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into the latter or subsidiary part of the order of reference. I am unable therefore to follow my learned brother Mahmood into his discussion of this Court's judgments given in cases not the subject of this reference. But perhaps it may not be irregular to remark, with reference only to the literary aspect of his criticisms on the phraseology used by Sir Comer Petheram and me in those judgments, that when we said that the Court in question "had not jurisdiction" to follow the procedure we disapproved, and therefore its proceedings were "null," we meant and said the same as my learned brother Mahmood recently did when he annulled the trial of a first appeal, and remanded the case for new trial, because the Judge, having unquestionable jurisdiction in the case, had omitted to formulate his judgment in the mode required by s. 574 of the Civil Procedure Code [*Mahadeo Prasad* v. *Sarju Prasad* (1)]. The proceedings were treated as null and void, the judgment and decree were pronounced "illegal," and a new trial in first appeal was ordered. We did the same in our cases and in similar language, but for different irregularities. In all the cases alike—in those remanded by us and in that remanded by my learned brother Mahmood—the Courts had unquestionable jurisdiction, but they had not jurisdiction, that is to say power, in the popular use of the phrase, to try them and decide them as they did.

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May 22.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DHARUP NATH (DEFENDANT) *v.* GOBIND SARAN (PLAINTIFF).*

GOBIND SARAN (PLAINTIFF) *v.* DHARUP NATH (DEFENDANT).*

Hindu Law—Daughter's son—Missing person—Act I of 1872 (*Evidence Act*), *ss.* 107, 108.

Ss. 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.

* Second Appeals Nos. 1622 and 1750 of 1885, from decrees of R. G. Leeds, Esq., District Judge of Gorakhpur, dated the 26th May, 1885, modifying decrees of Munshi Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 22nd December, 1884.

(1) Weekly Notes, 1886, p. 171.

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In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son.

Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it.

Held that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 108 of the Evidence Act; that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed.

Mazhar Ali v. *Budh Singh* (1), *Janmajay Mazumdar* v. *Keshab Lal Ghose* (2), *Guru Das Nag* v. *Matilal Nag* (3), and *Parmeshar Rai* v. *Bisheshar Singh* (4) referred to.

ON the 10th October, 1882, Musammat Sheo Kuaria, the surviving widow of one Hanuman Dat, died. On the 24th December, 1882, Gopal Saran, the daughter's son of Hanuman Dat, sold certain landed property to the plaintiff, to which he alleged himself to be entitled as the sole heir of Hanuman Dat. The plaintiff's claim to possession of the property was resisted by Dharup Nath, the son of Gobind Saran, Gopal Saran's brother, and daughter's son of Hanuman Dat, and the plaintiff accordingly sued him for possession. The defendant defended the suit as to a portion of the property, on the ground that it had, on the death of Sheo Kuaria, descended on his father and Gopal Saran, the plaintiff's vendor, jointly, and Gopal Saran was not competent to alienate it; and as to the rest, that it formed no portion of Hanuman Dat's estate, and Gopal Saran had no title to it.

(1) I. L. R., 7 All. 297.
(2) 2 B. L. R., A. C., 134.
(3) 6 B. L. R., Ap. 16.
(4) I. L. R., 1 All. 53.

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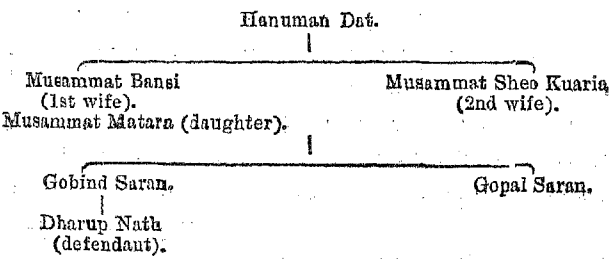
It appeared that Gobind Saran, the defendant's father, was missing. The plaintiff alleged that Gobind Saran had not been heard of for seven years prior to the death of Sheo Kuaria, and contended that it must be presumed that at that time he was dead. The defendant alleged that his father had been heard of within that period, and contended that the presumption relied on by the plaintiff did not arise.

