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upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. Supposing the whole of this land were covered by trees, and possession of the trees was given to the plaintiff, the ex-proprietary tenure would practically be defeated.

For these reasons I would decree the appeal, and direct that the decrees of both Courts be so modified as to dismiss the plaintiff's claim, so far as it seeks possession of the trees within the two plots Nos. 1021 and 1039, which have been found to be *sir*, and that costs in all Courts, as regards this particular part of the subject-matter, be allowed to the defendant-appellant in proportion to the amount involved. Beyond this I would not disturb the first Court's decree.

STRAIGHT, Offg. C. J.—I concur in my brother Mahmood's conclusions as to the proper order to be passed in this case.

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*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

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MANGU LAL AND OTHERS (DEFENDANTS) *v.* KANDHAI LAL AND ANOTHER (PLAINTIFFS). *

*Act XV of 1877 (Limitation Act), s. 14—"Prosecuting"—"Good faith"—"Other cause of a like nature"—Limitation Act, construction of.*

In October, 1881, an account was struck between *K* and *M*, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs. 885 was paid. In March, 1885, *K* sued *M* for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881.

*Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation.

* Second Appeal No. 1636 of 1885, from a decree of Mirza Abid Ali Khan, Subordinate Judge of Shâhjahânpur, dated the 17th June, 1885, reversing a decree of Rai Bahal Rai, Munsif of Shahjahânpur, dated the 18th April, 1885.

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*Per* STRAIGHT, Offg. C. J.—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

*Per* MAHMOOD, J.—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as "statutes of repose" and not as of a penal character or as imposing burdens. *Roddam* v. *Morley* (1), *Syed Ali Saib* v. *Sri Raja Sanyasiraz Peddabeliyra Simhulu Bahadur* (2), *Empress* v. *Rola Lalang* (3), *Bell* v. *Morrison* (4), *Shah Keramut Hossein* v. *Golab Koonwar* (5), and *Mohummud Buhadoor Khan* v. *The Collector of Bareilly* (6), referred to.

The facts of the case are stated in the judgments of the Court.

Munshis *Hanumán Prasad* and *Madho Prasad*, for the appellants.

Mr. *Abdul Majid* and Pandit *Nand Lal*, for the respondents.

STRAIGHT, Offg. C. J.—This appeal relates to a suit brought by the plaintiffs-respondents under the following circumstances:—The plaintiffs, alleging that on the 12th October, 1881, a certain account was struck between them and the defendants, seek to recover the balance of that account, on account of which a certain sum of Rs. 885-15 was then paid, and the cause of action is stated to have arisen on the 24th February, 1885. It appears that for some time before the 12th October, 1881, there were pecuniary relations between the parties, the plaintiffs having from time to time advanced moneys to the defendants, which were duly entered in the books of the former. On the 12th October, 1881, those accounts were, as I have said, made up, and a balance of Rs. 1,457 was found due by the defendants to the plaintiffs, and it was agreed between them that this was the correct balance then due. Rs. 885-15 were paid of this amount, and the debt was reduced in round figures to about Rs. 600, the amount with interest, which the plaintiffs in this suit seek to recover as upon an account stated. I have remarked that in the plaint there is an allegation that the cause of action arose upon the 24th February, 1885, and to explain how this date was arrived at, it is necessary to refer to certain matters in connection with a former suit between the same parties in 1885. It would seem that as far back as 1873, the plaintiffs became the

(1) 1 De G. and J., 1; 26 L. J., Ch. 4 38.
(2) 3 Mad. H. C. Rep. 5.
(3) I. L. R., 8 Calc. 214.
(4) 7 Peters (U. S.) R. 360.
(5) 3 W. R. 101.
(6) L. R., 1 Ind. Ap. 167.

