding. There is nothing to shew why the owner of lands should not in Malabar as well as in England keep all documents of title. And if there were reason to suspect that these kanoms would disclose anything material in favour of the devaswams, there might be some justification for making presumption against the Iyans.

But there is no reason for any such suspicion. As regards the kanom of 1832 it is out of the question, for that document was the basis of the suit of 1833 when the Iyans got a decree against the claim of the devaswam. As regards the kanom of 1843, there is the notice of it in the Palghat Outcherry, and the recital of it in the instrument of 1851, which simply point to it as a kanom or bond executed by Rajah II. to Chitambara’s trustee. It is to the last degree improbable that this kanom should be materially different from the several other kanoms affecting the same lands and exhibited in this suit, or should shew anything more favourable to the devaswams than the payment of paddy secured by the grant of 1851.

Moreover, the Rajahs have not themselves been free from blame in destroying this evidence. Counterparts of the kanoms were executed to be kept by them, and Rajah VI. is fain to excuse himself for not producing his counterpart in the suit of 1874, by alleging that when Rajah V. died the documents of the stanom were taken away by his nephews who had not given them back to him.

Even then if this were all, the Rajah’s case must fail, because the burthen of proof lies on him. But there is a considerable amount of evidence, though principally of a negative kind, bearing in favour of the Appellants’ contention that the land is stanom and not devaswam property.

Their positive evidence besides the suits of 1833, 1834, and 1874, consists of two sets of documents, one set shewing that the Rajahs have freely dealt with portions of the lands in dispute as stanom property, the other set shewing in the case of other
undisputed stanom lands that the Rajahs have been in the habit of demising or granting them, with reservations of specific and limited payments to family pagodas. The Subordinate Judge seems not to have rightly apprehended the purposes for which these exhibits were produced.

Moreover, in the year 1864 Sivarama Iyan's tenants were obstructed in taking water from the Simhanada Bhagavathi tank, a right granted by the instrument of 1851. Sivarama prosecuted the obstructors, and succeeded in his prosecution. He could hardly have done so without interference by the persons who represented that devaswam, if he was without title. It may be that the obstructors represented the devaswam, but, if so, Sivarama appears to have prevailed against it.

The negative side of the evidence is perhaps of more importance. The claim is made on behalf of four devaswams. But no attempt is made to shew when, by whom, or in what way the land was dedicated to them, nor at what time they have had actual enjoyment of it. Nor is there even so much as a statement by the Rajah of the shares or proportions in which they are entitled.

Above all it is clear that the Iyans were in possession of all the lands, at least from the month of June, 1851, up to the suit of 1877, and that they paid nothing to the Rajah, and nothing to the devaswams more than the specified quantities of paddy. During that period there were three descents of the stanom. Even if Rajah III. had colluded with the Iyans to alienate the property of the devaswams, it is inconceivable that Rajahs IV and V. and up to 1877 Rajah VI., should do so too, or that they and all the managers and priests of the devaswams should keep silence if they were entitled to land sowing 575½ paras, out of which they were only receiving 200, or at most, 264 paras of paddy. According to the only calculation on this point appearing in the record, the sowing para of land is said to yield rent at 7 paras of produce.

The foregoing reasons are sufficient to dispose of the case upon the first step in it. But if the view of the Courts below had prevailed here, it would have been necessary to decide whether the Iyans had fraudulently kept from the Rajahs all knowledge of the
grant of 1851, so that time should not run in its favour. Accordingly this question has, as regards both evidence and argument, been treated as fully as any other point in the case, and their Lordships have full materials for a judicial decision upon it. And they think it right to pronounce one, because they find that the Subordinate Judge has pronounced upon this point against the Appellants' family, with a great deal of severity which appears to them to be undeserved; and because from the silence of the High Court it is by no means clear what view was there taken of the matter. They will not however travel so much into detail as would have been desirable if they had decided that the property belonged to the deaswams, and that the Appellants could only keep it by help of the Statute of Limitations.

The main point relied on by the Subordinate Judge, if it suggests any fraud at all, points rather to fraud in the inception of the grant than in its concealment. He says that whereas by the grant 64 paras of paddy are made payable to the Neerattu-Kulan-gara Siva temple, no such temple can be found to exist. The temple, he says, is described in the grant as the Rajah's own temple, viz., "my temple." The Rajah's family temple connected with Neerat is a Ganapathi temple, not a Siva temple. And though the Iyans gave evidence that they have regularly paid the 64 paras for the Annabishkam ceremony to a Siva temple in the village of Tharakat, situated some 200 yards from the Rajah's Neerattu-Kulam tank, it is not to be believed because receipts are not produced. The Subordinate Judge holds that the whole introduction of this temple into the grant is a fraud concocted between the Iyans and the Rajah's agent, which continued up to the time when Rajah VI. discovered the grant, which according to his statement was in January or February, 1874.

It is exceedingly difficult to understand what could be the object of such a fraud as the insertion of a non-existent temple in the grant. But, object, or none, there is not in this record sufficient evidence to support a proposition requiring clear proof. In the first place, the grant of 1851, as translated for the record which must be the guide here, does not correspond with the quotation by the Subordinate Judge. It refers to the Simhanada temple as the Rajah's—"my" temple—but when it speaks of the
other temple, it is only called "the" temple. If any inference can be drawn from such language, it is that the second temple was not the Rajah's. It seems clear that the Tharakat Siva temple was generally known by that name, and by no other. The payments of 64 paras for the Annabishekan ceremony in the Tharakat Siva temple are deposed to by the Appellant Venkateswara Iyan himself, who was examined for the rajah, by Viswanath Pattar, one of the Rajah's karyastas, or agents, and by one Javanthi, an inhabitant of Tharakat, who was examined for the Iyans, and says that he himself received and gave receipts for the paddy for the Annabishekan ceremony performed for his house's sake in the Tharakat Siva temple. Since the decree some documents purporting to be Javanthi's receipts have been produced. But Javanthi cannot tell what position or authority he had to entitle him to receive the paddy. No one is called from the Tharakat temple to deny receipt of the paddy. One of the Rajah's witnesses, a priest in the Neerat Ganapathi Pagoda for nine years, says that 64 paras of paddy were paid yearly to him by Venkateswara Iyan. Upon this state of the evidence the difficulties felt by the Subordinate Judge are far from being cleared away; but it is too much to say that they stamp the transaction as fraudulent.

Whatever obscurity may hang over this portion of the case, the true question is, not whether everything connected with the grant can be explained, but whether the grant itself has been so fraudulently concealed as to exclude the effect of time. Upon that point the Subordinate Judge thinks that the mention and registration of it as a kanom has been the means of concealment. But even if a kanom is a wrong appellation, it is not easy to see how that affects the Rajah's knowledge of his right to sue. Whatever interest may be conferred upon the Iyans by the grant of 1851, if the land was devaswam land and was wrongfully alienated, the Rajah had a right to set that grant aside.

The fact of registration seems to their Lordships to displace the theory of concealment. Registration at this period was not compulsory, and it is very difficult to suppose that a person desiring to conceal an instrument should lodge it in a public office within two months of its execution. The Subordinate Judge says that the registration amounts to nothing, because the place of registry
was in Calicut, 100 miles from Palghaut. But the fact is, as above
stated, that on the 20th of August, 1851, it was registered in the
Court of the District Moonsiff of Palghaut, in pursuance of a
notice from the Subordinate Court of Calicut.

Again in the month of July, 1864, a question arose whether or
no some lands claimed by the Government under an escheat were
really lands included in the grant of 1851. Both the Rajah, who
was Rajah VI., and the Iyans appeared by their vakeels before the
Escheat Officer to maintain their claim. The instrument of 1851
was produced, and a copy taken to be kept in the Escheat Office.
The Subordinate Judge says that there is no evidence that either
the Rajah or the Iyans had notice of the claims preferred by the
other, and he thinks that each was acting behind the other’s back.
That is possible, though not probable. But if it were the case it
does not do away with the fact that the Iyans openly claimed
under the grant of 1851 in a public Court.

The same course was pursued by the Iyans in the dispute
about the tank, which has been before mentioned. The instru-
ment of 1851 was then produced in Court, and initialled by the
magistrate.

It is observable that in both these cases it would have answered
the purpose of the Iyans equally well to claim under the previous
kanoms, instead of claiming under the grant of 1851. If they
had, as suggested, wished to appear to others as claiming only
under kanoms while keeping a more absolute title in the back-
ground, it is incredible that they should have produced in public
the evidences of that more absolute title.

Moreover the Rajah has never given any evidence. In his plaint
of 1877 he says that he discovered the grant of 1851 in January
or February, 1874. But he does not say, what in such a case is
extremely important to know, what was the occasion of such dis-
covery or the circumstances which led to it. Nor in his plaint
filed in April, 1874, does he say a word about his then recent
discovery or about any fraudulent concealment.

It is clear that ever since June, 1851, at the latest, the Rajah or
the devaswams or both have been kept out of a valuable property.
Why did they not make inquiries about the cause of so disagree-
able an occurrence? It is shewn that they had only to step into the
District Moonsiff's Court at Palghaut in order to find notice amply sufficient to guide them to the exact truth. But no word of explanation is given of this extraordinary inaction.

The result is that their Lordships agree with Mr. Wigram, and apparently with the High Court, in thinking that there was not only no fraudulent concealment of the grant of 1851, but no concealment at all. They are of opinion that on this issue, as well as on the issue respecting the nature of the property, judgment should go for the Appellants. They will humbly recommend to Her Majesty that the decrees should be reversed, and the suit dismissed with costs in both the Courts below. And the Respondent must pay the costs of this appeal.

Solicitors for the Appellant: Gregory, Rowcliffe, & Co.
THE "BRENHILDA" . . . . . DEFENDANT;

AND

BRITISH INDIA STEAM NAVIGATION } PLAINTIFFS.
COMPANY . . . . . . . . .

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Practice—Appeals from Vice-Admiralty Court—Appeals must be asserted within Fifteen Days from Decree.

By the 35th Rule ordained by the King in Council, in pursuance of 2 Will. 4, cl. 51, all appeals from the Vice-Admiralty Court are to be asserted within fifteen days after the date of the decree. A similar provision was contained in the old rules of the Admiralty Court.

The words "after the date of decree," mean after the date when the decree is pronounced, not the date when the decree is reduced to writing and signed.

Where the Appellants allowed the fifteen days to expire, summoned the Respondents before the Registrar, and appeared without protest to the Respondents' summons to assess damages, held, on motion to that effect, that their petition of appeal must be set aside with costs both of the motion and of appeal.

APPEAL from a decree of the High Court (Garth, C.J., and Pontifex, J., July 23, 1880), affirming an order and decree of the said Court in its Vice-Admiralty jurisdiction (Jan. 6, 1880), in a cause of damage civil and maritime which was promoted by the Respondent company, the owners of the steamship Ava, against the ship Brenhilda, her tackle, apparel, furniture, and freight.

The said Court in its Vice-Admiralty jurisdiction pronounced that the collision in question in the cause was occasioned by the fault of both vessels, and that the Brenhilda was liable to answer for half of the damage occasioned to the Ava, by the collision. Those damages were by mutual agreement assessed at £50,000, and the Court pronounced the sum of £25,000 to be due to the Respondent company, and condemned the Brenhilda in

that amount. The High Court directed that the Appellants should deduct therefrom half the amount of damage sustained by the Brenhilda. The Appellants summoned the Respondents before the Registrar to assess this amount.

The notice of appeal was given, as mentioned in their Lordships' judgment, on the 2nd of September, 1880, and, after the appeal was presented, an appearance under protest was entered in the registry of Her Majesty's Court of Appeal by the Respondent company.

Woodroffe, for the Respondent company, moved to dismiss the appeal on the ground that the same was not asserted within the time and in the manner prescribed by the rules and regulations in force; and to relax and dissolve the inhibition and citation issued thereon. He also contended that acts had been done by the Appellants in furtherance of the decree appealed from, and therefore that the Appellants had no right of appeal, that their appeal was perempted. The rules and regulations were those of William IV. issued in pursuance of 2 Will. 4, c. 51. He referred to rule 35, which is set out in the judgment. As to whether those rules governed this case, he referred to 24 & 25 Vict. c. 104, s. 9; letters patent of the High Court, 1862; sect. 31 and sect. 27 of charter of 1774, and the commission dated the 19th of July, 1822, in reference to Vice-Admiralty jurisdiction, to be found in Smout and Ryan. The High Court has no power to regulate by its rules and orders issued under its letters patent appeals to the Privy Council, and the later legislation (see Act VI. of 1874 and Act X. of 1877, sect. 616, &c.), leave the rules of William IV. untouched. Moreover, the notice of appeal was issued under the rules. Reference was made to The Aquila (1); The Clifton (2); Lloyd v. Pole (3); The Hydroos (4); Tronson v. Dent (5).

Butt, Q.C. (Benjamin, Q.C., and Clarkson, with him), did not dispute that the rules of William IV. applied. He contended that

(1) 6 Moz. P. C. 102.  (3) 3 Hag. Eccl. 477.
(5) 8 Moz. P. C. 419.
the objection to the appeal not having been asserted in time should have been taken in the High Court, and that there was a presumption that the order was right. The Appellants waited, as they were entitled to do, till they obtained a copy of the decree to be appealed from. They were not bound by the Civil Procedure Code to proceed earlier, and there had not been any laches or intentional delay. As to the argument that the appeal had been perempted by reason of the judgment in appeal having been acquiesced in, that was highly technical. Though the Appellants had to take out a summons to assess damages, that was not, under the circumstances, a voluntary act, but an involuntary submission to the directions of the Court.

Woodroffe replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is a motion on the part of the British India Steam Navigation Company, the owners of the ship Ava, to relax and dissolve the inhibition and citation issued in a certain pretended appeal of the above-named Appellants, and to dismiss or to quash the said appeal for want of competency, or to grant the Respondents leave to file an act of protest on petition against the admission of the said pretended appeal.

The suit came before the High Court in the exercise of its original jurisdiction. It was brought by the owners of the steamship Ava against the Brenhilda for a collision which took place in the Bay of Bengal. The High Court, in its original jurisdiction, held that there was negligence on both sides, and consequently that half the damages which resulted to the owners of the ship Ava were to be paid by each of the parties. The damages were assessed at £50,000, which would leave £25,000 to be borne by the owners of the Ava themselves, and £25,000 to be paid by the owners of the ship Brenhilda. The parties appealed to the High Court in the exercise of its appellate jurisdiction, and that Court affirmed the decision of the first Court so far as it was held that there was negligence on the part of each of the ships; but they
thought it right to amend the decree by declaring that instead of the owners of the *Brenhilda* paying the full sum of £25,000, being one half of the damages sustained by the owners of the *Ava*, they should be allowed to deduct half of the damages which they had sustained by the injury to their ship, and that it should be referred to the Registrar of the Court to assess those damages. That decision was pronounced on the 23rd of July, 1880. The parties went before the Registrar for the purpose of assessing the amount, and it appears by the report of the Registrar that the damages were assessed at £3000 with the consent of both parties. On the 2nd of September, 1880, a notice of appeal was given, which was recorded as follows:—"Pursuant to rule 35 of the rules and regulations made and ordained by His late Majesty King *William IV.* in Council, in pursuance of the 2 Will. 4, c. 51, Mr. *Phillips*, advocate for the impugnment, appears and declares his intention of appealing to the Privy Council against both the decrees made in this cause." The rule referred to is in these words:—"All appeals from the decrees of the Vice-Admiralty Courts are to be asserted by the party in the suit within fifteen days after the date of the decree, which is to be done by the proctor declaring the same in Court, and a minute thereof is to be entered in the assignation book, and the party must also give bail within fifteen days from the assertion of the appeal in the sum of £100 sterling to answer the costs of such appeal." The judgment was delivered on the 23rd of July, 1880, and consequently the notice on the 2nd of September was not an assertion within fifteen days from the date of the decree. It has been urged that the decree was not drawn up in writing and signed by the Court until some considerable time afterwards, and that the parties could not appeal without annexing a copy of the decree to their petition of appeal. But the rule of annexing a copy of the decree to the petition of appeal refers to appeals which are preferred under the *Code of Civil Procedure, Act VIII.* of 1859; it does not apply to appeals preferred or asserted under the 35th section of the rules of *William IV.* The words "after the date of the decree," according to their Lordships' view of the rule, do not mean after the date when the decree is drawn up in writing, but
after the date on which the decree or sentence is pronounced by
the Vice-Admiralty or Admiralty Court, as the case may be. The
words which are constantly used in Acts which refer to decrees
in the Admiralty Court are "the pronouncing of the sentence or
decree." Their Lordships, therefore, think that the date of the
decree did not mean the date on which the decree was reduced to
writing and signed by the Court, but the date on which the High
Court delivered their judgment and expressed what the decree
was. If the parties intended to appeal, they ought, in accordance
with the rule, to have asserted their appeal within fifteen days
from the date of the decree, by declaring in Court that they
intended to appeal; and that they did not do. It is important
in Admiralty proceedings that notice of appeal should be given
within a short period. When a ship is sued it is usually arrested,
and unless it is released upon bail it is detained by an officer of
the Court. It is, therefore, important if a party intends to appeal
from the decision of the Admiralty Court, that notice should be
given within a certain limited time, and that time with regard to
Vice-Admiralty cases is fifteen days from the date of pronouncing
the decree.

The collision took place in the Bay of Bengal, and therefore it
may be a question whether the High Court was exercising Vice-
Admiralty or Admiralty jurisdiction; but that is not material, for
if the case was tried in the Admiralty jurisdiction the appeal
ought to have been asserted, according to the old rules of the
Admiralty Court, within fifteen days. The parties have stated in
their petition that they asserted the appeal in accordance with
the 35th rule of William IV. The assertion was too late, and
consequently the Appellants had no right to appeal. Further,
they appeared before the Registrar for the purpose of carrying
out the order of the High Court in assessing the damages which
they had sustained by the injury which had been done to the
Brenhilda, and acted without protest. It is said that they were
obliged to go before the Registrar; but they might have appealed
and got an inhibition, or if not they might have appeared before
the Registrar under protest. The owners of the Brenhilda took
out the summons to compel the owners of the Ava to appear

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before the Registrar for the purpose of acting under the decree of the High Court in assessing the amount of damage sustained by the owners of the Brenhilda. That, of itself, according to the decision to which we have been referred, would be a sufficient ground for preventing the parties from appealing. Their Lordships therefore think that the owners of the Brenhilda have not put themselves into a position to appeal, as a matter of right, against the decision of the High Court. The question before their Lordships is not whether they should recommend Her Majesty to grant an appeal as a special matter of favour. That they could do only if a petition were presented to Her Majesty, and referred to the Judicial Committee to report their opinion thereon.

Under these circumstances their Lordships think that the motion ought to be granted, and that the petition of appeal ought to be set aside. It is unnecessary to do more than set aside the petition of appeal; upon that being done, the relaxation of the inhibition will issue as a matter of course. Their Lordships, therefore, will humbly report to Her Majesty that the petition of appeal ought to be dismissed. The Appellants must pay the costs of this motion and of the appeal.

Solicitors for the Appellants: Lyne & Holman.
Solicitors for the Respondent: Parker & Co.
PULUKDHARI ROY AND OTHERS . . . . APPELLANTS; and 

RAJAH RADHA PERSHAD SINGH . . . . RESPONDENT.  

ON APPEAL FROM THE HIGH COURT AT BENGAL.  

Practice—Civil Procedure Code, 1877, s. 583, clause J.—Orders in Execution under s. 244 for Attachment of Property appealable.  

Held, that an order under sect. 244 of Act X. of 1877 for attachment of property in execution of a decree is of the same nature as an order under sect. 485 for the attachment of property in the course of a suit, and that as the latter is appealable under clause R. of sect. 588 so the former is appealable under clause J. of the same section.  

APPEAL from a decree (April 1, 1879) dismissing an appeal from an order of the Subordinate Judge of Shahabad (Aug. 31, 1878).  

Execution proceedings had been pending between the parties to the appeal, or those whom they represented, since 1866. The petition in this case was presented by the Respondent as decree-holder on the 26th of June, 1878, for attachment and sale of certain property. The Appellants pleaded that the Subordinate Judge had no jurisdiction to make the order prayed; that all the proceedings theretofore held in the execution department had not been held by a Court of competent jurisdiction, and were therefore null and void; and that the decree of which execution was sought was null and void.  

The Subordinate Judge ordered that the "debtor's plea of limitation be dismissed with costs," and the High Court dismissed an appeal therefrom on the ground that such order was not appealable. The High Court held that the order was in effect an order granting the application for attachment and sale, that the same was made under sect. 244 of Act X. of 1877, but that it was not appealable under clause J. of sect. 588 of that Code, which is as follows:—  

"588. An appeal shall lie from the following orders under this Code, and from no other such orders.  


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“(J.) Orders under sect. 244 as to questions relating to the execution decrees of the same nature with appealable orders made in the course of a suit.”

The questions of jurisdiction and limitation arose in the following way:—The decree in the suit was passed on the 14th of April, 1856, by the District Court of Ghazipur, and was for the possession and mesne profits of land situate at the date of suit and of decree, and long afterwards, in that district. The final decree in appeal was made by the Sudder Court of the North-Western Provinces on the 7th of April, 1866.

On the 9th of April, 1866, the Respondent applied for execution to the District Court of Ghazipur, and on the 24th of April, 1867, the Judge of that Court transferred the execution case to the Subordinate Judge of Ghazipur, or, as he was at that time designated, the Principal Sudder Ameen. By a certificate issued by the Principal Sudder Ameen under sect. 285, Act VIII. of 1859, dated the 11th of November, 1867, the decree of the Sudder Court was forwarded to the Judge of Shahabad for execution; and by the latter Judge it was transferred to the Court of the Subordinate Judge of the district in whose Court the actual proceedings were held. Execution was first taken out in respect of possession in 1874, and in 1876 an application was made for ascertainment and realisation of mesne profits, which were subsequently assessed at eleven lacs of rupees. An application was made on the 19th of March, 1877, for attachment and sale of the Appellants' properties, but previously thereto the Appellants applied to the Judge of Ghazipur to call for the proceedings; and on the 15th of April, 1877, the Ghazipur Court having sent for and received the records, held that all the proceedings of the Subordinate Judge's Court at Ghazipur and at Shahabad were without jurisdiction, and that the execution was barred by limitation. The High Court of the North-Western Provinces subsequently set aside this order, and directed the proceedings to be returned to Shahabad; whereupon the Respondent, on the 26th of June, 1878, made the application the subject of this appeal.

The Subordinate Judge held that the Court of the district of Shahabad was fully competent to hold the proceedings theretofore held by his Court in execution, and that the same were held not
under a certificate alone but also by reason of the transfer of the decreed land to district Shahabad, meaning that since the decree had been passed the Government of India had by a notification, dated the 11th of January, 1867, declaring the flowing current of the Ganges to be the boundary between the districts of Ghazipore and Shahabad, transferred the land in question from the territory and district of Ghazipore to those of Shahabad.

The judgment of the High Court on appeal was as follows:—

"The Defendants then appealed to this Court, and a preliminary objection has been made here by the Respondents, that no appeal lies against an order of this kind.