The Court of first instance (Subordinate Judge of Gorakhpur) held that it was proved that the defendant's father had not been heard of for seven years prior to the death of Sheo Kuaria, and it must be presumed that he was dead at the date of her decease; and it gave the plaintiff a decree as claimed. On appeal by the defendant the lower appellate Court (District Judge of Gorakhpur) affirmed the decree of the Court of first instance, except as regards the property which the defendant contended did not form part of the estate of Hanuman Dat. As to this property the Court held that it did not form part of that estate, and dismissed the plaintiff's claim. The plaintiff and defendant both preferred second appeals to the High Court, the defendant's appeal being numbered 1622, and the plaintiff's 1750, of 1885.

Mr. *J. Simeon*, for the defendant.

Lala *Lalta Prasad*, for the plaintiff.

MAHMOOD, J.—These two connected appeals, numbered 1622 and 1750 of 1885, can be disposed of together, as they arise out of one and the same decree and suit; and the following pedigree shows the relative position of persons whose rights have to be considered in this case:—



Hanuman Dat had two wives, one of whom was Musammat Bansi, who gave birth to Matara, a daughter, who had two sons,

Gobind Saran and Gopal Saran. Gobind Saran had a son named Dharup Nath, who is the defendant in the suit.

The property in suit to which S. A. No. 1622 relates has been found to have formed the estate of Hanuman Dat, and upon his death without a son, it would, by the usual course of Hindu law, devolve upon his two widows, who would take together as a single heir with the right of survivorship, and no part of the estate would pass to any more distant relation till both were dead. This is shown by Mr. Mayne in s. 468 (2nd ed.) of his work on Hindu law, where he has cited numerous authorities in support of the proposition. And it has been found in this case that, after the death of Musammat Bansi, the other widow, Musammat Sheo Kuaria, came into sole possession of the property, and continued as such till 10th October, 1882, when she died. The main question in this case is—On whom did the property devolve upon the death of Musammat Sheo Kuaria?

It is a principle of Hindu law, as Mr. Mayne has stated in s. 422 (2nd ed.) of his work, that "the right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot, under any circumstances, remain in abeyance. And the rightful heir is the person who is himself the next of kin at that time. No one can claim through or under any other person who has not himself taken, nor is he disentitled because his ancestor could not have claimed. For instance, under certain circumstances a daughter's son would be heir, and would transmit the whole estate to his issue. But if he died before his grandfather, his son would never take."

One of the sons of Musammat Matara, namely, Gopal Saran, was alive at the time of Musammat Sheo Kuaria's death in October, 1882; but his brother, Gobind Saran, father of the defendant, was admittedly missing; and it has been found by the learned Judge of the lower appellate Court that neither the brother nor the son of Gobind, nor any one else, had heard of him ever since he left home fifteen years ago; and the learned Judge has fortified this conclusion by the fact that on the 24th February, 1882, the defendant Dharup Nath himself stated on oath that his father Gobind had gone away ten years before, and had not since been heard of. And upon this state of things the learned Judge, applying the provisions

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of ss. 107 and 108 of the Evidence Act (I of 1872), held that the missing Gobind Saran, father of the defendant, could not be regarded as having been alive at the time of Musammat Sheo Kuaria's death in 1882, and that the whole estate which she held by inheritance from her husband Hanuman Dat, devolved entirely upon Gopal Saran, to the exclusion of the defendant Dharup Nath.

