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she should, as it were, be taken thereby to have contracted herself out of her rights, and be unable to recover them when those circumstances have become changed, and that through the fault of the husband." Their Lordships do not agree to this. Having regard to the Burmese law as to the property of married persons, they do not see in the facts of this case any ground in equity or good conscience for making the defendant liable for maintenance. It may be that he requested the plaintiff to live in a respectable manner, but she incurred no additional expenses in consequence. It did not cause any change in her style of living, and it is not possible to assign any portion of her claim to that request.

It remains to be noticed that in the reasons for the appeal it is said that there had been a divorce according to Buddhist law by the conduct of the parties. This was not made a ground of defence in the defendant's written statement, and there was no issue upon it. And consequently their Lordships intimated to the Counsel for the appellant that they could not allow this question to be argued.

For the reasons above given their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to order the suit to be dismissed with costs in that Court. The costs of the appeal to be paid by the respondent.

Solicitors for the appellant: Messrs. *Sanderson & Holland.*

Appeal allowed.

PRIVY COUNCIL.

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KISHNANAND (PLAINTIFF) *v.* KUNWAR PARTAB NARAIN SINGH (DEFENDANT.)

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

Limitation Act XV of 1877, Sch. II, Art. 109—Mesne profits—Interest.

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877, Sch. II, Art. 109. An under-proprietor having been dispossessed by a manager of the superior estate, appointed under the Oudh Talukdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits.

Present: LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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Held, that a person who had not himself received the mesne profits having come into possession of the taluq upon its being released from management under the above Act, would not be chargeable with sums, which, as it was alleged, might have been received by way of mesne profits, but had not been *received in consequence of the manager's wilful default*; there being nothing to show that such taluqdar could be charged with anything more than was actually received by him. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not.

APPEAL from a decree (15th December 1881) of the Judicial Commissioner of Oudh, affirming a decree (19th May 1881) of the Additional Judge of the Faizabad District.

In the lifetime of the late Maharaja Man Singh, taluqdar of Mehdaona in the Faizabad District, the appellant held possession in sub-settlement right ("hakh puktadari") of villages Dewariya and others, forming part of the taluq. After the death of the Maharaja, and whilst the taluqdari estates were in charge of a manager appointed by the Chief Commissioner (under powers conferred on him by the "Oudh Taluqdars' Relief Act" XXIV of 1870), the appellant was dispossessed, in January 1871, of his undertenure, for possession whereof he sued in the Court of the Settlement Officer then carrying on settlement operations in the Faizabad District. Both the manager, and the Maharani Subahao Koer, the Maharaja's widow, on whose behalf as guardian of a minor, then regarded as the probable successor to the taluqdari estates, were being managed, were made defendants. No claim was made for mesne profits. A decree in favor of the plaintiff was made by the Settlement Officer in 1873, and having been reversed by the Commissioner on appeal was, in the end, restored by order of Her Majesty in Council, dated 26th June 1879; the plaintiff regaining possession of his holding on 25th September 1879.

The suit out of which this appeal arose was instituted on the 26th July 1880 by the present appellant against the "Mehdaona estate," to recover Rs. 5,764 on account of mesne profits from the date of his dispossession of his undertenure, *viz.*, the 20th January 1871 to the 1st September 1879, when he recovered possession. He alleged that as the suit for possession had been

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pending from 22nd May 1873 to 25th September 1879, he was unable to sue for mesne profits during that period, and that the cause of action had arisen at the latter date.

The taluqdari estate was, on the 1st October 1880, released from management, and was made over to the respondent, Kunwar Partab Narain Singh, to whom the estate had been adjudged by order of Her Majesty in Council, dated 18th August 1877. At the hearing the manager appointed under Act XXIV of 1870 did not appear, and on the 21st October 1880 this appellant petitioned that, as the estate had since the commencement of the suit been released from management, the respondent who had succeeded to it should be made defendant. This was ordered and the present respondent, appearing on summons as a defendant, the manager's name was struck off. Issues were fixed raising the question whether the plaintiff's suit for mesne profits, for the period anterior to the three years preceding the date of the institution of this suit, was barred by limitation; also as to the amount, and as to the costs of collecting rents; and whether any part of the realizable assets had not been received by reason of want of ordinary care on the part of the officials managing the estate under Act XXIV of 1870; and if so, to what amount, and whether, with reference to art. 3, s. 4, and ss. 17 and 23 of the above Act, the plaintiff was precluded from receiving more than the sum actually realised by the manager.

