## APPELLATE CIVIL.

*Before Suhrawardy and Graham JJ.*

1926

*Feb.* 15.

LAL BEHARY MAITY

*v.*

RAJENDRA NATH MAITY.*

*Sale for Arrears of Revenue (Act XI of 1859)—Failure to issue notification of sale under s. 6—Substantial injury, if necessary, to be proved under s. 33 to set aside the sale.*

Where in a sale for arrears of revenue under Act XI of 1859 it was found that notification of sale under section 6 had not been issued :

*Held*, that non-compliance with the provision of section 6, whether an illegality or an irregularity, does not render the sale *ipso facto void* but makes it liable to be set aside on proof of substantial injury under section 33 of the Act.

There is no distinction made in Revenue Sale Law between "illegality" and "irregularity".

*Gobinda Lal Roy* v. *Ram Janam Misser* (1) relied upon.

Other cases on the subject discussed and reviewed.

SECOND APPEAL by Lal Behary Maity and another, the plaintiffs.

This appeal arose out of a suit for the recovery of possession of a six annas share in Touzi No. 1666 of the Midnapore Collectorate after setting aside the sale of the Touzi held on account of arrears of revenue, or in the alternative, for a direction upon the defendants to reconvey the plaintiff's share in the Touzi to them; the Court of first instance decreed the suit

*Appeal from Appellate Decree No 2343 of 1923, against the decree of A. Henderson, District Judge of Midnapore, dated June 29, 1923, reversing the decree of Amrita Lal Mukerjee, Subordinate Judge of that district, dated July 29, 1922.

(1) (1893) I. L. R. 21 Calc. 70.

setting aside the sale as null and void, but on appeal the District Judge reversed the decision and dismissed the suit; the plaintiffs thereupon preferred this appeal before the High Court.

*Mr. Amarendra Nath Bose* and *Mr. Rama Prasad Mukhopadhya*, for the appellants.

The sale is illegal as no notification under section 6 of Act XI of 1859 was served, the provisions of the statute should be strictly observed, section 33 of the Act does not cover the defect. *Maharaja Mahashar Singh* v. *Babu Haruck Narain Singh* (1), *Lala Mobarak Lal* v. *The Secretary of State for India in Council* (2); the Courts below should have held that on a proper calculation there was no arrears, the sale was without jurisdiction, the amount claimed for cess should not have been considered as part of revenue recoverable under Act XI of 1859, *Gujraj Sahai* v. *Secretary of State for India* (3).

*Dr. Dwarka Nath Mitter*, *Mr. Harendra Kumar Sarbadhikari*, *Mr. Subodh Chandra Dutt* and *Mr. Nripendra Chandra Das*, for the respondents.

Notice served in the present case under sections 5 and 13 was a combined notice under sections 5 and 6 of the Act; non-service of notice under section 6 is a mere irregularity covered by section 33, the sale was for arrears justly due and cannot be set aside, the plaintiffs have failed to prove substantial injury: *Radha Charan Das* v. *Sharfuddin Hossain* (4), *Gangadhar Das* v. *Bhikari Charan Das* (5), *Gobinda Lal Ray* v. *Ram Janam Misser* (6) and other cases cited.

(1) (1862) 9 Moo. I. A. 268, 278, 282.
(2) (1885) I. L. R. 11 Calc. 200.
(3) (1889) I. L. R. 17 Calc. 414, 431
(4) (1913) I. L. R. 41 Calc. 276.
(5) (1911) 16 C. W. N. 227.
(6) (1893) I. L. R. 21 Calc. 70.

