

1880
 IMPRESS OF
 INDIA
 NAWAB.

sufficiency of any evidence before the Magistrate, though I would remark in passing, that the mere fact of a previous conviction or of previous convictions of offences involving dishonesty, is not sufficient to justify the putting in force the powers of s. 506, unless there is some additional evidence to show, that the person complained against has done some act or resumed avocations, that indicate upon his part an intention to return to his former course of life and to pursue a career of preying on the community. The greatest thief is entitled to a *locus penitentie*, when he has served out his punishment; it is only when he outrages that grace which is extended to him and thereby shows he is unreformed, that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for society that he will not commit further depredations upon it. The order of the Magistrate of the 7th February last must be quashed. But upon a consideration of all the circumstances of the case I think it right to direct that this record be forwarded to the Magistrate of the District for his consideration, in order that he may, should it appear to him proper to do so, himself take steps under s. 491 of the Criminal Procedure Code to call upon the applicants to find sureties of the peace in such amount as to him may appear adequate.

APPELLATE CIVIL.

1880
 April 11.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

GUMANI (PLAINTIFF) v. RAM PADARATH LAL AND OTHERS (DEFENDANTS).*

Act X. of 1877 (Civil Procedure Code), ss. 13, 43—Act XII. of 1879, s. 7—Bond for the payment of money hypothecating property as collateral security for such payment—Omission of claim.

The obligee of a bond for the payment of money, hypothecating immovable property as collateral security for such payment, sued for the moneys due on the bond, but omitted to claim the enforcement of his lien, and obtained a decree only for the payment of the amount of the bond-debt. He subsequently sued to enforce his lien. *Held* that, under s. 43 of Act X. of 1877 as amended by s. 7 of Act XII. of 1879, he could not be permitted to sue to enforce his lien.

THE defendant Ram Padarath Lal, on the 1st May, 1875, gave the plaintiff a bond for the payment of Rs. 130, in which he hypo-

* Second Appeal, No. 1219 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 9th July, 1879, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 7th May, 1879.

theated his four-pie share of a mauza called Khoria as collateral security for the payment of that amount and interest. On the 21st August, 1876, his four-pie share of mauza Khoria was put up for sale in execution of a money-decree which the other defendants had obtained against him on the 16th December, 1874, and was purchased by the other defendants. Subsequently the plaintiff sued the defendant Ram Padarath Lal on her bond, asking for a money-decree only, which she obtained on the 11th December, 1876. She now sued to recover the amount of this decree, Rs. 189-3-9, by the sale of the property hypothecated in the bond. Both the lower Courts held that the suit was barred by the provisions of s. 13 of Act X. of 1877, the lower appellate Court further holding that it was also barred by the provisions of s. 43 of that Act.

On appeal by the plaintiff to the High Court it was contended that the suit was not barred by either of those sections.

Pandit *Ajudhia Nath* and *Lala Lalta Prasad*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Munshi Sukh Ram*, for the respondents.

The judgment of the Court (STUART, C. J. and STRAIGHT, J.) was delivered by

STRAIGHT, J.—S. 43 of Act X. 1877, as amended by Act XII. of 1879, is more apposite to the present case than s. 13. An obligation and a collateral security for its performance constitute the cause of action, and a plaintiff cannot be permitted to sue first in respect of the money-debt due on a bond hypothecating property, and afterwards, in respect of the same cause of action, for enforcement of lien. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

ASHGAR ALI SHAH (PLAINTIFF) v. JHANDA MAL AND ANOTHER
(DEFENDANTS)*

Determination of title or of proprietary right—Act XIX of 1873 (N. W. P. Land-Revenue Act), ss. 113, 114—Res judicata.

In the case of an objection to a partition raising a question of title, it is only when the Collector or Assistant Collector records a proceeding declaring the

* Second Appeal, No. 1213 of 1879, from a decree of R. M. King, Esq., Judge of Meerut, dated the 24th June, 1879, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 25th February, 1879.

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GEMANI
" RAMPADA-
BATH LAL.

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April 15.