

MADRAS RECORD OFFICE.

Government of Madras.

India DEPARTMENT.

G.O. No.	1673	Press
		~~Mis.~~
Dated	22 - 10 - 1866	

Not to be folded or roughly handled

Proceedings of the Madras Government, Judicial Department.

22nd October 1866.

No. 283. Read the following letter from Messrs. G. WYMAN & Co., Publishers, Calcutta, to the Secretary to Government, Fort Saint George; dated Calcutta, 10th September 1866.

We have the honor to transmit Volume I. of "The Revenue, Civil, and Criminal Reporter," together with a few copies of the bi-monthly issues, as specimens of the work, and respectfully request that you will be so good as to lay them before His Excellency the Governor in Council for inspection.

2. We beg to state that "The Revenue, Civil, and Criminal Reporter" was started to meet a want long felt on this side of India, namely, a legal publication that should embrace every ruling of importance of the Bengal High Court, and which, while securing all the advantages resulting from the editorial management being entrusted to strictly legal hands, was saleable at such a price as to bring it within the means of the humblest Officers presiding in the Mofussil Courts, and of the Vakeels practising in them. "The Revenue, Civil, and Criminal Reporter" is, in fact, the cheapest legal journal of the kind that has yet made its appearance in India.

3. As to the merits of the publication, we need say nothing more than that, though started in January last, it has already secured a large and highly influential subscription list.

4. We would particularly bring to the notice of His Excellency in Council the fact of the Government of Bengal having selected this publication, after report upon its merits comparatively with other rival publications, for supply to the Mofussil Courts. To this end, a standing order for 600 copies of each issue of the work has been received.

5. We would beg to state that "The Revenue, Civil, and Criminal Reporter" is edited by a gentleman of the Bengal Civil Service of high legal attainments; and that the work has been got up in a style and manner equal to the first English Law Journals, in the hope to secure for it a wide circle of subscribers. In bringing these facts to the notice of His Excellency in Council, the Publishers have only to add that their earnest endeavour to provide, at considerable expense, a good, reliable, and cheap journal of Rulings of the High Court, has been spontaneously recognized by the Government of this Presidency, and they respectfully hope that the Government of Madras will be pleased, after an examination of the work, to extend to them the same liberal support.

No. 284. To Messrs. G. WYMAN & Co., Publishers, Calcutta; dated Fort Saint George, 22nd October 1866, No. 1673.

In acknowledging the receipt of your letter of the 10th ultimo, I am desired to inform you that the Madras Government are prepared to take six copies of each issue of your bi-monthly serial, entitled "The Revenue, Civil, and Criminal Reporter."

(Signed) A. J. ARBUTHNOT,
Chief Secretary.

Exd. J. Tulloch.

NOTICE.

Messrs. George Wyman & Co. are prepared to undertake the binding of the "Revenue, Civil, and Criminal Reporter" as under.

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THE
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A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO
THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH
CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE
JUDICIAL DEPARTMENT OF THE GOVERNMENT OF
BENGAL; PRIVY COUNCIL DECISIONS;
SMALL CAUSE COURT AND
OTHER REFERENCES,
&c., &c., &c.

VOLUME II.

No. 5--September 3.

(To be continued in bi-monthly parts, on the 3rd and 18th of every month.)

UNDER THE DIRECT PATRONAGE OF THE GOVERNMENT OF BENGAL.

Calcutta:

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1866.

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CONTAINING
THE LIMITATION UNDER ACT XIV OF 1859; THE SPECIAL
LIMITATIONS UNDER ACT X OF 1859; AND THE VARIOUS
REGULATIONS AND ACTS PROVIDED FOR BY
SECTION III OF ACT XIV OF 1859.

BY
WALTER M. BOURKE, ESQ., M.A.,
BARRISTER-AT-LAW.

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Appendix; Regulations and Acts, or portions of them from which the descriptions of the various kinds of suits referred to are taken; and a Section on Prescription.

N.B.—Part I will be ready on the 1st of September, 1888, and the following Parts at intervals of one month.

GEO. WYMAN & CO., Publishers,
1A, HARE STREET.

The Hon'ble Sir BARNES PEACOCK, *Knight, Chief Justice*,
and the Hon'ble G. LOCH, *Judge*.

1866.

Case No. 3378 of 1865.

28th June.
CIVIL JURISDICTION.

Special Appeal from a decision passed by Baboo Gungachurn Shome, Principal Sudder Ameen of Sarun, dated the 21st August, 1865, affirming the decision passed by Moulvie Fureedoodcen, Sudder Ameen of that district, dated the 27th October, 1862.

Munnoo Beebe, (Plaintiff) *Appellant*,

versus

Nundkishore Lall and others, (Defendants) *Respondents*.

Baboo Anund Gopaul Paulit for Appellant.

Baboos Greeshchunder Ghose and Debendronarain Bose for Respondents.

The right to sue accrued when the purchase was made under the revenue sale, and the opposite party could not have opposed the claim, on the ground that the suit was pending to set aside the sale. The defendant was no party to that proceeding. We do not think that that suit is a legal reason within the meaning of Section 14, Regulation III of 1793. It certainly did not preclude the plaintiff from obtaining redress, if she had a right. The judgment of the Lower Appellate Court is right, and is affirmed with costs.

Plaintiff's right to sue having accrued when the revenue sale took place, the fact of a suit pending to set aside the sale would not save limitation, nor would be a legal reason within the meaning of Section 14, Regulation III of 1793.

The Hon'ble W. S. SETON-KARR and the Hon'ble L. S. JACKSON, *Judges*.

20th July.

Case No. 59 of 1866.

Regular Appeal from a decision passed by the Judge of the Small Cause Court, in favor of a Principal Sudder Ameen, of Packerunge, dated the 19th December, 1865.

Bhectun Koonwar, *alias* Monecar Beebe, (one of the Defendants) *Appellant*,

versus

Jorssen Dass, (Plaintiff) and others, (Defendants)

Respondents.

Babu Dhurvanath Mitter and Kalimohun Dass for Appellant.

Babu Upcool Chunder Mookerjee and Mohiny Mohun Roy for Respondents.

Appeal valued at Rs. 14,903-8-6-14.

We think it quite clear that the part of the judgment of the Lower Court, dated 19th December last, which is complained of in this appeal, must be reversed. Instance of misjoinder of claims.

Brijrutun and Hurjibun were ^{sons} brothers, Hindoos, domiciled at Dacca, subject to the law of succession, and died in the Mitakshara. Brijrutun, who survived his brother, had one daughter, Pitum Koomati, one of the defendants in the suit and appellant before us. Hurjibun had left two sons, the plaintiffs Joykissen and another. A Hindoo, under the Mitakshara law, may die possessed of both joint property and self-acquired, which may descend in different ways. In that case no presumption exists in favor of the cognate heirs in regard to the self-acquired property.

Brijrutun executed a will in 1862, B. S., and died in 1265. That will, which was attested and assented to in express terms by Joykissen, and under which Joykissen has now sued, Brijrutun absolutely bequeaths and disposes of the various estates and items of property mentioned, giving the bulk of it to his nephews, a less portion to his daughter, and a part to religious purposes. The estate, however, is charged with the payment of the testator's debts, and is for that purpose to be placed under the control of the daughter's husband, Motichund, also a defendant in the suit.

The plaintiff alleged misconduct on the part of Motichund, and prayed that an account might be taken, and he divested of the control. It also

1866.

20th July.
CIVIL JURISDICTION.

claimed five churs, which were described as accretions to, or rather re-formations of, the family zemindary, and therefore belonging one-half to the plaintiff as one of the heirs-at-law both of his father and of his uncle.

Defendant, Pitum Koomari, on the other hand, alleged, as to this part of the case, that Brijrutun's estate was separate; that consequently, even under the Mitakshara, the daughter was heir; and that the plaintiff was entitled to no more than fell to him by the will.

The Principal Sudder Ameen, however, decreed for the plaintiff on this branch of the suit as well as the other, and Pitum Koomari appeals.

We think it right to remark, in the first place, that the plaint discloses two entirely distinct causes of action against different persons, which, in strictness, ought not to have been included in one suit.

As the plaintiff had no cause of action against Pitum in respect of the executor's accounts, or against Motichund in respect of the churs held by Pitum, the 8th Section of Act VIII of 1859 does not justify the form of the suit. But as this objection was not taken before us, we need not insist upon it further.

But we think the decision of the Principal Sudder Ameen, as far as it gave the churs to the plaintiff, to be not sustainable upon any principle.

The grounds of his decision appear to be these: that the evidence, in his opinion, left no doubt but that plaintiff's father and his uncle (Brijrutun) lived in commensality and in joint estate down to the death of the father, and that consequently plaintiff and his brother were entitled each to halves of the joint property which, after the father's death, remained under the management of the uncle; that plaintiff having consented to the will, which affected his legal rights, was bound by it as far as concerned the property with which it dealt, but that the lands in question, not being included in the will, and not being proved by defendant to be appendages of the zemindary left to her, must be held to belong to the joint estate, and thus to be the property of plaintiff and his brother, as heirs both of their father and of Brijrutun.

This reasoning contains at least two fallacies: first, the inference that because the evidence went to show a condition of joint estate down to the death of plaintiff's father, therefore he was entitled to the property left by the surviving uncle, in preference to that uncle's daughter; second, the implied finding that in this case it lay on the defendant to show that the property in dispute came to her under her father's will.

It may be generally laid down that any Hindoo within these provinces, whether governed by the Bengal rule of succession or otherwise, possesses a power to bequeath an estate by will, co-extensive with his power over the estate in his lifetime.

And when it is sought to exclude female heir from succeeding to a husband or father under the Mitakshara, on the ground that the estate was joint, it must be shown to have been so at the time of his death, and not merely at the death of a pre-deceasing brother who was entitled to the claimant.

Now, if we apply the evidence in the case, which the Principal Sudder Ameen considered conclusive on the point of joint estate, and which is indeed the only evidence on the point in the record, we find that it brings the matter down at the latest to the Bengal year 1250, which is fifteen years previous to the death of Brijrutun, the testator, who died three years before his death we find him disposing of his property by will. We find the plaintiff, his nephew, actually attesting and assenting to that will, and finally suing under its provisions.

This appears to us to be a circumstance which effectually disposes of the earlier evidence, and which clearly proves that Brijrutun, three years before his death, with the full concurrence of his nephew, dealt with his estate as separate, in great part self-acquired and assumed, and exercised the power of dealing with it as he thought proper.

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20th July.
CIVIL JURISDICTION.

In this state of things, if the churs to which the appeal before us relates were shown to have devolved upon the defendant from her father, it would still have been open to the plaintiff to show that they had formed part of an original joint estate which, to this extent, had not been divided. Just as if the estate had been proved to be generally joint, the defendant might yet have shown that the churs were property separately acquired, and not subject either to co-parcenary, or to be absolutely taken by the male heir.

In fact the churs in question appear to have been acquired by the defendant under settlement from the Collector at a very recent period. Since the death of Brijrutun, one of them at least is shown to have been an accretion to an estate which belongs to the defendant in a different pergunnah, and, as we understood, on the opposite side of a river from those held by the plaintiff.

It may, however, be assumed that the defendant acquired the churs in right of her father.

It has been fully settled by the Privy Council in what is known as the Shiba Gunga case,† that a Hindoo, subject to Mitakshara, may die possessed of

* IX Moore, p. 539. a share in joint family property, and also of separately acquired property, and that the two will not necessarily devolve on the same heir, but that they may either descend to different persons, or, if descending to the same persons, may descend in a different way and with different consequences.†

† Vide judgment in case cited, p. 609.

In the case before us, Brijrutun unquestionably had separate property as shown by the will; he may also have had a share in joint family. In such a case there is no presumption whatever in favour of the cognate heirs, nor any on either side beyond that which arises out of the fact of possession.

It seems to us, therefore, that the defendant could not be called upon to prove either that the churs in question came to her under the will, or that they were accretions to property which had to come to her, but that plaintiff had in the first instance to prove that they were portions of joint family property to which the defendant could not succeed, and then it would have been for the defendant to show that, notwithstanding this, she was entitled to retain the property.

No evidence has been submitted to us from which the matter which the plaintiff had to prove could be established, and it follows therefore that, as to these churs, the plaintiff's suit ought to have been dismissed with costs.

We may add that if there be, as we think there is, reason to believe that these churs really came to the daughter under the arrangements made by the testator, the plaintiff's claim becomes inequitable in a high degree, for we shall then find him taking advantage of the dispositions made by his uncle in respect of property which in the ordinary course of Mitakshara law would have gone to the daughter as heir, and then falling back upon that same law as entitling him to property which the testator intended for the daughter.

Our decision, however, proceeds on the simple ground that the present was a case in which no presumption existed in favour of the plaintiff, in which he had to prove his title, and in which he has entirely failed to prove any such thing.

We therefore reverse the part of the judgment complained, and direct that, in respect of the churs in dispute, and also in respect of the dwelling-house mentioned in the plaint, to which the same reasoning applies, judgment be entered in favor of the defendant, Pitum Koomari, with costs in proportion.

1866.

21st July.
CIVIL JURISDICTION.

The Hon'ble Sir BARNES PEACOCK, *Kt.*, Chief Justice, and
the Hon'ble L. S. JACKSON, Judge.

Case No. 3279 of 1865.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated 30th August, 1865, reversing a decree of the Principal Sudder Ameen of Furreedpore, dated the 29th February, 1864.

Chunder Collah Dassce and another, (Plaintiffs) Appellants,
versus
Jotendromohun Tagore and others, (Defendants) Respondents.

Baboo Bungseedhur Sein for Appellants.
Baboos Dwarkanath Mitter, Sreenath Dass, and Peary Lall Roy for Respondents.

Extent to which
an Appellate Court
can affirm or reverse a
Lower Court's de-
cision, although the
whole of the parties
interested therein
were not before
Court.

The Chief Justice.—This is an appeal from the decision of the Judge. The Judge reversed the decision of the Lower Court as to 186 beegahs.

That was done upon the appeal of the defendants, who were in possession and claimed title to those 186 beegahs. The only question before the Judge related to those 186 beegahs. But having reversed the decision as to the 186 beegahs, he went on and said, "as the defendants (the appellants before the Judge) do not contest the right of the plaintiff to the remainder of his claim, beyond the 186 beegahs belonging to them, the plaintiff will have a decree for the remainder with costs in proportion."

The other defendants in the suit, who were the owners of dags 1 to 6, Kesmat Golla Koorali, and of dags 1 to 3, were made co-respondents in that appeal, but as the appeal to the Judge related only to the 186 beegahs, having reversed the decision as to them, he ought not to have gone on and dealt with that part of the case in which the Lower Court had given a decision in favor of other defendants.

It appears to me that the decision of the Lower Appellate Court must be affirmed as to the 186 beegahs with costs, and that it must be reversed as to the aforesaid dags, Nos. 1 to 6, Kesmat Goalla Koorali, also with costs, because the defendant interested in those dags was summoned by and at the expense of the plaintiff, appellant, and although not made a respondent in this case, he was summoned, and the appellant paid the costs of his summoning. Therefore, having brought him here, the plaintiff ought to pay his costs.

As to dags 1 to 3, the defendant has not appeared; but I think that we ought not to affirm the decision of the Judge as to dags Nos. 1 to 3, when we see that the Judge ought not to have interfered with the decision of the Lower Court as to those dags, 1 to 3. The decision of the Judge as to those three dags ought to be reversed without costs.

The effect will be that the judgment is affirmed as to all except dags 1 to 6 of Kesmat Ghalla Koorali and dags 1 to 3, and reversed as to dags 1 to 6 of Kismut Goalla Koorah with costs to the defendants to whom those dags were decreed by the Court of first instance, and to the defendants representing the 186 beegahs, but without costs to the defendants representing dags 1 to 3.

Mr. Justice Jackson.—I quite concur in the judgment which has been given, but I desire to explain the grounds on which I find myself at liberty to agree in reversing the judgment in respect to the dags called 1 to 3, the parties interested in those dags in the original suit not being before us.

Ordinarily speaking, I imagine we are only called upon to affirm or reverse as much of the judgment of a Court below as is brought before us. But Section 337 declares that "if there be two or more plaintiffs or two or more defendants in a suit, and the decision of the Lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favor of all the plaintiffs or defendants."

Now here we have a suit and an appeal in which there were several defendants. Some of the defendants were interested in respect to 186 beegahs of land; certain other defendants were interested as regards dags from 1 to 6,

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and a third set of defendants in a different set of dags numbered from 1 to 3. The Judge having before him an appeal in respect to the 186 beegahs, decided that appeal and went on to pass further orders in respect to dags from 1 to 6, and also dags from 1 to 3. The parties interested on dags from 1 to 6 having been served with notice to appear in this Court, have been treated as respondents, and they have urged their objection under Section 348, and that objection has been successful. But the ground upon which their objections proceeded, and that on which the decree of the Lower Court was given, was common to the parties interested in dags from 1 to 6, and those interested in the other dags numbered from 1 to 3. For this reason I think we are at liberty or reverse so much of the decision of the Lower Court as goes upon that common ground.

The Hon'ble J. P. NORMAN and the Hon'ble G. CAMPBELL,
Judges.

23rd July.

Case No. 256 of 1866.

Special Appeal from a decision passed by the Judge of Zillah Purneah, dated 10th November, 1865, reversing a decision passed by the Sudder Ameen of that district, dated 24th March, 1865.

Mussamat Amirunnessa and others, (Defendants) Appellants,
versus

Mr. Charles Chapman and others, (Plaintiffs) Respondents.

Mr. R. E. Twidale for Appellant.

Baboo Khetter Mohun Mookerjee for Respondent.

The plaintiff sued for the recovery of Rs. 1,000, less Rs. 140, of which he admitted the receipt, due to him as a pleader in respect of a judgment obtained in favor of the defendant, his client, on the 18th of February, 1862. The suit was dismissed by the Sudder Ameen on the ground that the plaintiff had received as much money as he was entitled to demand.

On appeal, the Judge gave the plaintiff a decree for the full amount of the fees claimed by him.

He observes that the suit was decided by Mr. Birch, the Officiating Judge, who rejected the plaint at the hearing under Section 29, Act VIII of 1859. (See Weekly Reporter, Full Bench Decision, p. 41.) Counsel and vakeels were heard on both sides, and two days were occupied in the hearing of argument before the decision. He says "the suit was not dismissed on default, and that the whole of the requisite pleadings had been filed. It was not the fault of the vakeel that the Judge did not proceed to a final decision." The Judge says he is therefore entitled to the full fees, according to the provisions of Regulation XXVII of 1814. The Judge notices that Rashbehary Roy, the vakeel originally appointed, died, and that Chapman was appointed in his stead; but he made no enquiry as to what part of the business was done by Rashbehary in his lifetime, and treated Mr. Chapman as if he had done the whole of the work. He notices that the judgment of Mr. Birch was set aside by the High Court on appeal, and that the case was remanded. He did not enquire what became of the case on the remand. Nor does he notice the important fact that Mr. Chapman did no work whatever for the defendant after the remand, but gives a decree for the full amount of all the money which he supposes the defendant would have been entitled to recover from her adversaries, if the case had been ultimately conducted to a successful termination.

Both the Lower Courts treat the case as if the question of the amount of the plaintiff's remuneration depended on, and was fixed by, Section 25 of Regulation XXVII of 1814. But by Section 6 of Act I of 1816, it is enacted that Section 25, Regulation XXVII of 1814, shall cease to be enforced except for the purpose specified in Section 7 of that Act. By Section 7 it is enacted that parties employing authorized pleaders in the Court shall be at

Only when a case is decided on the merits can the full pleader's fees, under Section 25, Regulation XXVII of 1814, be awarded. That Section regulates the fees as costs between the contending parties in the suit, not as between pleader and client.

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liberty to settle with them, by private agreement, the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the vakalutnamah, provided that when costs are awarded to a party in any regular suit, original or appeal, decided on the merits against another party, the amount to be paid on account of fees of pleaders shall be calculated according to the rules in Section 25, Regulation XXVII of 1814; and that when costs are awarded in other cases, the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits.

It is quite clear that Mr. Birch's judgment was no decision on the merits, and there was nothing in it which, under Section 7, Act I of 1840, would have entitled the defendant, against her adversary, to the full amount of costs on the scale fixed by Section 25 of Regulation XXVII of 1814. She would only have got one-fourth of such amount. But the decision, such as it was, was set aside.

The Section expressly applies only to cases as between party and party. It does not directly touch claims by pleaders against their own clients.