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SUHRAWARDY J. This appeal by the plaintiffs arises out of a suit for recovery of possession of their 6 annas share in Touzi No. 1666 of the Midnapore Collectorate after setting aside the revenue sale of the said Touzi held on the 10th January 1921 or in the alternative for a direction upon the defendants to reconvey the plaintiff's share in the Touzi to them. The learned Subordinate Judge in the trial Court being of opinion that there were no arrears and that there was no publication of the notice under section 6 of the Revenue Sale Act (XI of 1859), which omission rendered the sale *ipso facto* void, passed a decree in favour of the plaintiffs setting aside the sale as null and void and allowing the plaintiffs to recover possession of their 6 annas share in the mehal. On appeal the learned District Judge of Midnapore held that the decree of the trial Court was apparently wrong in setting aside the entire sale when the other proprietors of the Touzi did not object to it. The only decree in his opinion that could have been passed was for an order upon defendant No. 1 (purchaser) to reconvey the property to the plaintiffs. The learned Judge further held that there was service of a notice which might be taken to be one under section 6 of the Act; but if there was no service of a separate notification under section 6, it amounted only to an irregularity and that as the plaintiffs failed to prove substantial injury, the sale was not liable to be set aside under section 33 of the Act. In this view the learned Judge dismissed the plaintiff's suit.

The plaintiffs have appealed and on their behalf it is urged, in the first place, that the sale was bad in law, as no notification under section 6 of the Revenue Sale Act was served and as this amounted to an illegality, the sale should be held to be invalid. In the second place it is contended that on proper calculation it

should have been found that there were no arrears; and that the Court below were wrong in considering the amount claimed for cess as part of the revenue recoverable under Act XI of 1859.

As regards the first ground, it is necessary to state the facts of the case. The mehal was assessed with revenue of Rs. 107-11-9 and cesses of Rs. 2-12 payable in four quarterly instalments. It is found that the amount due for March and June kists of 1920 was short by Rs. 5-7-9. According to the notification made by the Board of Revenue under section 3 of the Act, the March kist was to have been paid on or before the 28th March and the June kist on or before the 28th June. Under section 2 of the Act these kists, if unpaid, were arrears on the 1st May and 1st August. On the 9th August 1920 the Collector directed the issue of notice under section 5 of the Act, which was served in September 1920, as there were some attachments on the mehal. This notice was in the following form: "Notice is hereby given under sections 5 "and 13 of Act XI of 1859 that unless the arrears of "revenue mentioned below are paid on or before the "next latest date of payment, viz., the 28th August "1920, the undermentioned estates or share of the "estate in the district of Midnapore will be put up for "sale at the office of the Collector of that district on "the 10th January 1921 at noon for the said arrears." On the 17th November 1920, the Collector ordered that the mehal should be advertised for sale. The sale was held on the 10th January 1921 and the mehal was purchased by defendant No. 1 for Rs. 2,100. Before the sale, on the 25th and 29th September 1920, the plaintiff remitted the sum of Rs. 5-1 to the Collector by two money orders with the direction that that amount should be credited towards the September kist.

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It appears that there was only one notice served purporting to be under sections 5 and 13, referred to above. The learned District Judge is of opinion that the notice was in the form of the notice prescribed by the Board of Revenue and in fact it amounted to a combined notice under sections 5 and 6 of the Act. I must express my regret that the form should have been adopted for the purpose of necessary notifications under the Act. The notice under section 5 is to be issued for the arrears of the description mentioned in that section. That section says that such notice shall specify the nature and amount of the arrear so demanded and the latest date on which the payment thereof shall be received and shall be served not less than 15 clear days preceding the date fixed for payment according to section 3 of the Act. According to section 3 of the Act the Board of Revenue has fixed the dates of payment of the kists which in the present case were the 28th March and the 28th June. The notice under section 5 should have issued 15 clear days before those dates. The notification under section 6 is to be issued after the latest date of payment fixed in the manner prescribed in section 3 of the Act. The notice under section 5 apparently is to be issued for the purpose of giving warning to the people concerned of the liability of the mehal being sold in the event of the payment not being made within the time fixed therein. It must therefore issue *before* the mehal has become liable to sale, whereas the notification under section 6 has to be issued *after* the property has become liable to sale, a date for sale having been fixed. In this view I fail to understand how a combined notification under sections 5 and 6 can be legally issued. The effect of the issue of this notice in the present case must be that there was no service of a proper notification issued under section 6 of the Act.

The next question that arises for consideration is the effect of non-service of a notification under section 6 of the Act. In order to decide this question, it is necessary to consider the second point raised on behalf of the appellants, namely, that there was no arrears of revenue at the time of the sale. If the appellants succeed in establishing that there were no arrears at the date of sale they must succeed in the suit as in that case the Collector had no jurisdiction to bring the mehal to sale.