On the question of limitation the Judge held as follows:

"It appears to me that the law, as it at present stands, provided expressly for such cases where the law of limitation worked hardly on the parties, and that it was the duty of the plaintiff to have moved the Court to provide, in its decree, for the mesne profits from institution of suit till the delivery of possession (s. 211 of Act X of 1877), and that, not having done so, the plaintiff must accept such remedy as remains to him by law. That limitation is three years under Art. 109, Sch. II of the Limitation Act. I have carefully examined the body of the Act, and can find no section which excludes, in a suit for mesne profits, the period during which a suit for possession is pending. When a plaintiff, seeking mesne profits, has been ousted by a decree of Court, the law (Art. 109, Sch. II) does take the

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period elapsing between this legal but wrongful ouster, and the time when he succeeds in recovering possession, into consideration; but it makes no such exemption when the plaintiff has been otherwise ousted, as in this case."

And on the other issues his judgment was:

"Generally they may be said to be, what are the mesne profits which plaintiff can legally recover? The estate was during the whole period held under Act XXIV of 1870."

Defendant contends they are only so much as was actually collected in the books of the manager.

Mesne profits, as defined in s. 211 of the Civil Procedure Code, include more than actual realisations: they include such profits as the person in possession might with due diligence have received. The person in possession was the manager; and neither the present defendant, the present taluqdar, nor Trilokinath, who was, for a time, recognised as such, had any power to collect at all. He having, under Act XXIV of 1870, been debarred from making any alteration whatever, no want of due diligence can then be asserted against him personally.

Let us suppose, however, that there was negligence on the part of the management. Can defendant be held responsible for this? Looking at the terms of Act XXIV of 1870, I do not see that he can. He was, for the time, absolutely in the hands of the management. He could do nothing himself. He could not, under s. 23, obtain any redress against the management; and I am of opinion that plaintiff cannot recover as against the defendant.

The Judicial Commissioner upheld this judgment.

On this appeal,—

Mr. *J. F. Leith, Q.C.*, and Mr. *J. G. W. Sykes* appeared for the appellant.

Mr. *J. Graham, Q.C.*, and Mr. *J. T. Woodroffe* for the respondent.

For the appellant it was argued, first, that Art. 109 of Sch. II of Act XV of 1877 was inapplicable to this claim; secondly, that interest should have been allowed on such mesne profits as were recoverable. The present defendant had derived

benefit from the manager's having had the use of the mesne profits, because they had gone towards paying off the encumbrances on the estate, whereby it had been the sooner released from management under Act XXIV of 1870. Mesne profits being treated as sums due at the end of each year, interest thereon should have been calculated and allowed by way of damages. Reference was made to the subsequent enactment in Act XIV of 1882, ss. 211, 212; also to the interest Act XXXII of 1839.

Lord Blackburn having intimated that their Lordships would hear counsel for the respondent on the question of interest only—

It was argued for the respondent that it was within the discretion of the Court below to allow, or not to allow, interest. That discretion had been reasonably exercised. The respondent was no wrong-doer; and, as had been pointed out by the Additional Judge, had had no right to interfere.

In the argument on both sides reference was made to the following cases:

Chowdry Wahed Ali v. *Mussumat Jumaye* (1); *Nursing Roy* v. *Anderson* (2); *Protap Chander Borooah* v. *Ranee Surnomoyee* (3); *Madhub Chander Dutt* v. *Haradhun Paul Sootrodhur* (4); *Hurrodurga Chowdhran* v. *Sharrat Soondery Dabea* (5).

At the end of the arguments their Lordships' judgment was delivered by

SIR R. COUCH.—The facts of this case are that on the 22nd of May 1873 the plaintiff instituted a regular suit for possession of certain villages which are named in his plaint, and he obtained from the Court of the Settlement Officer a decree for sub-settlement right enjoyable for life. This decree was set aside by the first Court of Appeal, which was confirmed by the second Court. The plaintiff then appealed to Her Majesty in Council, and the decree in his favour was restored, so that he was declared

(1) 19 W. R., 87.
(2) 19 W. R., 125.
(3) 14 W. R., 151.
(4) 14 W. R., 294.
(5) I. L. R., 4 Calc, 675; I. L. R, 8 Calc., 332.

