nor his officers could have any authority, after the lapse of six or eight years from the date of purchase, to interfere summarily and put the plaintiffs into possession of what they had purchased. Their remedy would be by a civil suit, if not barred.

As to the possession before 1871, if any, it was what is called symbolical possession,—that is to say, possession by the sticking up of a bamboo, or the like. That is not the mode of giving possession of a property like the present—a family dwelling-house. The purchasers were entitled to ask for, and in order to save limitation they ought to have obtained, actual possession. Now, actual possession, if we suppose it could have been given in 1871, was not of a legal or regular kind, because it was by the intervention of the Nazir, who had no more power in that case than any private individual. It did not subsist for any space of time so as to give it any real effect. Therefore, the plaintiffs derived no fruit from their purchase since it was made in 1863, and as this suit was brought on the 18th November 1876, nearly fourteen years after the date of purchase, it was clearly burred by limitation. The judgment of the Munsif, therefore, was right, and must be restored, and that of the Subordinate Judge set aside with costs.

Appeal allowed.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

NURSINGH NARAIN SINGH (DEFENDANT) v. BABOO LUKPUTTY SINGH AND ANOTHER (PLAINTIFFS).*

1879
May 12.

Zurpeshgi Lease—Rent set off against Advances.

Where a plaintiff let out in zurpeshgi certain property for a fixed period at a certain rental, in consideration of a sum of money advanced, and the defendant withheld and did not tender the rent as it fell due,—*held*, that the plaintiff was entitled to set off the rent so withheld, against the money

* Appeal from Appellate Decree, No. 767 of 1878, against the decree of A. V. Palmer, Esq., Judge of Shahabad, dated the 25th of February 1878, affirming the decree of Moulvi Mahomed Nural Hossein Khan Bahadoor, Subordinate Judge of that District, dated the 10th of September 1877.

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advanced, and was entitled to claim an account as against the defendant, although the period for which the zurpeshgi lease had to run had not expired.

THE plaintiff in this case granted a zurpeshgi lease of certain property to the defendant for a term of fifteen years, from 1273 to 1287 (1866 to 1880), at a yearly rent of Rs. 130, on an advance of Rs. 800. It was agreed that the lender and lessee should be allowed to deduct out of the rent, Rs. 96 as interest at 12 per cent. on the advance made by him, and the remainder, Rs. 34, was to be paid over in cash to the lessor. It was further provided that the entire debt (Rs. 800) was to be repaid in one lump sum at the end of 1287 (1880).

In 1283 (1876), before the period at which the principal was to be repaid arrived, the plaintiff brought this suit to recover possession of the demised property, and prayed for an account, alleging that the reserved rent of Rs. 34 had never been paid to him, and that if an account were taken, it would be found that the debt had been satisfied by the end of Joisto 1283 (June 1876).

The defendant contended that the plaintiff was not entitled to recover possession till 1287 (1880); that, if the rent of Rs. 34 was outstanding, the plaintiff ought to have brought a suit for the same under Act VIII of 1869, and not to ask that it might be set off as against the money advanced by him; and that the claim for rent from 1273 to 1280 (1866 to 1873) was barred by limitation: and, further, that the money advanced by him had not been satisfied.

The Subordinate Judge held, that the rent payable by the defendant might be set off as against the money advanced to the plaintiff by him; and that it was clear from the evidence, that by so setting off the rent, the principal and interest advanced had been satisfied; but that the plaintiff was not entitled under the deed to possession until the year 1287 (1880), and that, therefore, the defendant was entitled to possession until that period, paying rent to the plaintiff under the deed.

The defendant appealed to the District Judge, who, affirming the decision of the lower Court, dismissed the appeal.

The defendant then appealed to the High Court.

Baboo *Chunder Madhub Ghose* (with him Baboo *Nilmadhub Bose*) for the appellant.—The plaintiff is not entitled to an account. His claim for rent for the years 1273 to 1280 (1866 to 1873) is barred, and he is not entitled to recover this rent by bringing a suit for an account; moreover the suit is premature.

Baboo *Mohesh Chunder Chowdry* for the respondents.

The judgment of the Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring), who, after stating the facts, continued:—The Courts below have found that the debt has been satisfied, and that there is a surplus in the hands of the defendant irrespective of the rent still payable up to the end of the term. They have also found that the plaintiff is not entitled to re-enter before the end of Jeyt 1287 (1880), the time fixed in the original lease. With this latter part of their decision we are not now concerned.

The questions before us are: *1st*, whether the plaintiff is entitled to an account at all; and, *2ndly*, whether this suit is not premature? The Courts below having found that the plaintiff had no right of re-entry until 1287 (1880), it is contended that he had no cause of action in 1877, when this suit was brought.

The position which is taken by the defendant is, that, whereas the plaintiff was entitled to recover his rent from time to time under the Rent Law, and did not choose to do so, these rents are, to a great extent, irrecoverable now under the operation of the law of limitation: and that, therefore, the plaintiff is not entitled by a suit for an account to recover those rents which he could not recover in a suit framed under Act VIII of 1869. But it appears to me that this is a defence which the defendant is not equitably entitled to set up. It amounts to this, that he may keep in his own hands the money due from him to the plaintiff, and at the same time require the plaintiff to pay to him the monies due on his side.

The defendant as lessee was bound to tender to the plaintiff his rent as it fell due. Instead of doing so, he choose to keep that rent in his own pocket. The plaintiff might have insisted

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on the conditions of the lease being strictly carried out, but as the defendant had departed from them, he was justified in treating the rent withheld and not tendered as a set off against his own debt to the defendant. The defendant has by his conduct altered the arrangement under which he held the property: and, as a consequence, the plaintiff is entitled now to come in and claim an account from him. Thus, whether or not the Courts below were right in holding that possession could not be recovered within the fixed term, it would seem that the plaintiff had a right to have an account taken in this suit.

In my opinion, therefore, this appeal ought to be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1879
Feb. 6
and
March 18.

FUZLUDEEN KHAN (PLAINTIFF) *v.* FAKIR MAHOMED KHAN (DEFENDANT).*

Registration Acts (VIII of 1871), ss. 48, 50; and (III of 1877), ss. 48, 50 —Innocent Purchaser—Possession—Notice.

Per GARTH, C. J.—The only reasonable construction of s. 50 of Act VIII of 1871 is, that where property under the value of Rs. 100 is purchased by two innocent purchasers, the one by a registered and the other by an unregistered deed, and there is no fraud shown, or other circumstances which in equity would protect the unregistered purchaser against the registered, the title of the latter shall prevail.

The section contains no such qualification, as that a purchaser under an unregistered deed, who has obtained possession, would have priority as against a subsequent purchaser under a registered deed, and the Courts are not at liberty to import such a qualification into the section.

Per PONTIFEX, J.—Section 50 is intended to apply to the case of two innocent purchasers, giving the preference to the one who has taken the greater precaution to secure his title, but is not intended to apply to the case of a subsequent purchaser who registers, but who, at the date of his purchase, had *actual notice* of a prior unregistered purchase.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Tottenham, dated the 16th September 1878, in Appeal from Appellate Decree No. 942 of 1878.