It has been held in several cases that where there were no arrears there was no sale under the Act and therefore the Civil Court has jurisdiction to set aside the sale, apart from the Act. It is argued on behalf of the appellants in the first place that the amount of cesses could not be included in the amount recoverable under the Revenue Sale Act; and for this view reliance was placed on section 42 of the Bengal Cess Act of 1886 and the case of *Gujraj Sahai* v. *Secretary of State for India in Council* (1). In my opinion this contention is right. But the amount of cesses comes to about Rs. 3 and if that is deducted from the amount due, namely, Rs. 5 and odd, there would still be a balance of Rs. 2 and odd due on account of arrears of Government revenue. It cannot therefore be said that there was no arrear due at the date of sale. This gave jurisdiction to the Collector to hold the sale under the Act. The fact that the amount of arrears claimed was different from what is found really due, did not take away that jurisdiction. The sale was therefore held with jurisdiction.

It remains to be seen whether the sale is liable to be set aside in the absence of service of notification under section 6 of the Act. The matter really rests

(1) (1889) I. L. R. 17 Calc. 414, 431.

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upon the construction to be put on section 33 of the Act. That section provides that no sale for arrears of revenue shall be annulled by a Court of Justice except on the ground of its having been made contrary to the provisions of this Act and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of. It is argued on behalf of the appellants that the failure to serve the notification under section 6 of the Act is not an irregularity and is not covered by section 33. In support of this view reliance has been placed on some passages in the judgment in the case of *Maharaja Mahashar Singh* v. *Babu Haruck Narain Singh* (1). That case was decided under the provisions of Act I of 1845 which did not contain any provision corresponding to section 33 of Act XI of 1859. Therefore it is no authority in support of the view pressed before us. The sheet anchor of the appellants' case is the decision of a Full Bench of this Court in the case of *Lala Mobarak Lal* v. *The Secretary of State for India in Council* (2). It was therein decided by a majority of four Judges that a non-compliance with the provisions of section 6 of Act XI of 1859 is not a mere irregularity curable by section 8 of Bengal Act VIII of 1868 but an illegality; and the sale held without compliance with the provisions of section 6 of the Act is null and void as not being a sale under the provisions of Act XI of 1859. Tottenham J. dissented from this opinion and held that the sale held under such conditions is not *ipso facto* null and void, but is liable to be annulled only on proof that the person whose land has been sold has sustained injury by reason of the informality in the publication of the notification. It is submitted on behalf of the respondents that this decision has, by

(1) (1862) 9 Moo. I. A. 268, 278, 282. (2) (1885) I. L. R. 11 Calc. 200.

the Judicial Committee as well as by later decisions of this Court, been impliedly overruled and the correct view that is now established upon the authorities is that non-compliance with the provisions of section 6, be it an illegality or irregularity, does not render the sale *ipso facto* void but makes it liable to be set aside on proof of substantial injury to the party complaining, under section 33 of the Act. In support of this view reliance is placed upon the cases of *Radha Charan Das* v. *Sharfuddin Hosein* (1), and *Gangadhar Das* v. *Bhikari Charan Das* (2). In the former case it is held that the Full Bench ruling in *Lala Mobarak Lal* v. *Secretary of State* (3), has in effect been overruled by the decision of their Lordships of the Judicial Committee in the case of *Gobinda Lal Roy* v. *Ram Janam Misser* (4). In the latter case the learned Judges held that *Lala Mobarak's* case has ceased to be binding by reason of the decisions of their Lordships of the Judicial Committee in *Tasadduk Khan* v. *Ahmad Hossein* (5) and in *Gobind Lal Roy* v. *Ram Janam Misser* (4). The position, therefore, has to be examined in order to find out if the view taken in these cases is correct. The decision of their Lordships of the Privy Council in *Gobinda Lal Roy's* case (4) was, in an appeal against a decision of this Court, reported, *sub nomine*, *Gobinda Lal Roy* v. *Bepradas Ray* (6). This was a decision passed by Tottenham and Gordon JJ. At pages 413 of the report the learned Judges stated thus: "We need not express "any decided opinion on this latter point" (the application of section 33 of Act XI of 1859), because it seems to us that we are bound by the judgment of a Full Bench of this Court, in a somewhat similar case, *Lala*

(1) (1913) I. L. R. 41 Calc. 276.
(2) (1911) 16 C. W. N. 227.
(3) (1885) I. L. R. 11 Calc. 200.
(4) (1893) I. L. R. 21 Calc. 70.
(5) (1893) I. L. R. 21 Calc. 66.
(6) (1889) I. L. R. 17 Calc. 398.