"They contend, that this order, though passed in the course of execution proceedings instituted under the Civil Procedure Code of 1859, was in fact made under the provisions of the new Code of 1877; and when we consider the nature of the application, and of the order which was made upon it (which was in effect to grant the application) it appears quite clear, that the order was made under the new Code; and this is a point which is hardly contested by the Appellants.

"Then, as under sect. 588 of the new Code there are only certain orders from which an appeal lies, we must see whether the order now appealed against is one of them.

"The Appellants contend, that it is an order made under clause J. of that section, that is to say an order made under sect. 244 upon a question which relates to the execution of a decree, and of the same nature as appealable orders made in the course of a suit.

"There can be no doubt that the order is made under sect. 244, and upon a question which relates to the execution of a decree; but the question remains, whether it is an order of the same nature as appealable orders made in the course of a suit.

"Now, the only orders made in the course of a suit which are appealable under the new Code are those which are enumerated in sect. 588; and having looked carefully through those orders we do not find any one of them which is at all of the same nature as the order which is here appealed against.

"That being so, it seems impossible for us to say that this order, although it relates to the execution of a decree, and raises
a most important question between these parties, is of the same nature as any appealable orders made in the course of a suit under the new Code.

"We therefore hold the objection to be a good one, and consider that no appeal lies.

"We have been referred during the argument to a case which was decided at Bombay by Mr. Justice Melvill and Mr. Justice Kenball, reported in 2 I. L. R. (Bomb. Series), 553, in which that Court appears to have disallowed upon similar grounds an appeal against an order relating to execution proceedings; and we find, moreover, that this decision of the Bombay High Court has been followed by other Division Benches of this Court.

Cowie, Q.C., and Cowell, for the Appellants, contended that the order of the Subordinate Judge which was, and was held by the High Court to be, in effect for the attachment and sale of the Defendants' property in execution, is of the same nature with an order under sect. 485, which authorizes the attachment of a defendant's property before judgment. An order under sect. 485 being appealable under clause R of sect. 588, it follows that the order in this case is appealable under clause J.

Leith, Q.C., and Doyne, for the Respondent, contended that the order appealed from, disallowing the Appellants' objection as to limitation, was not included amongst the orders rendered appealable by sect. 588, and that therefore the High Court was right in their decision. Unless appealable under sect. 588 there was no other provision in the Code which could be relied upon by the Appellants.

Cowie, Q.C., replied.

Sir Barnes Peacock:—

Their Lordships consider that the appeal is admissible, and should have been heard on the merits. Their Lordships will do what the High Court should have done and hear the appeal.

Cowie, Q.C., and Cowell, contended that the District Court of Ghazipore alone could execute the Sudder Court's Decree of 1866,
and for that purpose complete the same by adjusting the amount of mesne profits recoverable thereunder: see Act VIII. of 1859, ss. 362, 284, 285. See Rajeeb Ram Doss and Others v. Mahomed Hareem (1). There is no provision in the Code under which the Judge could transfer the case to the Principal Sudder Ameen, and still less under which the latter could either execute the decree himself or validly transfer that duty to any other tribunal. [Sir Richard Couch:—It is not clear that the Judge did transfer the execution to the Principal Sudder Ameen; and as the date of the alleged transfer is after the transfer of the territory, the probability is that he merely authorized the issue of a certificate in reference to a case in which he had lost jurisdiction to proceed any further.] A long series of cases shows that the Judge could not transfer the execution to the Principal Sudder Ameen, nor the latter issue the certificate relied upon so as to transfer the jurisdiction to execute, and although the jurisdiction over the land was gone with the transfer of territory, the suit remained, and its transfer must be regulated by the same provisions and authorities.

Leith, Q.C., and Doyne, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

Sir Barnes Peacock:

The appeal to the High Court in this case was from an order of the Subordinate Judge of Shahabad made upon an application for execution of a decree, praying that an attachment and sale of the judgment debtor's property specified in the application should be had for the purpose of satisfying the decree. A question arose as to whether the Statute of Limitations was a bar to that application, and the Subordinate Judge held that the debtor's plea of limitation should be disallowed, with costs. He did not go on to say that the attachment be issued; but their Lordships treat the order as substantially an order that the debtor’s plea of limitation should be disallowed, and that the application should be granted. The case was appealed to the High Court, and that Court dismissed the appeal upon the ground that the order was not an appealable

(1) 6 Suth. W. R. (Misc.) 51.
order within the meaning of the 588th section of Act X. of 1877. The section says:—"An appeal shall lie from the following orders under this Code, and from no other such orders," and then a number of orders are enumerated; and amongst them are the orders specified in clauses J. and R. Clause J. is:—"Orders under sect. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit;" and one of the orders in clause R is an order under sect. 485, by which property of the Defendant sufficient to satisfy any decree which may be passed in the suit may, under certain circumstances, be attached in the course of a suit, and need not, according to the provisions of sect. 490, be re-attached in execution of such decree. The question then is whether an order for attachment and sale in execution of a decree is an order "of the same nature" as an order made in the course of a suit for attachment of the debtor's property. Their Lordships think that the nature of the order in both cases is an order for attachment of property, and that an order for attachment of property in execution of a decree is an order of the same nature as an order for attachment of property in the course of the suit. Indeed, the only appealable order in the course of a suit at all resembling an order for attachment of property in execution of a decree is an order under sect. 485. Their Lordships, therefore, are of opinion that, taking the order under appeal as substantially an order for attachment and sale of the property in execution of the decree, it was an appealable order within sect. 588. The learned Judges of the High Court have not very clearly stated their reasons, but the learned Chief Justice, Sir Richard Garth, does state that the order in this case was substantially, and in fact, an order to grant an application for attachment and sale; and in that remark their Lordships concur. They therefore think that the order of the High Court ought to be reversed, so far as it says that the order is not appealable. Their Lordships being of that opinion have heard the appeal.

The grounds of appeal are frivolous. The suit was originally commenced in the Court of the Judge of Ghaspore. The case was appealed to the High Court, and ultimately to the Queen in Council. The judgment was affirmed, and was sent back to the
Judge of Ghazipore for the purpose of being executed; but in the meantime an order had been made by Government for changing the boundaries of the districts of Ghazipore and Shahabad, and by virtue thereof the lands which were the subject of the suit, and which were originally in the district of Ghazipore, had become lands in the district of Shahabad. The Judge of Ghazipore, therefore, could not execute the decree, and it was necessary for him to send the decree to the Judge of Shahabad for the purpose of being executed. The Judge of Ghazipore did not do it himself, but he referred it to the Subordinate Judge, and directed him to send a certified copy of the judgment to the Judge of Shahabad to be executed.

It was contended that, inasmuch as the judgment which got to the Shahabad Court for the purpose of being executed was sent by the Subordinate Judge instead of by the Judge himself, the Judge of Shahabad when he got it, had no power to execute it. Their Lordships think that that is not an objection which can be maintained.

Then it was urged that when the Judge of Shahabad got it, he, instead of executing it himself, referred it to the Subordinate Judge for the purpose of being executed, and that he could not legally do so; but when their Lordships look at Act VIII of 1859, s. 287, they think that the Judge of Shahabad clearly had the power of referring the decree to the Subordinate Judge, for the purpose of its being executed by him. The 287th section of that Act enacts as follows:—"The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such Court, and may, if the Court be the principal Civil Court of original jurisdiction in the district, be executed by such Court, or any Court subordinate thereto to which it may entrust the execution of the same." It seems clear that, under the very words of sect. 287, the Judge of Shahabad had a perfect right to entrust the execution of the decree to the Subordinate Judge.

Their Lordships, having heard the appeal upon the merits, are of opinion that it ought to have been dismissed and the decree of
the First Court affirmed. Arriving, therefore, at the same conclusion as the High Court did, though for different reasons, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment of the First Court. The Appellants must pay the costs of the appeal.

Solicitors for Appellants: Barrow & Rogers.

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J. C.
1881

PULUKDHARI ROY
v.
RAJAH RADHA PERSHAD SINGH

---

J. C.*
1881

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL

\[\text{Defendant;}\]

AND

RANI ANUNDMOYI DEBI

\[\text{Plaintiff.}\]

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ON APPEAL FROM THE HIGH COURT AT BENGAL.

Bengal Reg. I. of 1824, sect. 9, cl. 11—Salt Lands—Liability to Assessment—Khalari Payments—Compensation.

Salt lands worked by the Salt Department from the time of the assumption by the Government of the monopoly of salt manufacture to the present day, though held by the Government subject to khalari payment, are nevertheless in contemplation of law (having regard to Reg. I. of 1824, sect. 9, cl. 11) lands held by the department rent free, whether they did or did not originally belong to a permanently settled estate; and when relinquished by that department are liable to assessment. If settled with others than the zemindar within the ambit of whose zemindary they are situated, the remissions made from his jumma during the holding by the department on account of khalari and other compensations will be allowed in perpetuity.

**Appeal** from a decree of the High Court (Sept. 15, 1879), varying a decree of the District Judge of Midnapore (Feb. 7, 1876), and declaring that the Plaintiff was entitled to possession of one half of the disputed lands in pargunnah Bhaitargurh, with costs.

One question involved in this appeal is as to the relation which the Government of India bears towards the zemindars in regard to lands taken possession of by Government for the purpose of salt
manufacture before the permanent settlement of their estates, and situate within the ambit thereof, and thenceforward continuously held by the State for such purpose until after the passing of Reg. I. of 1824. Another is as to the relative rights of the Government and such zemindars in such lands, after their relinquishment by the Salt Department of the Government.

The circumstances of the case are sufficiently stated in the judgment of their Lordships.

The suit was brought by Rajah Gojendro Narain Roy, the deceased husband of the Respondent, on the 21st of December, 1872, to obtain a declaration that the land in dispute, which had been relinquished by the Salt Department, formed part of the real lands of his permanently settled estate, for possession, and to set aside certain temporary settlements thereof which had been made by the Collector with his co-Defendants.

The material allegations of the plaint were to the following effect:—

"That before the accession of the British Government his ancestors used to manufacture salt in pergunnah Dakhin Mal and Bahirimootha by means of mohlughis on the lands fitted for that purpose therein, and to sell the same when so manufactured; that the Government after its accession, on taking the salt monopoly into its own hands, used to manufacture salt in the pergunnahs, and to grant to his predecessors in title khalari rent and salt moshahara; that on the 29th of May, 1801, Government made a permanent settlement of all three pergunnahs as one entire estate with his grandfather, Rajah Nar Narain Roy, fixing the annual jumna (Government revenue) at Sa. Rs.3405 for Dakhin Mal, at Sa. Rs.2913 for Bahirimootha, and Sa. Rs.55 for Bhaitigurh, but that as the Government retained the salt monopoly in its own hands, as also the lands in the first two pergunnahs which were fit for salt manufacture, there was granted to him in accordance with a resolution of the Governor-General in Council, dated the 8th of August, 1794, an annual sum of Rs.1176. 10a. 3p. as khalari rent, which the ajoora molungis formerly used to pay as the rent of such salt lands, and an annual rent for cutting firewood on all three pergunnahs at the rates of Rs.1. 8a. and Rs.2. 8a. per each cooly engaged each
year in that business, and also salt compensation together with
salt for home consumption at the rate of four per every hundred
maunds manufactured in the three pergunnahs. That at the
time of the permanent settlement Government did not make use
of any lands in pergunnah Bhaitgurh for salt manufacturing
purposes, and that consequently there was no khalari rent fixed in
the dowl of settlement for that pergunnah, but that immediately
after the settlement was made the Government took possession
of certain lands in that pergunnah fit for salt manufacture, and
carried it on, owing to the absence of any khalari therein, in those
of the adjoining pergunnah Bahirimootha, and did not pay khalari
rent separately for the lands so taken possession of therein, as it
was included in one estate along with the two other pergunnahs;
that the settlement was not made after the measurement of the
lands fitted for salt manufacture in the first two pergunnahs, but
that the Government fixed the khalari rent for the whole quantity
of land at a lump sum as before, and did not keep any particular
land separately in its possession for the purposes of salt manu-
facture at the time of settlement, but held possession of such lands
in all three pergunnahs as were suitable for salt manufacture so
long as they produced salt, and when fit for cultivation gave them
over to the zemindar, who incorporated them with his mal estate,
and that in this way the quantity of land used for salt manu-
facture varied from time to time. The Plaintiff then alleged that
Government had from 1801 to 1864 used all such lands in the
three pergunnahs as were or became from time to time suitable
for salt manufacture, and paid to his ancestors and himself the
khali rent and rent for cutting firewood as well as the salt
compensation, and also gave the salt for home consumption."

The written statement of the Collector alleged in substance
that it was not true, as stated in the plaint, that the salt produc-
ing lands remained in possession of Government until they became
fit for cultivation, when they were made over to the zemindar as
part of his mal lands: that the disputed lands had been in pos-
session of Government from a time anterior to the permanent
settlement, and had ever since been retained by them for the
purposes of salt manufacture, and that the khalari rent alleged in
the plaint to have been paid by Government as rent for the land
in suit was not rent for land, but a cess or tax which the zemindars used to levy on the molungis, and it submitted that the Plaintiff was not entitled to the possession of the same as part of his zemindary, and that the Government was, under clause 11, sect. 9, Reg. I. of 1824, entitled upon the relinquishment thereof by the Salt Department to assess the same.

On the 8th of August, 1873, the following issue was recorded. Does clause 11 of sect. 9, Reg. I. of 1814, bar this suit, even if Government has made any payment with reference to these lands either as rent or as compensation? The Judge held in the affirmative, and dismissed the suit with costs.

On the 20th of January, 1875, the High Court (Ainslie and Mitter, JJ.), remanded the case for trial in accordance with certain directions given in the judgment of Mr. Justice Ainslie. The Judge thereupon recorded seven issues in the case, and on the 7th of February, 1876, directed that the Plaintiff was entitled "to recover and hold, without any fresh assessment of revenue, all the lands in suit, except those situated in pergunnah Bhaitgurh, which are affected adversely to Plaintiff by clause 11, sect. 9, Reg. I. of 1824," and decreed accordingly.

The judgments of the learned Judges of the High Court (Sept. 15, 1879), were as follows:—

"Mr. Justice Ainslie:—This suit was brought before this Court in 1875. At that time I was of opinion that clause 11, sect. 9, Reg. I. of 1824, would operate to defeat the claim of the Plaintiff in respect of lands worked by the Salt Department from the time of the assumption of the salt monopoly to the passing of Regulation I. of 1824 (8th January, 1824), or otherwise assumed and held before and since the perpetual settlement, although they originally belonged to an estate for which a permanent settlement has since been formed.

"In this view it was necessary to inquire whether the whole of the lands claimed, and as to which the defence put forward by Government is the 11th clause of the 9th section, are lands properly covered by that clause.

"My learned brother, Mr. Justice Mitter, differed as to the construction of clause 11. In his view it refers to lands at one time
appertaining to an estate for which a permanent settlement has been formed, but which, having been severed from it before the settlement was concluded, became the property of Government, and he considers that these lands are those which, by the operation of the 3rd clause, have become the property of Government.

"The Judge in the Court below had based his decision in favour of the Government entirely on the words of the Regulation. I thought he had put a correct construction on the 11th clause, but that certain other facts required to be ascertained before the case could be disposed of; and Mr. Justice Mitter pointed out that there had been no binding admission by the Plaintiff's pleader, that the lands in suit have been held by the Government for the purpose of manufacturing salt from before the permanent settlement.

"In remanding the case this Court directed the Judge to determine this point, and any other issues which might arise in the course of the hearing. The District Judge has taken the order of this Court of the 20th of January, 1875, as leaving open the whole case, except the question of the applicability of Reg. I. of 1824 to lands in Hidgelli, as to which my learned colleague and I were of one mind. It, however, is obvious that it could not have been the intention of the Court to refer the point of law, on which there was a difference of opinion, for the consideration of the Court below. The 36th section of the Letters Patent governed the case.

"I am of opinion, however, that the point is not material in the present instance. On the appeal and the cross-objection we have the whole case before us, and have to make a decree in the suit. The mode in which the Judge in the Court below has dealt with the case, has led to the question of the application of clause 11, sect. 9, Reg. I. of 1824, being re-argued before this Court, and I conceive that there is no bar to my reconsidering my former judgment before making any final decree.

"The Judge in the Court below holds that the words of clause 11 are not conclusive of the title of Government to hold rent-free, and assess, when no longer required by the Salt Department, all lands which may have been occupied before the permanent settlement for the purpose of salt manufacture; but that if they were included in the permanent settlement and assessed with revenue,
under it, Government is not now entitled to a fresh assessment. He states that this was admitted by the Collector on the part of Government. This admission is now repudiated; and as it is merely a statement of the view of the law taken by the Collector, and did not practically affect the conduct of the case by the Plaintiff in the Court below, it seems to me that it is not binding on the Government.

"The Judge found that the lands in pergunnahs Bahirimootha and Dakhin Mal were included in the permanent settlement, but that those in pergunnah Bhaitgurkh were not so included, and, among other reasons, he gives this, that the khalari rents paid to the Plaintiff in respect of lands in the two former pergunnahs, were rents for the use of the land, although not calculated on the area of land used. He has found that there is no distinction between fuel and other salt lands.

"I have reconsidered the 11th clause of sect. 9 with all the light I have been able to bring to bear on it. The position of things with which the regulation from sect. 9 onward deals, is that set out in the first three clauses of that section. It states that the Government, since the establishment of the salt monopoly, had been occupying certain lands adapted to the manufacture, and had been exercising the privilege of assuming what appeared fit for the purpose, such lands being, at the time of occupation, wholly or mainly unfit for cultivation.

"It then says that inquiries had been instituted for the purpose of settling the character of the annual remissions of land revenue, and the claims of the zemindars and salt officers on each other, and, in the 3rd clause, declares the principle upon which the remissions were originally made; and by the fourth remissions on account of khalari rents, &c., collected before 1188 B.S., were declared to be perpetual.

"No doubt seems to have been entertained as to the legal right of Government to occupy such lands as are mentioned in clause 1, to the total exclusion of the zemindar, at least up to the permanent settlement; and this may probably be explained by the views originally entertained of the position of those who are termed in the Regulation 'land revenue engagers,' of which we get notices in the Fifth Report of the Select Committee on the
affairs of the *East India Company* (1812) in various places, *e.g.*, in p. 20. See passage referring to a letter of the Court of Directors of the 29th of September, 1792.

"When it was assumed that the only product of certain land was salt, and this was coupled with a declaration that the zamindar was prohibited from using the land for making salt, there was a bare ownership without profit, and it was, as it seems to me, only to meet any possible objection based on the permanent settlement, that the Government adopted that form of title which we find in Chapter II.—a perpetual rent-free title of occupancy, and abstained from declaring itself absolute owner in any case in which the lands had been, since assumption by the Salt Department, included in a permanently settled estate.

"In lands, to which it could set up a title by a prescription under clause 12, it took an absolute proprietary right. When the permanent settlement had taken effect before occupation by the salt officers, it abstained from setting up any higher title than that of lessee at a rent to be settled by contract.

"I do not read the word 'mehal' in clause 3 as referring to any defined extent of land: it is here used in the same sense in which it is used in Reg. X. of 1813, where the abkari mehal is spoken of, and represents a source of revenue, an excise or tax or profit derived from manufactured articles, and not from land. Consequently, I do not read this clause as declaring that any proprietary interest in land accompanied the occupation of the salt mehal.

"The land revenue engagers, before the monopoly, collected and paid both land revenue and salt revenue. They made their profit out of both. With the establishment of the monopoly of salt, their profits under that head ceased; and, as a natural and necessary consequence, their payments ceased also: hence the remissions made perpetual by clause 4. It is remarkable that, as pointed out in Mr. Plowden's Note on the Hidgelli Agency, there were two modes of dealing with the salt lands. Where there had been a settlement with individuals, it seems to have been thought sufficient to forbid the manufacture, and remit the Government revenue assessed on the profits of it.

"Where the Government itself was in possession of the entire
zemindary, there were payments to the ousted zemindars of malikana and mushahara, for loss of profits on the land and salt collections respectively. Obviously, there were no remissions to make; but it does not appear clear why the result should have been no salt revenue payments to Government in either case, but compensation for loss of profits continued in one case, and profits swept away without compensation in the other. However so it appears to have been. This, however, does not affect the consideration of clause 11.

"The basis of that clause, as it seems to me, is the notion that, as regards lands held from before the permanent settlement, there could not be any collections at the date of that settlement arising from the occupation of those lands, as Government held their only product, and, therefore, there could have been no assessment; and, as a consequence, there was no bar to an assessment whenever it might suit the Government to cease to take a salt revenue in lieu of a land revenue. The zemindar's right of occupation and use seems to have been deemed overridden by the exercise, at an earlier date, of the arbitrary privilege of assumption for the purposes of the salt monopoly; and the subsequent permanent settlement, in which 'there could be included no assets from this part of the estate, was held not to convey a title to hold without liability to enhancement. The absence of possible assets at the date of the permanent settlement, and the consequent exclusion from assessment of the lands of the profits of which the salt monopoly deprived the zemindars, is the foundation of the right of Government, asserted in clause 11, and it is this only that saves it from conflict with Reg. I. of 1793.

"If, then, as a matter of fact, I find that the lands which form the subject of the present suit were otherwise dealt with; that at the settlement of the estate the assets were calculated including income from these lands, I am forced to hold that, in spite of the language of clause 11, sect. 9, Reg. I. of 1824, the Government has, by its own conduct, precluded itself from now putting forward a claim to assess under that clause. It cannot both have its assessment and a right to assess on the ground of no prior assessment. It has been found by the Judge below, that the item in the assessment shown as khalari rent is a rent of land,
and in this I entirely concur. It could not be a profit on salt manufacture, for, excepting so far as compensation for loss of profits under the head of mushahara was allowed, the rights and interests attaching to the possession of the salt mehal were swept away by the monopoly, and, obviously, Government would not recognise a right to levy a tax on salt manufacturers for licenses to manufacture, unless that tax could be supported on the ground that it was payment for a right of entry on and use of the land; or, in other words, that it was rent of land.

"The mode of computation seems to me immaterial. Whether a rate per acre, leaving the salt agent to get what he could out of defined acres, or a rate per khalari (or centre of manufacture), under which the area was limited only by the average working capacity of a khalari, or a rate per head of manufacturers engaged, leaving them free to work where it suited them, was adopted, it was the use of land and of land only that the zemindar gave. The salt in or on the land was not his to give. Now, when the Government chose to include a rent of land, arising out of the salt lands, in the assets of the permanent settlement of the estate, it cannot, in virtue of clause 11, sect. 9, Reg. I. of 1824, override the provisions of the permanent settlement, by which it has bound itself by its own contract with the zemindar.

"The clause deals with lands included in the geographical limits of a permanently-settled estate, but excluded from consideration in valuing that estate for assessment. I cannot understand how the Government can say,—'We have paid you rent for this land ever since the beginning of the century, and we have taxed you on those payments: but we now intend to declare that this is a perpetual rent-free occupancy tenure, and to tax it over again.'

