

an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation. In the case before us it has been found that the appellant, knowing that the respondent was building on her land, abstained from commencing proceedings for one or two years. The respondents have set up a title to the land which has been held to be manifestly false. They must have known they had no claim to it, and they could hardly have doubted it belonged to the zemindár. Had they thought it probable the zemindár would consent to their usurpation, they might have assured themselves on the point by applying to her before they expended a rupee on the land. Under the circumstances, we cannot hold that the delay in the institution of the suit is sufficient to deprive the appellant of her right to relief.

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The appeal is decreed with costs, and so much of the decrees of the Courts below as dismissed the claim to the plot in question in this appeal are reversed, and the claim is decreed.

ORIGINAL CIVIL.

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August 31.

(*Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and
Mr. Justice Oldfield.*)

CROSTHWAITE (PLAINTIFF) v. HAMILTON (DEFENDANT).

*Principal and Surety—Clerk of the Small Cause Court—Bond for Performance of
Duties of Office—Liability of Surety—Act XI. of 1865, ss. 45, 51—Small Cause
Court Judge—Principal Sudder Ameen (Subordinate Judge)—Jurisdiction.*

Held that, in permanently investing, under s. 51, Act XI. of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares, with the powers of a Principal Sudder Ameen (Subordinate Judge), the local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name from time to time, with the powers of a Principal Sudder Ameen, may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted. (Mussumat Bijee Kooer v. Rai Damodar Duss (1) impugned.)

The defendant and J. W. C., Clerk of the Small Cause Court at Allahabad, entered into a bond to the Judge of the Small Cause Court, as well as to his successors in office, in a certain sum as security for the true and faithful performance by J. W.

(1) H. C. B., N. W. P., 1873, p. 55.

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C. of his duties as Clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. *Held*, in a suit against the defendant as surety, that he was liable for misappropriation by J. W. C. of moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, and that, had the Small Cause Court Judge not been invested, at the time of the execution of the bond, with the powers of a Subordinate Judge, the defendant's liability in respect of such moneys would not have been thereby affected.

THIS suit was instituted in the Court of the Subordinate Judge of Allahabad, but was transferred to the High Court for trial by an order of Turner, O.C.J., on the application of the defendant. It was a suit on a security-bond executed on the 20th March, 1871, by the defendant and one J. W. Church, then Clerk of the Small Cause Court at Allahabad; and it was brought to recover from the defendant a sum of Rs. 2,000, being a portion of certain moneys alleged to have been received by the said Church in his official capacity, and to have been fraudulently misappropriated by him.

The plaint, as originally drawn, purported to be filed on behalf of the Secretary of State in Council. The material portion of the bond was as follows:—"Know all men by these presents that we, John Montgomery Hamilton, of Allahabad, land and householder, and John William Church, Clerk of the Court of Small Causes at Allahabad aforesaid, are hereby jointly held, and each of us severally firmly bound unto William Tyrrell, Esquire, of the Bengal Civil Service, and Judge of the Court of Small Causes aforesaid, as well as to his successors in office, during the continuance of these presents, in the sum of two thousand rupees lawful current money as security for the true and faithful performance by the said John William Church of his duties as Clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. Now the conditions of this bond are that, if owing to misappropriation or misapplication, but not owing to fire, robbery with force, or any cause beyond the control of the said John William Church, any deficiency shall arise in the moneys so to the John William Church entrusted, then we the said John Montgomery Hamilton and John William Church, and each of us separately, our respective heirs, executors, administrators, and assigns, are bound to make good the same to the extent

of the misappropriation or misapplication, provided the same does not exceed the amount herein stipulated, in which case no claim shall lie as under this instrument further than for the sum of two thousand rupees against each of us separately."

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On an objection taken by the defendant, it was held by the Court that the suit was not maintainable in the name of the Secretary of State, as he was not a party to the bond; and the plaint was thereupon amended, the name of Mr. Crosthwaite, the then Judge of the Court of Small Causes at Allahabad, being substituted as plaintiff. In his answer to the case on the merits the defendant admitted the execution of the bond and the misappropriation by Church, but contended that he was not liable for any money received by Church, except in his capacity as Clerk of the Small Cause Court; that after the execution of the bond (and not previously) the Judge of the Small Cause Court at Allahabad was invested with the powers of a Subordinate Judge, and that it was in the discharge of duties imposed upon him by the Judge acting in this new capacity that Church had received and misappropriated the moneys referred to, and that the plaintiff "misconceived the extent of his liability in suing him for sums received by Church acting as bailiff to the Subordinate Judge."