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"*Mobarak Lal* v. *The Secretary of State for India* "*in Council* (1); and that in accordance with that "judgment, we are compelled to hold that section 33 "of Act XI is not applicable to the present case, "whatever be our own opinion on that point." The last few words had reference to the dissentient judgment of Tottenham J. in that Full Bench case. On appeal from this decision the Judicial Committee set it aside and confirmed the sale; but no direct reference was made to the Full Bench case in their Lordships' judgment. It, however, appears from the report of the case that it was argued before their Lordships on the strength of the Full Bench decision of this Court. In giving their judgment their Lordships made the following observation: "In the opinion of their "Lordships a sale is a sale made under Act XI of 1859 "within the meaning of that Act when it is a sale "for arrears of Government revenue, held by the "Collector or other officer authorised to hold sales "under the Act although it may be contrary to the "provisions of the Act either by reason of some "irregularity in publishing or conducting the sale or "in consequence of some express provision for exemp- "tion having been directly contravened . . . . . It is "difficult to suppose that the introduction of that "sentence ('and then only on proof that the plain- "tiff has sustained substantial injury by reason of the "irregularity complained of') into the Act of 1859 "could have been intended to have the effect of "excluding from section 33 all cases of illegality as "distinguished from irregularity." The case of *Radha Charan Das* v. *Sharafuddin Hossein* (2) was taken in appeal, *Sharafuddin* v. *Radha Charan Das* (3), before the Privy Council and their Lordships

(1) (1885) I. L. R. 11 Calc. 200. (2) (1913) I. L. R. 41 Calc. 276.
(3) (1918) L. R. 45 I. A. 205.

confirmed the decision of this Court. It was argued in that case that the non-publication of the notification under section 6 in the vernacular local gazette was an illegality and not a mere irregularity. Their Lordships held that the procedure was not contrary to the provisions of the Act and if it was an irregularity the appellant had failed to show any substantial injury arising out of the irregularity complained of. On these authorities, therefore, there is no escape from the conclusion that whether the non-compliance with the provisions of the Act amounts to an illegality or an irregularity, it can only be a ground for setting aside a sale if the party complaining succeeds in proving that substantial injury has resulted from such non-compliance. The divergent views on the effect of an illegality or irregularity on the sale held under Act XI of 1859 is due to the use of the word "irregularity" in section 33. But reading all the clauses of the section together there can be no doubt left that what is meant by the word "irregularity" in the section is the fact of the sale having been held contrary to the provisions of the Act. There is no indication in the Act that any distinction was made between "illegality" and "irregularity." The authorities to which I have referred show that if the Collector has jurisdiction to hold the sale, non-compliance with any of the provisions of the Act will render the sale liable to be set aside only on the ground that a party has sustained substantial injury by reason of the illegality or irregularity complained of. It is no doubt hard to suppose that the Collector may hold a sale without observing any provision of the Act and the sale should be held good if no injury is caused to any party. But the law with regard to the recovery of arrears of Government revenue is strict as their Lordships observed in *Gobind Lal*

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*Roy's* case (1): "Sales for arrears of revenue are of "constant occurrence; anything which impairs the "security of purchasers at those sales tends to lower "the price of the estates put up for sale."

On the question of injury the learned Judge has found in agreement with the Subordinate Judge that the plaintiffs have failed to prove any fact which would justify the inference that the inadequacy of price fetched at the sale was in any way due to the failure of the Collector to issue a notification under section 6. It was argued on behalf of the plaintiffs that the property was worth Rs. 4,000—whereas it was sold for Rs. 2,100. On this point the learned Judge remarks that there were several bidders present and that there was a hot contest between them and the low price fetched was to be attributed to the fact that the sale was a Court sale. The finding that the low price fetched at the sale was not due to the failure of the Collector to issue proper notification under section 6 of the Act is a finding of fact which must be accepted. That being so, whether the non-compliance with the provisions of section 6 amounts to illegality or irregularity, the plaintiffs are not entitled to succeed on the finding of the Court below that the inadequacy of price was not due to the breach of any provisions of the Act.