There being no express agreement, the plaintiff is only entitled to a reasonable sum as remuneration for his work and labor as a pleader. There is, as we understand, no evidence on the record to show that he has not been sufficiently paid. It appears that he was employed by Rajah Inayet Hossein and several other persons, of whom the defendant was one; that he received the defendant's vakalutnamah through the Rajah; that he was paid the sum of Rs. 700 at the time, when he accepted the vakalutnamah, and has since received a further sum of Rs. 900 from the Rajah. There is nothing to show that the defendant had an interest distinct and separate from that of the Rajah; or if so, what was the extent of that interest? The plaintiff appeared for the Rajah, the defendant, and other persons in the same interest, who made payment to him, as they say, *ijmalee*. We see no reason to think that he ought to be allowed a full separate fee from each of the persons whom he so represented, still less ground can there be for contending that he is entitled to a full fee from each of these parties upon the full valuation of the entire suit. Of course, under Act I of 1846, he was entitled to make his own bargain; but as he failed to do so, we are wholly unable to say that he has not been fully paid for anything that he did by the sum of Rs. 1,600, which it is certain that he has already received. If the defendant is a mere nominal party, we see no reason to think that he has not been sufficiently paid for that part of the suit which he did for her by the Rs. 140 which he has already received. Indeed, in the absence of any agreement or understanding to the contrary, we should be inclined to assume that it was a payment in full. In our opinion, the plaintiff has wholly failed to show that he is entitled to anything more than he has already received.

We reverse the decision of the Lower Appellate Court with costs, and direct that the suit be dismissed with costs, unless the respondent desires a remand for further enquiry with reference to the above observations. He must distinctly understand that we give him no sort of encouragement.

If the respondent does not ask for a remand within twenty-one days, the suit will stand dismissed.

27th July.

The Hon'ble J. P. NORMAN and the Hon'ble W. S. SETON-KARR, Judges.

Case No. 1282 of 1866.

Special Appeal from a decision passed by the Additional Judge of Zillah Hooghly, dated 5th February, 1866, modifying a decision passed by the Principal Sudder Amcen of that district, dated 9th May, 1865.

Pizeruddeen Mahomed and another, (Defendants) *Appellants*,

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versus
Huribur Mookerjee, (Plaintiff) *Respondent*.

Baboo Tarucknath Sein for Appellant.

Baboos Eama Churn Banerjee and Umbica Churn Banerjee for Respondent.

The only substantial point taken by the appellant in the present case is that the respondent, the appellant in the Lower Appellate Court, appealed upon an insufficient stamp. The objection should have been taken in the Lower Appellate Court. It is not one that goes into the merits of the suit in any way. Had it been taken before him, the Judge would in all probability have allowed the plaintiff, appellant below, to deposit the additional stamp. That being so, we direct that the present appeal be dismissed with costs upon condition that the now respondent file within ten days an additional stamp sufficient to cover that which ought to have been paid on his petition of appeal to the Lower Court. Should he fail to deposit the additional stamp, the present appeal will be decreed with costs, so far as regards the wasilut awarded to the respondent in the Court below, and dismissed as to the residue with costs in proportion.

The Hon'ble L. S. JACKSON and the Hon'ble G. CAMPBELL, Judges.

30th July.

Case No. 336 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 16th November, 1865, reversing a decision passed by the Principal Sudder Amcen of that district, dated the 22nd May, 1865.

Ranee Surnomoyee, (Plaintiff) *Appellant*,*versus*Luchmeeput Dogur and others, (Defendants) *Respondents*.

Baboos Sreenath Dass and Bhugobuttchurn Ghose for Appellant.

Mr. R. T. Allan and Baboos Bungseebuddun Mitter, Nilmony Sein, and Romaprosanno Mookerjee for Respondents.

Mr. Justice Jackson.—I have intimated, in the course of the argument, the difficulty which I should feel in reversing or setting aside the judgment of the Lower Appellate Court. I cannot say in this case any more than I could say in a similar case which was before us to-day, that the judgment or decision of the Zillah Judge was altogether satisfactory. Still it appears to me indisputable that the Zillah Judge has, whether his reason be conclusive or not, come to a positive finding upon the single issue of fact which is before us in the present case. That issue is whether the particular mehal, now in dispute, was acquired, as it purports to have been acquired, by Khaimun-nissa Beebee, or by her husband, who is one of the judgment-debtors. It is not, as it seems to me, a separate issue in the cause, whether the purchase money, by which the property was acquired, was the property of the husband or of the wife. But the source whence that money was derived is one test, and a very important test, as to the character of the purchase. It has been laid down by the Privy Council in a case where a Hindoo family was concerned, that this fact (namely, the source whence the money was derived) is a material test; and no doubt, in a joint Hindoo family where the parties live in commensality and joint estate, the source whence the money is derived is of paramount importance, with a view to determining the right to the property.

It appears to me that the state of a Mahomedan husband and wife is essentially different from that of a Hindoo family. A Mahomedan husband and his wife may have, and often do have, independent estates. To say in such a case that because the property stands in the name of the wife, and because the husband is indebted, we are to presume collusion, or to presume benami

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purchase, and to throw it upon the wife to prove substantively the purchase with her own funds, would be, in my opinion, going to an extent to which our Courts have never gone, and cannot properly go. No doubt, in such a case, if evidence were adduced which went to show that the purchase money had been actually the money of the husband, as Judges of fact, we should require something to be shown, and clearly shown, on the other side; and if it were not shown, we should have little difficulty in coming to the conclusion that the property had been acquired by the husband.

Now, in the case before us, the special appellant's pleader has not contended that the state of proof in this case was such that the Judge was absolutely bound in law to find in behalf of the plaintiff; although he has stated his objection over and over again, it has never taken that shape. His objection was that the Judge had not sufficiently investigated the case.

I believe that the Judge has as much investigated this case, and considered the circumstances and conclusions, upon them, as he would do if we were to remand the case fifty times over. I am satisfied that the Judge has considered the case; and it seems to me perfectly clear that he has recorded an opinion which he must have meant to be unmistakable.

That being so, and his opinion on the fact being final, I say (and I say it with some regret) that this Court, on special appeal, is not competent to disturb it.

I carefully refrain from saying what we should do with this case, if we were trying the case in regular appeal, or in the exercise of original jurisdiction. It would be superfluous and irregular to say so, because we have not looked, and cannot look, into the evidence. It appears that the Court of first instance relied on the evidence of the zemindar, who granted the putnee, to show that the tenure had been paid for by the husband out of his own private funds.

If we were to look into the evidence, we might possibly find that the zemindar had nothing on which to found this statement, but his own conjecture. It is perfectly manifest that the lady in whose name the property stands, being a Mahomedan and Purda Nusheen, could not have gone personally to the zemindar to take a putnee.

Now I do not see how it was possible for the zemindar to say that the money which the husband took was his own money, and not the money of his wife. It was alleged on the side of the plaintiff, and it may or may not be true, that at the time when the money was paid, the husband was in insolvent circumstances. If he were so, it would be more probable that the money for this purchase had come from the wife than from the husband. However that may be, whatever our conclusion might have been, if we had been trying the case as Judges of fact, I cannot too strongly insist on the position that a distinct finding of fact has been arrived at by the Court below, and that we are not competent to disturb that finding.

Mr. Justice Campbell.—In my opinion there is no sufficient finding of the Judge in this case; the finding is such that, if upheld in special appeal as sufficiently disposing of the case, a most dangerous precedent will be created.

The plaintiff is a creditor holding a decree against the husband, and the question therefore, in the suit before us, is whether the property in dispute is really the property of the husband or the property of the wife. Upon that question I have no doubt that the issue might be, probably would be, properly stated to be simply, is the property that of the husband or that of the wife? But I cannot find that there is any clear decision of any kind upon this point. The Judge does not say, "In my opinion the property is the property of the husband." He does not even say, "In my opinion it is not the property of the wife." He simply says, at least I take his judgment, which is not even so far clear, to mean this, "it is not proved that the property is the property of the husband," which seems a kind of verdict of not proven.

Now the point of law on which I think the Judge is wrong is this. He lays down, as it were, this position of law: it is not enough that it should be proved that the money was paid by the husband, and that the husband, for the series of years since the purchase, has had the management and control of the

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property, because he seems to say that state of things is consistent with the possible hypothesis, that the property may nevertheless have really belonged to the wife. It seems to me that the position of the Judge is so far wrong, that if it be shown in evidence that the husband paid the money for this property, and has since had the management and control of the property, then the *onus* is shifted, and it will be for those claiming under the wife to show that in reality the wife had funds of her own, and that the property was the wife's.

It is only so far that I differ from my learned colleague.

I have said that probably the correct issue in this case may be whether the property was that of the husband or that of the wife. Towards finding that issue, I think that the ruling of the Privy Council establishes that the essential question which really represents the issue is "what is the source whence the money is derived?"

There is no doubt a certain distinction between a Hindu and a Mahomedan family. As respects a Hindoo family, I should be inclined to hold, under the ruling of the Privy Council, whether, in the case of a son or a wife, the mere holding in the name of such a member of the joint family establishes no presumption of separate ownership, and that in such a case it would be for the member claiming separate property to prove it. In the case of a Mahomedan family no such broad presumption of law can be set up. On the other hand, the custom of the country to which the Privy Council in their decision alluded, is a custom in Bengal, which is almost universal to hold property benamee in the name of female relations and others. It is a custom as prevalent among Mahomedans as it is among Hindoos, and so far, in reference to the custom of the country, that decision of the Privy Council wholly applies. Therefore, I would say that although in the case of a Mahomedan wife there is, in the first instance, from the fact of her holding the property in her own name, a very slight presumption that the property belongs to her, still if it be proved that the money was paid by the husband, and that the property was under the control of the husband, then, as I have already stated, the *onus* would be shifted, and it would be for those claiming under the wife to prove that the property was the wife's.

In this case I have stated the matter a little more broadly than appears in the Judge's judgment, because his actual words are, "that it is not sufficient to prove that a part of the money was paid by the husband." Now I find that the Court of first instance, after going into the evidence, found in the most distinct way that part of the money had been paid by the husband, that the remainder had been remitted by him, and that the property remained in the management and control of the husband. I think that the Judge was bound to come to a distinct decision on that finding of the Lower Court, and as he has not negatived this part of the decision, and has accepted the finding as regards a portion of the money, his decision at any rate is, in my view, insufficient in law. It seems to me that he has fallen into the error of considering this case as if it were a criminal case, as if the defendant had been indicted in a Criminal Court; and some of his expressions would seem even to imply that he thinks it necessary, not only that it should be proved that the property was fraudulently held benamee by the wife, but that the transaction was a fraud on the particular creditor who now sues.

That seems to me to be a mistake. It appears to me that in a civil suit the Judge was bound to weigh the evidence equally and impartially, and see on which side the scale preponderated. If there is strong evidence on one side, he should not lightly reject it, unless there is stronger on the other, especially after the first Court has given credence to it. He should weigh the evidence on this side and that—not require one side to prove a case to demonstration.

These latter observations, however, are beyond the main point of law on which I have the misfortune to differ from my learned brother.

In my opinion, so far as the Judge has found that part of the money was paid by the husband, the *onus* of proving that the property was nevertheless her own, rests on the wife; and so far as he has not found whether the Lower

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Court was right in considering that the remainder of the money was also paid by the husband, he should find that fact.

Mr. Justice Jackson.—The judgment of the Court, then, under Clause 36 of the Letters Patent, will be that the special appeal is dismissed with costs.

2nd August.

The Hon'ble G. LOCH and the Hon'ble A. G. MACPHERSON,
Judges.

Case No. 311 of 1866.

Summary Special Appeal from an order passed by the Judge of Eerbhoom, dated the 16th February, 1866, reversing the decree of the Sudder Ameen of that district, dated the 22nd July, 1865.

Junnardun Dass Mitter and others, (Debtors) *Petitioners,*
versus
Rajah Ruknee Bulow Bahadoor, (Decree-holder) *Opposite Party.*

Baboos Otool Chunder Mookerjee and Sham Lall Mitter, and Mr. R. T. Allan for Petitioners.
Baboo Obhoychurn Bose for Opposite Party.

A suit by a decree-holder in furtherance of execution was infructuous, and shown to have been unnecessary; held that it was not a proceeding within Section 20, Act XIV, 1859, keeping decree alive.

In this case there is no doubt that the decree-holder is out of time, and cannot now take out execution, unless he is entitled to exclude from the three years' rule, contained in Section 20 of Act XIV of 1859, the time during which a certain suit was pending between himself and Messrs. Colvin, Cowie and Co. Having got a decree against his debtor, the decree-holder applied for execution in 1859, which application was eventually struck off for default. Messrs. Colvin, Cowie and Co. had about that time sold lands of the judgment-debtor which had been previously mortgaged to them. It is unnecessary to enter into details as to their position, further than to say that the decree-holder thought himself entitled to attach certain monies in Court which Colvin, Cowie and Co. claimed as the proceeds of the mortgage. To establish his right to attach this fund, the decree-holder brought a civil suit against Colvin, Cowie and Co., making the judgment-debtor also a defendant. This suit was unsuccessful both in the Court of original jurisdiction and in the Appellate Court, by which it was finally dismissed in October 1863. In March 1865 a fresh application for execution was made. The decree-holder urged that though more than three years had elapsed since his former application was struck off, still he was in the meaning of Section 20, Act XIV of 1859, proceeding, to enforce his decree within that the right to execute the decree was not barred.

We think the order of the Lower Court is wrong, and we reverse it with costs. Two decisions of this Court, reported in 2 Weekly Reporter, 3 (Mis.), and 6 Weekly Reporter, 15 (Mis.), have been referred to in support of this order of the Lower Court. But they do not apply to the present case, because the suits which are there decreed to be proceedings within the meaning of Section 20, were suits in which the decree-holder was successful, and which were properly, if not necessarily, brought by him to enable him to realize his debt by removing obstructions from his path. Here the litigation was wholly unnecessary and fruitless: no obstacle was (and never, we must presume, could be) removed by it. Such a suit, we do not think, comes within the meaning of Section 20 of Act XIV of 1859.

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The Hon'ble G. LOCH and the Hon'ble A. G. MACPHERSON,
Judges.

Case No. 305 of 1866.

Summary Special Appeal from an order passed by the Judge of East Burdwan, dated the 8th February, 1866, reversing the decree of the Sudder Ameen of that district, dated the 7th November, 1865.

Kristomohun Jush, (one of the Debtors) *Petitioner,*
versus

Chunderkant Chuckerbutty, (Decree-holder) *Opposite Party.*

Baboo Ombicachurn Banerjee for Petitioner.
Nones for Opposite Party.

The money that was paid to the decree-holder in June 1862 was a sum in deposit, the proceeds of a previous sale in execution of this decree; and the act of taking out this money, which really belonged to the decree-holder, cannot, we think, be considered a proceeding such as is contemplated in Section 20, Act XIV of 1859. Under this view of the case, we reverse the order of the Judge.

Taking the proceeds of a former execution sale under same decree out of Court, is not a proceeding keeping decree alive.

3rd August.

The Hon'ble C. B. TREVOR and the Hon'ble H. V. BAYLEY,
Judges.

Case No. 1006 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhagulpore, dated the 23rd March, 1866, reversing the decree of the Moonsiff of that district, dated the 22nd December, 1865.

Parscnath Misser, (Plaintiff) *Appellant,*
versus

Shaik Bunda Ally and others, (Defendants) *Respondents.*

Baboo Mohendro Lall Shome for Appellant.
Baboo Kally Kissen Sein for Respondents.

Plaintiff held from the defendant a bond with a lien of certain property as security for the amount borrowed by him; the defendant did not pay the sum borrowed at the stipulated period, so the plaintiff brought a suit for the same and obtained a money decree; he subsequently brought a second suit to enforce his lien by the sale of the property pledged, making as defendant the party in possession.

The Court is bound to see if it has jurisdiction, whether limitation be pleaded or not.

A party having a lien on property as security for a loan, must obtain both a decree for the money and for realization of it, by sale of the pledged property, within three years of the date on which the money becomes due.

The Judge, omitting points which are not before us, ruled that plaintiff was out of Court, under Clause 10, Section 1, Act XIV of 1859, more than three years having elapsed since this cause of action accrued. Plaintiff now appeals specially, urging that Clause 12, and not Clause 10, applies to the present suit, which is for the recovery of an interest in immoveable property, and that consequently plaintiff is not out of Court, the former provision of the law giving him 12 years within which to sue; and second, that as the defendant did not urge the plea of limitation, the Judge should not of his own mere notion have raised the plea.

Looking to the second objection, we are clearly of opinion that, under Act XIV of 1859, whether a defendant raised the plea or not, it is incumbent on the Court to see that they have jurisdiction, and if that jurisdiction has lapsed by an efflux of time, to refuse to exercise a jurisdiction which they have not by law. As to the application of the statute in the present case, we have nothing before us to show that it has been wrongly applied; the Judge quotes the law correctly, though he does not explicitly state the date, and the special appellant was unable to supply that date with a view of showing that an error had been made below. We will only therefore observe that, under Act XIV of 1859, if a party has a lien for certain property as security for a loan, it is

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incumbent upon him to obtain both a decree for the money and for the realization of it, by the sale of the property pledged, within three years from the date on which the money became due under the unregistered bond, and if he do not obtain both within that time, he is out of Court under the statute of limitation. We reject the special appeal with costs.

4th August.

The Hon'ble F. B. KEMP and the Hon'ble W. MARKBY,
Judges.

Case No. 1039 of 1866.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 23rd January, 1866, reversing the decree of the Sudder Amcen of that district, dated 30th May, 1865.

Radhakishen Majee, (Plaintiff) *Appellant*,

versus

Rajnarin Mundul and others, (Defendants) *Respondents*.

Baboo Nilmadhub Sein for Appellant.

Baboo Ishur Chunder Chuckerbutty for Respondents.

By Hindoo law, as current in Bengal, the son of a daughter who was unmarried at the time of her succession, succeeds to the paternal estate, to the exclusion of her married sisters.

The Court below has tried this suit on the following issue:—

"Whether, if a Hindoo daughter, unmarried, succeed to the paternal property and die leaving a son, her share goes to her sisters, provided they have, or are likely to have, sons, or to her own son."

The Judge found that the estate went to the sisters having, or likely to have, sons, to the exclusion of the son of the unmarried daughter (page 147, Vyavastha Durpana); and the decision of the late Sudder Court, dated the 8th August, 1821, is quoted in support of this ruling.

It is admitted that this suit is governed by the Hindoo law current in Bengal. Now it is clear that, in default of son, grandson, great-grandson, or widow, the unmarried daughter succeeds in preference to the married daughter. In this case it has been found by the Court of first instance that the wife of the special appellant was unmarried when her father died: this fact is not disputed. She married, and died leaving a son; that son is entitled to succeed in exclusion of the sisters and sister's son.—Macnaghten's Hindoo Law, Volume I, page 25; Elberling on Inheritance, pages 75-76; Daya Bhaga, Colebrooke's translation, chapter XI, page 193, para. 30.

The Judge has quoted from the Vyavastha Durpana, a Digest of the Hindoo law, by Baboo Shamachurn Sircar, a work of great research and utility, but which is not recognised by our Courts to be of equal authority with the more correct and learned work of Sir William Macnaghten.

In the work of the Baboo we find it laid down that, in failure of son, grandson, great-grandson, and wife, the unmarried daughter is the sole heiress of her father's estate (page 147.)

It is true that in the same page the following passage occurs—"If the maiden daughter in whom the succession has vested, and who has been afterwards married, die—then, on death of this daughter, vested with property, the estate, which was hers, becomes the property of those persons—the married daughter or others—who would regularly succeed if there were no such unmarried daughter in whom the inheritance vested;" but the author does not give any opinion as to the rule of succession in a case where the unmarried daughter, in whom the succession has vested, marries and leaves male issue.

The decision of the late Sudder Court, alluded to by the Judge, is not at all in point, and does not apply to the question before the Court.

The decision is reversed and the suit remanded for trial on the merits.

The Hon'ble F. B. KEMP and the Hon'ble W. MARKBY,
Judges.

Case No. 1049 of 1866.

Special Appeal from a decision passed by the Judge of Zillah Dacca, dated 20th March, 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 15th September, 1855.

Brojendro Coomar Roy Chowdhry, (one of the Defendants)
Appellant,

versus

Juggernath Roy Chowdhry, (Plaintiff) and others, (Defendants) *Respondents*.

Baboos Dwarkanath Mitter and Chundermadhub Ghose for Appellant.
Mr. R. V. Doyne and Baboo Unnodapershad Banerjee for Respondents.

In this case it appeared that there were three persons holding decrees against one Shunkhomoney; the first in order of date was the defendant in this suit, the present appellant; the second was the plaintiff in this suit, the present respondent; and the third was one Mudun Mohun Roy. The property of Shunkhomoney was attached by all three creditors, and was put up to sale at the instance of the plaintiff; at this sale the plaintiff became the purchaser of the property, but the whole, or nearly the whole (it is not precisely stated), of the sum realized was applied in satisfaction of the defendant's debt.

