

sion. I cannot for a moment hold that, under the circumstances disclosed, he was deprived of self-control by grave and sudden provocation, for (to quote a passage cited from *Oneby's Case*, 2 Lord Raymond, 1485, in "Russell on Crimes and Misdemeanours," Vol. I, 4th ed. p. 725) "in cases of this kind the immediate object of the inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty." Such being the view I take of the case here, the conviction of the accused must be altered to one of murder under s. 302 of the Penal Code, and in accordance with s. 439 of the Criminal Procedure Code, the sentence will also be altered to that provided for the offence, namely, transportation for life. I think, however, that, having regard to the facts, and making allowance for the peculiarities of native character in reference to the misconduct of women of their families, especially among the less advanced and more ignorant residents of the rural districts, I may properly recommend the Government to commute the sentence to fourteen years' transportation.

MAHMOOD, J., concurred.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HARDEO DAS (APPELLANT) v. ZAMAN KHAN (RESPONDENT).*

Execution of decree—Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss. 253, 545, 546.

S. 253 of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

* Second Appeal No. 58 of 1886, from an order of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 15th April, 1886, reversing an order of Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 6th January, 1886.

1886

QUEEN-
EMPRESS
v.
LOCKAN.

1886

August 3.

1886

HARDEO DAS
v.
ZAMAN
KHAN.

The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety.

Held that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.

THE facts of this case are stated in the judgment of the Court.

Munshi *Kashi Prasad*, for the appellant.

Shah *Asad Ali*, for the respondent.

OLDFIELD, J.—One Dwarka Prasad obtained a decree against the respondent Muhammad Sahib Zaman Khan, and it was affirmed in appeal by the District Court on the 10th December, 1881. After this he took out execution to recover costs awarded. The respondent applied to stay execution on the ground that he proposed to file an appeal to the High Court.

Execution was not, however, stayed and the costs were deposited by the respondent and paid to Dwarka Prasad, and the appellant gave a bond, by which he undertook to refund the amount to the respondent, in the event of the latter succeeding in his appeal to the High Court and of Dwarka Prasad failing to repay to him the amount. The respondent subsequently filed an appeal to the High Court and was successful; and he then applied in the execution department to recover the sum from the appellant, and his application was disallowed by the Court of first instance, but has been allowed in appeal by the Judge. The appellant appeals to this Court on the ground that the Court executing the decree had no jurisdiction in the matter. I think the plea is valid. Ss. 545 and 546, and 253, Civil Procedure Code, have been referred to as enabling the Court to deal with the respondent's application, but they do not appear to be applicable. S. 545, Civil Procedure Code, contemplates proceedings to stay execution of decree on security being given by the applicant, and s. 546 is a provision for staying execution when an appeal is pending, but the security given in the case before us was not made under circumstances to which the provisions of that section are applicable.

S. 253 provides that whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. But this section contemplates that there shall be a suit pending at the time security is given for its performance, and would not seem to apply to a case like this, where no suit can be said to have been pending, as the litigation in the Court of first instance and Court of appeal had ended, and no second appeal had been instituted in the High Court when security was given.

1886

 HARDEO DAS
 v.
 ZAMAN
 KUAN.

I do not therefore think that s. 253 will apply so as to allow the decree of the High Court to be executed against the surety.

I would decree the appeal, and set aside the order of the Court below with costs, and restore the order of the Court of first instance.

MAHMOOD, J.—I agree.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

ACHOBANDIL KUARI (DEFENDANT) v. MAHABIR PRASAD
 (PLAINTIFF).*

1886

 August 8.

Vendor and purchaser—Non-payment of consideration money—Burden of proof.

In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

Held that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

* Second Appeal No. 1509 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 3rd August, 1885, modifying a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 26th December, 1884.