Now, upon these findings of fact, which we are bound to accept in second appeal, the first point which has to be considered is, whether the provisions of ss. 107 and 108 of the Evidence Act are applicable to the present case with reference to the missing Gobind Saran. The learned Judge has applied those sections to this case by parity of reasoning deduced from the Full Bench ruling of this Court in *Mazhar Ali* v. *Budh Singh* (1), where it was held that the rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan law is applicable. That ruling would not by itself be applicable to this case, which is governed by Hindu law, though the principle laid down in that case would apply, if the question of the death of a missing person is simply a question of evidence and not of succession. In the case of *Janmajay Mazumdar* v. *Keshab Lal Ghose* (2), it was held by the High Court of Calcutta that when a Hindu disappears and is not heard of for a length of time, no person can succeed to his property as heir until the expiry of twelve years from the date on which he was last heard of; and a similar rule appears to have been adopted by the same Court in *Guru Das Nag* v. *Matilal Nag* (3). But both these rulings are antecedent to the Evidence Act which now regulates all questions of evidence; and the ruling which seems to come nearer to the present case than either of the other two cases is the Full Bench ruling of this Court in *Parmeshar Rai* v. *Bisheshar Singh* (4), where it was held that in a suit by a reversioner next after a missing reversioner the death of such missing reversioner might, for the purposes of such a suit, be presumed under the provisions of s. 108 of the Evidence Act, though the learned Judges

(1) I. L. R., 7 All. 297.
(2) 2 B. L. R., A. C., 134.
(3) 6 B. L. R., Ap. 16.
(4) I. L. R., 1 All. 53.

doubted whether, in a suit for the purpose of administering the estate of a missing Hindu, the rule contained in the above-mentioned section of the Evidence Act would be applicable.

In the present case the learned pleader who has appeared in support of the appeal, has made no attempt to show that the rule which I am now considering is regarded by the authorities of Hindu law as a rule of succession and inheritance, to which the provisions of s. 24 of the Civil Courts Act (VI of 1871) would be applicable; and under such circumstances I must hold that the question, whether the missing Gobind Saran was alive in 1882, at the time of Musammat Sheo Kuaria's death, is a simple question of evidence governed by ss. 107 and 108 of the Evidence Act; specially as the question in this case does not relate to the admitted property of the missing Gobind Saran; but the point is, whether Gobind Saran was alive at the death of Musammat Sheo Kuaria, so as to inherit any portion of the estate of his maternal grandfather after the death of the widow.

Now, ss. 107 and 108 of the Evidence Act may be read together, because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. The sections are thus worded :—

"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. 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." The rule so enunciated has obviously been borrowed, with hardly any modification, from the English law of evidence as stated in Taylor's celebrated work (s. 157, 2nd ed.), from which I may quote the following passage :—"In such case, after the lapse of *seven years*, the presumption of life ceases, and the burden of proof is devolved on the other party. This period was inserted, upon great deliberation, in the statutes respecting bigamy, and the statute concerning leases for lives, and has since been adopted, by analogy, in other cases. But although a person who has not been heard of for seven

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years is presumed *to be dead*, the law raises no presumption as to the *time* of his death; and therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the presumption of the continuance of life."

I am prepared to accept this as a good explanation of the rule contained in ss. 107 and 108 of the Evidence Act, and I do not think that those sections, taken together, lay down any rule as to the *exact time* of the death of a missing person. So that whenever the question as to the *exact time* of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. In the present case the Court of first instance, upon the evidence before it, found that "the plaintiff's witnesses fully prove that he (Gobind Saran) has not been heard of for fifteen years," and the Court went on to discredit the allegation of the defendant that his father disappeared only ten years ago. This finding, as I have already said, was accepted by the lower appellate Court as justified by the evidence and circumstances of the case; and that Court found that the missing Gobind Saran was dead at the time when, by the death of Musammat Sheo Kuaria in 1882, the estate of her deceased husband, Hanuman Dat, would devolve upon his daughter's sons, the widow's estate having then terminated.