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entitled to recover possession of these villages, of which, in January 1871, the manager under the Oudh Talukdars' Relief Act, Act XXIV of 1870, had taken possession, and dispossessed the plaintiff. The present plaint is entitled "Kishnanand Misir, plaintiff, against the Mehdnona estate, defendant"; but it appears from the proceedings that a summons had been issued and served upon the manager of the estate. On the 21st of October 1880, pending the suit, the estate having been released by the Government, it was asked that a fresh summons should be issued. Although this summons does not appear on the proceedings, it would appear to have been a summons to the present respondent, who had been put in possession of the estate on its being released by the Government. His counsel appeared for him before the Judge on the 24th of November 1880. It may, therefore, be taken that he became the defendant in the suit. The plaint stated that the plaintiff, having thus regained possession under the decree of Her Majesty in council, was entitled to profits from the time of the dispossession, and during the pendency of the suit, and claimed mesne profits for nine years. No written statement was put in; but it appears from what was stated by the counsel for the defendant, when he appeared before the Judge, that the defence raised was that the suit was barred by the law of limitation, except as to the mesne profits for three years before the filing of the plaint, that is, before the 26th of July 1880. The first Court gave judgment for mesne profits for that period, and refused to allow the mesne profits for the previous time. That judgment was affirmed by the Judicial Commissioner. There was also a claim for interest, which was not allowed; both Courts saying that they did not think it reasonable to allow it.

Upon the appeal to Her Majesty in Council, which has now been heard, three questions were raised by the learned counsel for the appellant. First he contended that under the law of limitation he was entitled to a greater amount of mesne profits than had been allowed. Art. 109, Sch. II, of Act IV of 1877, which was the Limitation Act in force at the time when the suit was brought, was referred to. That article is in these terms: "For the profits of immoveable

property belonging to the plaintiff which shall have been wrongfully received by the defendant:—when the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession." The learned counsel sought to show that the dispossession was in the nature of a dispossession under a decree, because the Settlement Officer, or the manager acting under the Oudh Taluqdars' Relief Act, was acting, as it were, judicially; but when he found that, in the course of the argument, he could not support such a contention, he very properly abandoned it. The question of the law of limitation may be therefore considered as disposed of.

Another question raised was that the Courts had only allowed in the mesne profits for the three years the sums which had actually been received; and it was sought to charge the present defendant, who was not the person who received the mesne profits, but who had come into possession of the estate upon its being released by the Government, with sums which might have been received except for wilful default. It seems clear that, whatever case might have been made against the manager of the estate, there is nothing to show that the defendant could be charged with anything more than was actually received by him. That disposes of the second question.

The remaining question was whether interest ought to have been allowed upon the mesne profits for the three years. It is not necessary to say anything upon the question whether in the present state of the law, having regard to the provision in the last Procedure Act, in which there is an explanation of mesne profits, interest was allowable. In the present case the claim cannot be put higher than that it is a matter for the Court to determine, under the circumstances, whether it is reasonable to allow interest. There is no rule obliging the Court to allow the interest. It is a matter in the discretion of the Court, upon the consideration of the facts of the case. In this case both the Courts have considered that it was not reasonable that interest should be allowed; and there are no facts proved which would enable their Lordships to say that this is a wrong decision. Mr. Sykes argued that the interest ought to be allowed, because the present defendant, in getting possession of the estate at an

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earlier period than he might otherwise have done, has had the benefit of the use of the money. But there is nothing in the evidence to support this, or to show that it was the fact. The question must be left as it has been decided.

Consequently the decision of the lower Courts ought to be affirmed, and their Lordships will humbly advise Her Majesty to affirm it, and to dismiss the appeal; and the appellant will pay the costs of it.

Solicitors for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

THAKUR ISHRI SINGH (PLAINTIFF) *v.* THAKUR BALDEO SINGH (DEFENDANT.)

P. C.* 1884 *February* 8, 12.

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

The Oudh Estates' Act I of 1869—Will of a Taluqdar—Customary rule of succession in a family to impartible estate—Primogeniture.

However true it may be that, if there is absolutely nothing to guide to any other conclusion, impartible estate will descend in a family according to the rule of primogeniture, evidence may establish the usage in a family to be that, of several sons, one son, selected without reference to primogeniture, succeeds to the impartible estate. The eldest of three brothers had succeeded to impartible family estate, and to a taluq also impartible, which had been, during the lifetime of their father, entered in the first and second, but not in the third, of the lists prepared in conformity with s. 8 of the Oudh Estates' Act I of 1869. Before his death, this eldest brother made an instrument registered as a will, but using the word "tamlik," and stamped as a deed whereby he gave the taluq to the third brother, reserving an interest on the whole for his own life, and in half for any son that might be born to him with maintenance to his wife on her becoming a widow.

Held, with reference to the indicia of a testamentary character, there being provisions for contingencies which might not be ascertained till the death of the maker of the instrument, as compared with the technical matters attending it, that this instrument was not a transfer *inter vivos*, but was a will, and within the above Act.

Held, also, on the objection that a will or declaration made by the father had fixed a mode of descent which could not be altered by his successor, that s. 11 of the above Act, giving to every heir and legatee of a taluqdar power

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.