

In the present case, Azim Khan, being a sawár in the Scinde Horse, his duties no doubt oblige his presence with his regiment for the greater part of his service, but the quarters of a regiment, always liable to be changed, are the temporary and not the permanent residence of the soldier ; Azim Khan's family residence, admittedly within the jurisdiction of the Court, and the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of the law.

1875.
July 20.

We reverse the decree of the lower appellate Court and remand the case under s. 351, Act VIII. of 1859, for trial of the appeal. Costs to follow the result.

BEFORE A FULL BENCH.

1875.
August 22.

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

PARMESHAR RAI AND OTHERS (DEFENDANTS) v. BISHESHAR SINGH AND OTHERS (PLAINTIFFS)*.

Hindú Law.—Inheritance.—Act I. of 1872, s. 108.—Act XVIII. of 1872, s. 9.—Missing Person.—Presumption of Death—Burden of Proof.—Act VI. of 1871, s. 24.

THE reversioners next after J. to the estate of S. deceased sued to avoid an alienation of S.'s estate affecting their reversionary right made by his widow. J. had not been heard of for eight or nine years, and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of s. 108, Act I. of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindú law of succession prescribed when a person is missing and not dead.

THE plaintiffs sued, as being reversioners to Salig Rai, deceased, the next heir, Janki Rai, being missing, for the cancelment of a mortgage of the real estate of Salig Rai made in favor of Fakir Rai, Lachmin Rai, and Parmeshar Rai, defendants, by his widow, Musammat Ablaki, defendant, in so far as the mortgage affected their reversionary right, and for a declaration of that right. The mortgagees, defendants, equally with the plaintiffs, were reversioners to Salig Rai. The defendants denied that Janki Rai was

* Special Appeal, No. 187 of 1875, from a decree of the Judge of Benares, dated the 8th December, 1874, modifying a decree of the Munsif. dated the 14th August, 1874.

1875.
August 22.

missing, alleging that he was in the Mauritius, where he had been for the last eight or nine years; and contended therefore that the plaintiffs were not competent to bring the suit, the Hindú law requiring that a person should be missing for 12 years before he could be held to be civilly dead. They admitted that Janki Rai had not been heard of for eight or nine years and that there was no proof of his being alive.

The Court of first instance held, and the lower appellate Court concurred with it, that Janki Rai must be regarded as civilly dead, the defendants having failed to rebut the presumption against them by s. 108, Act I. of 1872.

On special appeal by the defendants it was contended by them that Act I. of 1872 did not affect the Hindú law, and that the plaintiffs could not bring their suit before the expiration of 12 years from the date that Janki Rai was last heard of.

The Court (Stuart, C. J. and Spankie, J.) referred the following question to the Full Bench :—

“Is the question whether a man be alive or dead one simply of evidence, not necessarily forming a portion of the Hindú and Muhammadan law of succession and inheritance, inasmuch as the order of succession, devolution of property, are not really affected by its determination, and therefore its determination should follow the rules of evidence in Act I. of 1872; or is it a question which can only be answered in accordance with the presumption allowed to be drawn by the Hindú and Muhammadan law of succession and inheritance, and therefore so much a portion of these laws, that the Courts are bound to follow the provisions of s. 24, Act VI. of 1871, in dealing with it?”

The reference was accompanied with the following remarks :—

§. 107 of the Evidence Act provides that, when the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. §. 108, as amended by s. 9, Act XVIII. of 1872, is as follows :—“Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have

heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

1875.
August 22.

The mortgagor defendant, especially, and the other defendants, equally with plaintiffs, are those who would have naturally heard of Janki Rai had he been alive, and the defendants are the persons who affirm that he is alive. The onus therefore has been laid on the right party. One thing is quite certain, that the question whether Janki Rai is alive or dead is the question which must be answered prior to the determination of the suit on its merits. When the question is whether a man is alive or dead, what is the effect of these two sections? Do they establish one uniform rule in all cases, or are the Courts bound to follow what has been held to be the Hindú and Muhammadan law on the point?

In the first report on the draft Bill the Committee remarks :—
“ We have, however, admitted one or two such presumptions to a place in the Code, as in the absence of an express rule the Judges might feel embarrassed. These are the presumption of death from seven years disappearance, and the presumption of partnership.”

The *Senior Government Pleader* (*Lala Judáa Parshád*) and *Munshi Hanumán Parshád* for the appellants.

Lala Lalta Parshád for the respondents.

The following opinions were delivered :—

TURNER, OFFG. C. J. and PEARSON, J.—The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance. Were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindú law. But they are claiming nothing belonging to him. He is the next heir or reversioner to one Salig Rai, deceased, whose estate is retained during her lifetime by his widow Musammat Ablaki; and this suit is brought by the plaintiffs, as next reversioners after the aforesaid Janki Rai, in consequence of his absence, for the avoidance of a deed of mortgage executed by Musammat Ablaki to the detriment of their reversionary rights. Under the circumstances, there seems to be no reason why the provisions of s. 108 of the Evidence Act should not be applicable. The death of Janki Rai may be

1875.
August 22.

presumed for the purposes of this suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the law of succession prescribed when a person is missing and not dead.

SPANKIE, J.—It appears to me that the question whether a man be alive or dead is one simply of evidence, and has no immediate connection with the devolution of property under the Hindú or Muhammadan law, and its determination should follow the rules of evidence in Act I. of 1872. When a person is claiming the estate of a missing person, he could not do so, if a Hindú, until after the expiration of 12 years from the date of that person's forsaking his family, and being lost sight of, or if a Muhammadan, until ninety years had passed from the date of the missing person's birth. The period at which the estate of a missing person may be claimed under the Hindú or Muhammadan law seems to be unaffected by the sections of the new Act referred to.

OLDFIELD, J.—Under Hindú law the property of a missing person will not vest in the next heir until the expiry of at least 12 years from the date that the missing person forsook the family, supposing that during the interval no intelligence of him has been received, and if the present case were one in which the plaintiff sues to succeed to the property of a missing person, it may be that we should apply the Hindú law as to the presumption of death, with reference to s. 24, Act VI. of 1871.

But the case before us is not of this character, and there is no question in respect of the devolution of property of a missing person. The plaintiff sues to protect property in the hands of a widow from alleged illegal alienations made by her, and ordinarily the next heir should sue, but in this case the missing person is the next heir, and plaintiff asks to be allowed to sue, and on the ground that the next heir is missing and presumably dead.

The decision will determine no right of inheritance or succession, so as to make Hindú law necessarily applicable, and in such a case, the general rules of evidence under the Evidence Act as to the presumption of death and consequent burden of proof may, in my opinion, properly apply to this case.