purchasers of the equity of redemption in a zamindari estate, which had been mortgaged to the defendants, and on the 15th November, 1884, a suit was brought by the plaintiffs, as purchasers of that equity, against the defendants for redemption of the mortgaged property. In that suit the plaintiffs put their case in this way; that is to say, after stating the amount of the mortgage-debt due from the original mortgagor to the defendants-mortgagees to be Rs. 1,226, they alleged that by an oral arrangement, which had been come to between the defendants and the plaintiffs on the 4th December, 1881, it had been settled that whenever the latter should claim redemption of the property, they should be allowed to take credit to the extent of Rs. 885, the balance then due from the defendants on the account stated on the 24th October, 1881. I need scarcely point out that this was a very peculiar form in which to present a suit for redemption, though I pronounce no opinion as to its legality; but what it came to was this, that because the defendants owed the plaintiffs the latter sum, they were entitled to redeem the property on paying the difference between Rs. 885 and Rs. 1,226, the amount of the mortgage. The Subordinate Judge decided that suit against the plaintiffs and seems to have given good reasons for his conclusions, their effect being that the agreement set up by the plaintiffs was found not to have been established. Their suit was therefore dismissed to the extent that they were not allowed to redeem except on payment of the whole sum of Rs 1,226 due upon the mortgage. This dismissal took place on the 24th February, 1885. This is how we get at the date which the plaintiff assigns as that on which his present cause of action accrued. That is to say, he treats the Subordinate Judge's dismissal of his claim to be allowed the amount demanded in the former suit as constituting his present right to sue. This, however, is not the true way of looking at the matter; and the real and only plea with which we are now concerned is that of limitation: because, taking as the starting-point the 12th of October, 1881, when the balance of Rs. 885 was left due by payment on account—unless limitation is saved by some rule under the statute—this suit, which was instituted on the 13th March, 1885, is barred. The question then is whether by s. 14 of the Limitation Act the running of time was suspended from the date the former suit was instituted to the date of its deci-

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sion, namely, the 24th February, 1885. If we are entitled to make this deduction for him, then the plaintiff is within time.

The contention on behalf of the defendants-appellants before us is, that time is not saved under s. 14 of the Limitation Act, and that the plaintiffs' claim is barred. I have therefore to see whether the provisions of s. 14 are applicable. Reading s. 14 of the Act, the first thing I have to ascertain is whether the time the plaintiffs ask to have excluded, was occupied by them in prosecuting with due diligence another civil proceeding against the defendant. As to this I see no reason to doubt that the plaintiff prosecuted the former suit of 1884 with due diligence and in good faith. It was "another civil proceeding," and the question then, according to the further requirement of s. 14, is, was it founded upon the same cause of action as the present suit? I am of opinion that it was not. That part of the plaintiffs' claim in the former suit which sought to have the Rs. 885 treated as an amount paid by the plaintiffs to the defendants, rested on an agreement alleged to have been made on the 12th October, 1881; and it was in virtue of such an agreement that the plaintiffs claimed to be entitled to deduct so much from the redemption-money they would otherwise have had to pay, and not upon the strength of the account stated. Further, the Court which tried the former suit was not unable to entertain it by reason of a defect of jurisdiction. On the contrary, the Court was competent to entertain and did entertain it, and came to a decision adverse to the plaintiffs. Hence it cannot be argued that the case was disposed of for a defect of jurisdiction, or for any cause *ejusdem generis*. It seems to me that it cannot correctly be said that in the former suit the plaintiffs were prosecuting a civil proceeding against the defendants on the same cause of action as that on which they rely in the present suit; and, in my opinion, the rule of s. 14 has no application to the present case. The appeal must be allowed with costs, and the order of the first Court being restored, the suit is dismissed with costs.