The issues to be tried were settled at the first hearing. The first of those issues referred to the institution of the suit by the Secretary of State in Council, and was disposed of in the manner above stated. The 2nd, 3rd, and 4th issues, the only others material for the purposes of this report, were as follows:—

- (2) At the time the bond in suit was executed by the defendant was the Judge of the Small Cause Court invested with the powers of a Subordinate Judge?
- (3) Was it a part of the duties of J. W. Church, as Clerk of the Small Cause Court, to receive moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Court of Small Causes in the exercise of his powers of Subordinate Judge?
- (4) If at the date the bond was executed the Small Cause Court Judge was not invested with the powers of a Subordinate Judge, does this circumstance effect the liability of the

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defendant in respect of sums received by the said J. W. Church as the proceeds of sales made in execution of decrees passed by the Judge in the exercise of his powers as a Subordinate Judge?

Certain evidence was adduced by the plaintiff, but the facts of the case, in so far as they are material for the purposes of this report, may be taken to have been undisputed. They were as follows:—On the 6th June, 1866, the Government of the North-Western Provinces issued the following notification:—“Under section 51 of Act XI. of 1865, His Honor the Lieutenant-Governor has been pleased to permanently invest the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares, with the powers of a Principal Sudder Ameen, to be exercised within the limits of their respective jurisdictions, subject to the orders of the Court of Sudder Dewanny Adawlut, North-Western Provinces, in respect to the reception of original regular suits and regular appeals.”

In the year 1869 Mr. J. W. Church was appointed Clerk of the Court by Mr. E. T. Atkinson, who was then officiating as Judge of the Small Cause Court, with the powers of a Principal Sudder Ameen, or Subordinate Judge, under s. 51, Act XI. of 1865. On his original appointment he had executed a mortgage of a bungalow belonging to him as security for the faithful discharge of his duties. The bungalow having been removed by the order of the Collector, he and the defendant executed to Mr. Tyrrell, who had meantime succeeded Mr. Atkinson, the bond forming the basis of the suit. It did not appear that Mr. Tyrrell had been invested with the powers of a Principal Sudder Ameen, or Subordinate Judge, otherwise than under the notification above set out; but Mr. Rawlins who was officiating as Judge of the Small Cause Court at the time of the misappropriation had been so invested by a special notification.

There had not been at any time any separate office or establishment for the purposes of cases tried by the Judge of the Small Cause Court as Subordinate Judge. The only office held by Mr. J. W. Church was that of the Clerk of the Small Cause Court, and as the Clerk of that Court, from the date of his appointment to that on which he absconded, he continued to perform the duties of the Clerk of the Court in respect of all cases, whether they were

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tried by the Judge on the Small Cause Court, or on the Subordinate Judge side. No attempt had ever been made to distinguish his liability in respect of one class of cases from his liability in respect of the other. The deposits had in each been entered by him in the cash-book and deposit-register, that of the Small Cause Court, and had been remitted to the treasury to be there credited indiscriminately to Small Cause Court deposits. On the 2nd May, 1865, the Sudder Court sanctioned the employment of the Clerk of the Small Cause Court in effecting sales of moveable property within the local jurisdiction of the Court. Under this sanction the Clerk continued to hold such sales in execution of decrees, whether they had been given on the Small Cause Court, or on the Subordinate Judge side of the Court, until a new bailiff was appointed in 1869, when Mr. Atkinson, the then Judge of the Court, in consideration of the smallness of his pay, allowed the bailiff to sell moveable property in execution on the Small Cause Court side and to enjoy the fees. The Clerk of the Court continued to sell all property and enjoy the sale-fees on the Subordinate Judge only, until, on a representation made by Mr. J. W. Church, Mr. Tyrrell recorded on the 6th April, 1871, seventeen days after the execution of the bond in suit, that "the fees in *all* sales properly go to the Clerk of the Court, and unless Mr. Church chooses of his own accord to part with any portion, they must be his." This rule continued in operation until the following August, when Mr. Atkinson, who was then again officiating, drew up new rules which laid down that "in all Small Cause Court attachments the bailiff will attach and sell, and retain the fees as before, and in all Subordinate Judge cases the bailiff will attach, but the Clerk will sell and retain the fees."