"That there is any separate Government julpai estate, does not seem to be made out. The same question was raised in 1838, and decided against the Government, and it seems to have been made clear then, that the salt agent worked at his will without reference to the boundaries he himself gave as limiting the Government and zemindary rights. It was said that the julpai chittas were not before Mr. Dick; but it seems to me that these chittas do not establish that the julpai lands mentioned in
them are exclusive of the lands for which khalari rent was paid. On the contrary, the rent of the salt lands given up in 1863, which the salt agent, by his notice of the 29th of July of that year, declined to pay after the 1st of May, then last past, did, as I understand, include the rents shewn in the documents in evidence in this case. Reference to the quinquennial registers proves nothing. In estates containing extensive tracts of unreclaimed land, the names of mouzahs afford no certain guide. The settlement was of pergunnahs, and there is nothing to shew that any parts of these pergunnahs were excluded.

"As to pergunnahs Dakhin Mal and Bahirimootha, the Settlement Records shew sums under the head of 'khalari rent:' in pergunnah Bhaitgurh, there is no such item. The Lower Court has, in consequence, held, that this last pergunnah must be treated differently from the two former. Against this decision the Plaintiff has taken an objection under sect. 348, Act VIII. of 1859, and I think it must be allowed. There seems to be no ground for supposing that the Government was, at the same time, treating one part of the estate one way, and one in another. The reasonable presumption is, that, in all parts of the estate dealt with at the same settlement, it treated lands of the same class in the same way. Thus when we find in two pergunnahs clear proof that the julpai land was taken into account in making the assessment, we may assume that the same was done in the third. The absence of a rent at that time is not, under the circumstances, sufficient evidence of exclusion from consideration.

"Many permanently-settled estates comprise extensive tracts, which were not charged with any revenue at the permanent settlement, but undoubtedly included in the engagements then made. I would, therefore, dismiss the appeal of the Government, and decree the appeal of the Plaintiff with costs of the whole litigation, payable by Government to the Plaintiff; the decree of the Lower Court being extended to include an award of possession of one-half of bighas 1,208-3-3-3, the disputed lands in pergunnah Bhaitgurh.

"Mr. Justice Mitter:—I agree with my learned colleague in thinking, for the reasons given by him, that the Government concluded a permanent settlement of all these three pergunnahs.
In the view which I take of clause 11, sect. 9, of Reg. I. of 1824, this finding is quite sufficient to entitle the Plaintiff to a decree; and therefore I am also of opinion that the appeal of the Plaintiff must be decreed, and that of the Defendants dismissed with costs."

Cowie, Q.C., and Woodroffe, for the Appellant, contended that the Government had the right to assess as against the zemindar the lands in suit. They were salt lands, and prior to 1780 the East India Company were in the habit of treating the zemindars as revenue farmers of salt land or mehals: see "mehal," Wilson's Glossary, pp. 318, 319. The manufacturer paid to the zemindar R.1. 8a. on each person employed. In 1780 the Government took the manufacture into its own hands, assuming the monopoly thereof. Salt lands were unfit for agricultural purposes, but the Government remitted to the zemindar khalari and other allowances in respect of the profits which the zemindars had previously made. Reg. VIII. of 1793, sect. 100, contains a special provision for salt lands. The Government continued the manufacture till 1863, and on giving it up called on the Respondent to come to a settlement in respect of the lands used for salt, which the Government was abandoning, and in respect of which no assessment had ever been made. The Respondent refused, and thereupon the Government, in June, 1875, settled with others. The Respondent's case is that those lands were included in the settlement under which he holds, and that the Government paid him rent for the use of the lands whilst they were in occupation. That is not so. The khalari payment was not rent, but compensation for the profits formerly made by the zemindar: see Reg. I. of 1824, sect. 9, clause 11. The zemindar never paid revenue for these lands whilst in the possession of Government, and if the Government yield him possession they are entitled to assess them, and the zemindar has no right thereto until a settlement has been come to. The judgments below are erroneous in the construction which they put upon the above-mentioned clause of the Reg. of 1824, and in holding that khalari payment was rent paid by the Government for the use of the land, and that the amount thereof had been included in the original assessment. The real force of
the clause is that it is a statutory declaration that these khalari payments are not to be considered rents, and that the lands are held rent free. Even assuming that the amount of the khalari payment was taken into account at the original assessment of the Respondent's estate, the Government is not by such assessment precluded from now assessing the lands in suit, seeing that the words of the Regulation are absolutely clear upon the point, and expressly confer the authority claimed.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:——

The present appeal arises thus. The Government of India determined to relinquish the manufacture of salt in the lands the subject-matter of this suit, and, in pursuance of a power which it conceived itself to possess under Reg. I. of 1824, offered, in the year 1865, to settle these lands with the Plaintiff, within the ambit of whose zemindary they were situated. The Plaintiff declined the offer, denying the right of the Government so to deal with them, whereupon they were temporarily settled with two other persons. The Plaintiff has brought the present suit for a declaration that a moiety of the lands in question, amounting to 16,665 begahs, are part of the mal lands of his permanently settled estate, viz., three pergunnahs, Dakhin Mal, Bahirimootha, and Bhaitgurh, for possession of them, and to set aside the temporary settlements.

The 1st Defendant is the Collector of the zillah of Midnapore, who represents Her Majesty's Government. The Defendants Nos. 2 and 3 are the grantees of the temporary settlements. The 4th, the widow of the Rajah Koar Narain Roy, is described as a pro forma Defendant, entitled to half of the land sued for.

The judgment of the High Court was in favour of the Plaintiff, and from that judgment the Collector has appealed.

The Government of India has always claimed, as indeed the Native Governments to which it succeeded had done, the sole right to all salt produced within its territory, and the revenue derived from salt has always been treated as quite distinct from
that derived from land. Before the year 1780 the Government had been in the habit of letting the salt-producing districts, which were commonly unfit for agricultural purposes, to farmers, who might or might not be the owners of the adjacent lands, and it was only in the latter part of the last century that some preferential claim to a lease of such districts was admitted on behalf of the zamindar within whose zemindary they were situated.

In the year 1780 the Government determined on assuming what is called in the Regulations a monopoly of salt, but which may be more correctly described as the exclusive right to manufacture it. They accordingly took all salt-producing lands into their own hands, working them by agents commonly called salt agents. The zamindars who were thus deprived of their lands were compensated by certain remissions and allowances. To require a zamindar from whom a portion of his land had been taken, to continue to pay rent for that portion would have been obviously unjust. So much rent therefore as he would probably have obtained for the land if he had kept it in his possession, and which was usually estimated on the footing of 1½ anna per head on the men who would probably be employed in the salt manufacture, was remitted to him. The remission was thus carried into effect. He was still assessed on the whole zemindary, but the estimated rent of the "khalari," or salt land, was treated as payable by the Salt Department, and debited to them. This payment or debit was assumed to be for the benefit of the zamindar, and he was credited with it; the effect of this arrangement being that, although he was nominally charged with the jumma due on all the land geographically within his zemindary, he was in reality charged only with so much of the jumma as appertained to that land which he retained in possession. A further allowance called mushubara (monthly allowance) was sometimes made to him in respect of profits which he might have derived over and above rent, and sometimes a further allowance of salt itself.

In the present case we have an authenticated extract from the decennial settlement in 1801 of the three pergunnahs in suit with the ancestors of the Plaintiff.

It will be enough to take the entries relating to the first named, pergunnah Dakhin Mal. No. 220 is described as consisting of
certain farms, Harripore, &c. "engaged for by the proprietor in perpetuity," and a sudder jumma of Rs.3,012. 1. 19. is assessed upon them. No. 221 is described as "khas" without any statement that it was engaged for in perpetuity, probably in conformity with Reg. 8 of 1793, s. 100, which declares that the rules for settling with proprietors do not apply to salt districts held khas by Government, which are to continue khas and be assessed from year to year. Under the head of "farms, &c., mehals," there is entered "khali renta" and the sudder jumma is stated as Rs.393. 11. 7., which added to the former figure makes a total jumma of Rs.3405. 13. 6. 1.

The manner in which the Rs.393. 11. 7. is dealt with appears from several purwannahs to the same effect as the following, of the 14th of February, 1856, relating to a portion of it.

"C. B., Salt Agent.

"To Raja Gajendro Narain Roy (minor), and Baboo Koar Narain Roy, zamindar.

"You are hereby informed that this purwannah is given to you as a certificate of the fact that the rent of the khali for the year 1262 n.s., as given below, has been duly debited in the office of this agency, and credited to your account under the collectorate head of zillah Midnapore, and that a statement of the same has been forwarded to the Collector of the said district. Dated the 14th of February, 1856, corresponding with the 4th Falgoon 1263 Willaity.

Description.                         Amount.

"Khalari rent for kist Magh 1262, for 3 annas' share of pergunnah Dakhin Mal R. A. P. and others . . . . . . 232 13 5

"Total, two hundred and thirty-two rupees thirteen annas and five pie only.

"Jodoonath Bose, Mohurriir."

It thus appears that the zamindar, who was treated as liable for the gross jumma, was relieved from the payment of the khali portion of it, that portion being debited to the salt agency and credited to him. Bahirimoota is settled in exactly the same
form as *Dakhin Mal*, but in the case of *Bhaitgurh* no khalari rent is mentioned.

These being the main facts, it is convenient now to refer to Reg. I. of 1824, s. 9, by the construction of which the rights of the parties are determined.

Clause 2 refers to the rules and regulations following for the government of the officers of the Salt Department.

Clause 3 of the section is in these terms:

"The principle upon which remissions were originally made from the jumma of zemindars, on account of khalari rents, or the like, upon the assumption of the salt mehal, is hereby declared to have been to relieve those to whom they were granted from an assessment upon assets which were transferred to Government on the establishment of the system of exclusive manufacture, with the rights and interests attached to the possession of the mehal."

The 4th is as follows:

"All zemindars and others, where claims to remission were allowed in the first instance, that is, on account of rents collected by them previously to the year 1188 B.S., shall be considered to fall within the class of land renters who received an abatement of what they then ceased to collect, upon the principle above laid down; consequently, it is hereby declared that the sums remitted to them will be allowed in perpetuity."

Clause 7:

"The remission allowed on account of rents collected previously to 1188 will still be retained in the revenue books, and will be carried to the debit of the Salt Department."

But the further levy of such rents is discontinued.

The 11th clause, on which the Government mainly relies, is in these terms:

"Salt works worked by the Salt Department from the time of the assumption of the monopoly to the present day, or otherwise assumed and held before and since the perpetual settlement (although originally belonging to an estate for which a permanent settlement has been formed), shall be considered to be held by the officers of the Salt Department, free of rent, under a perpetual title of occupancy, and shall be considered to be, and to have been, liable to assessment by the revenue authorities, when relin-
quartered by the officers of the Salt Department, in the same manner as if they had been farmed by an individual from Government, and had been open to resettlement on the expiration of his lease."

Clause 12 runs thus:—

"Salt lands, upon which salt works have been established, whether before or after the perpetual settlement, shall, provided they have been worked for twelve years without claim on the part of any one to receive rent or compensation for the use of the same, be deemed to be the absolute property of the Government.

The short history of the litigation is as follows:—

The case first came before Mr. Lance, the Judge of Midnapore, who dismissed the Plaintiff's suit, on the ground that Reg. I. of 1824, sect. 9, cl. 11, gave to the Government the power which they claimed.

On appeal to the High Court the case was remanded in order that it might be tried whether or not some portion of the land claimed was "julpai," that is to say, land on which the right of the Government was to collect fuel, not manufacture salt, and which consequently was not affected by clause 11.

Mr. Justice Ainslie, the Senior Judge, seems then not to have dissented from the view of the regulation taken by Mr. Lance, and to have remanded the case only on this ground. Mr. Justice Mitter, indeed, took a different view of the clause, appearing to think that the words in parenthesis, "although originally belonging to an estate for which a permanent settlement had been formed," narrowed the meaning of the previous words, limiting it to such an estate only, and that the estate in question was not such an estate.

Their Lordships are of opinion that the words have no restricting effect, but are intended to prevent restrictions, and mean that whether the salt lands worked did or did not belong to a permanently settled estate, the same consequences would follow.

The case on being remanded came before Mr. Tottenham, who had succeeded Mr. Lance, and instead of confining himself to the comparatively simple question on which the case had been remanded, he retried it from the beginning on a number of issues,
which, in their Lordships' judgment, tended rather to obscure than to elucidate it.

He gave judgment for the Plaintiff with respect to the two first mentioned pergunnahs, mainly on the ground, as their Lordships understand, that the khali payment was, properly speaking, rent paid to the Plaintiff for the land, a subject on which there had been much controversy. He gave judgment for the Defendant with respect to the third, Bhaitgurh, mainly on the ground that the Government had not paid rent for that.

On cross appeals the High Court affirmed the judgment so far as it was in favour of the Plaintiff, and reversed it so far as it was against him.

In their Lordships' opinion the case is resolved by giving to the words of the Regulation their plain meaning. Clause 3 clearly applies to this case, and was probably drawn with the intention of its being applicable to such cases. A salt mehal was assumed by the Government, a remission was made from the jumma of the zamindar on account of khali rent, in order to relieve him from assessment on an asset which was transferred to the Government. Clause 7 points to the course which the settlement paper and the pergunnahs shews to have been followed. The applicability of clause 11 depends wholly on whether or not the lands in question came within the first words of it, "Salt lands worked by the Salt Department from the time of the assumption of the monopoly to the present day," the alternative which follows need not be considered, nor the parenthetical words.

Their Lordships understand the Courts to have found in substance that the lands in suit (including Bhaitgurh) have been so worked, and they adopt this finding. This being so, the Legislature declares that they shall be considered to be held by the officers of the Salt Department, free of rent, under a perpetual title of occupancy. Their Lordships agree with Mr. Lance that, these being the words of the Regulation, it is quite immaterial whether the khali payments are called payments, or rents, or remissions. As has been before intimated, they seem, properly speaking, remissions within the meaning of clause 3, but their being called or treated as "rents" would not affect the force of the Regulation, which enacts that the lands shall, in contempla-
tion of law, be held by the Salt Department rent free, and when relinquished by that department shall be liable to assessment just as they would have been if held under a lease which had expired. The effect of the decisions of the Courts is to import limitations into the Regulation which are not to be found in it, and to fritter away its plain words. It may be further observed that, if there had been no "khalari rent" or compensation, the Government would, under clause 12, have acquired a title in twelve years. Clause 11, as distinguished from clause 12, seems to contemplate some such rent, or payment, or remission, and it is not improbable that the words "shall be considered free of rent" were inserted with the intention of rendering impossible the contention which has been raised.

For these reasons their Lordships are of opinion that the Government have the right which they claim to resettle these lands. They think it right, however, to refer to the concluding words of the 4th clause,—"It is hereby declared that the sums remitted to them (the zemindars) will be allowed in perpetuity." Their Lordships assume that the khalari allowance will be continued to the Plaintiff, or, what is the same thing, that if the relinquished salt lands be settled with others he will be assessed only for so much of the talook as was settled with his ancestors as proprietor in perpetuity in 1801, and which he retains; to assess him for land which he can no longer occupy would be clearly unjust.

For these reasons, their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, and the suit dismissed, each party to pays its own costs in the Court below. Any payment which may have been made in respect of costs to be refunded.

Solicitor for Appellant: H. Treasure.
CHAUDHRI UJAGUR SINGH . . . . PLAINTIFF;
AND
CHAUDHRI PITAM SINGH AND OTHERS . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mitakshara—Rights of the Son in Father’s Share.

Although a son under Mitakshara law acquires by birth an interest in the share to which his father is entitled under a Government grant of immoveable property, he does not acquire by birth any equitable right to procure an alteration in the terms of such grant either as against the Government, his father, or his father’s cosharers, or to sue to set aside a compromise in respect thereto which his father has effected with his cosharers.

APPEAL from a decree of the High Court (April 30, 1878), reversing a decree of the Subordinate Judge of Mainpuri, and dismissing with costs the Appellant’s suit for possession of five biswas of mouzah Takha, together with all the zemindary rights appertaining thereto.

The circumstances out of which the suit arose and the proceedings therein are set out in the judgment of their Lordships.

Leith, Q.C., and Doyne, for the Appellant, contended that the Appellant was not barred as to his rights in the mouzah in suit by the acts of his father. The arrangement of June, 1867, under which his father accepted one-fourth share in lieu of the one-half share to which he and his father were jointly entitled was made during the Plaintiff’s minority. It did not bind the Plaintiff, and there was no evidence of any transactions in reference to the mouzah in suit which were sufficient in law to cut down the share to which the Plaintiff and his father were jointly entitled to less than a moiety of the whole.

Cowie, Q.C., and Cowell, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This suit was brought to obtain possession of two and a half biswas of a mouzah called Takha, pergunnah Barthana, out of the five biswas which were said to have belonged to Musammat Gulab Kunwar, deceased, the wife of Sundar Singh, and for a declaration of right in respect of two and half biswas out of five biswas of the Defendant Musammat Sahib Kunwar. After the plaint was filed Musammat Sahib Kunwar died, and it was amended by making it a claim for the possession of those two and a half biswas also. The property was originally that of Anand Singh, who had five sons, Chatar Singh, Durjan Singh, Sundar Singh, Desraj, and Chatarpat. Chatar Singh died without issue, and the surviving four brothers then became entitled to it in four equal shares. Each became entitled to five biswas. Durjan died in 1823, leaving a son, Chakarpan; Sundar Singh died in 1826, leaving a widow, Musammat Gulab Kunwar, who died in 1860; Desraj, the third son, died in 1852, leaving a son, Gandharb Singh; and Chatarpat, the fourth surviving son, died in 1829, leaving a widow, Musammat Sahib Kunwar. Chakarpan, the son of Durjan, had three sons, who are the Respondents. Gandharb Singh had two sons, one being the present Appellant; and the other, Madho Singh, being a minor, was not joined in the suit.

It appears that after the death of Chatar Singh the estate was recorded as being held by the four survivors, Durjan Singh, Sundar Singh, Desraj, and Chatarpat. On the death of Durjan, Chakarpan was entered as the holder of the estate, and after the death of Sundar Singh and Chatarpat, the name of Desraj appears to have been recorded. Subsequently to this the names of the widows were entered as the holders of the shares of their deceased husbands. It is said, on the part of the present Appellant, the Plaintiff in the suit, that this was done for the purpose only of giving them maintenance; but whether it was so or not does not appear to their Lordships to be material. The fact is that they were entered for a time as the holders of the shares; but subsequently, in 1842, the widows being still alive, the names of Ajudhia Pershad and Budh Singh, two of the sons of Chakarpan, appear to have been substituted for the names of the widows. It
is said that in the document in which this appears there has been an interpolation, and that at the time when that document was authenticated by the acknowledgment of the parties those names were not in it. However, whether that be so or not, the estate fell into arrears, and it was sold by the Government at auction for arrears of revenue. After the sale a lease for twelve years was made of the property to Chakarpan, Desraj, Ajudhia Pershad, and Budh Singh. Before that lease, which was made in 1844, expired, the Government appear to have come to the conclusion that it would be better to make a regrant of the property, and certain proceedings were taken which are very material in the consideration of the case. They appear to have been begun by a proceeding of the Collector of the 14th of April, 1853, in which it is stated that a letter had been received from the Commissioner of Revenue, dated the 2nd of April, in reply to a previous letter of the Collector, together with a letter of the Secretary of the Board of Revenue, dated the 22nd of March, 1853, containing a direction that "The Collector should submit a special report of this village,"—therein called Takha, pergunnah Sakatpur Ayrova,—"stating full particulars in regard thereof, in order that Government orders may be obtained in behalf of the former zemindar. A full report should be submitted. It should contain other accounts of the settlement, such as what sum has fallen due as arrears, and in what years. It should likewise state whether the zemindars agree to take the property on the condition of paying the sum of Rs.3,810 or more—whatever sum might be considered proper to be taken from them, and nothing should be left out." The Collector made an order that a parwana should be issued to the tehsildar, directing him to furnish a report, "stating what persons are heirs of Desraj, the deceased farmer and former zemindar, and how are Ajudhia Pershad and other farmers related to Chakarpan and Desraj, former zemindars." The parwana was issued, and is dated the 21st of April, 1853, and upon that the tehsildar made his report, dated the 27th of April, 1853, in which he says: "In reply to the parwana dated the 21st of April, 1853, No. 271, I beg to say that, from an inspection of the khewat for 1249 Faśli, it appears that, in respect of the zemindary of this village the names of Chakarpan and Desraj are entered as lambardars, and
those of the wives of Sundar Singh and Chatarpat are entered as pattidars. It appeared from the statement of the kanungoe of the mehal that Sundar Singh and Chatarpat were real brothers of Desraj and the real paternal uncles of Chakarpan. After the death of Sundar Singh and Chatarpat, the names of their wives were entered in the khewat; and afterwards this village was, on account of revenue arrears, sold by auction, and purchased by the Government.” This their Lordships find was correct. “No one had any proprietary right left therein excepting the Government. But, at the time of the revised settlement, the settlement officer, in consideration of the rights of the former zemindars, farmed out the village to them, and the names of the said Desraj and Chakarpan, and those of Adjudhia Pershad and Budh Singh, sons of Chakarpan, were entered.” Then comes what is most material: “The reason of the names of Adjudhia Pershad and Budh Singh being entered,”—shewing that at that time the names were actually entered, because he says he had inspected the khewat,—“appeared from the statements of Chakarpan and Gandharp Singh, son of Desraj, to be this, that the wives of Sundar Singh and Chatarpat made a gift of their shares to Adjudhia Pershad and Budh Singh, and, having executed the deeds of gift, got them witnessed by the kanungoe of the mehal. This was also corroborated by the statement of the kanungoe. Chakarpan stated that the deeds of gift, &c., were filed in the Revenue Court. Desraj has no other son but Gandharp Singh, nor any other heir; nay, ere this, after the death of Desraj, the name of Gandharp Singh has been entered in the place of Desraj, deceased. Adjudhia Pershad and Budh Singh are the sons of Chakarpan, and are grandsons to Desraj in point of relationship. I have sent Chakarpan, Adjudhia Pershad, Budh Singh, and Gandharp Singh, the four farmers under a separate chalan, to you, with Jalub-ud-din”—a peon; shewing that he did not, as was suggested in the argument, make this report merely upon an inspection of records, but that he had the parties before him—including Gandharp, the Plaintiff’s father—and that he also gave to the person to whom he made the report the means of examining them himself. Upon this report proceedings appear to have been taken by the Government. On the 8th of July, 1853, a letter was sent by the Secre-
tary to the Board of Revenue, by whose direction these proceedings were taken, to the Secretary to the Government, saying: "I am directed by the Sudder Board of Revenue to request that you will submit for the consideration and orders of the Honourable the Lieutenant-Governor the accompanying file of correspondence regarding mouzah Takha, the property of Government." It is to be observed that the Government treats it as at that time absolutely its property, and which it could deal with it as it thought fit. The letter states the reasons why the Government thinks that the re-grant should be made:—that the village broke down in consequence of the famine, and the revenue was not properly paid. It continues: "Chakarpan, the farmer who has continued till the present time in occupation, is the ex-zemindar, and, in consideration of his having failed only on account of the assets being inadequate to the demand, it is proposed to restore the proprietary right to him on condition that he pay up Rs.3,810. 2a. 6p., the amount of balances which accrued under his own management, and not under kham tehsil. These are detailed in the margin. The Board of Revenue are of opinion that a good case is made out for the old proprietors, and they recommend that the proposed measure may receive his honour's sanction, subject to the conditions that, preliminary to reinstatement, a full and complete compact for future management be executed and recorded." Upon that there is a letter from the Officiating Assistant-Secretary to Government, dated the 22nd of July, 1853, in which he says:—"I have the honour to acknowledge the receipt of your letter No. 353, dated the 8th instant, with its enclosures, and am directed by the Honourable the Lieutenant-Governor to inform you in reply that he has been pleased to confer the proprietary right in mouzah Takha, a Government estate in pergannah Sakatpur, zillah Farukhabad, on Chakarpan, the farmer and ex-zemindar, on the conditions proposed by the Board."