Before the auction sale a fourth party, Sunoo Chunder, claimed the property attached as purchaser under a private bill of sale prior to the attachment; his claim was investigated under Section 246 of the Code of Civil Procedure, and ejected, and the sale took place. Subsequently Sunoo Chunder brought a regular suit to set aside the sale and recover the property, in which he was successful.

The present suit is brought by the plaintiff to recover back the purchase money which has been handed over to the defendant, and the Judge has made a decree in the plaintiff's favor.

Upon this appeal two objections have been urged against this decree: first, it is said that there was no irregularity in this sale, and that at a sale under a decree for execution the purchaser takes all risks of title upon himself; but upon the present appeal we have no power to enter into this question, because the sale has been set aside by a competent Court for reasons which must be presumed to be sufficient. That having been done, the right to the purchase money, under Section 258 of the Code of Civil Procedure, is absolute, and this suit may be maintained (see 1, Weekly Reporter, page 55).

Then it is said that even if this be so in ordinary cases, the plaintiff cannot recover in this suit, because he himself caused the property to be put up for sale. But there is nothing whatever in this objection. It is not suggested that the plaintiff was guilty of any fraud or misrepresentation by which he might be deprived of a right which he would otherwise be entitled to assert; nor did he in any way guarantee the validity of the sale under the decree. He merely did what any judgment-creditor has a right to do. He put those proceedings in motion, of which the defendant stepped in and took the benefit.

Both objections, therefore, which have been taken on this appeal fail; and this appeal must be dismissed with costs and interest.

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Plaintiff being a judgment-creditor, put up the property to sale, purchasing it himself; the proceeds were applied in liquidation of a prior creditor's decree; sale having subsequently been set aside, plaintiff sued for refund of purchase money. Neither misrepresentation nor fraud being shown, nor that the sale was guaranteed, plaintiff was entitled to succeed.

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CIVIL JURISDICTION.The Hon'ble W. S. SETON-KARR and the Hon'ble SUMBHOO-NATH PUNDIT, *Judges.*

Case No. 1043 of 1866.

*Special Appeal from a decision passed by the Judge of Zillah Cuttack, dated the 26th January, 1866, reversing a decision passed by the Sudder Ameen of Balasore, dated the 31st March, 1865.*Hurroperashad Roy, Canoongoe, (Defendant) *Appellant,**versus*Puddolochun Mundul and others, (Plaintiffs) *Respondents.**Baboos Chundermadhub Ghose and Obhoy Churn Bose for Appellant.
Baboos Bycantonath Paul and Mohenlrolall Shome for Respondents.*

The objector being a purchaser from the defendant against whom the decree had passed, was not a third party within the meaning of Section 230, Act VIII of 1859, and the Lower Appellate Court was wrong in directing the first Court to register the objection as a suit under the provisions of the Section.

It appears that the special appellant sued and obtained a decree against certain individuals, and in execution of it some dispute arose regarding the lands now in dispute between him and a purchaser of a portion of the estate from the defendant against whom the special appellant had obtained a decree for the same. The Court of first instance decided against the objections of the said objectors, and then, under the orders of the Lower Appellate Court passed on appeal of the said objectors, the Court of first instance was directed to register his objections as a suit under Section 230 of Act VIII of 1859.

That case has now been decided up to the Lower Appellate Court, and the special appellant objects before us, in the same suit, that the Lower Appellate Court should not have directed the Court of first instance to register any claim, as there is no appeal against orders refusing to register a claim in execution, and that Section 230 does not contemplate the registry of objections of defendants, but of others besides defendants; and as the objector was a purchaser from the defendant, after the passing of the decree in favor of the special appellant the said objector is no better than the aforesaid defendant himself, and is not a third party entitled to the benefit of the said Section.

We agree with the special appellant, and hold that this suit has been wrongly registered, and so tried without jurisdiction. We therefore decree the appeal with costs, and reversing the orders of both the Lower Courts, dismiss with costs this suit under Section 230. This is not, however, intended to prevent the Lower Appellate Court from hearing any miscellaneous appeal against the orders of the Court of first instance passed in execution of decree, if that Court should think it proper, even after the lapse of time, with reference to the merits of the dispute, to allow any such appeal, and to decide any matter that may be essential to the ends of justice.

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The Hon'ble G. LOCH and the Hon'ble A. G. MACPHERSON,
Judges.

Cases Nos. 307 and 308 of 1866.

*Summary Regular Appeal from an order passed by the Judge of Zillah Gya, dated the 7th April, 1866.*Mussamut Josoda Koonwar, *Petitioner,**versus*Gouree Byjnath Sahoy, *Opposite Party.**Messrs. R. V. Doynes and Peacock, and Baboos Unnodapersad Banerjee, Kishen Kishore Ghose, and Mohesh Chunder Chowdhury for Petitioner.
Messrs. A. T. T. Peterson and Allan, and Baboos Dwarkanath Mitter, Kishen Suckha Mookerjee, and Tarucknath Sein for Opposite Party.*

A legal partition is established if it be proved that the parties have separated in good

fidelity under Act XXVII of 1860, as representative of her deceased husband, Joy

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Kurum Lal; the other granting a certificate under that Act to the respondent, Gouree Byjnath Pershad, the nephew of the deceased.

Gouree Byjnath Pershad contends that he and his uncle (Joy Kurum) were joint in estate at the time of the death of the latter, and that he is therefore the heir, and entitled to the certificate. The appellant, on the other hand, contends that Joy Kurum had separated many years before his death from Gouree Byjnath and Gouree Bijmath's father, Deonath, (the brother of Joy Kurum), and that therefore she as his widow, there being no male issue, is his heiress, and entitled to the certificate.

The Lower Court being of opinion that it was not proved that a partition ever took place, rejected the application of the widow, and granted that of the nephew.

In appeal it is urged—*first*, that on the face of Gouree Byjnath's own petition, it is apparent that he is not entitled to a certificate; and *second*, that the partition has in fact been proved, and therefore the widow is entitled to that for which she prays.

On the first point it is argued that the uncle and nephew either were or were not joint in estate. If they were not, then clearly the widow would be entitled in preference to the nephew. If they were, and there were no separate property or debts of the deceased, no certificate is necessary, and none can be granted, because the nephew in that case takes all by survivorship, and needs no certificate to enable him to realize the outstandings.

Stress is also laid on the fact that in his petition Gouree Byjnath alleges himself to have been "in possession of the property of the deceased" since his death, and says that without a certificate it is improbable that the dues of the deceased, amounting to about a lac of Rupees, payable by the debtors, can be realized. These expressions are pressed upon us as admissions vitiating the nephew's claim, inasmuch as they show that his avowed object is the recovery, not of joint debts, but of debts belonging to the deceased alone. We think, however, that the words used in the petition ought not to be construed literally. The petition commenced with a statement that the family was joint at Joy Kurum's death, no partition ever having taken place, and that the petitioner is therefore sole heir. Under such circumstances we are clear that the petition must be read in the only sense in which the petitioner could ever have intended it to be read, namely, as alleging the family to be joint, and consequently all debts standing in Joy Kurum's name to be debts due to the joint estate. To have alleged the debts to be due to Joy Kurum separately, would have been wholly inconsistent with the claim to a certificate which is expressly based upon the ground of there having been no partition, and of Gouree Byjnath being for that reason entitled to succeed. We attach but little weight to the argument that, if the estate were joint, Gouree Byjnath took any debts outstanding in the sole name of Joy Kurum (like the rent of the joint estate) by survivorship, and that therefore a certificate was unnecessary and could not be granted. We are of opinion that whether the nephew takes his uncle's share by mere survivorship or by inheritance, if he takes on the ground of their having been joint in estate, he "succeeds to" and becomes entitled to the effects of the deceased within the meaning of Act XXVII of 1860.

Then comes the second issue, whether at the time of his death Joy Kurum was or was not joint in estate with Gouree Byjnath. This is the main issue between the parties, for there is no doubt that if a partition took place, the widow is entitled to the certificate, while if it had not the nephew succeeds.

It is admitted that no actual allotment of the lands between the two persons ever took place. That there was no division into parcels, whereby talook A was given to the one to be held in severalty, while talook B was given to the other to be held in severalty. But it is said, nevertheless, that such events occurred, and such a course of dealing was followed by the parties as amount in law to a partition.

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For Gouree Byjnath it is broadly pleaded that by the Mitakshara law (which is the law applicable to this case) there is no partition in law, save when there has been an actual division by metes and bounds, or an allotting of one parcel to be held by the one party alone, and of another parcel to be held by the other party alone. It is contended that no arrangement, however strictly carried out, by which the parties agree to be separate in all respects, and each to be separately possessed of an eight annas or any other share in an estate absolutely freed from any interest or control of the other party, that no such arrangement can amount to a partition in the absence of separate allotment of properties in severalty, and certain decisions of the late Sudder Courts at Madras and Agra are referred to which bear out this position. It is said in the judgment in one of these cases that the rule thus laid down is safe and clear. There is no doubt that it is clear and simple, and if it be in accordance with the Mitakshara law, which it is our duty to administer, there is no doubt also that it is safe, while its adoption would enable us to dispose of the present case at once, without entering upon any detailed considerations of the merits and so to avoid the host of difficulties which, in the absence of such a rule, beset the path of those who have to say whether or not there has been a legal partition. Fully alive, however, as we are to the importance and convenience of having any such simple rule, and to the daily practical difficulties which arise from the want of such a rule, it appears to us that the decisions in question are not in accordance with those of this Court or of the late Sudder Court, and that they are not in accordance with the Mitakshara law as it prevails in those provinces which are subject to the jurisdiction of this Court. We have not come to this conclusion without much deliberation, and we proceed to review in detail the authorities bearing on the subject, as we deem it necessary to show the grounds on which we refuse to adopt the rule of the Madras and Agra Courts.

The Mitakshara itself says (Chapter II, Section XII):—

- 1.—“When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof, or by separate possession of house and field.
- 2.—“If partition be denied or disputed, the fact may be known, and certainly be obtained, by the testimony of kinsmen, relatives, of the father or of the mother, such as maternal uncles and the rest, being competent witnesses as before described; or by the evidence of a writing or record of the partition. It may also be ascertained by separate or unmixed house and field.
- 3.—“The practice of agriculture or of other business, pursued apart from the rest, and the observance of the five great sacraments and other religious duties performed separately from them, are pronounced by Naroda to be tokens of a partition. If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs. The religious duty of unseparated brethren is single. When partition indeed has been made, religious duties become separate for each of them.”

In the Vyavahara Mayukha, the law of which is on most points substantially the same as of the Mitakshara, we find (Chapter IV, Section 3, page 47 of Stoke's edition):

“Even when there is a total failure of common property, a partition may also then be made by the mere declaration—“I am separate from thee.” A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities of this term.”

Again in Chapter IV, Section 7 (page 80, Stoke's edition), Yajuvalkya states the modes of decision in case of denial of partition made by any one; “Where partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by a written proof, or by house and field separately possessed.” From the term “separately possessed” we must understand it of houses and lands separately given (to each). Naroda also says—“If a question arise among co-heirs in regard to the

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of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs.”

Further on, in page 34, we read how Naroda declares other signs also of partition. “Separated brethren may bear witness. Gift and acceptance cattle, grain, houses, lands, and attendants must be considered as distinct among separated brethren; as also the rules of gift, income, and expenditure. Those by whom such matters are publicly transacted with their co-heirs may be known to be separate, even without written evidence. Brihaspati says they who have their income, expenditure, and wealth distinct, and have mutual transactions of trading and traffic, are undoubtedly separate.”

The Vivida Chintamon, page 310, has the following:—

“Naroda says, if there be any doubt with regard to partition among co-heirs, it may be removed by kinsmen who are the witnesses to it, by the partition deed, and by distinct income and expenditure, and so forth. When the brothers live together, only one of each set of religious ceremonies is performed by all of them. But after partition they separately celebrate religious rites. Divided partners give or receive things in mortgage, separately perform ceremonies every new moon, and so forth, and contract or give loans without consulting each other.

“Divided brothers can be witnesses to the concerns of each other, can be sureties for each other, can make or receive presents, but undivided ones cannot do so. Those who perform the above-mentioned deeds out of their own stock, shall be known as separated, even if there be no partition deed.

“When one becomes a witness, and another contracts a debt or becomes surety, or when one grants and another receives a loan, they are known to be separated.”

Yagyavalkya says that if there be any doubt about partition, it may be removed by kinsmen, witnesses, the partition deed (*Yatuka*), different houses and fields.

“*Yatuka* means separate. It is derived from *ya* which means unmixed.

“The purport of the above is that the aforesaid transactions cannot take place without partition; therefore partition will be determined by them.”

The Dyabhaga of Juggurnatha, giving the Bengal law on the subject, is much to the same effect. (Book V, Chapter VI, Section II, Act XI, p. 385) (Volume 2, Madras Edition, 496) &c. So the Dyabhaga Jimuta-vabona (Chapter I, Sections 8-10, and Chapter XIV).

These are the principal authorities among the native expounders of the Hindoo law, and although the separate enjoyment of house and field is mentioned as a criterion of partition, we certainly see nothing which leads us to conclude that separation in house and field is the sole evidence of partition, or that there can be no partition of lands save by an actual division and allotment of parcels in severalty; nor, to turn to the works of English writers, is there anything which leads to such an inference in Strange's Hindoo Law (see Volume I, pp. 225-229, and Volume II, pp. 387-397). So in Macnaghten's Hindoo Law, Volume I, page 53, we find the following:—

“Partition may be made without having recourse to writing or other formality, and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet in matters of property each may be separate; while, on the other hand, they may reside apart, and yet may be in a state of union with respect to property, though it undoubtedly is one among the presumptive proofs to which recourse may be had in a case of uncertainty to determine whether a family be united or separate in regard to acquisition and property.” There is nothing in this or the subsequent passages in the same work to shew the actual division and allotment of separate parcels of land was deemed necessary. And in the second volume, at page 168, we find a case (22nd, under the head “Partition”), where it was held that a legal partition, according to the Mitakshara law, had taken place, although there had been no allotment of parcels or enjoyment of them in severalty.

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Such being the law as it appears in the text books, we shall proceed to enquire how the subject has been treated in the Courts of Lower Bengal. In the reports of the decisions of the late Sudder Court in 1859 (page 858) we find a case in which the matter was discussed. In giving judgment, the Court makes the following observations:—"It has never been held necessary in this Court that a separation of brothers in countries governed by the Mithila law should be proved by a deed of partition; generally speaking, the separation is gradual, and it is rarely that it constitutes a single act such as might be fitly recorded in a deed. The rule upon which the Court seems always to have acted is that laid down in the twelfth section of the Mitakshara, which treats of the evidence of a partition. "If," says Naroda, "a question arises among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of distribution, or by separate transaction of affairs. The last of these texts alone, when satisfactorily established, has generally been considered sufficient evidence of separation; but, in the present case, we have the first and last combined, and we find that Bhola Dutt persevered for years in his endeavour to secure the second." In this case no actual allotment of separate parcels to the different sharers had been effected, and one of the strong points in the case, relied on by the Court in deciding that there had been a separation, was that Bhola Dutt (who it was pleaded had separated) had in his own name given to the proprietors of a certain Indigo factory a lease of his own share of certain portions of the family property, which portions had not been allotted to him in severalty.

In deciding as it did, the Court merely followed the course which had been taken by the Sudder Court in dealing with earlier cases. In no instance do we find it laid down that, according to the Mitakshara law, an actual division and allotment of parcels, to be held by each parcener in severalty, was necessary. See Sudder Dewanny Adwalut, 1853, page 618. Select Report 11,320, V 351, VI 273, VII 87. It is, however, to be remarked that from the imperfect nature of the reports of these cases, it is in more than one of them impossible to say whether any allotment in severalty had been made in fact or not.

And so also in the High Court. Thus in a case* at page 119 of Vol. II of the reports published by Hay and Co., where the issue was whether a partition according to the Mitakshara law had taken place, no question was raised as to the necessity of proof of an actual taking of the respective shares to be enjoyed in severalty. Again in *Belas Koer vs. Bhowanee Buksh*† (Marshall 611), which is relied on by both the parties now before us, the Court remarks, after stating many circumstances which led to show that no partition had taken place, and which might have led to the conclusion that it had—"Nor will such transactions as those shown us be sufficient proof of separation, nor, in our opinion, can the proofs of separate transaction, unless they amply show that the transaction had no reference to joint interest, preponderate against the facts and probabilities arising from the absence of the best evidence, viz., that of recorded and recognized separation. But, especially in this case, those separate transactions are, as above shown, very far from being of that complete nature that they can be accepted as proof of the alleged real partition." In these observations we see no indication of any opinion that actual separation and allotment of parcels is requisite. The Court goes no further than to say that in the absence of recorded and recognized separation there must be full and clear proof of separation, which, there is no doubt, is always necessary.

Then there is the case of *Badamoo Koowur vs. Wajeer Sing* (5 Weekly Reporter 78†), a special appeal on which there was a difference of opinion between the Judges. We need here only give the following passage from the judgment of Mr. Justice L. Jackson, there being no nearer approach in any of the judgments delivered to an expression of opinion that actual allotment of parcels

* *Coram Trevor, Seton-Karr, and L. Jackson, J. J.*

† *Coram Bayley and Roberts, J. J.*

† *Coram Seton-Karr, L. Jackson, E. Jackson.*

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in severalty is essential.—"It appears to me that the Lower Courts found as a matter of fact that the family was not separate in estate, and that the special appellant, by the form of his contentions in the Lower Appellate Court, virtually admitted this to be so. I think that unless there has been a definitive separation in estate, indicated by separate enjoyment and distinct liabilities, the family must be held joint, and it will not establish a separation in estate to shew that the different members of the family dealt separately with their shares of the proceeds, or even that they collected rents or profits from different parts of the estate, for that might simply result from some arrangement made for the general convenience of the family, and could not indicate any cessation of the joint rights or responsibilities." Here also we fail to find it laid down that there can be no partition save by actually making over separate parcels to each sharer. Nor is any such opinion to be found in the judgment of another Division Court, in a case in the course of which the question of whether there had or had not been a partition was much discussed,—the case of *Ramkissen Sing vs. Rajah Shibnundun Sing*, June 10th, 1865, Regular Appeal No. 167 of 1858.* Another decision, which has been referred to in argument by the Counsel for the respondent, is one passed on the 30th April, 1861, in Special Appeal No. 1715 of Macpherson, J. J.

1863.† The Court there remarks,—"Where no formal partition of the family estate has taken place, the family must be considered joint and undivided, and the succession descends accordingly, and this notwithstanding a separation in food and residence." The use of the word "formal" in this judgment is relied on for the respondent as shewing that the Court contemplated an actual division and allotment of the estate in severalty. But when the whole judgment is read, it is clear that the word "formal" is used only in the sense of *distinct* or *definitive*. The main question in that case was whether evidence of separation in food and residence was sufficient to establish separation in estate also, and what the Court decided is practically no more than this—that separation in food and residence is insufficient in the absence of clear proof of separation in estate also.

In the case of *Boolakee Lall versus Mussamut Indurputtee Kowar*‡ (3 W. R. 41), we find it laid down that "any act or declaration showing an unequivocal intention on the part of any shareholder to hold and enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition." The judgment of the Privy Council in the case of *Rewanpershad versus Mussamut Radha Beeby* (4 Moore, 137), seems to us to bear out the same principles; for their Lordship appear to have been of opinion that a document in the nature of a will operated as a partition of the property given by it.

The cases specially relied on by the respondents are *Shunker Lall and others versus Mussamut Rohmer Kowar* (North-Western Provinces Report for 1865, page 379), and *Nagoppa Nynaur versus Meedundee Surm Nynaur* (Madras Sudder Court Reports for 1853, page 125.)

In the former case four Judges are unanimous in holding that, in order to institute a partition in land, particular portions of the aggregate area of land must have been divided off and assigned separately to the sharers. The Court express the opinion that in so deciding, they in no way act inconsistently with, or in opposition to, the principles on which the judgment of the Privy Council in *Rewan Persad's* case is based, or to anything laid down there by their Lordships; an opinion in which we do not concur, as will appear from what we have already said as to that case. The Court also refer with approbation to two previous decisions of the Agra Court to the same effect—*Radhakissen versus Sreekissen* (9 North-Western Provinces Report, 357, June 30th, 1854), and *Jokhoo Ram Panday versus Mattre Pershad Panday* (12 North-Western Provinces, March 25th, 1857). We shall only observe, as to the latter of these two cases, that the decision was that of only a majority of the Court which consisted

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of three Judges, and that it is in direct opposition to the opinion given by the Hindoo Law Officer of the Court whom the Court consulted, and with whom the dissenting Judge concurred.

In the case of Nagappa Nynaur, in the Madras Court, nothing was decided, save that the mere execution of a deed to effect a division of family property does not suffice to constitute a division, which can only be held to have taken place when the members of the family may have actually divided their property, each taking possession of his allotted share.