The money misappropriated by Church was part of the proceeds of a sale in execution of decrees on the Subordinate Judge side of the Court conducted under these new rules.

Mr. Conlan (with him Mr. Leach) for the defendant.—The language of the bond must have the ordinary meaning given to it. The contract was made with Mr. Tyrrell as Judge of the Small Cause Court. Supposing Mr. Tyrrell to have been invested with the powers of a Magistrate—s. 51, Act XI. of 1865—when the bond was executed, and the Clerk of the Small Cause Court

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embezzled moneys realized by fines. Could such moneys have been recovered under the bond? If I give an undertaking for the Clerk of the Small Cause Court for the performance of his duties as such, I do not see why I should be liable for his defalcations on the Magistrate's or Subordinate Judge's side of that Court. What other language could have been used than that in the bond to limit the liability of the surety? The liability might have been extended by the use of the words "and Subordinate Judge." The language, being limited, should not be extended so as to include every office with which the Clerk of the Small Cause Court might be invested. The amount of the security demanded shows that the bond referred to an office in which the responsibility was small. If it had been intended to secure loss on both sides of the Court, a larger security would have been demanded. (OLDFIELD, J.—Was the Clerk in charge of the moneys belonging to the Subordinate Judge side of the Court when the bond was executed?). There is no evidence. (TURNER, Offg. C. J.—There is only one office. Mr. Tyrrell was not a Subordinate Judge, but the Judge of the Small Cause Court, with the powers of a Subordinate Judge). He was not legally invested under the Government Notification, dated the 6th June, 1866, with the powers of a Subordinate Judge. In each case there must be an investment—*Mussumat Bijee Kooer v. Rai Damodar Dass* (1). Assuming that Mr. Tyrrell was Judge of the Small Cause Court only when the bond was executed, and was invested with the powers of a Subordinate Judge subsequently to such execution, the defendant could have come forward and said that he was not to be considered responsible for Mr. Church as Clerk of the Subordinate Judge. There is nothing to show that Mr. Church was exercising the duties of the Clerk of the Subordinate Judge when the bond was executed. If his duties were subsequently enlarged by Mr. Rawlins, the defendant is not liable for the faithful performance of such duties. The learned counsel referred to *North-Western Railway Company v. Whinray* (2): *Pybus v. Gibb* (3): *Franks v. Edwards* (4): *Anderson v. Thornton* (5.)

(1) H. C. R., N. W. P., 1873, p. 55. (2) 23 L. J. Exch. 261; 10 Exch. 77; C. L. R. 1237. (3) 6 Kl. and Bl. 902; 3 Jur., N. S. 315; 26 L. J. Q. B. 41. (4) 8 Exch. 214; 22 L. J. Exch. 42. (5) 2 G. & D. 502; 3 Q. B. 271; 6 Jur. 1102.

The *Government Advocate* (Mr. Warner) for the plaintiff, in reply.—It is the duty of the Clerk of the Small Cause Court to receive all moneys payable into the Court—s. 45, Act XI. of 1865. Although a Judge of a Small Cause Court may be invested with the powers of a Subordinate Judge, there is only one tribunal, viz., the Small Cause Court. The learned counsel cited *The Guardians of the Portsea Island Union v. Whallier* (1).

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The judgment of the Court in so far as it related to the issues above set out was as follows :—

The first issue had reference to the institution of the suit on behalf of the Secretary of State for India in Council. That personage, it was argued, was not a party to the bond or interested therein. The Government Advocate admitted the force of the argument, and was allowed to amend the plaint by substituting the present Judge of the Small Cause Court, Mr. Crosthwaite, as plaintiff. By this amendment of the plaint, the objection taken to the competency of the plaintiff to maintain the suit has been removed.