It is clear that Chakarpan, where he is spoken of as the ex-zemindar, was not intended by the Government to be the only person who was to have the benefit of the grant. This, indeed, has not been suggested. He was to have it for the persons who are spoken of as the old proprietors. Then who were the persons that the Government considered to be the old proprietors? They
had in the report which was before them, and upon which they acted, a statement that the old proprietors and the persons who had been in possession under the lease were Chakarpan, Gandharb Singh, Ajudhia Pershad, and Budh Singh; and the only construction that can be put upon these letters, which are in fact the grant by the Government, is that the intention was that the Government, being, by reason of the sale for arrears of revenue, the absolute owner of the property, and so considering itself, resolved to make a grant to them in four shares.

What took place subsequently is this: On the 5th of April, 1855, two years afterwards, Chakarpan and Gandharb Singh, the father of the Plaintiff, and Ajudhia Pershad and Budh Singh, appeared, and caused to be recorded what is called a village administration paper, in which it is stated that they were entitled to this property in the shares of five biswas each. It appears that on the 3rd of April, two days previously, an inquiry was made, in which Chakarpan and Gandharb Singh stated that, at the time of the settlement, they were the two lambardars, and that it was arranged that they should continue to be appointed lambardars, and Ajudhia Pershad and Budh Singh should remain pattidars. The patwari was examined, and he stated that the shares which they had stated were correct—the shares of five biswas each—and he went on to say: “All the four persons are in possession as usual, and, besides these four shares, there is no other co-partner and co-sharer.” There is evidence, therefore, that the possession followed the grant by the Government, and was in accordance with the view which their Lordships take of it. That possession appears to have continued without any dispute, as far as their Lordships can see, down to November, 1864, when the parties made an agreement for an arbitration for making a partition. After that had been proceeded with some little way, Gandharb Singh set up a claim to five biswas, in addition to the five of which he had been in possession. His claim was that the property was the family property, and that upon the death of the widows he became entitled to half of the share of each of them. In consequence of this, the arbitrators refused to proceed. They considered, and properly, that they had no authority to try such a question, and the arbitration came to an end. Then, in 1867,
Gandharb brought a suit claiming the five biswas, which was compromised, and the present Plaintiff has brought a similar suit, claiming to be entitled not only to the share of the five biswas which clearly belonged to his father Gandharb, but to the other five biswas, and to set aside the compromise. The suit by Gandharb did not proceed to trial, but he agreed to a decree by which he acknowledged that he was entitled only to the five biswas. He did, however, obtain by the compromise a decree for partition, but their Lordships consider that it is not necessary for them to give any opinion as to the effect of the compromise upon the right of the present Plaintiff. He, at the time of the grant by the Government, was not living; he was not born until the 24th of February, 1855, and, whatever rights he may have under the Mitakshara law to ancestral property, it cannot be said that at the time of his birth there was any ancestral property of which he could acquire a share except the five biswas. The grant being, in their Lordships' opinion, a grant by the Government—which, as has been said, had the absolute power to dispose of the property in any way it thought fit—only of five biswas, that was all the interest which Gandharb Singh had, and his son could not acquire a share in any other. It has been said that Gandharb was imposed upon; that he was led by the false representations of Chakarpan to assent to the entry of the names of the two sons of Chakarpan, and to allow it to appear to the Government that they were proprietors. Supposing that he was so imposed upon, and that there was some right in him to procure an alteration of the grant, that is not such an interest as a son would by his birth acquire a share in. Whatever the nature of the right might be—whether it could be enforced by a suit or by a representation to the Government—it does not come within the rule of the Mitakshara law which gives a son, upon his birth, a share in the ancestral estate of his father.

Their Lordships, therefore, will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the High Court, and the Appellant will pay the costs of the appeal.

FAKHARUDDIN MAHOMET AHSAN CHOWDHRY

{ Appellant; J. C.

AND

OFFICIAL TRUSTEE OF BENGAL

(No. 34 of 1878)

AND

FAKHARUDDIN MAHOMET AHSAN CHOWDHRY

{ Plaintiff.

AND

OFFICIAL TRUSTEE OF BENGAL

(No. 35 of 1878)

AND

ALIMUNNISSA KHATUN

Appellant;

AND

OFFICIAL TRUSTEE OF BENGAL

Respondent.

AND

SHA SUFI SUFILLA

Appellant;

AND

OFFICIAL TRUSTEE OF BENGAL

Respondent.

(CONsolidated Appeals, Nos. 38 and 39 of 1878.)

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Limitation—Act IX. of 1871, Sched. 2, Clause 93—Decree for "Possession with Wasilat."

In a suit brought in 1875 to set aside a deed as a forgery, it appeared that the same was executed on the 17th of July, and registered on the 19th of July, 1864, and that an attempt to enforce the deed had been made in 1865—

Held, that the suit fell within the description of clause 93 of the 2nd schedule of Act IX. of 1871, and was barred by limitation, whether the period (three years) ran from the date of registration or the date of the attempt.

Where a decree is for "possession with wasilat," the reasonable construc-


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tion thereof is that wasilat is given thereby up to the date of delivery of possession, and not merely up to the date of suit, notwithstanding that in the schedule to the plaint wasilat is estimated according to the amount thereof then due.

APPPEAL in No. 34 of 1878, from a judgment of the High Court (May 28, 1878) affirming that of the Judge of zillah Furriapore (Dec. 31, 1877).

The Respondent represented a decree-holder for land and mesne profits, and the Appellant contended that those mesne profits were under the original plaint, upon which the decree was obtained, recoverable only up to the date of the filing of that plaint in December, 1861, and not afterwards, and that, assuming that they were recoverable for the subsequent period, those mesne profits have been assessed upon an improper basis and are excessive.

The Courts below concurred in holding that, under the terms of the decree in question, the Plaintiff and her assignees were entitled to mesne profits down to the time of the recovery of possession of the lands decreed, and that the assessment of mesne profits was fully supported by the evidence.

The facts of the case and the decree in question (July 27, 1864) are sufficiently set out in the judgment of their Lordships.

As regards the point of law the judgment of the High Court was as follows:—

"The questions which we are called upon to determine in this appeal are two: firstly, whether the decree-holder, that is to say, the person who now stands in the shoes of the original Plaintiff, in whose favour the decree has been made, is entitled to recover mesne profits upon the estate which was the subject of dispute down to the period of obtaining possession, or only for the precise period for which wasilat is estimated in the schedule attached to the original plaint; and the second is, whether, supposing that the decree-holder is entitled to wasilat for the whole period, the Court below has assessed it upon a proper principle, and upon sufficient materials. On the first of these questions we have been much pressed by the learned counsel for the Appellant with the Full Bench decision in Mosoodun Lall v. Bheekaree Singh and others (1), which decision, it is remarked, has received the approval.

of the Judicial Committee of the Privy Council in the case of Sadasiva Pillai v. Ramalinga Pillai (1). I was a party to the decision of the Full Bench which I have referred to, and although I may regret that a wider construction was not given to the powers of the Court, executing a decree under sect. 11 of Act XXIII. of 1861, I must admit that we are fully bound by the decision in that case, especially in so far as it has been definitively affirmed by the authority of the Judicial Committee. Now, the point which was referred for the decision of the Full Bench was whether when a decree is silent as to interest the Court executing the decree has power to award interest. The learned Chief Justice, in delivering the judgment of the Court, went, no doubt, a little beyond the reference, and he said: 'We have no doubt that in executing a decree the Court which executes it has no power to alter or add to it.' But I observed that the Judicial Committee, in stating their approval or their affirmation of that decision, say:—'They therefore accept the construction of the Indian Courts as settled law, and that acceptance, as was admitted, suffices to dispose of the claim to interest on the subsequent mesne profits, which is raised by the present appeal.' Then, as regards the question of interest, which was entirely a separate question, the judgment of the Full Bench of the Calcutta Court, and the concurrent judgments of the other Indian Courts, are referred to as settled law. However, even admitting that the authority of the Full Bench decision goes the full length of the judgment of the Chief Justice, we have to consider here whether the judgment and decree delivered in this instance by Mr. Peterson was silent on the subject of mesne profits. It certainly was not silent, for, at the conclusion of the judgment the words previously used in the body of it are repeated, and it is said:—'the Plaintiff be declared entitled to possession of the land mentioned in the kabinnama, together with wasilat from the commencement of Srabun; the wasilat to be ascertained by local inquiry, and to bear interest at 12 per cent. from date of the ascertainment of the amount due to date of payment.' Now it is clear that that which the Court gave to the Plaintiff by these words was ordered to be ascertained by local inquiry. On referring to the answer of the Defendant in that suit it appears

that, in fact, he did not deny the correctness of the sum alleged by the Plaintiff to be due as wasilat for the specific period there mentioned. That being so, and the Plaintiff and the Defendant, therefore, not being really at issue as to that particular amount, it is clear that there was nothing to be inquired into, or ascertained in execution, if the Court only meant to give wasilat for the particular time mentioned in the plaint. I think that what the Court intended was to give wasilat from the date of dispossession down to the date of the recovery thereof. This interpretation of the decree had already been come to by Mr. Geddes, the District Judge, before whom the execution proceedings first came. It was impugned before myself and my brother White on a former appeal, and we, though not formally, certainly by implication, expressed our approval of that construction, and after a full consideration of the point my present colleague and I now see no reason to arrive at a different conclusion. I think, therefore, that the decree of this Court which reversed the decree of the Court below in the original suit was not silent as to mesne profits, and that the Court intended to exercise and did exercise the discretion vested in the Courts by sect. 196 of the repealed Code of Civil Procedure, and allowed the Plaintiff mesne profits in continuation of what she had claimed in the plaint down to the time of the recovery of possession. It is conceivable and probable that the learned Judges who delivered judgment on that occasion desired to save the parties further endless litigation; and we can see from the concluding words of the Judicial Committee in Sadasiva Pillai's case how extremely unwilling their Lordships would be that a just claim should be defeated upon an objection thought of at a late period of the proceedings, namely, upon an objection of limitation brought forward at that time. On the first of these points, therefore, we are distinctly against the Appellant."

Leith, Q.C., and C. W. Arathoon, for the Appellant, in appeal No. 34, contended that this judgment was wrong, and that, having regard to the terms of the decree of the 27th of July, 1864, the Respondent could only have had awarded to him mesne profits down to the date of suit. The suit was for possession and mesne profits down to date, the decree was in accordance with sect. 197
of Act VIII. of 1859, and did not award more than was asked. The Indian Courts have in executing the decree added to it words which it did not contain, and that was beyond their competence. [Sir Barnes Peacock referred to sect. 11 of Act. XXIII. of 1861]. Reference was made to Mosoodun Lall v. Bheekaree Singh (1); Sadasiva Pillai v. Ramalinga Pillai (2).

Cowic, Q.C., and Doyne (Woodroffe with them), contended that under the decree the Respondent was entitled to mesne profits down to date of recovering possession. The mode of valuing the mesne profits in the plaint only affects the stamp. Reference was made to Dhurum Narain Singh v. Bundhoo Ram and others (3); Bunsee Singh v. Mirza Nusuf Ali Beg (4); Rajah Lelamund Singh v. Maharajah Luckmissur Singh Bahadoor (5).

Leith, Q.C., replied.

Appeal in No. 35, of 1878, from a judgment of the High Court (May 27, 1878) affirming that of the same Judge (March 28, 1877) whereby the suit of the Appellant was dismissed which he had brought on the 22nd of December, 1875, as the mutawah or trustee and manager of a wukf or endowment to set aside hibabul-e-waz (gift in lieu of consideration) dated the 17th of July, 1864, said to have been executed by Najamunissa Khatun, the Appellant’s wife, and purporting to convey a six annas share of such endowed property to N. P. Pogose, deceased, represented by the Respondent, on the ground that it was a fraudulent transaction, and for a declaration that the property being wukf was inalienable. The High Court dismissed the suit as barred by limitation under Act IX. of 1871, sched. 2, clause 93.

Leith, Q.C., and C. W. Arathoon, for the Appellant, contended that there was no “attempt to enforce” within the meaning of clause 93, that the proceedings relied on did not constitute an attempt.

Cowis, Q.C., Doyne, and Woodruff, for the Respondent, were not called upon.

Consolidated appeals (Nos. 38 and 39 of 1878) were preferred from one judgment of the High Court (May 28, 1878) and two decrees thereon, affirming an order of the Subordinate Judge of Furriedpore (Sept. 3, 1877) disallowing the objections of the Appellants to the validity of an auction sale of their property (Feb. 21, 1876), which sale took place on the application of Pogose, whereby the applicant himself became the purchaser.

These appeals raised a question of fact the nature of which is stated in the judgment of their Lordships, and the decisions upon which by the Courts below were concurrent.

Leith, Q.C., and C. W. Arathoon, for the Appellants.

Cowis, Q.C., Doyne, and Woodruff, for the Respondents.

The judgment of their Lordships was delivered by

Sir Robert P. Collier:—

The circumstances which gave rise to these appeals are as follows:—Najamunnissa Khatun, a Mahommedan lady, in 1861 brought a suit against her husband for the purpose of obtaining possession, together with mesne profits, of certain lands which she alleged to have been conveyed to her by her husband by a deed described as a kabinnama in lieu of prompt dower. The First Court decided against her. The High Court, on the 27th of July, 1864, reversed that decision, and gave her what she claimed. She describes her suit as brought "to obtain possession of the zemindaries and putni talooks mentioned in the schedule given below, and the mesne profits thereof"—claiming mesne profits in a very general manner. It is true that, subsequently valuing the suit, and for that purpose describing her claim in the schedule, she speaks of her claim for mesne profits for the period of dispossession, that is to say, some eighteen months before the institution of the suit, as amounting to Rs.48,400. The High Court, in giving judgment in her favour, on the 27th of July, 1864, observed:—

"It is unnecessary to make further comment on the case of the
Plaintiff, which I think fully proved to the extent of the factum of the kabinnama and her right to the absolute possession of the lands therein mentioned, together with wasilat and interest from the commencement of Srabun 1267, when she was taken from her husband's house." The decree is drawn up in pursuance of that judgment, and is in these terms: "It is ordered and decreed by the said Court, that the decree of the Lower Court be and the same is hereby reversed, and the Plaintiff is declared entitled to possession of the land mentioned in the kabinnama with wasilat from the commencement of Srabun 1267; the wasilat to be ascertained by local inquiry, and to bear interest at 12 per cent. from date of the ascertainment of the amount due to date of payment."

From that judgment and decree of the High Court the husband, Ahsan Chowdrey, appealed to this Board; but that appeal did not come on for hearing till the year 1873. In the meantime, the lady being dispossessed, and probably being in pecuniary difficulties, had recourse to a money lender; and on the 17th of July, 1864, ten days before the written judgment, but after an oral judgment had been pronounced, she executed a hibbanama or deed of conveyance to Pogose, a money lender, of a 6 anna share in the decree, in consideration of an advance by him, which probably, among other reasons, she would require for the protection of her interests in the appeal. In 1865 Pogose applied, upon the strength of this hibbanama, to be admitted as a respondent in the appeal. That application was opposed by Ahsan Chowdrey, but finally an order was made in 1866, permitting Pogose to be added as a respondent, but declaring it to be open to Ahsan Chowdrey to bring an action or any proceeding he may think fit, at any time, for the purpose of setting aside this hibbanama, which Ahsan Chowdrey disputed.

The appeal then came on before this Board in 1873, and the judgment of the High Court was affirmed. In 1875 Pogose appears to have taken some steps to obtain execution of the decree; but he made an assignment for the benefit of his creditors, and, having died not very long after, he was and is still represented in this suit by the official trustee, who is now the Respondent. The official trustee in 1876 applied for execution, claiming to be put into possession of a 7 anna share and a little more, and
subsequently claiming to be put into possession of a 13½ anna share.

It requires to be explained how the rights of Pogose had grown from the 6 annas to the 13½ anna share. It appears that the lady, the original Plaintiff, had died; thereupon her property devolved upon her heirs, being her husband, two daughters, and a son. Pogose in 1874 bought, by private contract, the share of one of the daughters; he further bought a decree against the mother, which bound her property, and on the strength of that decree he applied for a sale of that portion of it to which the son and the daughter were entitled as heirs of their mother; and under that decree the property was put up for sale in February, 1876. Objections were made to the sale on the part of those who then represented the son and the daughter, on the ground of various irregularities. The First Court found there was no irregularity; but the High Court found there was, and remitted the case to the Court below, for the purpose of ascertaining whether the plaintiffs had proved that they had sustained material damage on account of this irregularity, which it was necessary for them to prove in order to set aside the sale. Both Courts have found that no such damage was proved. An appeal has been brought from the decision of the High Court upon that question, and it is the subject-matter of the third appeal.

The second appeal arises in this way:—Ahsan Chowdry in 1875 brought a suit for the purpose of setting aside the hibbanama of 1864, whereby Pogose claimed the 6 annas which were by it conveyed to him. The official trustee appeared as defendant in that suit, and he was satisfied to rest his defence upon two points of law; one limitation, and the other res decisa. The latter point has been decided against him; but both Courts have decided in his favour on the question of limitation, and that is the subject of the second appeal.

The subject of the first appeal is this:—It has been decided by the High Court that the Plaintiff, representing Pogose, who claimed in right of the original Plaintiff, Najamunnissa, was entitled to wasilat or mesne profits up to the time of the delivery of possession, it being contended by the Defendant that he was only entitled in this suit to wasilat up to the time of the commence-
ment of this suit; further questions have been raised as to the amount of the wasilat, and whether there ought not to have been a local inquiry other than that which was instituted. These questions are the subject-matter of the first suit.

Such being the circumstances giving rise to the appeals, it appears to their Lordships convenient to take the last suit first. The only question in that suit, viz., whether or not those who sought to set aside the sale have proved that they have been materially injured by any irregularity which occurred in the notification of it, is a pure question of fact. It has been decided by both Courts, and their Lordships on looking through the judgments of those Courts have come to the conclusion, that no evidence of a satisfactory character was adduced on the part of the objectors to the sale proving what it lay upon them to prove, that they had sustained any material damage or injury. In the absence of any such proof the judgments are right, and their Lordships are of opinion that that appeal should be dismissed.

The question in the second appeal arises on the Statute of Limitation, and the point is a narrow one. The deed sought to be set aside, and which is impugned as a forgery, was executed in the year 1864. The suit to set it aside was brought in the year 1875. The question is whether the suit was in time or not. The Act bearing upon this matter, which was in force at the time of the institution of the suit, namely, in 1874, is Act IX. of 1871, and the part of the second schedule referring to the subject-matter is clause 93, which is in these terms:—"Description of suit: To declare the forgery of an instrument issued or registered or attempted to be enforced;" for which the period of limitation is three years. This suit undoubtedly was a suit of that description, for in the plaint the Plaintiff declares that the deed was false and fabricated. The words applicable to such a suit are: "Time when the period begins to run; the date of the issue, registration, or attempt." "Registration or attempt" must be construed with regard to the words in the former paragraph, that is the date of the registration, or the date of the attempt to enforce the deed. Both Courts have held, and their Lordships think rightly, that when Pogose, in the year 1865, set up this deed, and insisted upon it for the purpose of being made a
Respondent in the suit, and when that application was opposed by Ahsan Chowdry, and, the parties being heard, Pogose succeeded in his attempt to become a Respondent, without prejudice, in the words of the order, to any action or proceeding to be brought by Ahsan Chowdry, that was an attempt to enforce the deed, and from that date limitation ran. Their Lordships observe further that the words of the section refer also to "the date of registration;" and looking at the deed, they find it was registered two days after it was made. It was made on the 17th, and registered on the 19th: and, therefore, it seems to their Lordships that the Statute of Limitation doubly applies. On these grounds, therefore, they will advise Her Majesty that the judgment in this case be affirmed.

The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the Plaintiff intended to claim wasilat up to the time of delivery of possession, although for the purpose of valuation only so much was valued as was then due; but be that as it may, they are of opinion that, under sect. 196 of Act VIII. of 1859, it was in the power of the Court, if it thought fit, to make a decree which should give the Plaintiff wasilat up to the date of obtaining possession. Section 196 is in these terms: "When the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree holder, with interest thereupon at such rate as the Court may think proper." The words of the judgment are, "The Plaintiff is declared entitled to possession of the land mentioned in the kabinnama, with wasilat from the commencement of Srabun 1267; the wasilat to be ascertained by local inquiry" and so on. Wasilat by law is demandable up to the time of possession; and the question is, whether the Court intended to give to the Plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they
could not have intended to give him wasilat up to the time of the
decision, which was three or four years after the commencement
of the suit. It appears to their Lordships that the more reason-
able construction of this document—which undoubtedly might
have been clearer—is that the Court, with a view to carrying out
the object of the Legislature, namely, the prevention of unneces-
sary litigation and multiplication of suits, intended in this suit to
give, with possession, that wasilat which was by law claimable up
to the time of possession. The view which their Lordships take
of the decree is much confirmed by two cases in the 12th Weekly
Reporter and in the 22nd Weekly Reporter, to which their atten-
tion has been called, wherein it would appear that the High
Court have, dealing with words identical or extremely similar,
given them the interpretation that possession with wasilat means
wasilat up to the time of possession being delivered. Their
Lordships cannot but fear that, if they were to hold the contrary
they would throw doubt upon many cases which have been
decided and acted upon in India.

Their Lordships do not feel at all pressed by the authority of
several cases to which their attention has been called, the
doctrine of which has been affirmed by this Board; namely, that
where a decree is silent on the subject of interest or of wasilat,
interest or wasilat cannot be added in the course of execution.
But here the decree is not silent on the subject of wasilat. On
the contrary, it is expressly mentioned; and the term "possession
with wasilat" appears to them reasonably to bear the construction
which has been put upon it by the High Court not only in this
but in many other cases. Their Lordships are, therefore, of
opinion that the High Court were right in deciding as they did,
that wasilat is claimable up to the time of delivery of possession.