But whatever may have been the decisions of other Courts, we are clearly of opinion that there is nothing in the text books, which are usually deemed authentic, on the subject of Hindoo law, or in the decision of this Court, or of the late Sudder Court, which would justify us in holding that, by the Mitakshara law, no partition can be effected save by the actual division of lands into parcels, and allotment of those parcels to the different sharers to be held by them in severalty. We think that a legal partition is proved, if it be proved that the parties have separated in food and residence, that there has been a distinct separation in estate, indicated by separate enjoyment and separate liabilities, and that they have dealt separately with their respective shares in a manner inconsistent with the idea of their being still joint; if, in short, looking at all the circumstances, it is clear that the parties really did intend to hold, and did in fact hold, their shares respectively, each freed from any interest therein of any other sharer, and if the separate enjoyment was not merely a matter of arrangement for the general convenience of the family.

This being our view of the law, it remains for us to see what the facts are, as they appear, on such evidence as is before the Court. And here we must remark on the exceedingly unsatisfactory manner in which this case has been disposed of by the Lower Court, whose brief judgment does not shew distinctly upon what grounds the Judge supposed himself to be proceeding. By consent of the parties the applications were disposed of, partly on certain admissions made, and partly on certain documents filed. This being so, it is very much to be regretted that the Judge should have failed to record intelligibly the precise nature and extent of the admissions made. From the reference to them contained in the judgment, however, and from the statement of Mr. Allan, pleader for Gouree Byjnath, who informs us that he was present in the Court of Gya during the hearing of this matter, we gather that the arrangement came to between the parties was to the following effect, viz., that for the purposes of these applications it should be taken as admitted that Joy Kurun had been for many years before his death entirely separate in food and residence from his brother Deonath, and after him from Gouree Byjnath; that it should be taken as admitted that for many years prior to his death Joy Kurun had separately collected and enjoyed an eight annas share of the property inherited from Mohadeo, the father of Deonath and Joy Kurun; that all the documents filed by the parties should be taken to be genuine documents and to be admissible in evidence; and that the Judge, upon those admissions, and giving due consideration to the effect of the documents and to the inferences legitimately to be drawn from them, should decide whether or not such a statement of things was established as would amount to a partition in law, as regards estate, between Joy Kurun and his brother and nephew. It is, then, upon these admissions, and the documents which are on the record, that we have to decide upon the merit of the claims set up by the several parties to the right to a certificate as representing Joy Kurun. It is clear that on the bare admissions themselves it would be impossible to hold that a legal partition was established, for there is nothing in the state of facts disclosed in the admissions, which in any way indicates that there must of necessity have been a separation in estate, or which is incompatible with the idea that the estate remained joint. The being separate in food and residence, the separate collection, and the separate enjoyment are items of evidence which may properly be taken into consideration in viewing the whole case in support of the contention that there was a partition; but taken by themselves alone, these items are insufficient and inconclusive.

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When we turn, however, to the documents which have been filed, and take them together with the admissions, the result arrived at is very different. The documents which have been put in are very numerous, and to some of them we shall refer in detail. They lead, in our opinion, to the irresistible conclusion that both Joy Kurun and Deonath not only collected and enjoyed their shares separately, but that by mutual consent each brother held and dealt with his share separately, from and independently of the other, and entirely free from the control and from the liabilities of the other. We think that it was no mere arrangement of joint brothers for their mutual convenience, but that it is clear that each brother resigned his whole interest in the share of the other.

Turning to the documents on the file, we find that Joy Kurun, on the 15th September, 1850, sold an eight annas share of a certain mouzah. The bill of sale recites that the eight annas share belongs to Joy Kurun, who is "in possession without the co-partnership of any other person, and without opposition by anybody," and purports to sell the share "absolutely." Then we have the following—"I have received the consideration money in full from the purchasers and appropriate the same to my own use; the entire sixteen annas of the mouzah aforesaid, deduct eight annas, the share of my brother Deonath, the remaining eight annas are sold." This bill of sale was registered on the 19th of September 1850.

Immediately thereafter, on the 1st of October, 1850, Deonath instituted a suit against Joykurun and the purchasers, claiming a right of pre-emption. The plaint in that suit contains a statement that the brothers were separate. It states that the mouzahs which had been sold had formerly belonged to Mohadeo, the father of Deonath and Joykurun; "that after the death of the father both parties were in possession of half shares each, i. e., eight annas share was held by the plaintiff (Deonath), and the other eight annas by Joykurun, without any partition or division of the lands, but that now through the evil machinations of enemies, whose object was to break up the house, Joykurun had become separate, and had accordingly sold an eight annas share to the purchasers," whereupon the plaintiff (the plaint continued) had gone through all the necessary preliminaries to entitle him to the right of pre-emption.

After various proceedings taken, the suit was eventually dismissed for default, on the 27th of April, 1852. And on the 5th of January, 1853, Deonath himself sold his eight annas of the same property to the persons who had bought Joykurun's share, and he gave them a bill of sale in terms similar to those of the bill of sale executed by Joykurun, reciting that he was owner of an eight annas share, and was in possession of it without co-partnership with any other person, selling the share absolutely, and stating that he has received the purchase money and appropriated it to his own use. Then there is the detail of shares at the end of the bill of sale. "Entire sixteen annas of the estate; deduct eight annas share of Joykurun, which is in possession of the purchasers by virtue of the deed of 15th September 1850, the remaining eight annas is the property sold."

What more cogent evidence of separation in estate could there be than is afforded by these facts? Joykurun dealt with his share as absolutely his own, and expressly said that he had no co-parcener. If his brother disapproved of the sale, and if the estate had been still joint, he might, without difficulty, have had it cancelled; inasmuch as, by the Mitakshara law, the sale by the parcener without the consent of the other was worthless. But not only did Deonath not attempt to set the sale aside, he actually admitted Joykurun's right to make it without his consent, by asserting and bringing a suit to establish a right of pre-emption. Such a course is wholly inconsistent with Deonath's having considered himself and Joykurun to be jointly interested in the property. Finally, after the suit was dismissed, we have Deonath acting just as Joykurun had done, selling his own share to the same purchaser, absolutely alleging himself to be sole owner without any co-parcener, and acknowledging the sale of the other half already made by Joykurun.

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We shall next notice a transaction by which Deonath took from his brother a lease of the latter's eight annas share in property which had once been joint. On the 5th of Aughran, 1258, Fuslee, Joykurun granted a pottah of his share in certain lands for three years to one Sheodyal Sing. On the 11th Bysack of the same year, Sheodyal executed an Ikrarnamah acknowledging he had in fact taken the pottah for Deonath, and assigning it over to him. This again is the strongest proof that the brothers were separate, and that they no longer had any joint interest in the land of which the one thus took a lease from the other.

Further, Joykurun repeatedly sued alone for arrears of rent, &c., in respect of his separate eight annas share, and in one case before the Collector of Behar (21st February, 1854), Deonath filed a petition admitting Joykurun's right to the share claimed. So we have some thirty-six pottahs and kuboolahs extending over many years, all tending to show that Joykurun dealt separately and independently with his eight annas share. It also appears that in some cases tenants took two pottahs—one from Joykurun, for his half share, the other from Deonath for his half share.

Of date so late as June 1865, we have the plaint in a suit then instituted by Gouree Byjnath against a tenant for arrears of rent. Gouree Byjnath was suing on a lease which covered the whole sixteen annas, and his object was to shew his right to collect eight annas separately. The plaint states that first the rents had been paid to Deonath and Joykurun jointly, "and after the separation of Deonath and Joykurun, to Deonath, my father, and to Joykurun, and after Deonath's death to me."

Then we find many decrees against Joykurun solely, which he alone satisfied. There are also decrees against Joykurun and Deonath or Gouree Byjnath, in which the amounts decreed were paid separately, and separate releases given; as, for example, by Joykurun paying his half and getting a release, or by the decree going against Deonath alone for his half, on the ground that Joykurun had already paid his share. So we find Joykurun appealing alone to the Privy Council, giving security alone, and the Judge of Gya considering his eight annas share sufficient security, and reporting Joykurun as in possession without co-partnership, although no separation of interest had taken place in the Collector's books.

There are on the record also several bills of sales (besides those above referred to by us) shewing that the parties sold these shares in certain properties independently. There are five such documents executed by Gouree Byjnath himself, dealing with his own half share. These latter bear dates in 1859, 1861, and 1864.

There are many Collectorate receipts for Government revenue produced by the appellant, receipts given for payments made by Joykurun, though there was no separation in the Collector's books.

Finally, there are some twenty bonds given by Joykurun for money lent to himself, for which he pledged his own credit and his own half share.

These are some of the documentary proofs of separation in estate relied on by the appellant; and there are on the record many others, the effect of which is similar. Taken together with the admissions of the parties, we think that, for the purpose of the present applications, they very sufficiently make out the appellant's case, and shew that she is entitled to the certificate which has been refused to her.

The evidence of Gouree Byjnath no doubt shows that Joykurun and Deonath, and Joykurun and Gouree Byjnath, frequently have sued together and done other acts jointly in the management of their property. But these acts done jointly for convenience sake, and many of them, in themselves, shewing that the parties consider their interests to be separate, are quite insufficient to rebut the very much stronger body of evidence which we have to show that the brothers were substantially separate in estate. More especially do we think that no inference, adverse to the appellant's case, is to be drawn from the fact that Joykurun joined with Deonath or Gouree Byjnath in a suit in which

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they sought to get possession of property which they claimed, as being the heirs entitled to succeed on the occurrence of certain events which had happened. It they were the next heirs who had just become entitled to the properties in question, the natural and proper course for them, even if separate in estate generally, would be to join in a suit to establish their rights as heirs.

For the appellant, it was also contended that, inasmuch even supposing no partition in law to be established, it is certainly proved that Joykurun had the separate enjoyment, for many years, of an eight annas share of the rents and profits; this fact is sufficient to create a presumption that the debts due to him, and now outstanding by him or the produce of such accumulations, and that in the absence of any evidence to the contrary, the debts the monies so separately received by him or the produce of such accumulations, and that in the absence of any evidence to the contrary, the debts in question must be assumed to be his separate property, going on his death to his widow. It is, however, unnecessary for us to express any opinion on this point, as our decision rests upon the broader ground that a partition is proved.

On the whole, looking at the case as it has been placed before us, we are clearly of opinion that, for the purposes of these applications, it is proved by the admissions which have been made, and by the documents which have been put in, that a separation in estate, according to the Mitakshara law, as well as in food and residence, did take place between Joykurun and Deonath, and that at the time of his death, Joykurun was separate in food, residence, and estate from Gouree Byjnath. We therefore reverse both the orders of the Lower Court, and direct that a certificate, under Act XXVII of 1860, be granted to the appellant, Mussamut Joshada Kooer; that the certificate which has been granted to Gouree Byjnath Pershad be set aside; and that Gouree Byjnath Pershad do pay the appellant all her costs, both here and in the Courts below.

The Hon'ble G. LOCH and the Hon'ble A. G. MACPHERSON,
Judges.

Case No. 351 of 1866.

Summary Regular Appeal from an order passed by the Principal Sudder Ameen of Sylhet, dated the 9th March, 1866.

Rajibram Dass and others, (Judgment-debtors) Petitioners,
versus

Mahomed Hossein, (Decree-holder) Opposite Party.

Faboo Mohine Mohun Roy for Petitioners.

Mr. C. Gregory and Faboo Unoda Pershad Banerjee for Opposite Party.

The first decree in this suit was passed by the Judge of Sylhet. There was an appeal to this Court, after the disposal of which an application for execution was made to the Judge, who, instead of dealing with it himself, transferred the application to the Court of the Principal Sudder Ameen for disposal. The Principal Sudder Ameen has attempted to execute the decree, and the present appeal is from his proceedings.

We think the whole of the proceedings taken in the Principal Sudder Ameen's Court are nugatory, that Court having no jurisdiction to deal with the case. The Judge has no power to transfer the execution of his own decree to the Principal Sudder Ameen's Court or to any other Court. The words of Section 362 of Act VIII of 1859 are clear and distinct upon that point, and leave no discretion to this Court; "application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court in the manner and according to the rules hereinbefore contained for the execution of original decrees."

Under these circumstances we set aside the whole of the proceedings before the Principal Sudder Ameen, and remand the case to the Judge, by whom the decree must now be executed.

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Judges.

Case No. 76 of 1866.

Summary Regular Appeal from an order passed by the Principal Sudder Ameen
of Mymensingh, dated the 5th February, 1866.Shib Chunder Bhadoory and others, *Petitioners*,Collector of Mymensingh, (on behalf of the Court of Wards)
Opposite Party.Baboo Kishen Dyal Roy for *Petitioners*.Baboo Jugdanund Mookerjee for *Opposite Party*.A defendant may
ask for retrial of
ex-parte suit within
thirty days of any pro-
cess in execution,
such as must have
brought the fact of
the decree to his
knowledge.

This was an application, under Section 119 of Act VIII of 1859, to set aside an *ex-parte* decree, on the ground that the applicant had not been served with the summons in the suit, and did not appear because he did not know that any suit had been instituted. The Lower Court has refused the application, as being made more than thirty days after process for enforcing the judgment has been executed. We think that the words "process for enforcing the judgment has been executed" refer to process executed against the person or property of the judgment-debtor; process so executed as to make it certain that the debtor has got notice of the existence of the decree against him. In the present instance, the applicant, while admitting that certain lands have been attached, says that they are lands in which he is in no way interested, and of which he is not in possession; and he alleges that he did not know of those lands having been attached as his, and that he did not in any other way become aware of the *ex-parte* decree until within thirty days prior to his application. The Lower Court clearly ought to have enquired into, and decided upon, the truth of these allegations. If true, the application ought to have been granted; if untrue, and notice of the decree, more than thirty days before the application, was brought home to the judgment-debtor, then it ought to have been refused.

This case is remanded to be retried with reference to the above remarks. The Court will take the case up at once out of its regular turn, and will dispose of it with the least possible delay.

6th August.

The Hon'ble F. B. KEMP and the Hon'ble W. MARKBY,
Judges.

Case No. 151 of 1866.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 15th
January, 1866.Mussamut Bhoorun Kooer and others, (*Plaintiffs*) *Appellants*,Sahebzadi and others, (*Defendants*) *Respondents*.Mr. R. T. Allan and Baboo Kishen Suchha Mookerjee for *Appellants*.Baboos Debendro Narain Bose, Dwarkanath Mitter, Unnodapershad Banerjee, and
Unocool Chunder Mookerjee and Moonshee Ameer Ali Khan for *Respondents*.

Appeal valued at Rs. 7,945-4-5.

Suit by a son to set aside alienations of the father, plaintiff having admitted, under the Mithila law, a joint ownership with the father in the property alienated. The *bona fides* and due diligence of the

This is an appeal from a decision of the District Judge of Tirhoot. By his plaint the plaintiff, who is the present appellant, prays for the cancelment of certain sales of real and personal property. The sales in question were made partly in execution of decrees obtained against the plaintiff's father, and partly under bills of sale privately executed by him. The plaintiff, under the Mithila law, claims a joint ownership with the father in the property alienated, and denies the father's right of alienation. He alleges in the plaint that his father, having inherited a large fortune, had,

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ever since he came of age, given himself up to luxury and immoral practices, and by that means had dissipated the whole property, and on this ground he asks that the purchases should be set aside.

The several purchasers of the property are defendants in this suit, twenty-four in number. With regard to several of them, however, the claim has been relinquished in the Court below; with regard to others, the plaintiff's claim has been rejected by the District Judge, on the ground that the sales took place before he was born, and that part of the decision is not now complained of; some of the defendants have not appeared, and the result is that we have to consider the cases of defendants 3, 4, 5, and 6 only.

None of the defendants deny that the Mithila Law of Inheritance is applicable to this property; but they assert that the sales were made in order to enable the father to meet expenses which he was justified in incurring. They also deny that the father was ever a rich man or that he was extravagant; and lastly, they assert that this suit is really brought by the father, who is setting up the rights of his son, in order to recover the property for his own advantage. Evidence in support of that portion of the plaint in which it is alleged that the father had been given to luxury and immoral practices, was adduced by the plaintiff in the Court below. The Judge expressed his opinion that this evidence was unsatisfactory. The appellant has not in any way impugned this expression of opinion by the Court below, and so it must be presumed that he acquiesces in it.

On the other hand, evidence was given in the Court below by each of the defendants, whose cases are now under consideration, to shew that the sales to them respectively were justified by the circumstances in which the father was placed; and the general result of this evidence is to establish, beyond dispute, that the father, shortly after he came of age, was involved in an extensive litigation which lasted for ten years; that there were debts outstanding in respect of the *shraud* of his grandmother, which, as a religious Hindoo, he was bound and, as between him and his son, he had a right to discharge, that the sales in question were conducted openly, and that the purchase money was adequate, and, moreover, that the father had taken a wrong interest in the progress of this suit, instructing vakeels and even trying to dispose of the claim.

Coming more particularly to the transaction of each defendant, we find that defendant No. 3 purchased property to the amount of Rupees 22,000; that, at the time he purchased, the whole joint property had been attached on account of decrees against the father, amounting to Rupees 14,000; and that in addition there were bond debts amounting to Rupees 2,000, besides interests and costs, all which had to be satisfied out of the purchase money, and the defendants allege that it was to meet these claims that the property was sold.

Defendant No. 4 purchased a 7 annas share of certain property of the value of Rupees 6,000; of this 4 annas was purchased at a sale by auction, and the remaining 3 annas at a sale in execution of decree. The sale by auction was expressly made to satisfy the *shraud* expenses, above referred to, and expenses of litigation.

Defendants Nos. 5 and 6 purchased property to the amount of Rs. 2,000 and Rs. 1,800 respectively. Both these sales were at the time asserted to be made in order to meet expenses of litigation.

The appellant before us has not denied that the above sales were made expressly for the purposes which the defendants allege, but he contends that this evidence is insufficient; he maintains that the defendants ought to go further and shew the nature of the debts for which the decrees were obtained, and the necessity of selling the property in order to meet them and the other debts incurred. He asserts that the alleged necessity of these sales is a mere pretext to cover the father's extravagance.

Upon this a good deal of discussion took place as to the precise limits to which each party is bound to carry his evidence, and the exact presumptions which ought to be made in a case like the present.

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With regard to the law, it is clear from the case of Hunooman Persad v. Mussamat Babooer Munnaj Konwaree, 6 Moore's Indian Appeals, 393, that a purchaser in a case of this kind does not take upon himself the entire risk of the existence of a case of necessity for alienation. It is there said that the lender (or purchaser as the case may be, the same rule would apply) "is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate." And further on it is said "their Lordships do not think that a *bond fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." That was the case of a widow in possession of her husband's property, and having an infant son: the present case is at least as strong in favour of the purchaser. In the same case, speaking of the *onus probandi*, their Lordships remark that the question on whom the *onus* of proof lies in such suits is one not capable of a general and inflexible answer, and that the presumption proper to be made will vary with the circumstances, and must be regulated and dependent on them.

Now applying the above remarks to the present case, and viewing this case, as the Privy Council say it ought to be viewed, according to its particular circumstances, we think the defendants have given sufficient evidence to raise a presumption in their favour, that the purchases made by them are valid. There is not a suggestion that they acted otherwise than *bond fide*, the alleged extravagance on the part of the father is not proved, and there appears to have been nothing to call for more than ordinary caution on the part of purchasers. On the other hand, it is shewn that circumstances of grave suspicion attach to this case, that it is promoted by the father to serve his own interests. We also find that a very large proportion of the purchase money was required to satisfy decrees in respect of which the whole of the joint property had been attached, and that a sale was imminent. For nearly the whole of the remainder, the ostensible necessity was that arising out of debts incurred in carrying on the litigation referred to, and there is nothing apparently unreasonable in the amount said to have been required for this purpose. The only remaining item is that of the *shraud* expenses, which, as we have already said, the father had a right to discharge.

Under these circumstances, we come to the conclusion that the defendants acted *bond fide* and with due caution, and was satisfied at the time of their respective purchases of the necessity of the sales, in order to meet debts which the plaintiff's father had a right to discharge. We therefore concur in the decision of the Judge of the Court below, and dismiss this appeal with costs and interest.

6th August.

The Hon'ble G. Loch and the Hon'ble A. G. MACPHERSON,
Judges.

Case No. 231 of 1866.

Summary Appeal from an order passed by the Judge of Shahabad, dated the 28th February, 1866.

Mussamut Sunkal Konwar, Petitioner.

Baboo Kallykishen Sein for Petitioner.