There is one other point which was urged during the argument on behalf of the appellants. It was stated that the amount of Rs. 5-1 sent by the plaintiffs to the Collector by money orders should have been credited to the defaulted kists. As to that the learned District Judge observed that it was sent with a direction by the plaintiffs that the amount should be credited towards the September kist and that under section 59 of the Contract Act the Collector had

(1) (1893) I. L. R. 21 Calc. 70.

no authority to do otherwise. We think that this view is correct. In *Sheikh Mahomed Jan* v. *Ganga Bishnu Singh* (1) under similar circumstances the Collector had appropriated the amount sent with a direction by the defaulter to appropriate it to a certain kist, towards the payment of another kist and their Lordships of the Judicial Committee held that the appropriation was not to be varied without the consent of the payer.

The result of the above considerations is that this appeal fails and is dismissed with costs.

GRAHAM J. I agree that the appeal must be dismissed and propose to state briefly my reasons. The learned advocate for the appellants confined himself to arguing two points. He contended firstly that the Court of Appeal below should have held that the issue of a notification under section 6 of the Revenue Sale Law was necessary, and that the omission to issue it was an illegality, and not a mere irregularity, the effect being to render the sale null and void. Secondly, he urged that there were in fact no arrears of revenue at the time of the sale, and that therefore the sale was bad.

In my opinion there is no substance in either of these contentions. With regard to the first point, it is no doubt true that Act XI of 1859 is a stringent enactment for the realisation of arrears of revenue and that, that being so, there is an obligation to comply exactly with its requirements. There is authority, too, for the view that omission to issue a notification under section 6 is not a mere irregularity, and that it renders such a sale null and void, *Lala Mobarak Lal* v. *Secretary of State* (2).

(1) (1911) I. L. R. 38 Calc. 537; L. R. 38 I. A. 80.

(2) (1885) I. L. R. 11 Calc. 200.

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But each case must be decided upon its own particular facts, and in this case there are some special features which require consideration. It is common ground that no notification under section 6 was in fact issued, but it was urged on behalf of the respondents that, though a notification purporting to be made under sections 5 and 13 of the Act was issued, that notification was in effect a notification under section 6 and contained all the particulars required by law to be included in such notification. In short, it is argued that it was a combined notification under sections 5 and 6, and that, as it had already been issued, and gave all the necessary information, it would have been a mere waste of time to publish a separate notification under section 6. This contention is plausible but I think the Courts below were right in holding that a notification under section 6 ought to be issued in all cases, and that it cannot be dispensed with on the ground that a notification has already been issued under section 5.

The matter, however, does not end there. The question next arises whether the omission to issue a notification under section 6 is an irregularity, or an illegality; and whether the sale can be set aside upon that ground. The trial Court relied upon the Full Bench ruling in *Lala Mobarak* v. *The Secretary of State* (1) referred to above, where a distinction was drawn between irregularities and illegalities. But that case was subsequently dissented from by the Privy Council in the case of *Gobind Lal Roy* v. *Ram Janam Misser* (2) and that decision was subsequently followed by this Court in *Radha Charan Das* v. *Sharfuddin Hossein* (3). In view of the decision in the Privy Council case, it must be accepted that th

(1) (1885) I. L. R. 11 Calc. 200. (2) (1893) I. L. R. 21 Calc. 70.
(3) (1913) I. L. R. 41 Calc. 276.

word "irregularity" in section 33 of the Revenue Sale Law covers also illegalities and indeed the language used in the section seems to point to that conclusion, for after speaking of the sale having been made "contrary to the provisions of this Act" it goes on immediately afterwards to refer back to this as an "irregularity". However, be that as it may, the decision of the Privy Council is binding upon us.