The course of litigation in this case was this: Some time after
the claim for execution on behalf of Pogose the matter came
before Mr. Geddes, a local judge, who took the view of the judg-
ment which has been expressed. An appeal was preferred against
his ruling to the High Court, and it was confirmed by the High
Court. Subsequently Mr. Peterson took the opposite view, namely,
that wasilat was only claimable up to the time of the institution
of the suit. The matter was sent back to Mr. Peterson, and he
was directed to ascertain the amount of wasilat up to the time of the delivery of possession; and his judgment, giving upwards of seven lacs of rupees, was affirmed by the decision now under appeal. The High Court in their judgment state:—"The questions which we are called upon to determine in this appeal are two: firstly, whether the decree holder, that is to say, the person who now stands in the shoes of the original Plaintiff in whose favour the decree has been made, is entitled to recover mesne profits upon the estate which was the subject of dispute down to the period of obtaining possession, or only for the precise period for which wasilat is estimated in the schedule attached to the original plaint; and the second is whether, supposing that the decree holder is entitled to wasilat for the whole period, the Court below has assessed it upon a proper principle and upon sufficient materials." With regard to the second question there are two concurrent findings of Mr. Peterson, the Subordinate Judge, and that of the High Court; and under those circumstances their Lordships have come to the conclusion that the finding cannot be disturbed. However, a third point has been taken before their Lordships, which, as far as appears from the judgment of the Court, was not taken in the argument below, although it is raised in the grounds of appeal. The point is, that although wasilat may be due and obtainable in this suit up to the time of delivery of possession, and the calculation of the amount may be right, still, inasmuch as the decree directed the calculation to be made by a local inquiry, and there has been no local inquiry—that is to say, an inquiry held by a Judge or an ameen sitting within the boundary of the land—the judgment cannot stand. Whether the judgment is to be reversed upon that ground, or the case is to be sent back for another local inquiry, has not been very clearly put before their Lordships; but they are of opinion that there is nothing in the point. The judgment of the High Court undoubtedly directs that the wasilat should be ascertained by local inquiry. An inquiry was instituted by the Judge of the district. The Judge made an order that Ahsan Chowdry should appear before him, and should produce his jumma-wasibaki papers, which would shew the amount of his receipts and expenditure with regard to this property, and would be the best
possible evidence, if trustworthy, which could be obtained, and
worth more than the examination on the spot of any number of
ryots. He appealed against that order to the High Court; but
he made it no ground of appeal that the Judge ought to have
gone to the spot, or have sent a commissioner to the spot, or that
he ought to have sat on some portion of his land. He made no
objection of that kind, and it appears that he attorned, as it were,
to the jurisdiction, and sent in certain papers (which were deemed
highly unsatisfactory), thereby taking his chance of a decision in
his favour by the Judge. It would be, therefore, too late for him
to object to the inquiry being conducted as it was, if he could
ever have objected. Their Lordships infer from the judgment
that no such point was seriously argued before the High Court,
probably because the counsel in India felt it to be untenable.

For these reasons their Lordships will humbly advise Her
Majesty to dismiss this appeal, together with the other appeals,
with costs.

Solicitors for Respondents: Lawford, Waterhouse, & Lawford.
J. C.*
1881
July 12.

MUSSUMMAT BEBEA SAHODRA . . . Defendant;

AND

ROY JUNG BAHADOOR . . . . . . Plaintiff.

Nos. 51 and 52 of 1877, Consolidated Appeals.

AND

LUTCHMAN SAHAI CHOWDHRY AND
OTHERS . . . . . . . . . . .

{ Defendants;

AND

ROY JUNG BAHADOOR AND OTHERS . . Plaintiffs.

No. 61 of 1877.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Limitation—Adverse Possession—Act IX. of 1871, Sched. 2, Head 144.

A Hindu widow having effected an agreement with her co-sharer, the
ancestor of the Respondents, that the property to which they were jointly
entitled should remain in equal shares in their joint possession and enjoy-
ment, but that she should have no power to alienate the same, and that
after her death the same should pass to her co-sharer, sold her share therein
in 1845, with possession to the ancestor of the Appellant, and died in October,
1862.

In a suit by the Respondents in August, 1874 to recover the share so
sold:

Held, that there was no adverse possession to the Respondents till the
death of the widow in October, 1862, and therefore the suit was not barred
by limitation.

The alienation of the widow’s estate was good for her lifetime; there was
no condition against alienation thereof, and if there had been, there were no
words of forfeiture and no rule of law attaching forfeiture to its breach,
consequently Act X. of 1871, 2nd Schedule, head 144, did not apply.

The consolidated appeals (Nos. 51 and 52) were preferred from
two decrees of the High Court (June 14, 15, 1877), which affirmed
two decrees of the Subordinate Judge of Mozufferpore (Sept. 27,
1875), whereby the suits of the Respondents (brought on Aug. 14,
1874) were decreed with costs.

* Present:—Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P.
Collier, Sir Richard Couch, and Sir Arthur Hobhouse.
Appeal No. 61 was preferred from a decree of the High Court (June 21, 1877), affirming that of the same Subordinate Judge (Sept. 27, 1875), whereby the suit of the Respondents (brought on Aug. 14, 1874) was decreed.

The facts of the case appear in the judgment of their Lordships.

Leith, Q.C., and Doyne, for the Appellants in Nos. 51 and 52.

O. W. Arathoon, for the Appellants in No. 61.

J. H. Arathoon, for the Respondents.

The judgment of their Lordships was delivered by

Sir Arthur Hobhouse:

The question raised by this appeal may be disposed of very briefly. There are two suits, each of which is the subject of an appeal; but the appeals have been consolidated for the purpose of argument here. Taking the earlier suit, No. 253 of 1874, it is brought by the Respondents to recover a 4-anna share of a mouzah called Athur, which the Defendant, who is Appellant, claims to be rightfully possessed of under a sale executed to her in the year 1845 by a widow of the name of Mainan Koer.

The position of the property was this: The mouzah Athur appears to form part of the ancestral property of a family who, in the year 1826, were represented by Kul dip Ram and this widow Mainan Koer, she being the widow of Kul dip Ram's first cousin, Mehtab Ram. The two parties were in litigation. Kul dip Ram claimed to be entitled to the whole property, subject only to such maintenance as the widow might be entitled to. The widow claimed the whole during her life or widowhood as representing Mehtab Ram. Under these circumstances the parties came to a compromise in the year 1826, and that compromise was carried into effect in the suit which was then pending for the purpose of settling this question as to the ancestral property. The compromise provides for several different things, as to payment of debts and so forth, but the only material provision which we need now consider is
that which relates to the interests given in the immovable property to Kuldip Ram and Mainan Koer respectively. As regards that property, the first clause of the solenama executed by Kuldip Ram is that all the villages, whether ancestral or acquired by purchase, which lie in certain districts and which were held by Roy Mehtab Ram deceased, "shall during the lifetime of the aforesaid Mussummat"—that is Mainan Koer—"remain in equal shares in the joint possession and enjoyment of me the declarant and the aforesaid Mussummat, but the aforesaid Mussummat shall have no power to alienate the moveable or immovable properties; and after her death all the moveable and immovable properties, and the outstanding of the time of Roy Mehtab Ram, and the said Mussummat, shall be the right of me the declarant." Then there are provisions for a mutation of names in the rent-roll of the Collector's office, so that the name of Kuldip Ram should appear with that of Mainan Koer; and also provisions for the parties being represented each by their own agents. A corresponding solenama was executed by Mainan Koer.

That compromise was carried into effect by the decree, which does not throw any further light upon the question, because it only orders that the two parties, Kuldip Ram and Mainan Koer, "do hold possession and occupation of all the properties left by Roy Mehtab Ram conformably to the conditions laid down in the deeds of compromise, having had their names entered in the office of the Collector as regards "the villages in question." Accordingly the two parties appear to have entered into possession, and to have remained in such possession until the sale which is the subject of the present suit.

That sale took place on the 5th of June, 1845, and by the deed of sale Mainan Koer purports to convey to the ancestor of the Appellant four annas of the mouzah Athur in question, the family property consisting of eight annas of that mouzah. It then appears that a mutation of names took place, by which the grantee under that sale put his name in the place of Mainan Koer; and it is stated by the Appellant, in her written statement in the Court below, that her ancestor, and after him she herself, continued in possession and occupation of a moiety, to wit, four annas, and the Plaintiffs and their ancestors in possession of
the other four annas, of the mouzah in dispute, that is the mouzah Athur.

Nothing else appears to have been done to alter the position of the property. Kulip Ram died some time in the year 1852, and Mainan Koer died on the 12th of October, 1862. The Respondents, who are the heirs of Kulip Ram, did not bring any suit for the recovery of the property until nearly twelve years after the death of Mainan Koer, but they did bring a suit just in time to save the Statute of Limitations if the starting point of the statute was the death of Mainan Koer.

The suit being brought, a great many issues of fact were raised which appear to have been of considerable difficulty; but those have all been disposed of by the Courts below, the two Courts finding all the issues of fact in the same way in favour of the Respondents, and they are not in question here. The single question now remaining is, whether the suit is barred by the Statute of Limitations, and that depends again upon the question whether the statute began to run on the 5th of June, 1845, when Mainan Koer sold her interest in mouzah Athur to the ancestor of the Appellant, or on the 14th of October, 1862, when she died.

The Appellant contends first that the case falls within head 144 in the second schedule to the Limitation Act IX. of 1871. Head 144 is this: “For possession of immoveable property when the Plaintiff has become entitled by reason of any forfeiture or breach of condition: twelve years from the time when the forfeiture was incurred or the condition broken.” Then she says that the effect of the compromise of 1826 was to give Mainan Koer an interest in the property on condition that she should not alienate; that by her attempt to alienate she broke the condition; that the entirety of the property then vested in Kulip Ram; and that the time of limitation began to run from that moment.

Their Lordships are of opinion that no such condition attached to Mainan Koer’s life estate, and therefore that there was no forfeiture of it.

The terms of the compromise are, that the property shall remain in equal shares in the joint possession and enjoyment of the two parties; but the Musummat Mainan Koer shall have no power to alienate the moveable or immoveable properties, and
after her death those properties shall be the right of Kuldip Ram. There are no words of forfeiture, and it would be a very strong thing and a very unusual thing to import a forfeiture where the parties have not provided for one, and where there is no rule of law attaching forfeiture to a particular act. But in point of fact the language of the deed of compromise points to quite a different result. There is every indication that Mainan Koer was to have just as full an enjoyment of her interest in the property during her lifetime as Kuldip Ram was to have in his, and there is no reason whatever on the face of the deed why she should not deal freely with her interest. And where it is said that she shall have no power to alienate the property, that prohibition is coupled closely with the statement that after her death the property shall go to Kuldip Ram. The inference to be drawn from that is, that when the parties spoke of alienation they were thinking of alienation in perpetuity, and the thing they desired to prohibit was such an alienation as would prevent Kuldip Ram taking the succession immediately upon Mainan Koer’s death. That being so, the alienation of Mainan Koer was perfectly good for her lifetime; there was no adverse possession until she died, and the suit is brought within twelve years from that time.

Mr. Doyne argued that the case might fall within head 143 of the same schedule. That head refers to a suit for possession of immovable property where the Plaintiff while in possession of the property has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under the head of the schedule, he must shew that there has been a dispossession or discontinuance; and the passage which has been read from the Appellant’s written statement distinctly shews that there was no dispossession or discontinuance of Kuldip Ram.

Those considerations are sufficient to dispose of the case as to mouzah Athur. The second suit, No. 262 of 1874, relates to another mouzah called Nasipur, and to eight annas of that mouzah which were the subject of another sale by Mainan Koer; but the questions are precisely the same, and therefore there is no need to repeat with reference to Nasipur what has been said with regard to Athur.
The result is that their Lordships entirely concur with the view taken by both the Courts below, and think the appeals should be dismissed with costs.

The appeal of Luchmun Sahai Chowdry v. Roy Jung Bahadoor (No. 61) of 1877, should also be dismissed with costs.

The Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors for Respondents: Henderson & Co.

SETH JAIDIAL . . . . . . . . PLAINTIFF;
AND
SETH SITA RAM . . . . . . . . DEFENDANT.
AND CROSS APPEAL CONSOLIDATED.
ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, OUDH.

Oudh Estates Act, 1869, s. 10—Talookdar—Declaration of Trust.

In a suit by an adopted son against his father for a declaration of right with consequential relief in a share of certain estate, the Defendant pleaded that he was absolute owner thereof, and in regard to two of the talooks named was entered in the talookdar's list prepared under Act I. of 1869.

It appeared that under a number of family transactions the property in suit had been given to the Defendant for such interest and with such right of succession to the Plaintiff as by virtue of the law of the Mitakshara attaches to ancestral immovable estate as between father and son:—

Held, that the Plaintiff was entitled to a declaration to that effect, and that sect. 10 was no bar to his assertion of the interest declared to be vested in him.

CONSOLIDATED appeals from a decree of the Judicial Commissioner of Oudh (July 23, 1878), reversing a decree of the Commissioner of Sitapur (Sept. 20, 1877), whereby a decree of the Deputy Commissioner of the same place was in part varied and in part reversed.

The circumstances of the case appear in the judgment of their Lordships.

The questions which arose in this appeal mostly related to the construction and effect of certain instruments and proceedings which appear in their Lordships' judgment. A further question, however, arose under Act I. of 1869 as to the effect of the Defendant being entered in the list of talookdars prepared thereunder.

Leith, Q.C., and J. H. Arathoon, for the Appellant, contended that on the construction of the four documents (C. 6–9) the Appellant was beneficially entitled to all the properties comprised therein, and that the Respondent should be held trustee of the said properties: Mussumul Thukrain Sookraj Kowar v. Government of India (1); Ranee of Chillaree v. Government of India (2); Thakoor Hardeo Bux v. Thakoor Jawahir Singh (3); Hurpershad v. Sheodyal (4). The insertion of the Respondent's name in the list of talookdars did not give him any right to any property unless it could be shewn that the requirements of sect. 3 of Act I. of 1869 had been complied with.

Graham, Q.C., and Woodroffe, for the Respondent, contended that under the summary settlements and sunnuds the Respondent had acquired the rights of a talookdar as subsequently defined by Act I. of 1869, s. 3. Under the four documents (C. 6–9), according to their true construction, it was not intended that the Respondent should divest himself of any rights in favour of the Appellant, or that the latter should take thereunder the proprietary right which he claimed in the plaint. The Respondent, by reason of his being entered in the list of talookdars, must be taken to have a permanent, heritable, and transferable right to the estates shewn in such list opposite to his name. The Respondent is not, and never was, a trustee for the Appellant.

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case the Appellant Seth Jaidial, the Plaintiff below, is the nephew by birth and the son by adoption of the cross-Appellant Seth Seearam, the Defendant below. The suit was instituted for the purpose of ascertaining and enforcing the rights and interests of Jaidial as against Seearam in certain moveable and immovable property which has been the subject of a number of family transactions from the year 1864 onwards. The history of the case prior to the year 1864 may be briefly stated.

Seth Lalljee a landowner of Oudh had two sons, the elder of whom was Moorli Manohur, and the younger Seearam. Moorli again had two sons, of whom the elder was Rughobardial, and the younger Jaidial. Seearam has never had a natural son. Up to and after the annexation of Oudh in the year 1856 the family was undivided, and it possessed ancestral estate which included the talooks of Moizuddeneenpur and Chandpur. At the time when the mutiny was suppressed Lalljee was dead, and Moorli was the head of the family. He then took steps to procure a settlement with himself or his two infant sons, and a sunnud to himself, so as to constitute himself the sole owner of the ancestral estate. These proceedings on Moorli's part led to counter proceedings on the part of Seearam, which came before the revenue officers on several occasions. The dispute was also referred to arbitration and in the month of May 1863 the arbitrator made an award substantially in favour of Seearam's contention that the lands in dispute were joint ancestral property.

A large portion of the evidence and of the discussion in the Courts below and here has been addressed to the question which of the two disputants had the stronger case. For the present purpose that question, which is an intricate and puzzling one, is not very material. It is sufficient to say that the award does not appear to have settled the matter, and that in the month of September 1864 Moorli was still asserting his sole ownership and Seearam claiming to share the property. In that state of things
an arrangement was come to, the true interpretation of which is
the substantial question in this suit.

On the 25th September 1864, *Moorli* was on his death-bed. It
would seem that his son *Rughobardial* had attained majority, and
that *Jaidial* was about eleven years old. On that day the family
met together, when four documents were framed which are now to
be construed.

The first (Exhibit C 6) is called *Moorli's* will, and is as
follows:—

"I *Seth Murli Manohur* son of *Lalji* caste Khattri, talukdar of
Moisuddinpur Chandpur Sandah Sarangan Kaghara &c. in the
district of *Sitapur*, declare that whereas I have been suffering from
ill health for a long time, I have with a view to prevent a dispute
between *Raghubar Dyal* and *Jaidyal* in future come to the follow-
ing determination: *Raghabar Dyal* my eldest son will after death
succeed to the whole of my property, consisting of cash goods &c.
and my debt and credit account.

"With regard to the talukas mentioned in the margin (1),
*Raghubar Dyal*, who is elder of the two, will (after the village
and talukdari expenses and Government demand have been paid)
get \( \frac{1}{3} \), and *Jaidyal* \( \frac{2}{3} \), of the net profits, and the kabuliyatdars
as they are at present, and in this proportion the net profits of
those talukas will be divided in which their names have not been
registered.

"After this determination had been come to, *Seth Sita Ram*
with my consent adopted my younger son *Jaidyal* and executed a
deed of adoption under the rules in force. *Sita Ram* will there-
fore be his protector and guardian like me, but in case of a
dispute arising between *Raghubar Dyal* *Jaidyal* and *Sita Ram* a
partition will be made in the above proportion. When a partition
is made the villages of *Katra* will go to the share of *Raghubar
Dyal*.

(1) *Moisuddinpur*, comprising principal villages and those included therein.
*Sanda* ditto, ditto, ditto.
*Sarayan* ditto, ditto, ditto.
*Chadpur*, comprising principal hamlets and those included therein.
*Dari Nagra* ditto, ditto, ditto.
Jungle grant.
"By this will every deed affecting the proprietary right in land existing up to date is cancelled. The parties above named are required to conform to the provisions of this will without quarrelling. After the partition is made each will pay for his own expenses.

"I have therefore executed this will that it may serve as a document, and prove of use when required.

"Out of the Government promissory notes Jaidyal will get his share to the value of 18,000, the remainder will go to Raghubar Dyal.

"I make over Jaidyal with his share above specified to Sitaram.

"Raghubar Dyal and Jaidyal have been joint owners of the elephants horses bullocks cows appurtenances of the kitchen clothes and other necessaries of life, and they are the owners of these things in the proportion of \( \frac{4}{7} \) and \( \frac{3}{7} \).

"Signature of Murli Manohar Seth, in Hindi.

"Signature of Sita Ram Seth, in Hindi.

"Signature of Raghubar Dyal, in Hindi."

The second (Exhibit C 7) called an acquittance roll, is as follows:—

"I Seth Sitaram son of Lalji caste Khatri, talookdar Moizuddinpur in the district of Sitapur do herein declare that whereas Seth Murli Manohur my brother has this day executed a will regarding moveable and immovable property about which there existed a dispute between me and him, and I having approved of the same have no more claim against him or against his son Raghubar Dyal with regard to goods cash zamindari or accounts of debt or credit.

"I have therefore executed this deed of acquittance that it may serve as a document and prove of use when required.

"The above written in Persian character is genuine.

"(Signed) Sita Ram Seth."

The third (Exhibit C 8) being a deed of adoption is as follows:—

"I Seth Sitaram son of Lalji caste Khattri, talukdar of Moizudd-
J. C.
1881

Seth Jaidyal

Seth Sita Ram.

dinpur Alahna Mahooa Kola &c. do herein declare that whereas I have no male issue I have adopted Jaidyal, son of my brother Murli Manohur, as my son, with a view that he may perform the ceremonies prescribed by the Hindu law; I have conferred on him all the legal and proper powers. I hereby declare that Jaidyal my adopted son will inherit the whole of my estate both moveable and immovable and no one else will interfere or have a claim to the same.

"Should I be blessed with a son hereafter, Jaidyal will get half, and the other half will go to my son.

"I have therefore voluntarily executed this deed of adoption that it may serve as a document and prove of use when required.

"This is a genuine document. "(Signed) Sitaram."

The fourth (Exhibit C 9) is called Sootaram's will, and is as follows:

"I Seth Sootaram talukdar of Alahna Mahoo Kola tahsil Misrik in the Sitapur district do herein declare that whereas I have received the aforesaid estate from Government for faithful services rendered by me, it has been determined with a view to prevent future disputes that Raghubhar Dyal should get \( \frac{2}{5} \) and Jaidyal \( \frac{3}{5} \) of the estate. Should a dispute arise between Raghubhar Dyal and Jaidyal, they will divide the estate between themselves in the same proportion, and as long as they are on amicable terms they will divide the profits under the terms of the will executed by Seth Murli Manohar.

"I have therefore executed this will that it may serve as a document and prove of use.

"This is a genuine will. "(Signed) Sitaram."

Before attempting to construe these documents, it is necessary to state the outcome of the disputes which have ensued upon them.

Moorli died the day after the arrangement was effected, and quarrels broke out again very soon after his death. On the 14th
of September 1865 Seetaram filed a plaint against his two nephews and others, in which he sought to set up the award of August, 1863, and to cancel Exhibits C 6 and C 7. But he very quickly abandoned his attack, and in November 1865 came to an agreement with Rughobardial to divide Moorli's estate in the proportions of nine annas to Rughobardial and seven to Seetaram. This compromise was affirmed by a declaratory decree passed in the suit on the 10th of February 1866. The interests of Jaidial were protected by the following directions:—

"That no part of the property the subject of partition shall be alienated to any third party pending decision of a suit to be instituted on behalf of Jaidial the minor and adopted son of Seetaram Plaintiff to determine whether he is or is not entitled by the will of his natural father or otherwise to the property specified therein as his share, so that the same may be held for him as a proprietor till he shall have come of age, leaving the parties to be fully bound thereby or by this consequent decree as between themselves, so that whatever more than Jaidyal's rights is now decreed to pass between them shall not be affected by any decree he may secure, and what is included in his rights shall stand as transferred to him instead of as by this decree to his adopting father the Plaintiff Seetaram, and that a curator be immediately appointed by the Civil Court to lay suit on behalf of the minor Jaidial, unless Sitaram Plaintiff file a satisfactory admission of the rights that may be claimed for the said minor Jaidial."

The next step was that in June 1867 Seetaram instituted a suit against Rughobardial alone, to enforce the declaratory decree of February 1866. Rughobardial resisted on the ground that Seetaram was only a trustee for Jaidial, but a decree was made against him on the 30th of July 1867.

Rughobardial then applied for review of the decree of February 1866, mainly on the ground that in November 1865 when the compromise was arranged he was the infant ward of Seetaram. Seetaram was the sole Respondent to this application. The point was decided against Rughobardial, and his application was dismissed by the Civil Judge of Lucknow in the month of August.
1868. He then appealed to the Court of the Judicial Commissioner; the case was heard by that officer Sir George Couper, sitting with Colonel Barrow, the Financial Commissioner, and under their advice a fresh compromise was arrived at.