A certificate holder under Section 7, Act XL, 1858, is not required to produce accounts of monies realized and disbursed, unless such be specially sued for, under Section 19, by

The question raised in appeal is whether an administrator holding a certificate under Section 7, Act XL of 1858, is bound to submit accounts periodically of monies realized and disbursed on account of the minor. The Judge has held that every holder of a certificate is bound, when ordered by the Court, to file accounts, and that no one is exempt on the score of relationship from this allegation. It is contended before us that only public curators or administrators appointed by the Court, under Section 10 of the Act, are required to give in periodical accounts, but not holders of certificates under Section 7.

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any relative of the minor.

After carefully examining the Act, we come to the conclusion that the law does not require a party holding a certificate under Section 7 to produce accounts, unless sued for such, under Section 19 of the Act, by any relative or friend of the minor. Public curators or administrators, appointed under Section 10, are required by the provisions of Section 16 to put in annual accounts, to the accuracy of which any relative or friend of the minor may take objections. But where a party is appointed under Section 7 to administer to the estate, it appears to us that he is bound, as was the practice before the passing of the Act, to account only to the minor on his obtaining majority, and to no one else, though of course he is liable to have the certificate withdrawn under Section 21, should any sufficient cause for its withdrawal be proved to the satisfaction of the Court which gave it. The order of the Judge is reversed.

The Hon'ble H. V. BAYLEY and the Hon'ble SHUMBOONATH
PUNDIT, Judges.

8th August.

Case No. 1248 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 29th March, 1866, affirming the decree of the Principal Sudder Ameen of that district, dated the 11th November, 1865.

Harranund Shahoo and others, (Plaintiffs) Appellants,

versus

Mussamut Shukheddeen, (Defendant) Respondent.

Mr. R. T. Allan and Baboos Mohesh Chunder Chowdhry and Onoocool Chunder Mookerjee for Appellants.

Mr. C. Gregory and Baboos Dwarikanath Mittler, Unnoda Prashad Banerjee, and Kishen Succa Mookerjee for Respondent.

In this case the ground of appeal, as set forth in the petition before us, is that, admitting malikana sued for by plaintiff, special appellant, not to have been received for twelve years before suit, still the right to malikana is, as a rent charge on the estate, a perpetually and annually recurring cause of action, and that the special appellant was, under Clause 16, Section 1, Act XIV of 1859, entitled to six years from the time his cause of action arose, even if not entitled to twelve years under Clause 12. The special appellant, at the same time, states that he only does claim six years' malikana prior to suit, and that his title as malik has been found by the Lower Appellate Court, and was admitted by the ancestor of defendant, special respondent.

The malikana, though arising out of the land and as a charge on the estate, cannot be regarded as rent, so as to give a constantly recurring cause of action. Six years' limitation applicable (Clause 16, Section 1, Act XIV, 1859).

The pleadings in the case show that plaintiff claimed malikana at ten per cent. on the gross collections of mouzah Serrol, and 25 per cent. on the sayer collections from 1267 to 1272, and plaintiff alleged that his father had to the period of his death received payments at these rates; plaintiff also averred that in the settlement made by Government with the mukurereedar, there was a sum deducted from the sudder jumma, payable by the mukurereedar under that settlement, to provide for malikana to be paid to plaintiff by the mukurereedar.

The defendant denied plaintiff's title to malikana at all, and they all generally pleaded limitation, and that ten per cent. on the sudder jumma was the maximum claimable.

The first Court found the payment to plaintiff's father within twelve years of suit proved, and decreed plaintiff's case.

The Lower Appellate Court records its decision as follows:—
"On the question of title, I think there is sufficient evidence to show that plaintiff's father did acquire a title to the malikana of mouzah Serrol, and the Lower Appellate Court refers on this matter to a statement of Mahomed Akbar, from whom defendant derives his rights." In respect to the petition of Mahomed Akbar, dated 31st January, 1859, filed a year before

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was not entitled to recover a rateable refund, through his grantor's want of title to the plots in question.

brought against them by the lakherajdar, the plaintiff could not charge the Rajah of Pachete for the costs of defending it.

So far as it goes, the decision of the Lower Court is no doubt correct on these two points.

Mr. Allan appeared for the Rajah of Pachete, who appealed against the decree of the Lower Appellate Court. A preliminary objection was taken by the respondent that no appeal would lie to this Court, inasmuch as the suit was one cognizable by a Court of Small Causes, and that the demand in respect of which the Lower Court had adjudicated did not exceed Rs. 500.

We are of opinion that there is nothing in this objection, as the demand for which the original suit was instituted *did* exceed Rs. 500, and if it had been treated as it ought and should have been treated by the plaintiff, as a suit for a breach of contract by the Rajah for not giving that which he had contracted to give, namely, a good title to the land, we think that damages to the extent claimed in the plaint might have been claimed in the suit, and therefore the appeal is not taken away under Section 27, of Act XXIII of 1861.

As regards the principal question in the cause, we may observe that the right of the plaintiff to receive back a portion of that which is described as the consideration money or price, must depend upon the establishment of one of two points, namely, either that the Rajah fraudulently induced the Coal Company to pay him that sum by a false representation that he had good title to the land in question, or that he warranted and covenanted with the Coal Company that he had a good title.

We observe that the Judicial Commissioner uses the expression "fraudulently entered the land in question as rent-paying land." But we do not find any fraud distinctly charged in the plaint, or that there is any evidence at all upon which the Court would be warranted in finding the Rajah guilty of any mal-practice or actual fraud or dishonesty of any kind, and we do not think that the Judicial Commissioner meant to impute actual fraud to the Rajah by the use of the language above quoted.

Then, as regards the other point, Baboo Mohendrolall Shome, who appeared for the respondent, wholly failed to show us that there was any distinct warranty, or anything that could be construed into any warranty or contract, that the Rajah had a good title.

There is nothing to lead us to suppose that the ordinary course was not followed in this case,—that the Rajah did not exhibit his jumma bundee, title deeds, and other papers to the Coal Company, or that the Coal Company had not the fullest opportunity of ascertaining whether the Rajah was in the receipt of the rents for those lands or not. The lands in dispute, we observe, form but a small portion of those leased to the Company in putnee.

It appears to us that the natural and legal conclusion, in the absence of such evidence on the part of the respondents, is that what is called the consideration money paid, was a mere salamee or payment of a gross sum upon the putnee. If it should turn out that the Rajah had no title to any of the villages included in the putnee lease, no doubt a tenant would be entitled to claim an abatement. But we do not think that there was any such understanding or contract between the parties, that the salamee was to be treated as severable or divisible into portions, corresponding to portions of the property leased, or that the tenant is entitled to ask for the return of any portion of it, because of the Rajah's want of title to a few biggahs in a very small portion of the large estate.

We observe that the Coal Company have been in possession of the property for many years, but that they do not show, as they might have done, that they have been compelled to pay, or even were asked to pay, rent or mesne profits to any one else in respect of such occupation. If they have paid rent to the Rajah, they have enjoyed the benefit of the lease of the land they bargained for.

For these reasons, therefore, we reverse the decision of the Court below, and decree the appeal with costs and interest.

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plaintiff's death, the Lower Appellate Court records—"This petition certainly (as said by the Principal Sudder Ameen) does not show that plaintiff's title to malikana has been extinguished or was invalid, but does show that plaintiff's father's title was disputed in his lifetime by the person who is said to have paid him regularly up to his death."

The Lower Appellate Court then finds that, on the whole, evidence of payment to plaintiff's father or to plaintiff within twelve years of suit, is not proved, and dismisses the suit as barred by limitation.

Against this plaintiff appeals specially on the ground before set forth.

Respondent, under Section 318, Act VIII of 1859, takes the objection that the Lower Appellate Court's finding of plaintiff's title to malikana is based on no legally sufficient evidence.

We are of opinion that in this case the malikana, though arising out of land, and a charge on the estate, is not, strictly speaking, rent, so as to be, as rent, a constantly recurring cause of action. Still the plaintiff could, we think, in the case of such malikana as this, sue within six years from the date of the cause of action, which is the date at which the claim to payment might be made, and in this view the suit might be instituted for non-payment within six years.

Considering then that the suit for any sum, the cause of action as to which is non-payment within six years, can be entertained, we reverse the decision of the Lower Appellate Court, holding the suit barred by limitation, and decree that it may be tried on the merits. And here we would observe that there is not a clear finding by the Lower Appellate Court whether (as plaintiff alleges) defendant contracted on the settlement to pay the malikana, or (as defendant alleges) defendant did not so contract. The evidence on this matter should be fully gone into, and the Lower Appellate Court should then pass such orders as it thinks just and proper. Remanded accordingly.

10th August.

The Hon'ble J. P. NORMAN and the Hon'ble W. S. SETON-KARR, Judges.

Case No. 1119 of 1866.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 26th January, 1866, affirming a decree of the Assistant Commissioner of Maunbhoom, dated 4th May, 1864.

Rajah Nilmonee Sing Deo, (Defendant) Appellant,

versus

Messrs. Gordon, Stuart and Company, Secretaries of the Bengal Coal Company, (Plaintiffs) Respondents.

Mr. R. T. Allan and Baboo Bamachurn Banerjee for Appellant.
Baboo Mohendrolall Shome for Respondents.

Where consideration money was paid for an extensive putnee, and the putneedar, in respect of a small portion of the lands, was cast in a suit by the tenant claiming them as lakheraj, held that the consideration money paid to zemindar was not intended to be divisible into portions corresponding to parts of the property, and that, fraud not being alleged, the putneedar

The Bengal Coal Company sued the Rajah of Pachete for 605 Rupees 8 annas and 6 pies, in a suit which they describe as being for a refund of the consideration money, and for a diminution of the rent, and for certain law expenses incurred by them in defending a suit.

The Lower Appellate Court, confirming the judgment of the first Court, gave to the plaintiffs a decree for 68 Rs. 4 annas and 10 pies, which is described as the proportion of consideration money paid in respect of a village called Chatnibadee, which was entered as *Mal* in the hustabood made at the date of the putnee, but which, or a portion of which—for this is a matter which is not quite clear—was subsequently discovered to belong, as lakheraj, to one Roy Narain Buckshee, who in a suit against the Coal Company and the Rajah, obtained a decree for possession.

The Lower Courts held that, as regards the claim for diminution of rent, they had no jurisdiction, but that the suit should be brought before the Collector, and as regards the law expenses incurred for defending the suit,

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The Hon'ble L. S. JACKSON and the Hon'ble W. MARKBY,
Judges.10th August.
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Case No. 309 of 1866.

Regular Summary Appeal from an order passed by the Judge of Gya, dated
7th April, 1866.

Mussamut Joshoda Koonwar, Petitioner,

versus

Baboo Gource Byjnath Pershad, Opposite Party.

Mr. R. V. Dojne and Baboos Kishen Kishore Ghosé, Unnodapershad Banerjee,
and Mohesh Chunder Chowdhry for Petitioner.Mr. R. T. Allan and Baboos Dwarkanath Mitter, Onnoocool Chunder Mookerjee,
Kishensucca Mookerjee, and Tarucknath Sein for Opposite Party.

Act XIX of 1841 applies only to wrongful possession in cases of succession, not where there may be a *prima facie* right. The Judge, on an application under that Act, cannot treat the case as a regular suit, and in no case can he decide on such an application and on one for a certificate, under Act XXVII of 1860, on the same issues. But should he do so, the High Court cannot interfere. Position of a Vakeel in Mofussil not that of an English Barrister. He can bind his client only to statements of fact.

Mr. Justice Jackson.—The facts of the case upon which the present application is founded are as follows:—

The person on whose behalf the application is made is the widow of the late Joy Kurun Lall, and the opposite party is Gource Byjnath Pershad, his nephew. Joy Kurun Lall died in December 1865, leaving his widow in possession of a very large real and personal estate, to the amount, it is said, of nearly a million sterling. He made no will, and the whole of this property is claimed by the nephew, and it is admitted that according to the Benares law, which governs the family, the nephew is entitled, unless there was separation in estate at the time of Joy Kurun's death.

On the 11th July, 1866, the nephew presented a petition in the Court of the Judge of Gya, under Act XIX of 1841, praying that possession of the property might be delivered to him. He made a deposition in support of this petition, in which he merely denies the widow's title and asserts his own.

Upon this statement, the Judge directed the widow to come in and shew cause against the application, which she accordingly did on the 2nd of February following.

A daughter of Joy Kurun Lall also presented a petition on the 9th of March in opposition to the nephew's claim for possession.

The nephew filed a statement, replying to those of the widow and the daughter.

In the meantime the widow had applied to the same Judge for a certificate to enable her to collect the debts due to the deceased, under Act XXVII of 1860. To this petition the daughter and nephew also appeared separately as objectors. The nephew also filed a cross petition for a certificate under the same Act, against which the widow and daughter appeared as objectors.

The above three petitions, one under Act XIX of 1841, and two under Act XXVII of 1860, being all before the Court at the same time, by consent of the pleaders on both sides, the Judge determined to try at once and upon the same issue; the different questions of law arising under those two Acts, and a certain state of facts being admitted, he proceeded to determine whether these circumstances amounted to complete separation. The issues were as follows:—

First.—If it be proved by oral and documentary evidence, on the part of the petitioner Joshoda Koonwar (widow), that both Gource Byjnath Pershad and Joy Kurun Lall in the lifetime of the said Joy Kurun Lall, and for many years previous thereto, collected separately and exclusively of each other 8 annas of immoveable property derived from Roy Prithee Sing, also separately granted pottahs to ryots, and received kubooleuts from them, and also separately paid Government revenue in regard to their respective 8 annas share of the said estate, would such acts amount to legal separation between the said Joy Kurun Lall and Gource Byjnath Pershad according to the Mitakshara?

Second.—If the several acts specified in the first issue in law should be considered sufficient to constitute a legal separation between the parties aforesaid, would such separation be negatived by the express admission of Joy Kurun Lall in various suits and proceedings, the last being as late as July 1862, that he, the

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said Joy Kurun Lall, and Gource Byjnath were joint and undivided in estate, and also by the fact that several kubooleunamas and mooktearnamals in the joint names of the said Gource Byjnath and Joy Kurun Lall were granted by them as late as 1865, for suits instituted and defended in their joint names?

These issues are somewhat oddly drawn, but it is clear that the question, and the only question, submitted to the Court was, whether at the death of Joy Kurun Lall the family was joint or separate.

The several applications for a certificate, under Act XXVII of 1860, were considered first, and the Judge having come to the conclusion on the facts submitted to him that the family was joint, on that ground refused the application of the widow and daughter, and granted the certificate prayed for by the nephew.

On the same day, and upon the same grounds, possession of the moveable and immoveable property of the deceased, under Act XIX of 1841, was also granted to the nephew.

Subsequently, upon the application of Mr. Dojne, on behalf of the widow, we granted a rule calling upon the nephew to show cause why the order of the Judge in the Act XIX case should not be quashed, as having been made without jurisdiction.

The first objection taken is that the Judge did not make the preliminary enquiry, necessary under Section 3, before summoning the widow. That Section enacts that the Judge shall "in the first place enquire by the solemn declaration of the complainant and by witnesses and documents, at his discretion, whether there be strong grounds for believing that the party in possession has no lawful title, and that the applicant is really entitled, and is likely to be materially prejudiced if left to ordinary remedy of a regular suit, and that the application is made *bona fide*." The 4th Section provides that "in case the Judge shall be satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of."

The Judge in this case was satisfied by the solemn declaration of the complainant, and without requiring any other witnesses or documents in support of the application, issued his citation to the widow; she appeared by her vakeel and contested the application on its merits. And here another point arises, namely, whether, under Section 3, the applicant is bound to support his application in the first instance by documents or witnesses, or both; or whether the Judge may issue a citation upon the applicant's own testimony.

It is further objected that even if the parties were properly before the Court, still that the Judge has erred in the way in which he disposed of the application, and that he has so erred as to exceed his jurisdiction.

I proceed to deal with these objections in their order, first as to matter which has to be proved before citation.

Upon this part of the case, it is plain to me that the Judge has so entirely erred, that if the matter were before us on appeal, or if this Court had authority to set aside the order by reason of defect in law, we should have no hesitation in doing so.

The power of summary adjudication vested in the Zillah Judge by this Act, affords an extraordinary remedy, and is intended to meet extraordinary cases.

The circumstances in which the Civil Courts are empowered to exercise this jurisdiction, and circumspection required from the Judges who exercise it, are set forth in the preamble to the Act.

"Whereas," it begins, "much inconvenience has been experienced where persons have died possessed of moveable and immoveable property, and the same has been taken upon pretended claims of right by gift or succession * * * the delays of a regular suit * * * and the inability of heirs when out of possession to prosecute their rights affording strong temptations for the employment of force or fraud in order to obtain possession; and whereas from the above causes, the circumstance of actual

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possession when taken upon a succession, does not afford an indication of rightful title equal to that of a decision by a Judge after hearing all parties in a summary suit, though such summary suit may not be sufficient to prevent a party, removed from possession thereby, from instituting a regular suit * * * and whereas it will be very inconvenient to interfere with successions to estates by summary suit, unless satisfactory grounds for such proceedings shall appear, and unless such proceedings shall be required by or on behalf of parties giving satisfactory proof, that they are likely to be materially prejudiced if left to the ordinary remedy of a regular suit."

Now these words very clearly indicate that the Act was passed in order to meet cases of wrongful possession or disturbance of possession under *pretended* claims of right, and to discountenance the employment of *force* and *fraud*. Also that the decision by the Judge was not to be of such a nature as to supersede the necessity of a regular suit. And thirdly, that the applicant was to be left to his ordinary remedy, by suit, unless he shewed that if so left he was likely to be materially prejudiced. And the provisions enacted correspond very closely with those recitals.

Section 3 provides that "the Judge shall "in the first place enquire * * * whether there be strong reasons for believing that the party in possession has no lawful title, and that the applicant is really entitled, and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bona fide*."

The 4th Section goes on—"In case the Judge shall be satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of."

So that before the Judge could lawfully issue the citation, he had to be satisfied upon the four points specified, and upon all of them the applicant was to show him strong ground of belief, and otherwise he was not to proceed.

A slight case would not be sufficient. The title and the *bona fides* of the applicant must be *prima facie* clear; it must also be manifest that the party complained of had no lawful title to possession, and that if the applicant were referred to a regular suit, he would be a serious sufferer, as by the risk of waste or misappropriation, or by his inability to prosecute his right when out of possession.

Now what, in the present instance, was the case submitted to the Judge of Gya? Certainly neither force nor fraud, neither a likelihood of misappropriation, nor an inability to proceed by regular suit.

The case was simply one of two brothers living under the Mitakshara law, possessed of equal moieties of property, moveable and immoveable, of immense extent, of whom one died leaving a widow and a daughter. It seems to have been admitted that the brothers had lived in separate houses, and had separately collected their shares of rent. But the surviving brother alleged that these circumstances did not constitute a separation in estate according to Hindoo law, and that consequently he was entitled, and it was vaguely asserted that the widow in possession was likely to commit waste.

Now here it was quite manifest that the widow was holding her deceased husband's estate under a state of facts which the Civil Courts might very possibly interpret as giving her a valid right to retain it. The applicant had already, in his own right, very extensive property, equal or nearly equal to that which he was claiming, and nothing restrained him from bringing a regular suit; and the suit once instituted, he could have immediately obtained, on shewing cause for it, an injunction under Section 92 of Act VIII of 1859.

Beyond all doubt, therefore, this was a case in which the Judge, on hearing the petition, ought to have refused to act; and it must be remarked that whatever the need for summary proceedings like the present, which may have existed in 1841, things have greatly altered in the quarter of a century which has elapsed since the passing of the Act, and the considerations which led to

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its enactment are greatly less cogent under the Civil Procedure Code. Formerly it was notorious that civil suits were protracted in one shape or another, frequently for a lifetime; whereas now the average duration of suits is probably less than a year, and appeals to the highest Court in the country are decided with equal expedition.

Upon all grounds, therefore, I think the Judge was wrong in citing the widow; but then it is contended this defect has been cured by her appearance, and opposing the application on its merits.

To this argument I feel compelled, after much consideration, to assent. She certainly was competent to have demurred to the proceedings on the ground that the Judge did not appear to have been satisfied upon the points specified in the 3rd Section, but I cannot say that she might not, if she was so advised, accept the citation waiving that objection, and submit to the Judge's determination of the right to possession. As she actually did take this course, I think it is now too late, after the determination, to say that she was improperly cited. Whether, if the objection had been taken in time, and the Judge overruling it had proceeded to determine the right to possession, this Court could have set aside the order as made without jurisdiction, it is not necessary to decide in this case, and I express no opinion on the point.

As to the question whether an enquiry, merely on the solemn declaration of the applicant himself, was legally sufficient, it is also needless to express an opinion for the reasons already stated, but I may observe that the words of the Act are—"by the solemn declaration of the complainant, and by witnesses, and documents at his discretion," which words appear to leave the taking of further evidence at all, as well as the amount of such evidence, wholly within the discretion of the Judge, so long as he came by strong reasons for believing the allegations which the applicant had to make.