It follows that in order to succeed upon this ground the plaintiffs must show that they have suffered substantial injury by reason of the irregularity complained of, and here we are confronted by the finding of fact arrived at in the Court of appeal below. The learned District Judge has found that the failure to publish a notification under section 6 did not affect the price realised. We cannot interfere in second appeal with that finding unless it is vitiated by some error of law, or procedure. It cannot be said that there are no materials to support it. The utmost that can be urged on behalf of the appellants is that the price fetched for the mehal was only Rs. 2,100 although the property has been valued at Rs. 4,000. But estimates of the value of property in cases of this description are apt to be exaggerated, and on the other hand it is a matter of common knowledge that properties sold at Civil Court sales do not as a rule fetch anything like their real value. It cannot therefore be held that Rs. 2,100 was an altogether inadequate price. The first contention therefore fails.

It is next contended that at the date of the sale there were no arrears and that consequently the sale was *ultra vires* and bad in law. In this connection it was first argued that cesses ought not to have been taken into account. That no doubt is correct as

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demands in respect of cesses are not revenue, and consequently the procedure prescribed by the Revenue Sale Law does not apply to them. There is authority for this, if authority is required, in the case of *Gujraj Sahai* v. *The Secretary of State* (1). But, even if the cesses be excluded, there was still an arrear of revenue at the date of the sale, unless the amounts remitted by the plaintiffs by exhibits 7 and 7(4) are taken into account and credited towards the kists in arrears. It is contended on behalf of the appellants that that is what the Collector ought to have done. But in view of the provisions of section 59 of the Contract Act it was not open to the Collector to appropriate those payments to any kist save and except the September kist in accordance with the express direction of the plaintiffs at the time when they made the payments. And indeed it is manifest that, if the Collector had adopted the course suggested, awkward complications might have ensued. For example, if any question should arise in future in connection with the payment of the revenue for the September kist, there might conceivably be default by reason of the Collector having transferred the moneys instead of crediting them to the September kist as requested by the plaintiffs, and in that case the plaintiffs might justifiably object that the Collector had no right to appropriate the amounts in a manner not authorised by them.

It was contended by the learned advocate for the appellants that section 59 of the Contract Act has no application as there were not several distinct debts but one debt. But there is authority for the view that that section applies to payments of Government revenue. *Mahamed Jan* v. *Ganga Bishun* (2).

(1) (1889) I. L. R. 17 Calc. 414.

(2) (1911) I. L. R. 38 Calc. 537; L. R. 38 I. A. 80.

Arrears due in respect of separate kists are distinct debts.

In the result the appeal fails upon both the points urged and must be dismissed with costs.

A. S. M. A. *Appeal dismissed.*

## APPELLATE CIVIL.

*Before Cuming and Page JJ.*

DEWAN ABDUL ALIM

*v.*

ABDUL HAKAM.*

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*April* 26

*Limitation—Limitation Act (IX of 1908), Art. 182 (2), construction of—Civil Procedure Code (Act V of 1908), s. 2 (2), meaning of.*

Upon the true construction of the terms of Art. 182 (2) of the Limitation Act, the limitation runs from the date of the final decree of the Appellate Court where there has been an appeal, irrespective of the question whether the appeal relates to the whole decree or not.

*Gopal Chunder Manna* v. *Gosain Das Kalay* (1) followed, and other cases referred to.

*Hur Proshaud* v. *Enayet Hossein* (2), *Raghunath* v. *Abdul Hye* (3), *Christiana Sens* v. *Benarashi Proshad* (4) and *Kartick Chandra* v. *Nilmani Mondal* (5) dissented from.

MISCELLANEOUS APPEAL by Dewan Abdul Alim, the decree-holder plaintiff.

The plaintiff instituted a suit against the defendants for the recovery of certain properties in schedules I, II, III, and IV of the plaint. His suit in respect of

*Appeal from Original Order, No. 116 of 1924, against the order of Aswini Kumar Das Gupta, Subordinate Judge of Mymensingh, dated May 17, 1923.

(1) (1898) I. L. R. 25 Calc. 594.
(2) (1878) 2 C. L. R. 471.
(3) (1886) I. L. R. 14 Calc 26.
(4) (1914) 19 C. W. N. 287.
(5) (1916) 20 C. W. N. 686.