In pursuance of this compromise a decree was passed on the 30th of March 1869, to the following effect:—

"We declare Jaidial to be the adopted son of Sitaram. We declare that the whole of the property directed in Murli Monohur's will dated the 25th of September 1864 to be divided in the proportion of \( \frac{1}{8} \) to Rughobardial and \( \frac{7}{8} \) to Seetaram, shall be so divided, the village Kootrah to form part of Rughobardial's nine-anna share.

"And in accordance with the express wish of the parties recorded before us this day, we declare that the remainder of the property, whether mentioned in the will or not, after deducting all legitimate costs, including the fees of one pleader on each side, shall be divided into three shares, of which Rughobardial shall take two shares, and Seetaram shall take one share.

"The jewels which have not been given to the ladies of the family shall be subject to division in the same proportion, viz., two-thirds to Rughobardial and one-third to Seetaram."

The decree is headed, In the case of Seth Rughobardial (Defendant), Appellant, v. Seth Seetaram (Plaintiff), Respondent, and is signed by Sir George Couper and Colonel Barrow. By a subsequent minute, dated the 18th of April 1870, these two officers declared that their intention was to divide the estate of Mahooa Kola, which is the subject of Exhibit C 9, in the same way as the property which by Exhibit C 6 is divided between Rughobardial and Seetaram in the proportions of nine and seven annas.

The partition directed by the decree of the 30th of March 1869 has been carried into effect. On the 1st of June 1870 the Deputy Commissioner ordered that Rughobardial should be put into possession of a nine-anna share of Mahooa Kola, and that Seetaram and Jaidial should retain a seven-anna share. And the sum of Rs.48,000 has been awarded to Seetaram as his share of Moorli's moveable property.

In September 1871 Jaidial attained his majority. In the year
1875 disputes arose between him and Seetaram, and in 1876 he filed a plaint in the Court of the Deputy Commissioner against Seetaram, asking for a declaratory decree to the effect that Seetaram was a trustee for him of seven annas of both Moorli's land and Mahooa Kola, and had no power to alienate or encumber the estate. On the 22nd of May 1876 the Deputy Commissioner dismissed the suit, his principal reason apparently being that, whereas the case made by the plaint was that Seetaram was a mere trustee, the case made at the Bar was that he had a life interest in the property.

On the 2nd of October 1876 Jaidial filed his plaint in the present suit. In it he lays claim to seven annas of Moorli's moveable and moveable property, and also of Mahooa Kola. He mentions the decree of the 30th of March 1869, and without expressly saying that he repudiates the compromise effected by it, remarks that he was not a party to the suit; a remark which is not quite accurate, though it is true that he was not made a party to Rughobardial's application for review. He prays for a declaration of his proprietary right, for recovery of possession, and for an injunction prohibiting transfer.

By his written statement Seetaram claims to be absolute owner of the property in question, and among numerous other pleas, states that he is entered as talookdar of Moisuddinapur and Mahooa Kola in the talookdar's list prepared in accordance with Act I. of 1869, which under sect. 10 of the Act is a bar to the Plaintiff's claim. He also maintains that Exhibit C 9 is a will, states that it has been revoked, and contends that the addition made on the 18th of April, 1870, to the decree of the 30th of March, 1869, was ultrà vires and void.

On the 4th of June, 1877, Mr. Anderson, the Deputy Commissioner made a decree as follows:

"The whole property decreed to Sitaram by Judicial Commissioner's decree of 30th March, 1869, including \( \frac{7}{15} \) share in estate of Mahooa Kola, is vested in Jaidial. But Sitaram will during his lifetime remain trustee and manager for Jaidial. Sitaram has no power of alienation. Jaidial is entitled to maintenance out of the estate. Dismiss the claim of Jaidial to cash and
personal property. Plaintiff will get his costs out of the estate. Interest at 6 per cent."

Both parties appealed to the Commissioner Mr. Macandrew who on the 20th of September 1877 decreed as follows:—

"That the claim of the Plaintiff to possession of the estate and the moveable property be dismissed. The Defendant is to be put into possession of a seven-anna share in the whole estate. He is to have a life interest, but is to be restrained from either alienating or wasting it. The Plaintiff be declared to be the heir and successor of the Defendant, and to have all the rights of a reversionary. He is declared to have a right to a suitable maintenance from the Defendant, and considering the state of feeling between them the Court is of opinion that this maintenance should be fixed and the case be remitted to the lower Court to fix and declare it and the order so declared shall become part of this decree; and as regards costs the Court orders that the costs of both parties be paid from the estate."

By a subsequent order of the Commissioner, dated the 13th of December 1877, the maintenance was fixed at Rs.4000 per annum.

Jaidial appealed to the Judicial Commissioner Mr. Capper, who considered that Jaidial took no interest in the immovable property beyond that which he acquired by his status as the adopted son of Seetaram. With respect to the moveable property he held that Seetaram was a trustee for Jaidial, and that though Seetaram was competent to make a compromise with Raghobardial, yet Jaidial might challenge it as being prejudicial to his interests. He therefore remanded the suit to the Deputy Commissioner for inquiry whether the compromise of March 1869 was prejudicial to the interests of Jaidial, and whether Seetaram had reduced into possession any of Moorli's property of which he was trustee for Jaidial.

On the 6th of June 1878 the Deputy Commissioner found that the compromise of March 1869 was as to personal property prejudicial to the interests of Jaidial and void as against him. He further found that Seetaram had received the sums of Rs.18,000
and Rs.30,000 on account of Moorli's Government promissory notes and his other moveables. He gave Jaidial a decree for Rs.30,947. 3. His finding as to the compromise appears to be founded, not on any calculation of the amount which without such compromise might have been got for Seetaram and Jaidial as against Raghobardial, but solely on the ground that Seetaram having got the money claimed to hold it as his own.

From this decree both parties appealed to Mr. Capper who varied it. The final decree made on the 23rd of July 1878 is to the effect that Seetaram shall pay to Jaidial by instalments the sum of Rs.44,947. 3, being the exact amount claimed by this plaint, and that the rest of Jaidial's claim shall be dismissed. It directs that the parties shall have their costs in all Courts in proportion to this decree, and interest from date of decree.

Again both parties have appealed, each contending that Mr. Capper's decree is wrong in making a distinction between moveable and immoveable property. Jaidial contends that the principle applied to the moveable property, and Seetaram that the principle applied to the immoveable property, is the true one.

It appears to their Lordships that the four Exhibits C 6, 7, 8, and 9 must be taken together as expressing a family arrangement for the purpose of settling the disputes between the brothers Moorli and Seetaram. Besides their desire of peace each would by such an arrangement avoid considerable risk of loss. Moorli had got a legal advantage with respect to Moisuddeenpur and Chandpur which it was quite possible he might retain and so exclude Seetaram from those properties entirely. Seetaram had at least a very arguable claim, it seems that in the ultimate opinion of the executive officers he had a sound claim, to one half of those properties. If he succeeded his nephews would only get one-fourth for each of them. Moorli was dying, and he wished his eldest son to take the larger share of his estate. Seetaram was childless, and his nephew Jaidial was a little boy. In these circumstances it was a very reasonable arrangement that the two brothers should bring the disputed properties and other properties into a common fund and divide them, Seetaram assenting to the gift of the larger share to Rughobardial, and himself
taking the smaller share with the obligation to provide for Jaidial as his son.

This is exactly what they did. By Exhibit C 6 Moorli recites his intentions towards his sons independently of any arrangement with Seetaram. Then he says that after those intentions had been formed the adoption of Jaidial by Seetaram was effected. Accordingly he now treats Seetaram as the effective owner of Jaidial’s share, saying “I make over Jaidial with his share above specified to Seetaram.” Seetaram on his part signs an acquittance (Exhibit C 7) of all claims against Moorli or Rughobardial, on the ground that Moorli “has this day executed a will regarding moveable and immovable property about which there existed a dispute between me and him.” In the deed of adoption, Exhibit C 8, he goes on to declare “that Jaidial my adopted son will inherit the whole of my estate both moveable and immovable,” subject only to the one contingency of a son being born to Seetaram, in which case Jaidial is to get half. And by Exhibit C 9 he brings his own talook Mahooa Kola into the scheme of division between Moorli’s sons.

It is impossible not to admit that there are some difficulties in the way of this construction, as there must be in the way of every construction of such hurried and informal documents. But this construction appears to their Lordships to satisfy better than others the wording of the documents, while it brings out of them the most reasonable results. On Jaidial’s construction which is applied by Mr. Capper to the moveable property, we are asked to believe that Seetaram, having a substantial claim which he was vigorously prosecuting against Moorli, not only gave up the whole of it, but also parted gratuitously with nine annas of his own separate property to Moorli’s eldest son. On Seetaram’s construction which is applied by Mr. Capper to the immovable property, we must suppose that Jaidial took nothing certain under the arrangement except a son’s rights in so much of Seetaram’s share of Moorli’s estate as may be held to have an ancestral character. In their Lordships’ view the two leading features of the arrangement are these:—First, that the share of Moorli’s property designed by him for Jaidial should pass to Seetaram and Jaidial as
father and son; and secondly that Jaidial should be secured in his
inheritance of the property coming to Seetaram under the arrange-
ment.

It appears to them therefore that Mr. Capper's decrees err in
drawing a distinction between the moveable and immovable pro-
erty, and in treating Seetaram as a mere trustee of the former.
On the other hand, in wholly dismissing Jaidial's suit as to the im-
moveable property, the decrees fail to give him the amount of
security contemplated by the arrangement of 1864.

There is another objection to these decrees, which is that by
giving to Jaidial the sums claimed by him, which are the seven-
anna shares mentioned in Exhibit C 6, they upset the compromise
of 1869 which divides the moveables on a different principle.
Their Lordships are clear that, whether they regard the terms of
the declaratory decree of February 1866, or ordinary principles of
justice, if Jaidial could have challenged the terms of the compro-
mise at all, he could only do it in the presence of Baghobardial;
and though it is competent to him to contend that Seetaram is
only a trustee for himself, he cannot, in a suit against Seetaram
alone, obtain anything more than an adjustment of the interests
of Seetaram and himself in the property actually taken by
Seetaram under the compromise. For the purpose of this suit
therefore Seetaram's interest under the compromise of 1869 must
be substituted for his interest under the family arrangement of
1864.

Turning to the decrees of Mr. Anderson and Mr. Macandrew,
their Lordships think that those decrees proceed on a right prin-
ciple in placing both classes of property on the same footing, and
in recognising the right of Jaidial to security of succession; but
that in giving him that security by dividing the property into a
life interest and remainder, they give it in a way which is not the
simplest nor the most in accordance with the notions of property
entertained by those who live under the law of the Mitakshara.
Moreover those decrees do not, and by the method adopted could
not without elaborate provision, allow for the contingency of
Seetaram having another son. Their Lordships conceive that in
declaring that Jaidial should inherit, Seetaram intended to place
him in the position which under the Mitakshara law a son occupies with reference to his father's ancestral immovable estate.

Their Lordships are further of opinion that, though Seetaram has no right to alienate the property whether moveable or immovable so as to defeat Jaidial's succession, no case has been made for an injunction to restrain him from such alienation. On this point the plaint alleges no more than that Seetaram became extravagant and contracted large debts.

With respect to costs, their Lordships think that the two lower Courts did right in ordering them to be paid out of the estate. The litigation has been lamentable, but each party has raised unjustifiable issues, and so far as the record tells the story it is impossible to blame one more than the other.

The decree should take the following form:—Discharge the decrees and orders of the 4th of June 1877, the 20th of September 1877, the 13th of December 1877, the 21st of March 1878, the 6th of June 1878, and the 23rd of July 1878. Declare that, according to the true construction of Exhibits C 6, 7, 8, and 9, all the share and interest in the moveable and immovable property of Moorli Manohur and in the talook of Mahoo Kaola, which is thereby stated to be given to Seetaram or to Jaidial, is given to Seetaram for such interest and with such right of succession to Jaidial as by virtue of the law of the Mitakshara attaches to ancestral immovable property as between father and son.

Declare that all property whether moveable or immovable taken by Seetaram under the decree of the 30th of March 1869, as explained by the minute of the 18th of April 1870, is taken by him for such interest and with such right of succession to Jaidial as by virtue of the same law attaches to ancestral immovable property as between father and son.

Declare that the entry of Seetaram's name on the talookdar's list is no bar to the assertion by Jaidial of the interest hereinbefore declared to be vested in him. Dismiss the plaint so far as it seeks recovery of possession and an injunction. Order the whole costs of the litigation, including the costs of these appeals, to be paid by Seetaram out of the property taken by him under
the decree of the 30th of March 1869 explained as aforesaid. Costs to be taxed as between solicitor and client.

Their Lordships will humbly report to Her Majesty accordingly, except as regards the costs of these appeals, which they will themselves order to be paid by Seetaram out of the estate.

Council; second, whether an adopted son has the same right which a natural-born son would have had of succeeding to property of a person to whom he stands by virtue of the adoption in the relation of maternal uncle.

The relationship of the parties appears from the following pedigree:

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<td>Deyamoyi.</td>
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<td>daughter,</td>
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<td>Gogun Chunder,</td>
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<td>adopted son,</td>
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<td>Shib Kishore,</td>
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<td>marries</td>
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<td>Gungamoni.</td>
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<tr>
<td>marries</td>
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<td>Hurramundari.</td>
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<td>Bhowani Kishore,</td>
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<td>dies 1840,</td>
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<td>marries</td>
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<tr>
<td>Bhoobunmoyi,</td>
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<td>pretended adopted son, Rajendro, 1st Respondent.</td>
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<td>Ram Kishore,</td>
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<td>adopted son,</td>
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<td>dies 1821.</td>
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<td>Joy Kishore,</td>
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<td>marriages Pudma Coomari,</td>
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The facts of the case are as follows:

The property in dispute in this case originally belonged to Gour Kishore Acharjia, husband of Chundraboli Debi in the above pedigree.

In 1809, Gour Kishore, having then no son, executed a document (registered on the 30th of March, 1811) in favour of his wife, whereby he authorized her to adopt one or more sons in succession, for the maintenance of their sadhs and the preservation of their property. On the 8th of November, 1819, he executed another document in favour of his wife, whereby, after reciting that she had given birth to a male child (Bhowani Kishore), he renewed his authority to her to adopt one or more
sons in succession, in case of the death of the said son. This
document also was registered on the 12th of November, 1819.

In 1821, Gour Kishore died, leaving his son, Bhowani Kishore,
who succeeded to his property, and his widow, Chundraboli.
Bhowani subsequently married Bhoo bun moyi Debi, and died in
1840, leaving no issue.

In 1843, Bhoo bun moyi, professing to be acting under a written
authority from her late husband, Bhowani Kishore, adopted one
Rajendro Kishore.

In 1844, Gokool Kishore, brother of Gour Kishore, deceased,
executed a document whereby he authorized his wife, Hurrosundari,
to give his second son, Ram Kishore, in adoption to Chundraboli.
Fifteen days after, being the day of his death, Gokool Kishore and
his wife gave Ram Kishore in adoption to Chundraboli, and on
the next day documents reciting the adoption were exchanged
between the widows.

In 1851, a suit was brought on behalf of Ram Kishore, then a
minor, against Bhoo bun moyi and Rajendro, and also against
Chundraboli and others, for the purpose of establishing his right,
as the adopted son of Gour Kishore, to possession of the property
left by Bhowani Kishore, and now in the possession of Bhoo bun-
moyi on behalf of Rajendro. In April, 1855, the principal Sudder
Ameen dismissed the suit, finding that the authority to adopt set
up by Chundraboli was not proved, and that the authority put
forward by Bhoo bun moyi was established.

This decision was reversed by the Court of Sudder Adawlut,
which held, in March, 1859, that the adoption of Ram Kishore
was made under a genuine authority from Gour Kishore, and that
the authority alleged by Bhoo bun moyi was a forgery, and conse-
quently that the adoption of Rajendro was invalid. Upon these
facts two of the three Judges held that Ram Kishore was entitled
to immediate possession as adopted son of Gour Kishore. Mr.
Justice Colvin, however, was of opinion that Chundraboli was not
warranted in adopting under that authority, after Bhowani had
attained majority and entered upon possession of the property.
The result was that a decree was given in favour of Ram Kishore.

This decision, again, was reversed by the decree of Her Majesty
in Council, which held that an adopted son of Gour Kishore could
not divest the estate which had already vested in Bhoobunmoyi on
the death of her husband Bhowani Kishore, since the person
entitled to inherit was the heir of the last male holder, and
Bhoobunmoyi, and not Ram Kishore, was such heir; there were,
however, some expressions in the judgment (1) which it was con-
tended laid down that the adoption itself was invalid, inasmuch as
"at the time when Chundraboli Debi professed to execute it the
power was incapable of execution."

It was expressly found by the Judicial Committee that the
authority to adopt set up by Bhoobunmoyi was a forgery,
and that the adoption made under it was invalid.

In 1867, Bhoobunmoyi died, and thereupon Chundraboli, as
mother and next heir of Bhowani Kishore, succeeded to his
estates.

In 1869, Chundraboli Debi executed a deed of relinquishment
in favour of Ram Kishore, in which, after reciting the previous
litigation, the death of Bhoobunmoyi, and her own succession as
next heir, she surrendered to him, as adopted son of Gour Kishore,
all her rights in the estate.

On the next day she executed a will, disposing of the property
held by her in her own right.

Gogunchunder also executed a document in favour of Ram
Kishore whereby he recognised the validity of his adoption, and
renounced in his favour any rights which he himself might have
had as heir of Bhowani Kishore. In April, 1870, the Collector
ordered that the name of Ram Kishore should be registered as
malik (owner) of the estates held by Bhowani as heir to Gour
Kishore in place of Chundraboli and Bhoobunmoyi.

Chundraboli died in April, 1870, and in 1874 Joy Kishore
brought the suit out of which the appeal arose to recover pos-
session of Bhowani's estate.

The Subordinate Judge dismissed the suit with costs, and the
High Court (L. S. Jackson, Ramerchunder Mitta, and M'Donnell,
JJ.), affirmed his decree.

The judgment of Jackson and M'Donnell, JJ., so far as it
relates to the questions in this appeal is as follows:—

"My brother M'Donnell and myself entirely concur with Mr.

(1) See 10 Moore's Ind. App. Ca. 279, 310.
Justice Mitter in the conclusion stated in his judgment, and we think, with our learned brother, that according to the true interpretation of the Hindu law prevailing in Bengal, an adopted son takes by inheritance, from the relatives, on the maternal side, of his father by adoption, in the same manner as a son begotten would take. If this construction of the law is correct, then Gogun, assuming him to have been adopted by Krishnanath, being indisputably nearer in degree than the Plaintiff, Joy Kishore, and his deceased brother, the Plaintiff would on that ground alone be out of Court, Joy Kishore and Brojo Kishore not being, in presence of Gogun, heirs to the deceased Bhowani Kishore, unless, indeed, Gogun were shewn to be incapacitated, and we may at once say that the attempt to shew this entirely failed, and has not been repeated before us.

"This if the matter were certain to rest here, would suffice to dispose of the suit. But as the Plaintiff may be advised to carry the case further it is our duty to decide also the other questions which arise out of it."

The learned Judge then stated the facts of the case, the contentions of the parties, and the grounds of the Subordinate Judge's decision. With regard to Gogun Chowdry's being, as alleged by him, the dattaka and not the aurasa son of Krishnanath, the Court found as follows:

"Upon the whole, although the matter is not free from doubt, and perhaps either conclusion might be supported, we are not prepared to dissent from that of the Subordinate Judge, viz., that Gogun was really adopted."

Upon the question whether the Plaintiff ought to have been allowed to maintain the suit, the judgment proceeded:

"Assuming for argument's sake that Joy Kishore's claim is preferable to that of Gogun, has he a better title than the Defendant, Ram Kishore, or the infant son on whom the deceased Ram Kishore's rights have now devolved? (Joy Kishore has died since the commencement of the suit.)

"It will be remembered that Bhoobunmoyi, after being maintained in possession by the judgment of the Privy Council, died, and Chundraboli succeeded as mother of Bhowani Kishore; but
she immediately surrendered her rights in favour of Ram Kishore by a deed in which it was declared that he had been adopted in accordance with the directions of her husband, Gour Kishore, had regularly performed the sradh and other rites and ceremonies, and was therefore justly entitled.

"Chundraboli might, of course, give up her own rights for her life, but she has since died, and the Plaintiffs’ case is, that the adoption of Ram Kishore was invalid, and has been so declared by the Privy Council, and that consequently the next heir of Bhowani Kishore will take.

"On this part of the case two serious questions arise.

"First. Whether their Lordships’ judgment wholly invalidates the adoption, that being the ground on which the adoption is assailed.

"Second. Whether Ram Kishore can be treated as the heir of Bhowani Kishore?

"The first of these two questions is not free from difficulty. It is necessary to consider the circumstances under which the judgment was given; and then to apply the law of evidence.

"This judgment was given upon appeal against a final judgment of the Sudder Dewany Adawlut, by which Ram Kishore, as a son adopted by Chundraboli, widow of Gour Kishore in 1844, recovered possession of the estate, which had been enjoyed by Bhowani Kishore, the begotten son of Gour Kishore, and had devolved at Bhowani Kishore’s death upon his widow as his heir according to Hindu law.

"It is to be observed that the last-mentioned widow had in 1843 herself adopted a son called Rajendro in pursuance of an alleged permission from her husband Bhowani, and this Rajendro having subsequently died, after attaining majority, she alleged herself to have adopted another son named Koylash, and appealed to England in the capacity of mother and guardian of this Koylash, who, however, as we gather, also died while the appeal was pending. The deed of permission was found by the Sudder Court, and afterwards by the Privy Council, to have been forged.

"According to the report in 10 Moore, p. 301, Sir Ba Palmer as counsel for the Appellant used the following argument:

"‘The important question arises, whether as such adopted son
of the late Gour Kishore, the father of the Appellants’ husband Bhowani Kishore, who survived his father twenty-three years, and left the Appellant his childless widow, and as such his admitted heiress by the Hindu law, could displace and supersede the Appellant as such heir in the possession of the estates which devolved on her husband as an absolute estate of inheritance. We submit that such a power of appointment, if exercised by a mother, was invalid if the son left a widow, as her vested rights (Strange’s Hindu Law, vol. i., p. 134) would be defeated by its exercise; and again, ‘Bhowani Kishore succeeded to the ancestral estate and property, by operation of law, as his father’s sole heir, and not under any devise or bequest from him, and the estate and property being in him, as admitted by the decree, as an absolute estate of inheritance, vested, on his death, in the Appellant as his widow and heiress; therefore her title and interest therein could not be displaced or divested by the act of Chundraboli Debi subsequently adopting a son, so as to vest the estate and property in such son as heir-at-law not of the Appellant’s deceased husband, but of his father, whose interest in the same ceased and determined on his death.’

“This argument was answered on the part of the Respondent Ram Kishore by the observation that, ‘even if the forged deed was genuine, the claim of the Appellant to her widow’s rights was negatived by the alleged adoption of Koylash Kishore on Rajendra Kishore’s death.’