I now come to the second main objection, which is that, even if the parties were properly before his Court, the Judge has so completely miscarried in his mode of dealing with the application as to have gone beyond his jurisdiction, and that consequently the order may, and ought to be, set aside upon this ground.

Now it must be said that it would be difficult to go further wrong in framing issues than the Judge has gone in the case before us. The Judge had to decide at the same time upon two questions between these parties, one being the present case, the other a contest for a certificate under Act XXVII of 1860, enabling the party who obtained it to collect the debts due to the estate of the deceased.

Now, Act XX of 1841 (repealed and re-enacted in an amended shape as Act XXVII of 1860), though passed simultaneously with Act XIX of the same year, had quite a different purpose in view, and contemplated an enquiry of a different kind.

In the one case there was a party in possession who was not to be disturbed unless his possession was manifestly wrongful. In the other case there was no consideration arising out of possession, and the Court, with several claimants before it, all standing upon equal ground, had to determine the right to the certificate, and to grant the same accordingly.

To say that a case under the first, and one under the second of these two Acts can be decided entirely upon issues common to both, implies, therefore, a misconception of the meaning of one or other of the Acts; in the present instance it is the meaning of Act XIX of 1841 that has been lost sight of.

But then it is said that the appellant's pleader having given his consent to these issues, she is bound by his act, and may not contend that those issues were erroneous. This argument, however, in my opinion, assumes for pleaders in the Mofussil Courts of this country an authority which they do not possess, and with which it would not be safe to invest them, and which, moreover, as we shall show, is not contemplated by the law of procedure in India.

In England, no doubt, the law is that parties are bound not merely by admissions, but by the view taken of their cases, and the mode of conducting them by their counsel at the trial.

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In the Mofussil Courts, no doubt, particular acts done within the conditions of the vakalutnamah, and admissions of fact by the pleader, are binding on the client,* but we cannot hold that the client is bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge, and not properly arising in the case.

There is but a slight analogy between a Barrister in English Courts of Justice and a Mofussil Pleader.

The former is usually entrusted with the conduct of a cause (though an attorney), by reason of his learning and ability; he is responsible to the Court, and to the profession of which he is a member, for his professional conduct, and he has well-known privileges and immunities.

The Vakeel is simply the representative of the suitor, possessed of his personal confidence, and in direct communication with him, but having neither in theory nor in fact the learning and the varied experience of the English Barrister.

The pleader is presumably well acquainted with the facts of the case in which he is employed, and he is bound to an honest care for his client's interest; but although of late years efforts have been made to ensure his having a rudimentary knowledge of the law, it is certain that those efforts have been only partially successful, and especially that no rule of practice can be laid down which is based on the presumed legal science of the Mofussil practitioner.

I say Mofussil practitioner, because these observations are not meant to apply to the Native Bar in the Appellate High Court, nor do I deny there are honorable exceptions even in the interior; but any one who is at all acquainted with the Mofussil Courts, is aware that, generally speaking, the possession of the commonest text books by pleaders there is quite exceptional, and it might be possible to find some who are not even possessed of the Act VIII itself.

Regulation XI of 1806, Section 12, Clause 2 (which appears to be still in force), directs the Zillah Judges to require the Native pleaders of their respective Courts to take copies of the translation of any Regulations which relate, directly or indirectly, to the administration of civil justice.

And Regulation XXVII of 1814, Section 40 (repealed only last year by Act XX of 1865), contained the following provision:—"That the pleaders in the several Courts, as well as other persons, may have it in their power to render themselves acquainted with the Regulations enacted by the British Government, there shall be kept, for public inspection in the several Courts of Judicature, printed copies of all such Regulations and of the translations in the native languages. And on receipt of the translation of the Regulations in the country languages, the Courts of Justice were to cause them to be publicly read, and to require the native pleaders to take copies," &c., &c.

And very mainly, no doubt for this reason, the Legislature has, in the Code of Civil Procedure, imposed upon the Courts themselves the responsibility of conducting suits in every stage.

Emphatically so as to the framing of issues, which, under the present as well as the former procedure, is exclusively the business of the Court.

By Section 38, Act XXIII of 1861, the procedure prescribed by Act VIII of 1859, is to be followed, as far as it can be, in all miscellaneous cases and proceedings which, after the passing of the Act, may be instituted in any Court.

The mode in which issues are to be framed under that Act is to be found in the Sections 139—141, which clearly shew that this is exclusively the function of the Court. Section 139 declares that the Court may frame the issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference, &c. This clearly

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shews that the pleader may bind his client by a statement of matter of fact, but nothing is said of issues or admissions of law.

The only cases in which the issues are not directly framed by the Court are those provided for by Sections 142 and 143. In those cases issues may be tendered to the Court under a solemn agreement between the parties in writing, by which they bind themselves to act according to the finding of the Court upon such issues; and the Court if it be satisfied that the parties have so agreed, and that the question is fit to be tried (still retaining a control over the frame of the issue), may proceed to determine the same. There was no agreement of the sort here, and the responsibility of the issue lay wholly on the Court.

There is a precedent* (Musst. Sabrita Moni, Appellant) in which this Court (Bayley and Campbell, J. J.) held, on a statement recorded to the effect that the vakeels of the several

* Marshall, page 519. parties accept the following issues, that neither party was competent to object in special appeal that a material issue had not been tried in the Court below. That case is distinguishable from the present, as it would perhaps be competent for the vakeel to waive an issue (presumably of fact) in the same manner as he might make a binding admission of fact, though he could bind his client to consent that the Court should decide the case according to its finding upon issues which could, lawfully arise in the case. We think the question to be determined in this case by the Judge was essentially the same as those in which he had to be *prima facie* satisfied before issuing the citation, whereas he has raised the whole question which will arise between the parties in the Civil suit, which is expressly reserved.

But then it remains to be said the Judge had in this case jurisdiction over the subject-matter, and he had jurisdiction to frame the issues, whether rightly or wrongly; and we cannot say that an error in drawing them, however glaring, gives us jurisdiction to interfere with an order which is by law final, and as to which neither appeal nor revision is allowed.

We regret exceedingly our inability in this case to afford relief to the petitioner, who has so much reason to complain of the proceedings below, and we have thought it right to state at length the reasons which have influenced our judgment.

The very unfrequency of such cases, and the want of appeal to a higher Court, make it the more necessary that we should take the opportunity of making an authoritative statement as to the effect and objects of this Act, otherwise it would have been consistent with our duty simply to say that we had no jurisdiction.

The rule must be discharged, but, under the circumstances, without costs. We are now given to understand that the question between the same parties, touching the right to a certificate under Act XXVII of 1860, having come before another Bench of this Court in appeal, the order of the Court below has been set aside, and a fresh certificate granted to the widow. It thus appears that a cruel and, for the present, irreparable wrong has been done to this unfortunate lady, who has been, by the order before us, deprived in the most sweeping manner of property of which she was apparently in rightful possession.

The 18th Section of the Act declares these orders not open to appeal or order for review; whether these words enable the Judge of his own motion to withdraw an order which he must now see was improperly made, we offer no opinion.

Mr. Justice Markby.—I concur in the view taken by my brother Jackson as to the general construction of this statute, but, for the reason which he has so fully pointed out, it is impossible for us to say that the Zillah Court has acted without jurisdiction.

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SON, *Judges.*

Case No. 389 of 1866.

*Summary Special Appeal from an order passed by the Judge of Zillah Hooghly, dated 6th March, 1866, affirming a decision passed by the Principal Sudder Ameen of that district, dated 8th December, 1865.*Gooroodass Dutt, (Plaintiff) *Petitioner,**versus*Dwarkanath Manna, (Defendant) *Opposite Party.**Baboo Anund Chunder Ghosal for Petitioner.**None for Opposite Party.*

A suit will not lie to register an instrument by right under Section 15, Act XVI of 1864: improper refusal only by the Registrar gives a cause of action under that Section.

This is a suit under Section 15 of Act XVI of 1864 to establish a right to have a certain instrument registered. We think the Lower Court has properly held that that Section does not apply to the present case. The Registrar was clearly right in refusing to register when the parties would not attend and did not consent to the registration; and in our opinion Section 15 applies only to cases in which the Registrar has refused when, under the circumstances, he ought not to have refused to register.

The appellant now seeks to convert the matter into a regular suit, but we decline to entertain such a proposition at the stage of the proceedings. We express no opinion as to what the effect of a regular suit under Act VIII of 1859 might have been or may still be, should such a suit lie.

The appeal is dismissed.

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The Hon'ble H. V. BAYLEY and the Hon'ble G. CAMPBELL,
Judges.

Case No. 1269 of 1865.

*Special Appeal from the decision passed by the Judge of Purneah, dated the 15th February, 1866, affirming the decree of the Principal Sudder Ameen of that district, dated the 20th March, 1865.*Soorjkant Roy, (Defendant) *Appellant,**versus*Mr. James Forlong, General Manager of the Rajah of Dur-
bhanga, (Plaintiff) *Respondent.**Baboo Khettromohun Mookerjee for Appellant.**Baboo Juggodanand Mookerjee for Respondent.*

When title is necessarily tried in an Act X of 1859 suit, the decision may be final, but in suits for ouster, the illegal possession only being looked to, it is not so.

This is a suit by a purchaser to oust a fraudulent and benamsee putneedar, and the tenure being found to be as alleged, a decree has been passed against defendant. He now urges that plaintiff having previously illegally ousted him, he was reinstated by the Collector in a suit for ouster under Act X, Clause G, Section 23, and that the present suit is barred. But we think that in such a suit the issue is not on title, but merely on the question of illegal dispossession, and that the Collector's decision merely amounts to this—that defendant having *prima facie* title, had been illegally dispossessed. Where questions of title are necessarily tried, an Act X decision may be final; but it is not so in a mere ouster suit under Clause G, Section 23, or Section 25, depending on the question of possession and illegal dispossession only. The present suit is not barred.

Nor was it beyond the discretion of the Lower Courts to refuse to admit documents not filed at the proper time, nor was there any appeal on that point. They were probably quite right as regards the non-examination of plaintiff's gomashita. The appeal is dismissed with costs.

The Hon'ble H. V. BAYLEY and the Hon'ble E. JACKSON,
Judges.

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Case No. 655 of 1866.

*Special Appeal from a decision passed by the Judge of Zillah Patna, dated the 12th December, 1865, affirming a decision of the Principal Sudder Ameen of that District, dated 18th August, 1865.*Kurim Chand Garain, (Plaintiff) *Appellant,**versus*Woodung Garain and others, (Defendants) *Respondents.**Baboos Dwarkanath Mitter, Kishen Suckha Mookerjee, and Kally Prosunno Dutt for Appellant.**Baboos Mohendro Lall Shome and Nilmony Sein for Respondents.*

The question raised in this appeal is whether, under the Mitakshara system of Hindoo law, a brother's grandson can succeed to the estate of a deceased person. The Judge of Patna has held that he is not included among the heirs, and has, on this ground, dismissed his claim to inherit his granduncle's estate. Under the Mitakshara, a brother's grandson, although not therein enumerated as an heir, may, on default of all heirs, succeed to his granduncle's estate.

In support of this view of this law the cases of Government *versus* Greedhary Loll Roy, page 13, Weekly Reporter, Volume IV, and of Mussamut Sona Dasee *versus* Bisumbhur Saha, pages 168 and 169, Legal Remembrancer, Volume I, have been specially pointed out to us as following former precedents, and distinctly ruling that the enumeration of heirs as laid down in the standard authority on the law, *viz.*, the translation of the Commentary on that law by Colebrooke, is an exhaustive enumeration. And it has been next pointed out that in no portion of that law is the brother's grandson anywhere mentioned as an heir. In Chapter 2, Section 4, Verse 1, brothers are mentioned, and in Verse 7 brothers' sons are mentioned, but brothers' grandsons are not alluded to. Again, in Section 5, Verse 1, it is laid down that "if there be not brothers' sons, gentiles share the estate," and this Section goes on to enumerate *who* the gentiles are, *viz.*, first, the supindas or kindred connected by funeral oblations, such as the paternal grandmother, the paternal grandfather, the uncles, and their sons; and on failure of that line, the paternal great-grandmother, great-grandfather, his sons, and their issue inherit; and in the next verse it is laid down that if there be none such, the succession devolves on sumonadacas, or kindred connected by libations of water, and goes on to point out that supindas cease with the seventh person, while the sumonadacas extend to the fourteenth degree. In the next chapter, again, cognates are declared to be heirs on failure of supindas and sumonadacas, and those cognates are specially enumerated. Acting upon the rule that when the particular relation is not specially enumerated as one of the heirs, he is excluded from inheritance; a sister's son was excluded in the decision above quoted, and on the same ground, in the case of Mussamut Kowar *versus* Agund Roy, Select Reports, Sudder Dewanny Adawlut, Vol. III., page 37, a brother's daughter's son was excluded.

On the other hand it was shewn for the appellant that the right of a brother's grandson to succeed to an estate under the Mitakshara law as a supinda, was virtually upheld both in the Sudder Dewanny Adawlut and by the Lords of Her Majesty's Privy Council, in the case of Gunga Dut Jha, and on his death Rutibegrat Dut Jha *versus* Rajendro Narain Roy and others, reported at page 11, Vol. II, Sudder Dewanny Adawlut Select Reports, and at pages 132 and 163, Vol. II, Moore's Indian Appeals for 1839. In that case the right of a descendant in the paternal line in the sixth degree to succeed as a supinda was held to be preferential to the right of a cognate. It is admitted that this case was governed by the Mithila law, and it is urged for respondent that there is some distinction on this point between the Mitakshara and Mithila laws. As respects the Commentary on the Mitakshara Law, the passages above alluded to as having been quoted by the opposite side, are referred to as clearly shewing that all the different heirs are not enumerated, and that there are heirs who are not there enumerated.

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It is not quite clear to what extent the learned Judge who decided the appeals of Sona Dasee and of Government *versus* Greedhary Loll Roy, would have carried the principle which they then laid down, that the enumeration of heirs by the Commentator on the Mitakshara, translated by Colebrooke, was exhaustive. The question before them related specially to one particular description of heirs, *viz.*, the cognates or bundhoos who are specially treated of in Section 6 of the Commentary. Looking to the wording of that Section, which is peculiar, and in which the quoted words of the law itself do not include all such persons as heirs who would be heirs under the Commentator's view of the law, and looking also to Verse 14, Section 1, Chapter 1, and to verse 2, Section 1, Chapter 2, the Judges in both cases came to the conclusion that the enumeration of heirs, as laid down in this standard authority, was exhaustive to the extent of excluding the sister's son, and it may be inferred thence that they would exclude any supinda or cognate who was not distinctly mentioned either in Chapter 5 or Chapter 6. If that was their view, it is said by appellant to be opposed to the view of the Hindoo law laid down by the Sudder Dewanny Adawlut and the Lords of Her Majesty's Privy Council in the case of Gunga Dut Jha. There is no such difference in the wording of the Mithila and the Mitakshara laws as would include a descendant in the sixth degree from a paternal ancestor also in the sixth degree from the deceased in the one law more than the other. The supinda declared entitled to the estate in that case held that degree of affinity to the deceased, and his claim as supinda was held to be good over that of an admitted cognate. There is no distinct enumeration of such an heir in Section 5 of the Commentary, and if only enumerated heirs can succeed, the claim of the plaintiff in that case, as an enumerated cognate, would have been superior to that of the defendant, who was an enumerated supinda. But the decision went in his favor on the ground that he was a supinda entitled to inherit before the cognate.

It may be, however, that though the learned Judges considered that the enumeration of cognates in the Commentary was exhaustive, they might not also consider the enumeration of supindas to be exhaustive, or it may be that they might consider the words "brothers' sons" in verse 7, Section 4, would include brothers' grandsons and all literal descendants in the male line who could offer funeral oblations; and that the words "uncles and their sons" and "great-grandfather, his sons, and their issues," in the 4th and 5th verses of Section 5, also included all such descendants in the male line who could offer funeral oblations. Can this extended meaning be given to the words "sons" and "issue?" The learned Judge, Mr. H. B. Harington, in the course of his elaborate opinion on the Hindoo law, quoted at page 156 of the decision of Her Majesty's Privy Council in the case of Gunga Dutt Jha, laid down that the term *putra* or son in the Mitakshara and its Commentary the *Subodhini* is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the Mitakshara, or the grandson as well as the great-grandson would be excluded from the immediate succession, though acknowledged in every system of Hindoo law "to represent their father and deceased grandfather." Mr. Harington goes on to give his reasons, alluding specially to the above quoted verses 4 and 5 of Section 5, and pointing out that the words "sons" and "issue" must mean generally lineal descendants in the male line. It may be inferred that he would have given the same interpretation to the words "brother's sons" in verse 7, Section 4, and if so, that in his opinion a brother's grandson could succeed to the estate of his deceased granduncle; and it is possible that the learned Judges who excluded the sister's sons, putting the same signification on the word "sons," would hold that brother's sons include brother's grandsons, and that therefore brother's grandsons are enumerated in the category of heirs who can succeed; always provided that brother's grandsons are kindred who can offer funeral oblations to the deceased.

We are of opinion that the word "sons" in the Mitakshara does, as a general rule, include all descendants in the male line who can offer funeral oblations, otherwise, as has been pointed out by Mr. Harington, great-grandsons could not

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succeed to the estate, not only of their grandfather, but even of their father, the wealth of every father becoming the property of his son by right of his being his son, (verse 3, chapter 1, Section 1 of the Mitakshara Commentary): otherwise also it would be useless for the Mitakshara to lay down that supindas descended from the seventh degree, or samondocas from the fourteenth degree, can succeed, if it also laid down that this was confined to the sons or the grandsons of the great grandfather in the seventh or fourteenth degree, as such sons and grandsons could not possibly be alive. The words "sons" and "issue" in verses 4 and 5, Section 5, Chapter 2 of the Mitakshara, must, we think, allude to the descendants of the paternal ancestor in the nearest degree, who may be then alive, up to the seventh or the fourteenth degree. It is to be remarked that not a single samondoca is enumerated, though samondocas are distinctly mentioned as able to succeed up to the fourteenth degree, and only two sets of supindas. The words "the relation of supindas ceases with the seventh person", in verse 6, Section 5, chapter 2, allude to the seventh degree in the ascending line, as is clear from all the comments on the law quoted in Gunga Dut Jha's case before the Privy Council.

It is by no means inconsistent with this view, that a brother's daughter's son has been held unable to succeed. A brother's grandson in the male line may be among the enumerated heirs under the words "brother's sons," even if the daughter is thereby excluded. This decision is not therefore opposed to that regarding a brother's daughter's son.

We accordingly reverse the decision of the Judge of Patna, and remand the case to him for disposal of the remaining issues which arise in it.

We would add that even if a brother's grandson cannot inherit in the direct order of succession after a brother's son, and before the paternal grandmother, it does not follow that he cannot inherit at all. He is mentioned by Strange as an heir after the brother's son. Macnaghten seems to exclude him from the direct inheritance after the brother's son; There are several commentators on the Mitakshara law who, however, held a different opinion. However this may be we think that even if the brother's grandson cannot succeed after the brother's son, still that he can succeed generally as a supinda or one of the kindred who can offer funeral rites to the deceased. In this case one brother's grandson has obtained possession of the whole estate. Another sues him to obtain possession of his share of it. There is no nearer heir to the estate. The sole question is whether, under any circumstances, in default of all heirs, a brother's grandson can succeed. We think that he can.

The Hon'ble G. CAMPBELL and the Hon'ble A. G. MACPHERSON, Judges.

Case No. 380 of 1866.

Summary Regular Appeal from an order passed by the Principal Sudder Ameen of Sarun, dated the 10th March, 1866.

Chedoo Lall, (Decree-holder) Petitioner,

versus

Nund Koomar Lall and others, (Judgment-debtors) Opposite Party.

Baboo Obhoy Churn Bose for Petitioner.

Mr. R. E. Twidale and Baboo Mohendro Lall Shome for Opposite Party.

A decree was passed against two defendants; one appealed; execution has been taken out against the other more than three years after original decree, but less than three years after decision in appeal. We think that if the decree was joint and several against the defendants, without distinction, the decree was put in peril by the appeal of one, and the execution will be within time. If the decree was not of that nature, that the appeal of one necessarily imperils the whole decree, it is not within time. We cannot decide on the point

If, where a decree has passed against two defendants, the appeal of one imperils the whole decree, limitation counts as regards both from decision in appeal. If not joint and

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several, limitation would run as regards the non-appelling defendant from passing of original decree. 19th August.

without seeing the original decree. The appellant has most carelessly omitted to file it, and the Lower Court has not dealt with this point as it should have done. On the condition that appellant bears the cost of this hearing, and the remand, we remand the case in order that, after reference to the original decree, the case may be decided in accordance with the above remarks.