I accept this finding, which I regard as one of fact and not open to any objection, on the ground of illegality or irregularity, and I take it that Gobind Saran was not alive when Musammat Sheo Kuaria died on the 10th October, 1882. This being so, Gopal Saran was the only daughter's son of Hanuman Dat upon whom the estate of his maternal grandfather would devolve, to the exclusion of the defendant. The Hindu law upon the subject seems to me to be perfectly clear; and I may refer to ss. 477-479 (2nd ed.) of Mr. Mayne's valuable work as enunciating the principles upon which a daughter's son inherits the property of his maternal grandfather. What is regarded in Hindu law as *woman's estate* is described by Mr. Mayne in ss. 536 and 537 of his work, and the nature of such estate is applicable alike to a widow and a daughter, both

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being a sort of *life-tenant*—a phrase which I use only by way of analogy. In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates. And I may here quote a passage from s. 479 (2nd ed.) of Mr. Mayne's work, which, in principle, is fully applicable to the rights of the defendant Dharup Nath; for even his father Gobind Saran's right of inheritance could not initiate till after the death of not only the widows of Hanuman Dat, but also of any daughters, if such were in existence at the time of the death of the widow Sheo Kuaria. Mr. Mayne says—

"A daughter's son, on whom the inheritance has once actually fallen, takes it as full owner, and thereupon he becomes a new stock of descent, and on his death the succession passes to his heir, and not back again to the heir of his grandfather. But until the death of the last daughter capable of being an heiress, he takes no interest whatever, and therefore can transmit none. Therefore, if he should die before the last of such daughters, leaving a son, that son would not succeed, because he belongs to a completely different family, and he would offer no oblation to the maternal grandfather of his own father."

This passage, which is fully supported by authority, shows that the death of a daughter's son, antecedent to the death of a daughter, would prevent the estate from devolving upon the son of such daughter's son; and this rule applies *á fortiori* to a case such as the present, where Gobind Saran, the father of the defendant, namely, the grandson of Hanuman Dat, has been found to have died before the death of Hanuman Dat's second widow, Musammat Sheo Kuaria. Gopal Saran was therefore the only existing son of a daughter of Hanuman Dat when the latter's widow, Sheo Kuaria, died in 1882; and upon this state of things, I have no doubt that the whole estate of Hanuman Dat devolved, upon the death of the widow, on Gopal Saran. But Gopal Saran, by a deed of sale of the 24th December, 1882, conveyed his rights and interests in the estate of his maternal grandfather to the plaintiff-respondent, and that deed has been found by the lower Courts below to have been genuine and valid,—a finding which we cannot

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disturb in second appeal. And this being so, the plaintiff is entitled to all that his vendor conveyed to him, and for these reasons I would dismiss this appeal No. 1622 with costs.

The cross-appeal No. 1750 of 1885 relates to the property which has been found, as a question of fact, by the lower appellate Court not to have belonged to the estate of Hanuman Dat; and that being so, it could not devolve upon the plaintiff's vendor, Gopal Saran, and the latter had no title to convey. The finding being one of fact, cannot be disturbed in second appeal, being open to no legal objection, and for this reason I would also dismiss the plaintiff's appeal No. 1750 with costs.

BRODHURST, J.—I concur in dismissing these two appeals with costs.

Appeals dismissed.

1886
June 26.

APPELLATE CRIMINAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* MOHAN.

Murder— Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 *(Penal Code), ss.* 300, *Exception* 1, 302, 304.

Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep, stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her.

Held that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation" within the meaning of s 300, *Exception* 1 of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder.

Queen-Empress v. *Damarua* (1) distinguished by STRAIGHT, Offg. C. J.

THIS was an appeal from a judgment and order of Mr. H. P. Mulock, Sessions Judge of Sháhjahánpur, dated the 4th January, 1886, convicting the appellant of murder and sentencing him to transportation for life. The facts of this case are stated in the judgment of Brodhurst, J.

The appellant was not represented.

(1) Weekly Notes, 1885, p. 197.