“A part, therefore, from the issues of fact relating to the several acts of adoption, and the deeds of permission under which they purported to have been made, it is clear that the important, if not the only, question for their Lordships’ decision was the validity of Ram Kishore’s adoption for the purpose of ousting Bhoobunmoyi from the estate.

“The judgment delivered by Lord Kingsdown in the first place, disposed of the adoptions made by Bhoobunmoyi, both of which were held in this suit to be invalid.

“The judgment proceeded:—‘The next question is, as to the validity of the adoption of Ram Kishore,’ and their Lordships then say, that while they see no reason to dissent from the Court below as to the genuineness of the annumati-patri or regularity of
the adoption, they 'think it unnecessary to examine into the
genuineness of this instrument, as we are of opinion, that at the
time when Chundrabiti Debi professed to exercise it, the power
was incapable of execution.'

"Lord Kingsdown then, after adverting to the facts that Gour
Kishore had, in 1811, executed a deed of permission, providing
for the case of his having no natural-born son, that a son had
been thereafter born to him, and that nevertheless two years later,
in 1819, he executed a further instrument, went on to discuss the
nature of that instrument, and held that it was not a will or devise,
but a mere permission to adopt.

"His Lordship next observed, that it undoubtedly contemplated
more than one adoption, and assigned no express limits to the
time within which the power of adoption should be exercised.

"'But,' the judgment goes on, 'it is plain that some limits
must be assigned,' and this both on the presumable intentions of
Gour Kishore, and by reason of the law. Upon one or two expres-
sions which occur in this part of their Lordships' judgment, we
shall have occasion presently to remark.

"It is then pointed out, that Bhowani Kishore had inherited,
and had in turn had full power of disposition over the estate; that
on his death he was succeeded by his wife, who would have been,
as an heir, preferable to his natural brothers if he had had any.
From this it followed that no one could, by being made a brother
by adoption, take the real estate from the widow, when a natural-
born brother could not have taken even a part.

"His Lordship said it was needless to consider whether Gour
Kishore could have limited his son's interest, because, as a fact,
he had not done so; and then stated, 'the question is, whether
the estate of his son being unlimited, and that son having married
and left a widow his heir, and that heir having acquired a vested
estate in her husband's property as widow, a new heir (to Gour
Kishore) can be substituted by adoption, who is to defeat that
estate and take as an adopted son what a legitimate son of Gour
Kishore would not have taken.' And this, their Lordships hold,
could not be done, pointing out, however, that the case would
have been otherwise if Bhowani had died unmarried, leaving his
mother as his heir, for then the 'adoption would have stood on
quite different grounds. By exercising the power of adoption she would have divested no estate but her own, and this would have brought the case within the ordinary rule, but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to shew that by the mere gift of a power of adoption to a widow the estate of the heir of a deceased son vested in possession can be defeated and divested."

"We thus have a suit to recover possession from the widow of B., on the ground that the Plaintiff is adopted son of A., who in his lifetime was B.'s father, dismissed by their Lordships on the principle thus concisely stated in Mr. Mayne's recent work on Hindu Law, page 161, that, except in the cases specified, an adoption made to one person will not divest the estate of anyone who has taken that estate as heir of another person.

"If the objection had been taken that this judgment was not admissible as evidence, or 'relevant' between the present parties, we might have had some difficulty; for, while in the former suit the parties were opposed as heirs of Gour Kishore and Bhowani respectively, in this they all make title under Bhowani, both widow and mother being out of the way.

"But Mr. Woodroffe, as we understood him, contented himself with arguing that it could not operate as res judicata, and we think it clearly could not, not merely because the parties are different, but because, in fact, their Lordships did not intend to decide that Ram Kishore could never be the heir of Bhowani, still less that he was not duly adopted. The expression 'the power was incapable of execution' must be considered with reference to the question which their Lordships had before them. They notice, indeed, an inclination of the Sudder Judges to hold that if 'Bhowani Kishore had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her the power of adoption given to Chundrabolli would have been at an end.' But their Lordships do not so decide, and it is very doubtful whether it could be so held, and whether the terms of the second permission from Gour Kishore are not wide enough to enable Chundrabolli to adopt on extinction of the issue either of the natural-born son, or of the first to be adopted son. But we have no occasion to decide this, what has happened being
the death of Bhowani without having either had sons born to him or given any permission to adopt. If, therefore, Chundraboli immediately on the death of Bhobunmoyi had made an adoption and so divested her own estate, there would have been nothing in the judgment of the Privy Council, and nothing that we are aware of in the law, to prevent her doing that which her husband authorized her to do, and which would certainly be for his spiritual benefit, and for that of his ancestors, and even of Bhowani Kishore.

"It has been pointed out in the case of Ram Soondur Sing v. Surbani Dast (1)—" The broad proposition for which the learned Counsel contends will in a great many cases defeat the essential object for which every Hindu desires to adopt, viz., the continuance of the spiritual benefit to be conferred upon him after his death. An adopted son attaining an age of sufficient maturity, and by performing the religious services enjoined by the Shastras cannot exhaust the whole of the spiritual benefit which a son is capable of conferring upon the soul of his deceased father. Because these services are enjoined to be repeated at certain stated intervals, and the performance of them, on each successive occasion, secures fresh spiritual benefit to the soul of the deceased father (see note to verse 74 of sect. 4 of Sutherland's Dattaka Mimansa, where these rites are fully described').

"With all respect, therefore, we imagine that Lord Kingsdown must have said by inadvertence, in reference to the idea of adopting a son to the great-grandfather of the last taker, that at that time 'all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied;' and again, 'Bhowani Kishore had lived to an age which enabled him to perform, and it is to be presumed that he had performed, all the religious services which a son could perform for a father.' There is really no time at which the performance of these services is finally completed, or at which the necessity for them comes to an end.

"Then if Chundraboli might have adopted at the date when Bhobunmoyi's death caused the inheritance to devolve on her, with the consequence of divesting her own estate, is there any

(1) 22 Suth. W. R. 121, at p. 123.
reason why Ram Kishore, if we suppose him to have been regularly adopted, and those who came before him as heirs to Bhowani Kishore out of the way, should not in that state of things take the inheritance which the mother gives up to him, and should not, to use the words of Mr. Mayne, be rewarded by the estate for the services which he renders to the deceased?

"We think not. He had been adopted many years back, and, as Chundraboli declared, had been ‘performing the sradhs tarpan, parban and deb-sevas,’ and there was ‘no other man but him to offer oblation of cake and libation of water to her husband and his paternal ancestors and to herself.’ And it seems to us that, although, as heir to Gour Kishore, he could not displace the widow and heir of a subsequent full owner, and as heir to Bhowani, he came after the widow and the mother, he might without objection succeed, when by their successive deaths or surrender he united in himself the capacities of heir to Gour Kishore and heir to Bhowani.

"This conclusion answers the other question. The case is anomalous, but is reducible to rule. The adoption made Ram Kishore brother to Bhowani; and as a brother he would succeed in his proper place and order.

"On all grounds, therefore, and upon every principle of equity and justice, we think the Defendant was entitled to the judgment of the Court.

"We consequently affirm the decision of the Subordinate Judge, and dismiss this appeal with costs."

Leith, Q.C., and Doyne (C. W. Arathoon with them), for the Appellants, contended that the Courts below had misconstrued the decision of the Judicial Committee reported in 10 Moore's Ind. Ap. 304. Pudma Coomari was the nearest heir to Bhowani living at the death of his widow Bhoobunmoyi, and was therefore entitled to succeed to Bhowani's estate, unless either of the two claimants, the original Defendants, that is Ram Kishore or Gogun Chunder, could make out a preferential title. As regards Ram Kishore's claim that depends upon the validity of his adoption by Chundraboli in pursuance of a power in that behalf given by her husband Gour Kishore. The judgment in 10 Moore, 304, properly con-
strued, determined that that power was incapable of execution. Though the decision was arrived at between different parties it conclusively established a principle of law which is of binding application to this case. The instrument itself contains nothing which indicates an intention on Gour Kishore's part to give to his widow a power of adoption to an indefinite period. All spiritual as well as temporal purposes for which the power was given were fulfilled by his son Bhowani, and the estate vested in his (the son's) widow at his death. Consequently the power to adopt was no longer operative. No new heir could be substituted for Bhou-bunmoyi, for the estate once vested could not be divested; and further than that, the adoption of Ram Kishore had become invalid for all purposes and not merely for that of creating an heir to Gour Kishore.

With regard to Gogon Chunder, he, as the adopted son of Krishnanath is not by Hindu law heir to Bhowani, who was his asagotra bandhoo. Reference was made to Menu, ix. 158; Dayabhaga, c. x., pars. 7, 8, 9; Mitakshara, c. i., sect. xi.; Macnaughten's Principles of Hindu Law, vol. i., pp. 69, 70; Gunja Mya v. Kishen Kishore Chowdhry (1); Uma Sunker Moito v. Kali Komul Mozumdar (2); Chinnarama Krishna Aiyar v. Minatchi Ammal (3); Dattaka Chandrika, sect. 5; Macnaughten's Principles of Hindu Law, vol. ii., Of Adoption, prec. 13, p. 188; Strange's Hindu Law, para. 4, c. 4; Vyavastha Darpana, pp. 948, 952, 956, 958. The decisions also go to show that an adopted son succeeds only within his own gotra. See Naraini Dibeh v. Hurkishor Rai (4); Shamchunder v. Narayni Dibeh (5); and on appeal, Sumbhoo Chowdor Chowdhry v. Naraini Dibeh (6); Gourhureree Kabraj v. Musst Rtnasweree Dibia (7); Lokenath Roy v. Shamasoondwree (8); Kasheeshwree Debia v. Greenschunder Lahooree (9); Kishennath Roy v. Hurseegbind Roy (10); Teencourrie Chatterjee v. Dinonath Banerjee (11).

(1) 3 Sel. Rep. 128.
(2) Ind. L. R. 6 Calc. 256.
(3) 7 Madras, 245.
(4) 1 Sel. Rep. 39.
(5) 1 Sel. Rep. 209.
(6) 3 Knapp, 55; S.C. 5 Suth. W. R.
(8) S. D. A. (decisions), 1858, p. 1868.
(10) S. D. A. (decisions), 1859, p. 18.
(11) 3 Suth. W. R. 49.
Cowie, Q.C., and Woodroffe, for the Respondent, the representative of Ram Kishore, contended that by the decision in 10 Moore, p. 303, the Judicial Committee had only decided that no new heir could be substituted by adoption so as to defeat the estate vested in Bhoobunmoyi. It was not upon the true construction thereof decided by that judgment that the adoption of Ram Kishore as a son to Gour Kishore was invalid and ineffectual for all purposes. It would have been unnecessary for the decision of that case so to have held. When the estate no longer vested in Bhoobunmoyi, but had devolved upon Chundraboli, there was no longer any question of substitution in invitum. Ram Kishore would take in the ordinary way in substitution for his adoptive mother, and his adoption was valid for that as well as other purposes except that of ousting Bhoobunmoyi. Reference was made to Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya (1); Bykant Monoo Roy v. Kisto Soonderee Roy (2); Ramsoondur Singh v. Surbanee Dossee (3); Kally Prosomno Ghose v. Gocool-chunder Mitter (4); Mayne’s Hindu Law, p. 161.

Mayne, for the Respondent Gogun Chunder Chowdhry, was not called upon.

Counsel for the Appellants were not called upon to reply in respect of Ram Kishore’s case.

Nov. 12. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in this case was brought by Joy Kishore Surma Chowdhry against Ram Kishore Acharjia Chowdhry and Gogun Chunder Chowdhry, for the possession of certain zemindaries, talooks, and other properties mentioned in the schedules to the plaint, which formerly belonged to Bhowani Kishore Acharjee Chowdhry, who died without issue on the 28th of August, 1840, leaving a widow, Bhoobunmoyi. Joy Kishore having died during

the suit, his widow, the first Appellant, was made a party to it in his place.

The property in dispute originally belonged to Gour Kishore, who died in 1821, leaving Bhowani Kishore, his only son, and a widow, Chundraboli, the mother of Bhowani. Chundraboli was the daughter of Krishnanath and granddaughter of Ramchunder Chowdhry. The Plaintiff, Joy Kishore, was the great grandson of Ramchunder, and he claimed to succeed as the heir of Bhowani Kishore on the death of Chundraboli, who had succeeded to the estates on the death of Bhoobunmoyi in 1867, and died in April, 1870.

In 1808 Gour Kishore, being then childless, executed a deed of permission to Chundraboli to adopt a son. Bhowani Kishore was born in December, 1817, and in November, 1819, Gour Kishore executed another deed of permission. On the death of Bhowani Kishore an instrument was set up as being his will by Chundraboli and Bhoobunmoyi, by which power to adopt a son was given to the latter, and until such adoption the income of the estates was given to Chundraboli and Bhoobunmoyi. The two ladies took possession of the estates and remained in enjoyment of them for nearly four years.

In December, 1843, Bhoobunmoyi professed to exercise the power alleged to be given to her by the instrument already referred to, and adopted a boy called Rajendro Kishore. Thereupon Chundraboli alleged that the supposed will of Bhowani Kishore was a forgery, and had not been made till after his death, and that Bhoobunmoyi had no power of adoption, and in May, 1844, she adopted, or professed to adopt, Ram Kishore, the first original Defendant, as the son of Gour Kishore, her late husband. The first of the now Respondents is his minor son.

The second Defendant and Respondent Gogun Chunder Chowdhry, it is now admitted, is the adopted son of Krishnanath by an adoption made by his widow Doyamoi, having been given in adoption to her by his father Gokul Kishore and his mother Hurrosoodandari Debi. It will be seen, therefore, that the Plaintiff cannot succeed if either Ram Kishore or Gogun Chunder has a valid title by adoption. Both the Lower Courts have held that Ram Kishore and
Gogun Chunder were heirs of Bhowani Kishore in preference to Joy Kishore, and the Plaintiff’s suit has been dismissed. Their Lordships will first consider the case of the former. Bhoobunmoyi, on behalf of Rajendro Kishore, her adopted son, having obtained possession of all the property of Bhowani, a suit was brought in 1862 by the next friend of Ram Kishore on his behalf against them and other persons, the Plaintiff claiming, as the adopted son of Gour Kishore, the whole property ancestral and acquired of Bhowani. To this suit Chundraboli was made a Defendant. It was dismissed by the Sudder Ameen, and there was an appeal from his decision to the Sudder Dewanny Adawlut at Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro was invalid, and that the will of Bhowani purporting to give the power of adoption was a forgery. They were also unanimous in holding that the deed of permission by Gour Kishore was a genuine and valid instrument, and that if the power to adopt continued at the time when Chundraboli professed to execute it there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favour of the Plaintiff as to the ancestral property of Bhowani Kishore, but not as to his self-acquired property.

From this decree there was an appeal to Her Majesty in Council, and the question in this appeal as regards Ram Kishore is what was then decided. The judgment of this Committee on that occasion is not and cannot be relied upon in this suit as binding the parties to it, the now Plaintiff not being a party to the former suit; but it is treated as a decision upon the law which should be considered as binding.

In that judgment their Lordships say:—

"The next question is as to the validity of the adoption of Ram Kishore. We see no reason to dissent from the opinion of the Court below upon the facts of the case, viz., that the oonamuttee putter of Gour is a genuine instrument, and that supposing the powers given by it to have been in force, when the adoption under it took place the adoption was good; but we think it unnecessary
to examine into the genuineness of this instrument, as we are of opinion that at the time when Chundraboli professed to exercise it the power was incapable of execution."

The judgment then, after stating the words of the instrument, and saying that it was not of a testamentary character, but merely a deed of permission to adopt, proceeds:—

"How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shews a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limit must be assigned. It might well have been that Bhowani had left a son natural born or adopted, and that such son had died himself leaving a son, and that such son had attained his majority in the lifetime of Chundraboli. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

"But, whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if Bhowani had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chundraboli would have been at an end.

"But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us."

After saying that on the death of Bhowani his wife succeeded as heir to him and would have equally succeeded in that character in exclusion of his brothers, if he had any, and that she took a vested estate as his widow in the whole of his property, their Lordships say:—

"The question is, whether the estate of the son being un-
limited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption, who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

"This seems contrary to all reason, and to all the principles of Hindu law, as far as we can collect them."

The substitution of a new heir for the widow was no doubt the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani, the power of adoption was at an end, and incapable of execution. And if the question had come before them without any previous decision upon it, they would have been of that opinion. The adoption intended by the deed of permission was for the succession to the zemindary and other property, as well as the performance of religious services; and the vesting of the estate in the widow, if not in Bhowani himself, as the son and heir of his father, was a proper limit to the exercise of the power. The words at the end of the instrument are "that dattaka (adopted) son shall be entitled to perform your and my sradh, &c., and that of our ancestors, and also to succeed to the property." Their Lordships are therefore of opinion that Ram Kishore had no title.

They have now to decide upon the title of Gogun Chunder Chowdhry.

It may here be stated that Chundraboli, after the death of Bhoobunmoyi and whilst she was in possession of the property, executed a deed of relinquishment in favour of Ram Kishore, dated the 10th of September, 1869, and put him in possession. And by a deed, dated the 30th of December, 1869, reciting this, Gogun Chunder agreed that neither he nor any of his heirs or representatives should be able to advance any manner of claim against Ram Kishore's right, and against any of the conditions of the aforesaid deed of relinquishment of rights. It is not necessary
in this suit to determine what is the effect of this deed. If Gogun Chunder is entitled, the Plaintiff cannot succeed.

Gogun Chunder, it has been stated, is the adopted son of Krishnanath, the maternal grandfather of Bhowani, and is not of the same gotra as Bhowani, whose gotra is that of his father Gour Kishore; and it is objected that, although Gogun Chunder as an adopted son may inherit collaterally, it must be in the same gotra, and consequently he is not heir to Bhowani. This was held by the Subordinate Judge, who quoted a gloss upon a text of Menu by Kalluka Bhatta as his authority. The High Court has held the contrary, and one of the learned Judges (Mr. Justice Mitter) said of the gloss in question, which is to be found in Colebrooke's Digest, book 5, ch. 4, sect. 1, art. 178:—

"In the original phrase 'gotra-dayada' stands for 'heirs to collaterals.' 'Dayada' is equivalent to heirs, and 'gotra' to family name. It is said that 'gotra-dayada' means heirs of the persons bearing the same family name. It may be that this would be the meaning of the phrase above alluded to if the letters are strictly adhered to. But it appears to me from the context that these words are intended to include all the collateral members of the family who stand in the relation of sapinda, &c., to the adopted son. But granting that the literal construction should be adhered to, does the text in question support the conclusion of the Lower Court? It lays down simply that the first six kinds of sons are heirs to the kinsmen sprung from the same family. It is not necessarily implied thereby that any one of these six descriptions of sons is not entitled to inherit to the estate of a kinsman sprung from a different family."

The limitation of the right of an adopted son to succeed to his collateral relations now contended for is contrary to the whole theory of the Hindu law of adoption. An adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, the authorities that govern the decision of questions of adoption arising in the Bengal school. And no text has been produced to shew that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family. The author of the
Dattaka Chandrika after referring to the contradictory doctrines on the subject of the adopted son being heir to his father's kinsmen, and stating his way of reconciling them, says, sect. 5, para. 24, "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, the adopted son takes the whole estate even." The doctrine in the Dayabhaga, ch. 10, v. 8, that adopted sons are not heirs of collateral relations (sapindas, &c.), which is in opposition to the text of Menu, was considered by this Committee in Sumboochunder Chowdry v. Naraini Dibe (1), and it was held that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations by adoption. And it has been pointed out by the High Court, and has not been disputed before their Lordships, that Gogun Chunder and Bhowani Kishore are related to one another as sapindas.

For the above reasons their Lordships are of opinion that Gogun Chunder is a preferential heir of Bhowani Kishore to Joy Kishore, and that on this ground the decree of the High Court affirming the decision of the Subordinate Judge who dismissed the suit is right. And their Lordships will therefore advise Her Majesty to affirm that decree, and to dismiss this appeal. The costs will be paid by the Appellants, one set of costs only to be allowed by the Registrar on taxation.

Solicitor for Respondent, the Court of Wards: H. Treasure.
Solicitors for Respondent Gogun Chunder: Barrow & Rogers.

(1) 3 Knapp's P. C. Cases, 55.
RAJAH UDAYA ADITYA DEB . . . . . Plaintiff;

AND

JADUB LAL ADITYA DEB . . . . . Defendant.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Impartial Raj—Inalienability—Family Custom.

The impartibility of a raj does not render it inalienable as a matter of law. Its inalienability depends upon family custom, which must be proved.

Anund Lall Singh Deo v. Maharaja Gobind Narain Deo (1) approved.

Appeal from a decree of the High Court (April 8, 1879) in special appeal from a decree of the Judicial Commissioner of Chutia Nappur (May 6, 1878) which affirmed with costs a decree of the Deputy Commissioner of Manbhum (July 30, 1877).

The circumstances appear in the judgment of their Lordships.

For a report of the case in the Court below, see Ind. Law Rep. 5 Calc. 113.

Leith, Q.C., and Woodroffe, for the Appellant, contended that the Rajah was not competent to alienate any portion of the estates either in perpetuity or for any period beyond his own life. Even if he could validly do so to a stranger, such power of alienation could not be extended in favour of a member of the family, at least when such member was a person who by the custom of the family was entitled to maintenance out of the estates. The voluntary alienation in question was at best no more than a maintenance grant, and consequently resumable by the custom of the family on the death of the grantor.

They referred to Anund Lall Singh Deo v. Maharaja Gobind Narain Deo (1); Bebee Punchumn Koomaree v. Maharajah Gurunarain Boy (2); Maharajah Kishen Kishore Manick v. Musst


Hurree Mala (1); Maharajah Gurunarain Deo v. Unund Lal Sing (2).

The Respondent did not appear.

The judgment of their Lordships was delivered by

Sir Richard Couch:

In this case the only Appellant—the other Plaintiff in the suit being the manager of the estate of the first Plaintiff—is the Rajah of Patemun, in Chutia Nagpur, and he is the son and successor of Rajah Shatrooghun. The raj is admittedly an inapartible raj, and one in which the custom of primogeniture exists. There is also a custom that the younger sons of the Rajah are entitled to maintenance, the second being called Hakim, the third, Konwar, and the fourth and subsequent, Lals; but the maintenance given according to this custom ceases with the life of the grantor, and has to be renewed upon a succession to the raj.

The late Rajah Shatrooghun during his lifetime executed two instruments, one, being called a pon-haba mokurruri pottah or permanent lease at a fixed rental granted in consideration of a bonus or fine, and the other a khorposh mokurruri pottah or permanent maintenance grant. The pon-haba mokurruri pottah was the first, being dated the 30th of April, 1868, and is in these terms:—"This mokurruri pottah, on payment of bonus, is executed. Within my zemindari of pargannah Patemun, appertaining to the sub-district of division Manbhoom, the entire mouzah Kallianpore (being one mouzah), as per boundaries given below, was previously fixed for your maintenance. Now, excluding it from that maintenance, I make a mokurruri settlement of the above entire Kallianpore, one mouzah, and Jhimri, one mouzah, with all rights appertaining thereto, in all two mouzahs, with you, by means of a mokurruri pottah, and on receipt of a bonus of Rs. 1200, and at an annual mokurruri rental of Rs. 85–10–2–2–2.” Then after some further passages it says:—"Neither I nor my heirs shall have any other right in those two mouzahs beyond the above-fixed mokurruri rent.”