The Hon'ble J. P. NORMAN and the Hon'ble W. S. SETON-KARR, Judges.

Case No. 1184 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 27th January, 1866, reversing a decree of the Sudder Ameen of that district, dated the 9th August, 1865.

Unoop Chunder Paul and others, (Defendants) Appellants,

versus

Ekkurree Singh and others, (Plaintiffs) Respondents.

Baboo Romesh Chunder Mitter for Appellants.

Baboo Obhoy Churn Bose for Respondents.

A review of judgment cannot be had at any time; the fact of there being a ruling of a superior Court, modifying the practice obtaining at the time the judgment sought to be reversed was passed, is no ground for admitting review, if the limit prescribed by law has been exceeded.

This is a suit for resumption. The defendant pleads a lakhiraj tenure, and the Sudder Ameen of East Burdwan gave a decree in favour of the plaintiff. After the expiration of two years and some months, the defendants put in a petition of review, which was admitted by a new Sudder Ameen. Upon the review, the Sudder Ameen reversed the decision of his predecessor, and dismissed the plaintiff's suit. On appeal, the Principal Sudder Ameen reversed the decision of the first Court, upon the ground that the application for review had been improperly admitted. Against that decision defendant now appeals before us.

We are of opinion that the Principal Sudder Ameen was quite right. The party applying for a review did not show any cause whatever for not having preferred the application within the limited period. It is perfectly true, what he suggests, that by the decision of 22nd February, 1865, of a Full Bench, a new interpretation was put upon the law relating to the matter decided in this suit. That would be a very good reason for preferring the application at the present time. But it is not a reason for not having preferred the application in proper time.

It is neither consistent with the law nor reason that questions which have been long ago finally decided by competent tribunals, are to be re-opened at any period of time, however remote, in consequence of a decision either in this Court or in the Privy Council which is supposed to modify the law or practice which prevailed at the time of such decisions.

We think the judgment of the Principal Sudder Ameen is perfectly right; that the Sudder Ameen had no jurisdiction under Section 377 to receive the application for review, and we therefore dismiss the appeal with costs.

We find that our decision is in accordance with one of Mr. Justice Campbell and Mr. Justice Glover of the 18th January, 1864.

The Hon'ble G. CAMPBELL and the Hon'ble A. G. MACPHERSON, Judges.

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Case No. 365 of 1866.

Summary Regular Appeal from an order passed by the Principal Sudder Ameen of Zillah Bhargulpore, dated 5th May, 1866.

Mussamut Mulka; (Judgment-debtor) Petitioner,

versus

Mussamut Sumpat Koomaree, (Decree-holder) Opposite Party.

Mr R. E. Twidale for Petitioner.

Baboo Ashoctosh Dhur for Opposite Party.

Under Section 4 of Regulation XVI of 1797, the Court must take sufficient security from the decree-holder for the due performance of such order or decree as the Privy Council may make. We do not think it essential that before any execution (for however small an amount) issues, security to the extent of the whole sum decreed should in every instance be given. We think that in the present case it will suffice if security is taken to the extent of the value of the property seized, and the costs, &c., of the appeal to the Privy Council, and any other costs which the Privy Council may order the decree-holder to pay. But if security is taken for less than the full amount decreed, an order must be made restraining the decree-holder from issuing any process of execution whereby property exceeding, in the whole, the value for which security is given shall be attached or sold, and restraining the decree-holder from issuing any process against the person with a view to realizing any sum in excess of that for which security shall be given.

The case is remanded to the Lower Court with reference to the above remarks.

The Hon'ble G. CAMPBELL and the Hon'ble A. G. MACPHERSON, Judges.

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Case No. 395 of 1866.

Summary Regular Appeal from an order passed by the 2nd Principal Sudder Ameen of Zillah Hooghly, dated 28th February, 1866.

Maharajah Dhiraj Mohatab Chunder Bahadoor, (Decree-holder) Petitioner,

versus

Kundurpomohun Kur, (Judgment-debtor) Opposite Party.

Baboo Chunder Madhub Ghose for Petitioner.

Baboos Mohendrolall Shome and Tarack Nath Sein for Opposite Party.

The appellant is in the right as regards the first point, namely, that it was not open to the respondent to contest in the present proceedings, the fact of his being the heir and representative of the original judgment-debtor, and, as such, liable to have execution issued against him. We find that execution has on a previous occasion been issued against him in the same representative character, that he then disputed (on other grounds) the right of the appellant to issue the execution, and that the right was established, the order for execution being confirmed by this Court on appeal. His liability as representative can therefore be no longer disputed, especially with reference to the terms of Section 216 of Act VIII of 1859, which provides that when execution against the representative of an original party to a suit is applied for, notice of the application need be given to such representative, "if, upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him." The Lower Court consequently was, in our opinion, wrong in

The question of the liability of the respondent, as legal representative of the judgment-debtor, having been decided in a prior appeal case, the Lower Court was wrong (under Section 216, Act VIII, 1859) in re-opening the question of liability on the further application to execute.

Where, under Section 216, the

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legal representative objects to the attachment, on the ground that the property is his—not that of the debtor he represents—no appeal is given by Section 11, Act XXIII of 1861. The representative, though made a party to the suit, objects to the attachment, not as a party to the suit, but in his own right, which precludes an appeal.

entering into any question as to the respondent's liability as heir, and the order of the Lower Court is reversed so far as it holds that the respondent is not liable to have execution issued against him as representative.

This, however, is the only part of the order of the Lower Court which is open to appeal. So far as the order declares that the property against which it was sought to execute the decree, is not property belonging to the respondent in his representative character, and, as such, is not liable to attachment, the order is one made in a proceeding under Section 246, and is not subject to appeal. It is contended that, as the question is one arising between parties in the suit in execution of a decree, there is an appeal under Section 11 of Act XXIII of 1861. But that Section in no way interferes with Section 246 of Act VIII of 1859, which seems to us to lay down the course to be followed wherever property claimed as not being liable to be taken in execution of the decree under which it has been attached. It is true that the respondent has been made a party to the suit, but that is only in his representative character; he is no party to the suit in his own right, and it is in his own right, and not in his representative capacity, that he came in and claimed the property attached; the property having been attached as belonging to the estate of the original judgment debtor, and being claimed by the respondent as his own private property, which never belonged to the estate, the respondent claimed as any third party, an entire stranger to the suit, might have claimed, and the claim was properly and necessarily disposed of under Section 246. The matter therefore cannot be the subject of appeal to us, and that appeal, so far as it relates to it, must be dismissed. Each party will bear his own costs of the appeal.

22nd August.

The Hon'ble H. V. BAYLEY and the Hon'ble SUMBHONATH PUNDIT, Judges.

Case No. 1490 of 1866.

Special Appeal from a decision passed by the Officiating Judge of Zillah Nuddea, dated the 22nd August, 1865, reversing a decision passed by the Sudder Moonsiff of that district, dated 21st July, 1865.

Mohesh Chunder Goopt, (Plaintiff) Appellant,

versus

Rajnarain Roy, (Defendant) Respondent.

Baboo Annund Chunder Ghosal for Appellant.

Baboos Bungshedhur Sein and Mohesh Chunder Chowdhry for Respondent.

Where, by a supplementary petition, the facts and character of the suit are made totally different from the original plaint, suit is illegal; but not if the phraseology only is changed, nothing requiring to be adjudicated other than that which was sought to be adjudicated at first.

In this case the point urged before us in special appeal is that the Lower Appellate Court has erred in holding that special appellant's suit should be dismissed, because he had at first represented himself in his plaint as a zemindar, and in a supplementary petition as the shikmee talookdar.

The Lower Appellate Court holds that these two representations constitute such a changing of the character of the suit as was held illegal in the precedents cited by it.

But those precedents are all to the effect that a party may not so change the facts and character of his case as to make it a different case from that originally brought, so that something must be adjudicated distinct from what was sought to be adjudicated at first.

Now, applying this very test, we think the Lower Appellate Court is wrong.

The matter in dispute was whether the land in dispute was inside or not inside the putnee lease; that plaintiff gave such a putnee was never denied before us. Therefore, whether it be the putnee of the zemindar or superior landlord of all, or of the shikmee talookdar, inferior landlord, is quite immaterial. There is no question of there being such a putnee so given. The only question is whether the land in suit was land of the putnee lease or of the separate

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talook of defendant. This decision is not affected by the status or character of the giver of the putnee in this case.

We therefore decree this appeal with costs, and remand the case for retrial on the merits.

Remanded accordingly.

The Hon'ble C. B. TREVOR and the Hon'ble F. B. KEMP, Judges.

22nd August.

Case No. 1046 of 1866.

Special Appeal from a decision passed by the Deputy Commissioner of Manbhoom, dated the 28th December, 1865, reversing a decision passed by the Officiating Moonsiff of that district, dated the 29th May, 1865.

The Government, (one of the Defendants) Appellant,

versus

Nuffer Khan and others, (Plaintiffs) and others, (Defendants) Respondents.

Baboos Kishen Kishore Ghose and Juggadunund Mookerjee for Appellant.
Baboos Kishen Suckha Mookerjee and Kalikishen Sein for Respondent.

This was a suit for possession of certain mahteran lands said to be situated in the village of Sahoo Baha, in the district of Manbhoom. The allegation is that the plaintiff purchased these lands in execution of a decree against the ghatwal defendants in this suit, and that he was formally put into possession of the same; that he exercised rights of ownership in granting leases, &c., and was subsequently illegally ejected by the ghatwals. The Government were not arrayed as defendants, but appear to have intervened, and to have attempted to question the legality of the sale, though no action had been brought by them, nor any objection preferred in the execution stage. The Lower Appellate Court has found that the plaintiffs purchased the rights and interests of the judgment-debtors, the ghatwals, in the lands, the subject of this suit; that he was put in possession, and was subsequently illegally ejected. The suit was therefore decreed. The ghatwals, who are clearly the most interested party, do not appear before us.

The Government alone appeals.

We think that the decision of the Lower Court must be affirmed. There has been a finding that the plaintiff was put in possession of the lands in dispute in execution of the decree, and that he was in possession until illegally ejected by the ghatwals. The Government may have a claim to the services of the ghatwals, and the lands may be subject to Police services; beyond this the Government can have no title to the land.

If there has been collusion between the zemindar and the ghatwals, defendants, which is not impossible, seeing that they do not appeal with a view to making out the lands to be mahteran when they are ghatwali lands, upon which the Government have a service lien, the Government is at liberty to bring a suit if so advised; but as an intervenor in the present suit, and in special appeal, they are not entitled to ask the Court to determine the question whether the sale was illegal, or whether there has been collusion between the plaintiff and the zemindar.

The special appeal is dismissed with costs and interest.

Where plaintiff as purchaser in execution of a decree against certain ghatwals was put in possession, and subsequently illegally ejected, held that his present suit for possession must succeed; that although the State may have a lien upon the lands as service tenures, it was not competent to Government, as an intervenor, to have it determined that the sale to plaintiff was illegal, or that collusion had taken place, though it might bring a suit for that purpose.

RULINGS IN RENT SUITS.

The Hon'ble C. B. TREVOR and the Hon'ble H. V. BAYLEY,
Judges.

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3rd August.
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RENT SUITS.

Case No. 1009 of 1866.

Special Appeal from a decision passed by the Additional Judge of Zillah
Hooghly, dated the 29th January, 1866, reversing a decision passed by the
Deputy Collector of that district, dated 5th July, 1865.

Mr. Lawder, (Defendant) Appellant,
versus

Benode Lall Ghose, (Plaintiff) Respondent.

Baboo Anund Chunder Ghosal for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

Plaintiff sued to enhance defendant's rent from Rs. 11-1-1½ to Rs. 13-7-17½, and got a decree on the 28th August, 1860 (13th Bhadro, 1267). He then, on the 29th Cheyt, 1271, sued for arrears of rent at the enhanced rates from 1268 to 1271, deducting the sums which defendant had paid at the old rates, and also sued for ejectment. Plaintiff got a decree. Defendant appeals, and specially urges:—

I.—That limitation bars the suit.

II.—That by acceptance of the old rates of rent from 1268 to 1271, plaintiff waived his claim to the higher rents decreed to him.

III.—That under Section 78, Act X of 1859, the present decree should not have been for ejectment absolutely, but conditionally on defendant's not paying the due rent within fifteen days.

On the first point, we are clearly of opinion that limitation does not bar the suit, because, under Section 32, suits for the recovery of arrears of rent shall be instituted within three years of the last day of the Bengalee year on which the arrears shall have been due. The arrears became due from 1268; the last day of the year was the 30th Cheyt. The suit was brought on the 29th Cheyt 1271; that is, within three years prescribed by that law. Plaintiff is therefore within time.

On the second point, we are of opinion that the alleged waiver relied on by special appellant is no waiver at all. The plaintiff cannot recover more than three years' rents, i. e., for that period from which he would be within time by law to sue, but his abstaining to sue for that allowed time, or receiving the old rent on account, is no waiver.

On the third plea, we think the special appellant is right. The law, Section 78, enacts that if the amount decreed, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, the execution shall be stayed. The decree should have been on the terms of the law. If therefore the defendant, special appellant, pay the decreed sum within fifteen days of this decree, ejectment in execution is to be stayed. In all other points the special appeal is dismissed with all costs.

The Hon'ble W. S. SETON-KARR and the Hon'ble SHUMBOO-
NATH PUNDIT, Judges.

Case No. 700 of 1866.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 15th
December, 1865, modifying the decree of the Deputy Collector of that Dis-
trict, dated the 11th September, 1865.

Gourcepershad Dass, (Defendant) Appellant,
versus

Rance Surnomoyee, (Plaintiff) Respondent.

Mr. C. Gregory and Baboo Kishen Succa Mookerjee for Appellant.
Baboo Unnodapershad Banerjee and Sreenath Dass for Respondent.

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Intermediate tenures should be assessed so as to allow the farmer a reasonable profit.

The special appellant is sued for enhancement of his jote, and the lands held by him are situated in ten villages, and their quantity is very considerable. He is clearly an intermediate holder between the zemindar and many ryots, and the assessment fixed for his lands, without allowing him any profits, by adopting the rate of rents payable by cultivating ryots, does not appear to us to be fair and equitable in his case. He has long held these lands, and has no doubt taken some trouble in settling and encouraging ryots thereon; and the law does not authorize the plaintiff to assess him so as to render the holding of the lands by the special appellant altogether void of all reasonable profit.

The case is therefore remanded to the Lower Appellate Court, with directions to adopt rates suitable to the intermediate position of the special appellant. Judge must endeavour to fix, by some means, what is fair and equitable for a person in such a position. He will see that it is clear that to charge him with the full rates of cultivating and resident ryots, such, for instance, as Rs. 4 for bastoo lands, would not be "fair and equitable." We may observe that the mere service by the appellant of a notice on certain of his ryots, is no proof that he realizes rents at the rate specified in such notice. The special appellant is also entitled to an enquiry by the Lower Appellate Court regarding the custom pleaded by him, that he should be allowed a deduction of two cottahs per beegah out of certain kinds of lands held by him under the custom locally known as Bishun Kancha.

The interest upon the assessment, fixed by the Lower Appellate Court from the date of the notice, should be allowed only from the date of the decree fixing the jumma payable by the special respondent, whatever it may be.

Remanded accordingly to the Judge for a fresh decision on the above points.

7th August.

The Hon'ble H. V. BAYLEY and the Hon'ble SHUMBOONATH PUNDIT, Judges.

Case No. 1262 of 1866.

Special Appeal from the decision passed by the Judge of Patna, dated the 15th February, 1866, reversing the decree of the Deputy Collector of that district, dated the 13th November, 1865.

Shaikh Abdool Ruhman, (Plaintiff) Appellant,

versus

Gurbhoo Mahtoan, (Defendant) Respondent.

Messrs. R. E. Twidale and C. Gregory for Appellant.
Paloo Romanath Bose for Respondents.

In this case the Lower Appellate Court has recorded its judgment in these words:—"Plaintiff elected to stand by the statement on oath of the defendant. The defendant swore stoutly in his own favour, and I do not see what remedy the plaintiff has. Appeal decreed with costs." The plaintiff appeals specially, urging that the mookhtear's act would not bind plaintiff, as it was not by his instruction or authority the agent proceeded, and the case in Vol. I, Weekly Reporter, page 263, is cited to support this plea. It is also urged that after this petition plaintiff tendered other evidence, which the first Court accepted, and that thereafter even the defendant himself filed further evidence, and that it was upon the whole of this evidence that the first Court decided the case; and that consequently the Lower Appellate Court was wrong in deciding the case as it did, solely upon the supposition that plaintiff had bound himself to the single result of the defendant's testimony.

On a reference to the record, we find that the case is as thus put by special appellant, and we are of opinion that when after the alleged petition of plaintiff, and after objections to defendant's testimony, both parties adduced

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evidence, and the first Court went into, and decided the case on their further documentary evidence, the Judge should also have fully considered all that evidence and decided the case thereupon.

We accordingly remand the case to him now to be retried with reference to the above remarks.

9th August.

The Hon'ble J. P. NORMAN and the Hon'ble W. S. SETON-KARR, Judges.

Case No. 147 of 1866.

Regular Appeal from a decision passed by the Deputy Collector of Zillah Jessore, dated the 6th March, 1866.

Madhubchunder Ghose, (Defendant) Appellant,

versus

Radhika Chowdranee, (Plaintiff) Respondent.

Mr. F. Cochrane and Baboo Bungshee Sein for Appellant.

Mr. R. T. Allan and Baboo Annundchunder Ghosal for Respondent.

Mr. Justice Seton-Karr.—This suit was decreed by the Deputy Collector in Civil Court, in June 1859, to fix the rent after service of notice, and the right to enhance was declared by High Court in December 1864. He sues now for arrears from the date of institution of that suit, 17th Choit 1277. Held that plaintiff's cause of action was given by the High Court's decree, and that having, under Section 30, Act X of 1859, sued within one year of its accrual, he must succeed, and that a fresh service of notice was unnecessary.

We may at once say that Mr. Allan, for the plaintiff, respondent, has not made out a plea taken by him in cross-appeal to the effect that the suit was revived irregularly. Nothing has been adduced to lead us to think that the revival of the suit was not regularly done.

The suit was for rent due from the date of the institution of a previous suit on the 30th of June, 1859, or Assar 1266 to Choit 1271, amounting with interest to Rs. 10,755, and it has been decreed by the Deputy Collector.

In appeal, Mr. Cochrane urges that the suit should not have been decreed, inasmuch as no notice was served on the defendant; and, in support of his view, he quotes the cases noted in the margin, in which rent suits were dismissed without trial on failure of notice.

But the case before us is taken out of the purview of those cases by the fact that, in this instance, the plaintiff had instituted a previous suit on the 30th of June, 1859, to fix the rent of the defendant after service of notice, and that the right to enhancement was only decreed and fixed by the decision of the High Court of the 17th of December, 1864. Until this former suit had been decided, it was useless for the plaintiff to sue, as the rent had not been ascertained, and when it was decided, the plaintiff had a right to come in under Section 30 of Act X of 1859, inasmuch as the ascertainment of the rent, by the decision in question, gave her a "cause of action," and she has sued within one year of the same.

The objections then, as to the failure of notice in this instance, have no application.

But it is objected that the plaintiff cannot get more than three years' rent, and that, in any view of the case, the plaintiff is not entitled to the rent of 1266, as she might have asked for and obtained them in her previous suit brought in 1859. In support of this point, a decision is quoted of Justices Trevor and Campbell, Weekly Reporter, Vol. III, page 19 of Act X Rulings.

We have given this decision very full attention, but we do not think the circumstances identical with those of the case now before us. In that case our learned colleagues held, though the plaintiff was not before them, that it was an action not merely asking for a declaration of right, but admitting "of the application of a remedy by a way of a decree for rent at the enhanced rate." The Court goes on to say, "that as the plaintiff failed to obtain in that action the

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RENT SUITS.

remedy as to the rents of 1266, which he might have obtained, we cannot allow him now to come into Court claiming rents which he might have before obtained, and which are now barred by the limitation prescribed by Section 32 of Act X of 1859."

But in referring to the previous decision in the case now before us, we find that there is nothing to show that rents could have been awarded for any period by that decision. The effect of the decision (W. R., Vol. I., page 339, Civil Rulings) is simply to take the talook then in dispute out of the class of those protected by Section 51, Regulation VIII of 1793, and to make it liable to enhancement, as not held at a permanent rate from a date previous to the perpetual settlement. The decision appears to us to fix the status and to define the liabilities of the defendant talookdars, and to do nothing more.

Under these circumstances, can it be said that the plaintiff ought to have sued, and was bound to sue for rents, while the status of her opponent was still uncertain, and when she did not know what rate of rent she might lawfully claim?