The Government Notification of the 6th June, 1866, *prima facie* determines the second issue in the affirmative. It is argued that the *permanent* investiture of the Judges of the Small Cause Courts of Agra, Benares, and Allahabad, *ex officio*, with the powers of a Principal Sudder Ameen by a single order was not within the scope or in accordance with the spirit and intention of s. 51, Act XI. of 1865, which provides that “*whenever* the state of business in any Court of Small Causes, the Judge of which shall be the Judge of such Court only, is not sufficient to occupy his time fully, the Local Government may invest him within such limits as it shall from time to time appoint, in addition to his powers as such Judge, with the powers of a Principal Sudder Ameen.” But we cannot hold that, because the order is open to some criticism on the ground urged, the Judges thereby invested with the powers of a Principal Sudder Ameen had no legal jurisdiction to exercise the powers so conferred upon them, and that all acts done by them in that capacity are null for want of such jurisdiction. Without

(1) 29 L. J. Q. B. 160; 2 Kl. and Kl. 755; 6 Jur., N. S. 887; 8 W. R. 492;
 2 L. T., N. S. 211.

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meaning any disrespect to the learned Judges who passed the decision dated the 27th February, 1873, in the regular appeal case No. 135 of 1872, *Mussumat Bijee Kooer*, appellant, v. *Rai Damodur Dass*, respondent, (1), to which our attention has been drawn, we are unable to concur in the conclusion at which they arrived on this point. The Government, it may be presumed, had reason to believe that the Judges of the three Small Cause Courts mentioned in the order had generally leisure to dispose of more business than was supplied by the small causes instituted in their Courts; and on the strength of this belief, in the exercise of the discretion which the law has given to it, passed the order of the 6th June, 1866. If this belief was well founded, or if it was entertained *bonâ fide*, we should not be justified in declaring the Government to have exceeded its power, or to have contravened the law, although the occasional investiture of Small Cause Court Judges by name from time to time with the powers of a Principal Sudder Ameen may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted. We are, therefore, of opinion that, by the Government order of the 6th June, 1866, the powers of a Principal Sudder Ameen were legally conferred on Mr. Tyrrell, who was officiating as Small Cause Court Judge on the 20th March, 1871, the date of the execution of the bond in suit.

We proceed to the third issue. The evidence of Mr. Tyrrell proves that, as a matter of fact, "it was a part of Mr. Church's duties, as Clerk of the Small Cause Court, to receive moneys realized under decrees or processes issued by the Judge in the exercise of his powers as Subordinate Judge." It could not well be otherwise; for "there was no separate establishment to carry out the orders of the Judge exercising those powers." Under this head we may notice the fallacy of the second plea set out in the defendant's written statement, to the effect that, "by the terms of the bond on which the suit is based, he is not liable for any money received by the Clerk of the Court of Small Causes, J. W. Church, except in his capacity as such Clerk and within the scope of such office; and the plaintiff has misconceived the extent of defendant's liability in suing him for sums received

(1) H. C. R., N.-W. P., 1873, p. 55.

by the said Clerk acting as názir, or bailiff, of the Subordinate Judge." That fallacy consists in supposing that the grant of the powers of a Principal Sudder Ameen, or Subordinate Judge, to the Judge of the Small Cause Court constituted him a Subordinate Judge, and created a Court distinct from that of the Small Cause Court. This supposition is altogether erroneous. The Judge of the Small Cause Court when exercising the powers of a Subordinate Judge is still the Judge of the Small Cause Court; decrees passed by him in the exercise of those powers are decrees of the Small Cause Court; moneys paid into Court under such decrees are paid into the Small Cause Court, and under s. 45, Act XI. of 1865, it is the duty of the Clerk of the Court to take charge and keep an account of them. If it was Mr. Church's duty, as Clerk of the Small Cause Court, to receive moneys paid or realized under decrees by the Judge of that Court in the exercise of the powers of a Subordinate Judge, it follows that the defendant, as Mr. Church's security, is liable for the misappropriation by his client of any of those moneys. A Munsiff is sometimes invested with the powers of a Small Cause Court within certain territorial and pecuniary limits. The decrees passed by him in the exercise of such powers are decrees of the Munsiff's Court not less than decrees passed by him in the exercise of his ordinary jurisdiction. It is equally the duty of the názir of his Court to receive moneys paid or realized under all decrees, whether passed by the Munsiff in the exercise of the one or the other jurisdiction; and the surety of the názir is just as much responsible for his client's misappropriation of moneys paid or realized under decrees passed in the exercise of the Small Cause Court jurisdiction as of moneys paid or realized in the exercise of the ordinary jurisdiction. This was not disputed by the defendant's advocate, but he contended that the case of a Munsiff invested with Small Cause Court powers was essentially different from the case of a Small Cause Court Judge invested with the powers of a Subordinate Judge. The only difference is that the grant of the powers of a Subordinate Judge to a Small Cause Court Judge gives him a larger jurisdiction than he possessed as Small Cause Court Judge; whereas the investiture of a Munsiff with Small Cause Court powers only gives him a peculiar kind of jurisdiction in some classes of causes which he had before jurisdiction to try. This difference does not in the least

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degree affect what is the matter in question, *viz.*, the extent of the duty of the Clerk of the Court, and of the *názir*, and of the liability of their sureties.