The other instrument is dated the 30th of November, 1868, and is in these terms:—"This mokurruri pottah for maintenance is executed. My second son and future Hakim Keshub Lal Aditya Deb deceased having died, and you being at present the second of my sons, you will, according to the special rule of our Rajdhani, become the Hakim on my death. A gift was therefore made to you before of one mouzah Doodri, one mouzah Chamda, one mouza Laya, one mouzah Kallianpore,"—and so on, naming other mouzahs, in all eight—"without any title deed, and for your maintenance as Hakim, and you are in possession of those mouzahs. Now considering it proper to execute a deed in respect of seven of the above mouzahs, except Kallianpore, I execute a deed for the remaining seven mouzahs aforesaid with the exception of one mouzah, Kallianpore. You shall continue to possess and enjoy the rights appertaining to the seven mouzahs aforesaid lying within the following boundaries by right of maintenance during your lifetime." Then after some other passages—"I made a gift of mouzah Kallianpore for maintenance. I have excluded that mouzah Kallianpore, and granted you a mokurruri settlement of the same along with mouzah Jhimri by a separate deed, and on another date, i.e., the 19th Bysack of the present year." These two instruments were given to the Respondent, who was the half-brother of the Appellant, and had been the third son of Rajah Shatrooghun, but in consequence of the death of his brother had become, when the instruments were executed, the second son and the future Hakim.

It is to be observed here with reference to the intention of these instruments that Kallianpore had, as is stated in the latter, been originally given for maintenance, but it is withdrawn from that gift and is included in the other mokurruri with the mouzah Jhimri, shewing that Kallianpore was no longer intended to be for maintenance, and that the instrument of the 28th of April, 1866, was not intended by the Rajah to be of the nature of a grant, but was intended to be a gift, or, as he thought it would be safer to make it on the face of it, a mokurruri for consideration.

The suit is brought by the eldest son, the present Rajah, to set aside both these instruments, and for possession of the mouzahs included in them. The lower Courts have found that the instru-
ment of the 30th of November, 1868—which is described as being a mokurruri pottah for maintenance—ceased to have effect on the death of the grantor Rajah Shatrooghun; and there is now no question with reference to that part of the decision of the lower Courts.

The question in this appeal arises upon the instrument of the 30th of April, 1868, and it is contended that the estate being impartible was inalienable—as their Lordships understand the argument—by reason of such impartibility; and further that, there being the custom to give maintenance, this instrument was in reality for the purpose of maintenance, and consequently, subject to the limitation, which is part of the custom, that it could not remain in force beyond the life of the grantor.

Now it is important to see what has been found by the lower Courts upon this subject. The Deputy Commissioner has said:—

"With regard to the mokurruri pottah, I hold that Plaintiff has failed to prove that the granting of it was contrary to family custom. An attempt has been made to shew that the deed should be thrown out, because it is more than doubtful whether the consideration recited in it ever passed; but I agree with the defence that such shifting of the Plaintiff’s claim cannot be allowed. I have not a shadow of a doubt that the late Rajah did grant the deed to the Defendant; Plaintiff himself does not deny it. But whilst I cannot allow the shifting of the claim, I hold that the fact, if fact it be, and I believe it to be a fact, that the consideration of Rs.1200 did not pass, is a valuable piece of evidence. If no consideration passed, does it not prove that the late Rajah was not sure of his ground? It seems to me he felt that he was going somewhat near a breaking of a family custom which the Courts might possibly not allow, and therefore he wished to give a business look to the transaction and pretended to take a consideration. If I am right, what was the family custom? I think that referred to by Regulation X. of 1800, that a zemindar, such as Plaintiff unquestionably is, succeeds to all that his father cannot by such custom alienate. So far as the evidence goes, I am of opinion that even if Shatrooghun had made on paper, what I believe he made in fact, a present of the mokurruri lease to the Defendant, the Plaintiff could not have set the deed aside.” This shews the Deputy
Commissioner considered that, although it had not been proved that the consideration passed as stated in the instrument, a gift of the lease was in fact made to the Defendant. Further on he says:—"It appears to me that the right to alienate land in Pat-coom has been proved, and therefore that the mokurruri grant must stand. The granting of a mokurruri is a favour on the part of the grantor, the obtaining of maintenance is a right on the part of the grantee; and the Courts of this district have been in the habit of laying down what maintenance any particular member of a zemindar's family shall be entitled to recover." Here, therefore, we have two distinct findings; one, that this was intended to be a present to the Defendant, the Respondent, and the other that there was a right in this raj to alienate land.

The case then went by way of appeal to the Judicial Commissioner, and he agreed with the Deputy Commissioner in the finding as to the consideration. He says:—"There is no doubt whatever, as the Lower Court holds, that the receipt of the Rs.1200 by the grantor is a complete fiction, and that the transaction was not a business one but a simple gift to the Defendant. But then the question arises, what was there to prevent the Rajah from making a mokurruri to the Defendant in the same way as he might to a stranger, even if no pun (consideration) passed?" Further on he says:—"I think I ought to confirm the decision of the Deputy Commissioner. The general power of alienation on the part of the late Rajah being, I think, established, and the mokurruri pottah being undoubtedly genuine and registered, it lies with the Plaintiff to shew its invalidity; and this he has attempted to do by maintaining that it is contrary to family custom;" and in a later paragraph he says, "That custom has not, I think, been shewn to be opposed to the mokurruri." Therefore the Judicial Commissioner quite concurs with the Deputy Commissioner in the findings of fact.

When the case came before the High Court, the Judges pointed out that it was necessary for the Plaintiff, in order to succeed, to shew that there was some custom which would prevent the operation of the general law which would give a power of alienation; and they said that the only custom proved was, that the estate descends to the eldest son to the exclusion of the other sons, and
that, instead of there being proof of a custom against alienation, what evidence there was shewed that alienations had been made.

Upon those findings, the question whether the mokurruri pottah is valid or not seems to be concluded. It could only be impeached either upon the ground that it was really intended to be a maintenance grant, and so would cease at the death of the grantor, or that, either by law or by a family custom, there was no power to alienate any part of the raj. It seems that there have been some decisions in India in which it was considered that there was not a power of alienation in zemindaries of this kind. But one of those decisions came before this Board in Anund Lall Singh Deo v. Maharajah Gobind Narain Deo (1), and there their Lordships considered that the inalienability of the zemindary was a matter to be proved; and as it appeared to them that it had not been sufficiently established, they proceeded to consider whether or not the grant that had been made was for maintenance. They certainly did not consider that, as a matter of law, the impartibility of the raj made it inalienable, but their Lordships treated the question of inalienability as one depending upon family custom, which would require to be proved. Here the findings are very distinct that there is no such custom in existence with reference to this raj; and their Lordships, therefore, are of opinion that the judgment of the High Court is a correct one, and they will humbly advise Her Majesty to affirm it and to dismiss the appeal.

Solicitor for Appellant: H. Treasure.

(1) 5 Moore's Ind. App. Cas. 82.
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BENGAL REG. I. OF 1824, s. 9, cl. 11.] Salt lands worked by the Salt Department from the time of the assumption by the Government of the monopoly of salt manufacture to the present day, though held by the Government subject to khaliari payment, are nevertheless in contemplation of law (having regard to Reg. I. of 1824, sect. 9, cl. 11) lands held by the department rent free, whether they did or did not originally belong to a permanently settled estate; and when relinquished by that department are liable to assessment. If settled with others than the zamindar within the ambit of whose zamindary they are situated, the remissions made from his jummas during the holding by the department on account of khaliari and other compensations will be allowed in perpetuity. SECRETARY OF STATE FOR INDIA v. RANI ANUNDMOYI DEBI ... 172

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EVIDENCE OF AGENCY: See Execution of Deeds by Purdanushin Lady.

EXECUTION OF DEEDS BY HINDU WIDOW: See Hindu Widow.

EXECUTION OF DEEDS BY PURDANUSHIN LADY.] In the case of deeds and powers executed by purdanushin ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who execute them,—In a suit to recover moneys lent against a purdanushin lady upon an account settled by her husband under a mooktarnama, which besides conferring ordinary powers authorized "all acts done by the said mooktar, such as giving and taking loans to and from others" :—Hold, that in the absence of evidence that the moneys had been borrowed by the husband on behalf of the wife, or that he was her agent carrying on business by her authority, the suit must be dismissed. According to the construction of the mooktarnama the husband had no authority to bind the wife by a mere statement of account. SUDISH LAL v. MUSUMUT SHEOBARAT KOER ... 39

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HINDU LAW.:] Where a deed of permission to a Hindu widow to adopt provided "that (dattaka)
HINDU LAW—continued.
adopted son shall be entitled to perform your and my sraddha, &c., and that of our ancestors, and also to succeed to the property,” and thereafter the estate of the grantor of such deed vested in the widow of his natural-born son:—Held, that upon the vesting of the estate in such last-named widow, the power of adoption was at an end and was incapable of execution. An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption.—Sambho Chunder Chowdhry v. Naraimu Dibeh (3 Knapp, 55), approved. Held, also, that the adopted son of the maternal grandfather of the deceased inherits though of a different gotra and is a nearer heir than such maternal grandfather's grand nephew. Pudma Coomar Deb v. Court of Wards———229

2. An elder-born son though of the junior wife is entitled to succeed to the father's estate in preference to the younger-born son of the elder wife.—Ramalakshmi Ammal v. Sivanatha Perumal (14 Moore's Ind. Ap. Cas. 570; Law Rep. Ind. Ap. Sup. Vol. p. 1) approved. A first-born son, though by the fourth wife, is entitled to succeed to the father's estate in preference to a younger-born son of the third and senior wife, whose marriage was subsequent to the deaths of the first two wives.—Quere, where the wives are of a different class or caste.—Quere also, whether the third wife, who was not married till after the deaths of the two former wives, stands in the position of a first-married wife. Pedda Ramappa Nayanivar v. Bangari Seshamma Nayanivar [1]

3. In a suit by the deceased's father's brother's daughter's son against the widow of the deceased and her alleged adopted son, to set aside the adoption, and a decree declaratory thereof alleged to have been obtained by the Defendants by fraud and collusion:—Held, overruling the decision of both the Courts below, that the suit must be dismissed; Plaintiff being a contingent remote reversioner, the heir who had neither alleged nor proved that there were no nearer reversionary heirs in existence, or that they had precluded themselves from suing. The right to bring such a suit is limited, and, as a general rule, belongs to the presumptive reversionary heir. If such nearest heir refuses without sufficient cause to sue, or has precluded himself by his own act or conduct from suing, or has colluded with the widow, or incurred in the act alleged to be wrongful, the next presumable reversioner would, on proof thereof, and subject to the discretion of the Court, be entitled to sue.—Brikaji Apaji v. Jagannath Vithal (10 Bombay, H. C. R. 851) approved.—Quero, whether the nearer reversioner would not in such suit be a necessary party. —It appearing that the Plaintiff was an Ouda talockadar, and that the widow was entitled to an under proprietary tenure upon his estate, and by her adoption purported to transfer such underrente, held, that Plaintiff had not by virtue of his talockady such a reversionary interest in the underrente as would entitle him to bring this suit. Ranee Anund Koir v. Court of Wards on behalf of Chundali Shekhar———14

HINDU WIDOW: See Hindu Law. 2.

—Held, that there being a total failure of proof as to the proper explanation of a deed of mortgage to a Hindu widow at the time of her execution thereof, and therefore a failure to transfer thereby her husband's estate, the deed was ineffective in that respect. Otherwise, in order to bind the husband's estate the mortgagor 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 necessities recognised by Hindu law as justifying such transactions.—Bunoooman Peeru Pandu v. Musumath Babooose Munraj Koomarree (6 Moore, App. Cas. 393) approved. Babil Kameswar Pershad v. Run Bahadoor Singh———8

HINDU WILL:—A Hindu died leaving a widow, a daughter's daughter, and a brother. His will, after providing that his widow should take an ordinary Hindu widow a estate in the whole of his property (subject to certain bequests), directed as follows:—7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my granddaughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation. —8. If the death of my wife should take place before my granddaughter (daughter's daughter) arrives at majority, and bears a son, then the whole of the estate shall remain in charge of the Court of Wards until she arrives at majority and bears a son. —9. If my granddaughter (daughter's daughter) should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per monthn for life.—20. If no son or daughter should be born to me, or if my granddaughter (daughter's daughter) should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate which shall remain after the estate has been apportioned with the various matters specified above have been devolved, shall be employed by the Government as it thinks proper, in the improvement of the school and dispensary and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village and of the neighboring villages.—In an administration suit by the Secretary of State against the brother, the widow, and granddaughter, it was contended by the brother that no part of the will was effectual except that which gave the estate to the widow for life:—Held, that clause 7, if it stood alone, would confer an absolute estate on the granddaughter upon the death of the widow.—The words pura poutrati kram (from generation to generation), though importing the male sex in their primary signification, apply also to the female heirs of a female where by law the estate would descend to such heirs; and are apt for conferring an estate of inheritance upon either male or female. Clauses 8 and 9 may be read together, and the disqualification must operate at the death
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of the widow.—Clause 20 should be read as supple-
mentary to clause 9, and under it the gift over to
the Government takes effect, if at all, at the
death of the widow, in the event of the grand-
daughter predeceasing her before bearing a son
or being disqualified at such death.—Quere,
whether the disqualifications, if they had been
conditions subsequent to the vesting of the estate
in the granddaughter, would or would not have
been in violation of Hindu law.—The case of the
granddaughter predeceasing the widow and
having borne a son not being provided for by the
will, their Lordships declined to declare the rights
of the parties in such contingent event, no judg-
ment which they could give being able to affect
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plained in the Tajojo Case approved. RAMLALL
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INVolUNTARY PAYMENT: Where the pur-
chaser of a mouzah paid money into Court to pre-
vent the sale thereof in execution of a decree which
had already been satisfied:— Held, that such pay-
ment was involuntary, and that an action lies
against the decree holder to recover back the
money, on the ground that it was inequitable that
the decree holder, whose claim had been previ-
ously satisfied, should retain it. DOOGLI CHAND
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KHALARI PAYMENTS: See Bengal Regula-
tion I. of 1824.

LAND ACT X. OF 1870, ss. 38, 39, 40.] The
provisions in Act X. of 1870, for the settling of
compensation for land taken for public purposes,
are intended to be final; where its amount and
distribution have been settled by a competent
Court, the decision not having been appealed
against, the settlement is final, and cannot be
questioned in a suit brought by a person whose
claim had been so adjudicated upon. The proviso
in sect. 40 applies only to persons whose rights
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Regulation I. of 1824.

LIMITATION ACT IX. OF 1871.] As regards
suits instituted before the 1st of April, 1873, all
applications in them are excluded from the opera-
tion of Act IX. of 1871.—An application for exe-
cution of a decree is an application in the suit in
which the decree was obtained.—Such application
is not barred by sect. 20 of Act XIV. of 1839, if
made within three years from the date of a pro-
ceeding within the meaning of that section.—
Assuming that a decree is barred at the date of
some order made for its execution:— Held, that
such order, though erroneously made, is neverthe-
less valid, unless reversed upon appeal.—Where a
sale of attached property is stayed on the appli-
cation of the judgment debtor on condition that
the attachment should remain in force, held, that
the subsequent striking off of the case from the
Judge's file does not affect the rights of the de
creeholders. MUNGAL PEBHIAD DICTT V.
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LIMITATION:] In a suit brought in 1875 to set
aside a deed as a forgery, it appeared that the
same was executed on the 17th of July, and regis-
tered on the 19th of July, 1864, and that an at-
tempt to enforce the deed had been made in 1865:
— Held, that the suit fell within the description
of clause 93 of the 2nd schedule of Act IX. of
1871, and was barred by limitation, where the
period (three years) ran from the date of regis-
tration or the date of the attempt.—Where a decree
is for "possession with waistat," the reasonable
construction thereof is that waistat is given
thereby up to the date of delivery of possession,
and not merely up to the date of suit, notwithstanding
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due. FAHARUDDIN MAHOMED AHAB CHOW-

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2. — A Hindu widow having effected an
agreement with her co-sharer, the ancestor of the
Respondents, that the property to which they
were jointly entitled should remain in equal
shares in their joint possession and enjoyment,
but that she should have no power to alienate the
same, and that after her death the same should
pass to her co-sharer, sold her share therein in
1845, with possession to the ancestor of the Ap-
pellant, and died in October, 1862.—In a suit by
the Respondents in August, 1874, to recover the
share so sold:— Held, that there was no adverse
possession to the Respondents till the death of the
widow in October, 1862, and therefore the suit
was not barred by limitation.—The alienation
of the widow's estate was good for her lifetime;
there was no condition against alienation thereof,
and if there had been, there were no words of for-
feiture and no rule of law attaching forfeiture to
its breach, consequently Act X. of 1871, 2nd Sché-
dule, head 144, did not apply. MISSEMMAK
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MADRAS REGULATION XXV. OF 1802: See
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MAHOMEDAN LAW:] A Mahomedan deed
after providing for the absolute gift (hibeb-bil-
waaw) to the donee, proceeded:—" I do declare
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self, and apply the income to meet her necessary expenses, and to pay the Government revenue"—:

_Held_ that under Mahomedan law, these words did not necessarily cut down or limit the operation of the absolute gift otherwise effected either to a gift for life or to an atriats or resamious loan. In this case they were descriptive of the motive of the donor, and ineffectual to control the operation of the technical words of gift. **Haji Mahomed Faiz Ahmed Khan v. Haji Ghulam Ahmed Khan**—-


2. — The testatrix directed: "I direct S. under this will to pay to every month Rs.644. 1a. 7p. (being one-third of Rs.1933. 5a. 4p., my monthly pay allowed by Government for Government promissory notes which are deposited) to my dependents and personal servants as detailed below: and they will give their receipts for the same. . . . Be it known that the expenses of immurbars, &c., will be continued for ever, and also the pay of G. and A. will be defrayed for ever, i.e., generation after generation. The rest of the servants will be paid for life only"—:_Held_, that these words constitute a bequest, and are not merely the expression of a mere direction, and also that payment thereof is not limited to the specific fund mentioned. — The title of the testatrix to the Government promissory notes being under a gift subject to a condition that she was to have the interest only for life, and that after her death there was to be a trust in perpetuity for all her heirs for all time; _quære_, whether under Mahomedan law such gift was not in its legal effect a gift to her absolutely, the condition being void.

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**MATERNAL GRANDFATHER'S ADOPTED SON:**

See Hindu Law.

**MITAKSHARA.** Under the Mitakshara law, as applied in the Carnatic, a daughter takes by inheritance a limited estate in her father’s property and law such gift was not in its legal effect a gift to her absolutely, the condition being void.

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**MITAKSHARA—continued.**

birth any equitable right to procure an alteration in the terms of such grant either as against the Government, his father, or his father’s co-sharers, or to sue to set aside a compromise in respect thereto which his father has effected with his co-sharers. **Chaudhuri Ujagar Singh v. Chaudhuri Patam Singh**—-


**MONY PAID TO PREVENT A COMPULSORY SALE:** See **Involuntary Payment**.

**NON-JOINDER:** See **Practice**. 1.

**ONUS PROBANDI:** See Hindu Widow.

**ORDERS IN EXECUTION UNDER SEC. 244 FOR ATTACHMENT OF PROPERTY APPRAISABLE:** See **Practice**. 4.

**ODDIES ESTATES ACT, 1869, s. 10.** In a suit by an adopted son against his father for a declaration of right with consequential relief in a share of certain estate, the Defendant pleaded that he was absolute owner thereof, and in regard to two of the taluks named was entered in the talookdar’s list prepared under Act I. of 1869. It appeared that under a number of family transactions the property in suit had been given to the Defendant for such interest and with such right of succession to the Plaintiff as by virtue of the law of the Mitakshara attaches to ancestral immovable estate as between father and son—:_Held_, that the Plaintiff was entitled to a declaration to that effect, and that sect. 10 was no bar to his assertion of the interest declared to be vested in him. **Seth Jaidal v. Seth Sita Ram**—-


**PARTIES:** See **Practice**. 1.

**PENSIONS ACT OF 1871.** The Pensions Act of 1871 applies to grants of money in respect of or in substitution for some right, privilege, perquisite, or office. To do gama hukks which the Garasah used to collect from the villages before the establishment of British rule are a recognised species of property, capable of alienation, and therefore a right within the meaning of the Act—:_Held_, that an allowance of money by the Government under an arrangement with Plaintiff's ancestors in lieu of a hukk tiercorfoore received by them falls within the Act, and that accordingly the Civil Courts cannot take cognizance of a suit relating thereto. **Maharaval Mohansingji v. Government of Bombay**—-


**PERMISSION TO ADOPT HELD INCAPABLE OF EXECUTION:** See Hindu Law.

**PRACTICE.** In a suit by three out of four joint sebais of a certain family endowment to set aside an alienation of the endowed property made by the fourth sebait, under which the Defendants claimed, and to recover possession of the same as debiteur—:_Held_, that the fourth sebait was a necessary party to the suit, and that as he had not been made either Plaintiff or Defendant it must be dismissed. The objection of non-joinder was not one of form only, the Plaintiffs deliberately abstained from making him a party, and under the circumstances complete justice could not be done in his absence. **Rajendronath Dutt v. Shaik Mahomed Lal**—-


2. — Although a son under Mitakshara law acquires by birth an interest in the share to which his father is entitled under Government grant of immovable property, he does not acquire by...
SALES OF PROPERTY ATTACHED IN EXECUTION. Under a private sale by a judgment-debtor of property attached in execution, a purchaser acquires no better title than his vendor possesses, that is, he buys subject to any alienation or incumbrance effected since the date of the attachment. Under an execution sale a purchaser acquires title by operation of law adversely to the judgment debtor, and freed from such subsequent alienation or incumbrance.—The Respondent having obtained judgment against B. attached, in May, 1863, B.’s decree against the Appellants for mesne profits; in May, 1865, obtained an order for sale thereof; and on the 27th of March, 1866, by private deed of sale, purchased the same; B. having meanwhile, on the 14th of September, 1865, consented to an order of that date (to which the Respondent was no party), whereby his decree for mesne profits was set off pro tanto against a much larger money decree by the Appellants against him:—held, overruling the decision of the High Court, that such private sale though it satisfied the Respondent’s judgment, only operated to pass such title as B. had in the decree for mesne profits; that is, a title subject to the order of the 14th of September, 1865.—Even if the sale had been in execution, quere as to the effect of the attachment having been issued pendente lite in regard to the right of set-off. Dineshenath Sannyal v. Ramcoomar Ghose — — 65

SALT LANDS: See Bengal Regulation I. of 1824.

SUIT BY REMOTE REVERSIONER: See Hindu Law. 2.

SUIT TO SET ASIDE ALIENATION OF ENowered PROPERTY: See Practice. 1.

TALOOKDAR: See Oudh Estates Act, 1869.

WILL: See Mahomedan Law.