We think not. We do not see that the plaintiff could sue for the rents of each year, or for the rents of any one year, until the main question as to the right of the talookdar had been decided. He could not bring rent suits at a mere venture, on the speculation that the civil suits would be decided in his favor. When he gained the decree ultimately, he sued within the year, and thus she can claim the benefit of Section 30 of Act X of 1859.

If we were to rule otherwise, it seems to us that we might be the means of depriving a zemindar of his rent, merely because his opponent was successful in protracting litigation for a period of more than three years from the time when rent was claimed.

Seeing, then, a clear distinction between the suit before us and that decided by our learned colleagues, and holding that the plaintiff could not have obtained rents in the former suit, we affirm the decision of the Deputy Collector and dismiss the appeal with costs.

The plaintiff will be entitled to her rents from the 1st of July, 1859, or the 15th Assar 1266 to the end of Choit 1271, with interest from the first date.

Mr. Justice Norman.—I entirely concur in the judgment. Baboo Bungshidhur Sein, the junior pleader of the appellant, contended that the decree, declaring the plaintiff's right to enhanced rent in the former suit, being simply a declaratory decree, was erroneous, or at least defective, and that the plaintiff should have recovered in that suit the rents from the date of its institution to the date of execution.

But the answer is that the rent was not due at the time of the institution of the former suit. The plaintiff has no cause of action for the recovery of such rent. Courts of Civil Justice exist for the purpose of redressing wrongs, or declaring rights in certain cases, when such rights are controverted. In the case under consideration, no complaint was made that up to the time of the institution of the suit rent had not been fully paid. If no rent was due, it would follow that the plaintiff had sustained no wrong, and that any suit for the non-payment of rent must have been dismissed. The decree declaring the plaintiff's rights, affirmed in special appeal by this Court, was the only decree which it was competent to the Court to pass.

The pleader compares a claim for rent to the case of mesne profits awarded in execution against a party wrongfully in possession. There is no real analogy.

In a suit for the recovery of the land, the cause of action is the wrongful dispossession. The damages for that dispossession are measured by the profits which the wrong-doer realizes down to the time when the wrong is remedied by execution and restoration of possession to the owner. In the same manner interest would be the measure of damage for the detention of a debt.

The Hon'ble H. V. BAYLEY and the Hon'ble G. CAMPBELL,
Judges.

Case No. 1435 of 1866.

Special Appeal from a decision passed by the Additional Judge of Mymensing, dated the 29th March, 1866, reversing the decree of the Deputy Collector of that district, dated the 31st October, 1865.

Golucknath Roy, (Plaintiff) Appellant,

versus

Mr. K. Broody, (Defendant) Respondent.

Mr. R. T. Allan and Baboo Nilmadhub Sein for Appellant.

Baboo Romesh Chunder Mitter, Sreenath Dass and Shoshee Bhoosun Sein for Respondent.

Plaintiff let an estate in farm to defendant, and there was a condition that the rent should go in satisfaction of a bond executed by plaintiff in favor of defendant. Plaintiff sued for the rent. Defendant claimed a deduction on account of diluvion, and the Deputy Collector trying the case on that issue passed a decree with a proviso that it should be executed by endorsing the amount on the bond, a course to which neither party objects. But the Judge has thrown out the case on want of jurisdiction. We think that he is wrong. There is no question in issue regarding the bond. The only question is the purely revenue one regarding the amount of rent which depends on the claim for diluvion. We remand the case to the Judge for trial of that point. Any rent found due will be paid by endorsement on the bond, as directed by the Deputy Collector.

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Plaintiff, who had executed a bond to defendant, leased an estate to the latter, it being stipulated that the rent should go in liquidation of the bond. On the suit of plaintiff for rent, the Deputy Collector, in passing decree, ordered execution by endorsing the amount on the bond. There being no question as to the bond, the Judge was wrong in throwing out the claim for want of jurisdiction.

The Hon'ble H. V. BAYLEY and the Hon'ble G. CAMPBELL,
Judges.

Cases Nos. 283, 284, and 285 of 1866.

Special Appeal from a decision passed by the Judge of Zillah Backergunge, dated the 17th November, 1863, affirming a decision passed by the Deputy Collector of that district, dated 21st June, 1864.

Juggut Chunder Dutt and others, (Defendants) Appellants,

versus

Mrs. Paniotty and others, (Plaintiffs) Respondents.

Mr. R. V. Doyne and Baboo Chundermadhub Ghose for Appellants.

Mr. G. C. Paul for Respondents.

These three cases will, it is admitted by the vakeels of both parties before us, be governed by one and the same decision in special appeal. Construction of section 4, Regulation XI of 1825.

Plaintiff alleged that defendants held a temporary (Gur-bundo bustee) 'zema talook,' named "Shibchunder and Sumboochunder Dutt," included in Kismut Raepore, at a jumma of Rs. 818-10-8; that by the action of the river a new chur, called Raepore, was formed, and that defendant held this chur, and hereby some 40 droons of land in excess of the zema; that plaintiff served notice of enhancement under Section 13, Act X of 1859; that this suit was dismissed by the Deputy Collector, who stated that it could not be entertained till a kuboolaut should have been asked for and a pottah tendered; that then a kuboolaut was asked for and a pottah tendered; but that defendant refused to give a kuboolaut, and that hence plaintiff brought this suit for it.

Defendant's case was that the land sought to be assessed was land of his zema talook which had diluviated and re-formed on the original site of such diluviated land, and that his zema tenure was protected by a dol or settlement of 1198 B. S.

The first Court gave plaintiff a decree at rates according to the kuboolaut and jumma-bundee papers, inasmuch as defendant raises no question as to that point.

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The Lower Appellate Court held that the suit could not lie as brought under Act X of 1859. But on special appeal here the order was set aside, and it was ruled by Mr. Justices Morgan and Sumbhoonath Pundit, on the 11th August, 1865, that this suit would lie under Act X of 1859. The remand order decided nothing else, but remanded the case for retrial on the merits.

Upon this the Lower Appellate Court has now decided for the plaintiff, holding that plaintiff's gomasta did tender a pottah, and that it was customary for the gomasta to give pottahs; that there was no diluvion or re-formation; that there was accretion; that the settlement of 1198 is not a genuine document, and that defendant "must pay the same rate as other cultivators pay in the neighbourhood for lands of a like description."

Against this decision defendant appeals, and the learned counsel, Mr. Doyne, contends in his behalf—

1. That the Judge has not found on any legal evidence that the plaintiff's gomasta had authority to tender a pottah.

2. That the Lower Appellate Court erred in trying the genuineness of the settlement of 1198 without giving defendant opportunity to prove it.

3. That even if defendant had failed to prove it, he was entitled to the benefits of the presumption under Section 4, Act X of 1859.

4. That by established usage this accretion, as an increment of the original tenure, is protected.

5. That the plaintiff himself admits the talook to be a zema talook, and therefore the accretion on it becomes an integral part of it, under Clause 1, Section 4, Regulation XI of 1825, and that thus the rent now and all along paid of Rs. 818-10-8 covers the entire area (original and accreted) as the rent of the one zema mehal named Sumbhoo Chunder Dutt.

6. That even if this be not so, the jumma to be assessed on the accreted area should be in proportion to that represented by Rs. 818 on the original area.

7. That under no circumstances could the rents have been awarded to be paid by defendant at ryotce rates, but at talookdary rates, i. e., less 10 per cent. collection charges and 10 per cent. talookdary profits.

On the first point, we observe that the Lower Appellate Court has sufficiently found as a fact that the authority to tender a pottah lies on a gomasta by the custom of this part of the country. By such a finding of fact, then a tender of a pottah would lie within the ordinary scope of a gomasta's duties in this case.

On the second point, we are of opinion that defendant had not due opportunity of proving his settlement.

The Lower Appellate Court, on a view of the exterior of the document, has held it to be spurious.

It might have been shewn, if opportunity had been given to defendant, that other settlements of the same appearance had really been held to be quite genuine, and the Lower Appellate Court might by independent evidence have been itself satisfied eventually of that fact. We think that on the second point defendant should have opportunity of proving his dol of 1198.

As to the third plea, we think there should be some finding by the Lower Appellate Court, and there is at present none.

On the fourth and fifth points, reliance is placed on the terms of Section 4, Regulation XI of 1825, as shewing the accretions to be an integral part of the zema, and that thus the total rent demands as for the one mehal (consisting of original and accreted land) are represented by the jumma of Rs. 818-10-8, and so no further jumma can be passed.

Now Clause 1, Section 4, is in these terms:—

"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior land-holder, or as a subordinate tenure by any description of under-tenant whatever, provided that the increment of land thus obtained shall not entitle

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the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the Government assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force. Nor if annexed to a subordinate tenure held under a superior land-holder shall the under-tenant, whether a khodkast ryot holding a mowrosee istemrari tenure at a fixed rate of rent per bigah, or any other description of under-tenant liable by his engagement or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable."

Now this law prescribes that the right to the occupancy of the accreted land shall lie with the owner of the parent mehal or subordinate tenure, as the case may be; but so far from saying that it shall be revenue or rent-free, or that the one original revenue or rent assessment shall cover the demand both for the original estate or original subordinate tenure, as for the accreted portions, the words of the Section show that the very reverse was in the contemplation of the Legislature, which provides the one shall pay revenue for the excess, the other rent, payable under law or usage. We do not therefore consider this plea tenable. On the fourth and fifth pleas, also, we think that the plaintiff does not admit the zema to be protected. The plaint to which we have referred in original, distinctly calls the zema *gurbundo bustee*. There is then no admission of the zema being of a permanent and fixed character, but the reverse.

Under these circumstances, all that can be said on the 6th and 7th pleas is that the Lower Appellate Court will have to decide them with reference to the result of its finding on the 1st, 2nd, 3rd, 4th, and 5th pleas; but we observe that the plaint calls the talook a zema talook. We think then that even if the accretions be found liable to enhancement at the ordinary neighbouring rates for similar lands, these should be fixed less 10 per cent for collection charges, and 10 per cent. for talookdary profits, 20 per cent. in all.

We remand the case to be retried with reference to the above remarks. The issues will be—

1. Is the settlement of 1198 proved?
2. Has defendant proved his right to hold the present tenure at a fixed rent under Sections 15 and 16, Act X of 1859?
3. If the parent tenure is held at a fixed rent, is it, according to the custom of the country, liable to any, and what, increase on account of alluvion?
4. If the parent tenure is held at a variable rent, what is the rate at which lands in excess of the original quality are assessable?

The Hon'ble W. S. SETON-KARR and the Hon'ble SHUMBOO-
NATH PUNDIT, Judges.

Referred under Section 434, Act XXV of 1861, and Circular Order, dated
15th July, 1863.

6th August.
CRIMINAL JURISDIC-
TION.
CRIMINAL RULINGS.

In re Queen versus Maly Sheikh.

We regret much that all the various cases referred to by the Sessions Judge had not been made over for disposal to one and the same tribunal, and we think the Magistrate somewhat to blame for not having perceived the nature of the cases, and for not having referred them to one and the same tribunal in the interests of justice. But we are unable to see our way to anything beyond the quashing of the sentence passed against Maly Sheikh for riot, viz., fifteen days' imprisonment.

The complaint of riot having been dismissed as against this person by the Assistant Magistrate, Maly Sheikh is, we think, in all fairness, entitled to be not again tried and convicted of riot by any other Court. But the dismissal of the case as against him cannot extend to the cases of other persons not then before the Assistant Magistrate; such persons having, further, it appears, been separately accused by Talib Sheikh. The dismissal by one Court of the charge of riot instituted by the Police, can be no reason why another Court should not, on a separate charge instituted by a third person, come to a different conclusion, even though the two charges, that preferred by the Police and that preferred by Talib Sheikh, may substantially refer to the same occurrences.

The charge of criminal trespass, for which Maly Sheikh was sentenced to fifteen days' imprisonment, appears to us to have been altogether a separate offence, and we do not see that an appeal lay from this sentence simply because, in a different case, the accused had been sentenced to a further punishment in two Courts, the three sentences altogether amounting to more than one month.

We do not think it would have been competent to the Sessions Judge to annul the sentences against Baser and Budai, merely on the appeal of Maly, even if Maly had the right to an appeal.

On the whole, as already observed, the only order which we think ourselves empowered legally to make, is that the conviction and sentence against Maly for riot, and for riot only, be quashed.

All the other sentences must stand good.

32
13
HIGH COURT CIRCULARS AND LETTERS.

CIRCULAR No. 29.

1866.

HIGH COURT CIRCULARS AND LETTERS.

To

ALL CIVIL JUDGES.

Dated Calcutta, the 7th August, 1866.

SIR,

I AM directed to inform you that Baboo Gourhurry Bose, late a HIGH COURT, &c.,
Pleader of this Court, has resigned the office of Pleader, and that his resignation
(CIVIL SIDE)
was accepted on the 20th of April last. As he has been unable to return Present :
his sunnud by reason of its having been lost, the Court requests that, should The Hon'ble C. B.
it ever happen to be presented before you, you will forward it to the Court, Trevor, Judge.
accompanied by a statement of the particulars regarding its presentation, with Resignation of
as little delay as possible. pleader.

A. GROTE and G. P. COCKBURN, ESQs.

1866.

REVENUE CIRCULARS.

Errata.

The following further errata have been discovered in the new rules:—
 P. 32.—Rule 10, for "60" read "65."
 In para. 2 of C. O. No. 7 of July 1866, read "June 1866" for "May 1866."

No. 1.

Under orders of Government, No. 1547T, dated 16th August, 1866, the submission of the Return of cultivation of Cotton, Indigo, Jute, Rice, and Tea, and of Rates of Wages, is dispensed with. Circular Order No. 1, of July 1866, is therefore cancelled.

No. 2.

All applications for refund of lapsed deposits under Board's Rule 13, p. 189, must be submitted in the printed form which has been prepared under the Board's instruction. District Officers should indent at once on the Superintendent of Stationery for a sufficient supply.

The following Rule should therefore be added as 13A:—"A form of application has been prescribed by the Board, printed copies of which should be obtained without delay from the Superintendent of Stationery."

No. 3.

Under Government Orders, all Municipal collections under Act III (B. C.) of 1864, shall be deposited daily in the Sub-Divisional Treasury, or District Treasury, or Branch Bank of Bengal, as the case may be. The following additions should be made to the Sub-Divisional Treasury Rules which are appended to the Board's Circular No. 5 of July 1866.

Addition to Rule 2.—The Sub-Divisional Treasury Officer may repay Municipal deposits on his own authority, taking the Chairman or Vice-Chairman's signature as his quitance for sums up to Rs. 300; and the signature of two or more Commissioners, in addition to the Chairman's or Vice-Chairman's, for sums above that amount.

No. 4.

Under instructions from the Government of Bengal, No. 3036, dated 31st July, 1866, the following sentence is to be substituted for the two last clauses of clause 3 on page 11, Board's Rules:—

"In such case the Controller, after auditing the bill, will make the necessary intimation to the Accountant General, who will adjust the amount in his books. In both cases alike, and whatever the purpose for which the lands are taken, the Collector will at once enter the expenditure in his cash account."

No. 5.

By para. 2 of the printed letter with which the certificates of Revenue Agents admitted to practice under Rule 11, page 193, have been returned to some districts, Officers have been enjoined to levy from such Agents, before delivering to them their certificates, the fee of Rupees 8, prescribed by Rule 8 on page 191.

2. The Board have ascertained that this practice does not accord with that adopted by the High Court, which holds that the said fee is to be levied only from persons admitted after examination.

3. They are therefore pleased to direct the refund of all fees levied from Revenue Agents admitted under the said Rule 11.

2. It was not intended that any rigid inquiries, either public or private, should be held into the character and acquirements of individuals already practising. Officers who have made their selection of Revenue Agents, upon principles other than those herein prescribed, are directed now to revise their proceedings with a view to the admission of such candidates as, under these orders, would be admissible;

No. 7.

2. Collectors are further requested to submit their opinion whether it would be desirable to prohibit drinking on the retailer's premises, and whether such a prohibition would be likely to promote drinking in private houses to an objectionable extent.

3. As soon as the District reports are all received, Commissioners will be good enough to submit an abstract of them, with their own opinion upon the questions raised, for the consideration of the Board.

No. 8.

"Licensed vendors are required to record in the papers sold by them, the place and date of sale, and the other particulars prescribed in Section 38, Act X of 1862. A breach of this rule will lead to their licenses being revoked, under the provisions of Section 36 of the Act."

	1ST BENCH. The Chief Justice and Mr. Justice L. S. Jackson.	2ND BENCH. Mr. Justice Trevor and Mr. Justice Campbell.	3RD BENCH. Mr. Justice Loch and Mr. Justice Macpherson.	4TH BENCH. Mr. Justice Bayley and Mr. Justice E. Jackson.	5TH BENCH. Mr. Justice Norman and Mr. Justice Seton-Karr.	6TH BENCH. Mr. Justice Kemp and Mr. Justice Markby.	REMARKS.
MONDAY	The Chief Justice will sit out for general business. Mr. Justice Louis S. Jackson will sit with Mr. Justice Campbell on the Miscellaneous Appeals of the 1st Bench, and references in Criminal cases.	Mr. Justice Trevor, English Department. Mr. Campbell will sit with Mr. Justice Louis S. Jackson.	Miscellaneous Appeals.	Special Appeals.	Appeals and References in Criminal cases.	Regular Appeals.	If, at the rising of any Division Bench, the day fixed for the hearing of Regular Appeals, a Regular Appeal, the only part heard, the Bench will proceed with that Appeal on the following day or days until it is finished, and adjourned in it, or until the day fixed for the hearing of the case be not sufficient for the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with the list of Special Appeals, and vice versa. And in like manner, if there be not sufficient Appeals or references in Criminal cases to occupy the time of any Bench on the days fixed, the Bench will proceed with the list of Special Appeals.
TUESDAY	Special Appeals.	Special Appeals.	Ditto	Ditto	Regular Appeals.	Ditto	
WEDNESDAY	Regular Appeals.	Ditto	Ditto	Ditto	Regular Appeals.	Ditto	
THURSDAY	Special Appeals. The Chief Justice will sit out for general business. Mr. Justice Louis S. Jackson will sit with Mr. Justice Campbell on the Miscellaneous Appeals of the 1st Bench, and references in Criminal cases.	Regular Appeals.	Regular Appeals.	Motions, and afterwards Special Appeals.	Motions, and afterwards Special Appeals.	Special Appeals.	
FRIDAY	Mr. Justice Louis S. Jackson will sit with Mr. Justice Campbell on the Miscellaneous Appeals of the 1st Bench, and references in Criminal cases.	Special Appeals.	Regular Appeals.	Ditto	Miscellaneous Appeals.	Ditto	
SATURDAY	Mr. Justice Louis S. Jackson will sit with Mr. Justice Campbell on the Miscellaneous Appeals of the 1st Bench, and references in Criminal cases.	Ditto	Miscellaneous Appeals.	Ditto	Special Appeals.	Appeals and References in Criminal cases.	

On Tuesday, the 19th instant, a Court of Appeal from cases heard in the exercise of original jurisdiction will be held at the Town Hall before the Chief Justice and Mr. Justice Norman. The Court will sit from day to day until the Appeals are disposed of. During the absence of the Chief Justice and Mr. Justice Norman, Mr. Justice Saton-Karr and Mr. Justice Louis S. Jackson will take the business of the 5th Bench.

A Full Bench will sit on Tuesday, the 7th August. The Bench will consist of the Chief Justice and Justices Terrot, Loch, Lord Macdougall, and Lord Macpherson. The Court will sit from day to day until these cases are finished, or the arguments therein concluded:—
Regular Appeals Nos. 443 and 449 of 1864.

Ditto	"	228, 240, 241
Regular Appeal	"	41 of 1866.
Special Appeal	"	153 of 1866.
Miscellaneous Appeal	"	350 of 1865.
Ditto	"	778 of 1865.

On Tuesday, the 14th August, a Full Bench consisting of the Chief Justice and Justices Loch, Kemp, Louis S. Jackson, and Macpherson will sit for the hearing of the following cases; and the Court will sit from day to day until these cases are finished, or the arguments therein concluded:—

Miscellaneous Appeals Nos. 569 and 570 of 1865.

Ditto " 778 of 1865.

Attendants appears Nos. 569 and 570 of 1865.
Ditto " 778 of 1865.
Ditto " 811 of 1865.
Afterwards a Full Bench will be formed, consisting of the Chief Justice and Justices Loch, Dayley, Louis S. Jackson, and Macpherson, when the following cases will be taken up:—

After those cases have been disposed of, a Full Bench consisting of the Chief or other Judges will continue to sit until all cases referred to a Full Bench have been heard in High Court. {
The 7th July, 1866.

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