The third issue is, therefore, decided in the plaintiff's favour.

Our decision on the second issue relieves us from the obligation of deciding the fourth ; but we have no hesitation in expressing our opinion that, had the Small Cause Court Judge, at the date of the execution of the bond in suit, not been invested with the powers of a Subordinate Judge, the Clerk of his Court would, nevertheless, have been bound to receive, take charge, and keep account of any moneys paid or realized under decrees passed by any of his successors in office invested with such powers, and that the Clerk's surety would have been liable for his client's misappropriation of any of those moneys. This, indeed, follows from what we have already said in disposing of the third issue. The Clerk's duty is to take charge of all moneys paid into the Small Cause Court, and this duty remains the same whether the Judge of the Small Cause Court only exercise his ordinary jurisdiction, or be invested with additional powers. The grant and exercise of such powers is an accident attached by the law to the office of a Small Cause Court Judge ; and the Clerk of his Court is as much bound to perform the accidental as the ordinary duties of his appointment, and the surety's pecuniary liability is co-ordinate with that of the Clerk. The defendant would not, therefore, have been able to repudiate his liability in respect of moneys paid to, or realized by, the Clerk in respect of decrees passed by the recent Judges of the Small Cause Court at Allahabad in the exercise of the powers vested in them of a Subordinate Judge, even had it appeared that, at the time when he executed the bond, Mr. Tyrrell had not been invested, or not legally invested, with those powers. The circumstance that, at that time, and for some years before, the Judge of the Small Cause Court has exercised those powers, and the Clerk of his Court had, as a part of his duty, received all moneys paid or realized under decrees passed in the exercise thereof, precludes the defendant from pleading with plausibility, and us from believing, that he executed the bond in ignorance of the Clerk's duty and liability, and under the impression that he was only undertaking a risk in respect of moneys paid or realized under decrees

passed by the Small Cause Court Judge in the exercise of his ordinary jurisdiction. The description of Mr. Church in the bond as the Clerk of the Small Cause Court and of Mr. Tyrrell as the Judge of that Court is strictly accurate, and not at all incomplete by reason of the absence of any mention of the powers of a Subordinate Judge vested in the Judge of the Small Cause Court. The plea that, in reference to that description, the defendant's liability was limited to moneys paid to, or realized by, Mr. Church under decrees passed by the Judge in the exercise of his ordinary jurisdiction is not sustainable.

Decree for plaintiff with costs.

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BEFORE A FULL BENCH.

1878.
August 5.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

JIWAN SINGH (JUDGMENT-DEBTOR) v. SARNAM SINGH (DECREE-HOLDER)*
Execution of Decree—Limitation—Act IX of 1871, s. 15.

Held (STUART, C. J., dissenting) that applications for execution of decrees are not "suits" within the meaning of s. 15, Act IX of 1871 (1).

ON appeal by the judgment-debtor against the order of the first Court disallowing his objection that the execution of the decree was barred by limitation, the question arose, whether, in computing the period of limitation, the time during which the decree-holder was endeavouring to obtain execution in a Court without jurisdiction should be excluded or not, under s. 15, Act IX. of 1871. The lower appellate Court held that the provisions of the section applied to applications for the execution of decrees, relying on a ruling of the High Court, dated the 1st May, 1874, in which Stuart, C. J. and Oldfield, J. ruled that the provisions of s. 14, Act XIV. of 1859,

(1) So held by Jackson, J. (McDonell, J. dissenting) in *Banee Kant Ghose v. Haran Kisto Ghose*, 24 W. R. 405—*contra* by Birch and McDonell, JJ, in *Rajah Promotho Nath Roy v. Watson & Co.*, 24 W. R. 303.

* Miscellaneous Special Appeal, No. 79 of 1874, from an order of the Judge of Ghazipur, dated the 3rd July, 1874, affirming an order of the Subordinate Judge, dated the 17th January, 1874.