MAHMOOD, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are these:—

The defendants held a mortgage charged upon certain zamindari interest in mauza Ikhtiarpur, which is said to have amounted

to Rs. 1,226, in lieu whereof they were in possession of the mortgaged property. Some time about the year 1873, one Ram Prasad, ancestor of the plaintiffs, purchased the equity of redemption from the original mortgagor, subject to the defendants' lien. It is then stated by the plaintiffs that in respect of certain monetary dealings the defendants were indebted to them for a sum of Rs. 1,457, which, after a statement of account, was found as the balance and signed and acknowledged by the defendants on the 4th December, 1881, when they paid Rs. 885-15 towards the debt, thus reducing the balance to about Rs. 600. Subsequently, on the 15th November, 1884, the plaintiffs instituted a suit against the defendants for redemption of their zamindari interests in mauza Ikhtiarpur, and in that suit they alleged that the amount of the balance due by the defendants to them should be deducted from the mortgage-money under an agreement entered into by the parties for allowing such deduction. The Court which dealt with that suit did not, however, allow such deduction, and in a judgment dated the 24th February, 1885, held that the alleged agreement was not proved upon the evidence, and the finding appears to have become final.

The present suit was commenced by the same plaintiffs against the same defendants for recovery of the sum due by the latter on the alleged statement of account dated the 4th December, 1881, which has been found to be the wrong date—the right date being the 9th Kuar Sudi, 1289 fasli, corresponding to the 12th October, 1881. The suit was instituted on the 13th March, 1885, and there is no question that it would be barred by three years' limitation under art. 64, sch. ii of the Limitation Act (XV of 1877), unless the period of the pendency of the former suit is deducted in computing the limitation under s. 14 of the Act. The Court of first instance dismissed the suit as barred by limitation, though it also went into the merits of the suit. The lower appellate Court on appeal has reversed the decree, holding the suit entitled to the benefit of s. 14 of the Limitation Act, and finding the merits in favour of the plaintiffs.

The learned Munshi, who has appeared on behalf of the appellants, has argued the case upon the solitary ground that the suit

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was barred by limitation, not being, under the circumstances, entitled to the benefit of s. 14 of the Limitation Act. I am of opinion that the contention urged before us by the learned Munshi on behalf of the appellants has force, and must prevail. This case, indeed, in the manner in which it has been dealt with by the lower appellate Court, affords a good illustration of what has so often come within my notice, namely, that the Mufassal Courts are inclined to regard statutes of limitation as operating in derogation of the rights of the parties by barring investigation of the merits; and in this light they are inclined to place as strict a construction against the operation of the statute as if it belongs to the class of penal statutes encroaching on the rights of, or imposing burdens upon, the subject. And I will take this opportunity of giving expression to views which I have long entertained upon the subject; not only because the present case calls for such a course, but also because some uncertainty seems to exist as to the exact manner in which statutes such as our own Limitation Act should be interpreted.

Mr. Maxwell, in his well-known work on the "Interpretation of Statutes," after referring to statutes which encroach on rights, goes on to say (p. 348):—"It would seem statutes of limitation are to be construed strictly. There may not necessarily be any moral wrong in setting up the defence of lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment; while provisions which give exceptions to the operation of such enactments are to be construed liberally." This view of the law is enunciated by the author on the authority of a judgment of Lord Cranworth in *Reddam* v. *Morley* (1), and I shall presently have to express my opinion about the rule, because I cannot help feeling that if the rule of liberal interpretation is to be applied to s. 14 of our Limitation Act, I should be inclined to agree with the lower appellate Court in holding that the plaintiffs are entitled to the benefit of that section, it being, in the words of Mr. Maxwell, a "provision which gives exception to the operation of such enactments" as our Law of Limitation. But is the rule as stated by Mr. Maxwell free from doubt? We have the following passage in another authority upon the construction of Statute

(1) 1 De G. and J. 1; 26 L. J., Ch. 438.

Law – (Wilberforce, p. 232) :—"The statutes of limitation have given rise to some conflict of opinion. It is said by Heath, J., that these statutes always receive a strict construction from the Courts, and the same view is taken by Mr. Sedgwick. On the other hand, Dallas, C. J, expresses himself thus with regard to the 21 Jac. I., c. 16.—'I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied; and this is pointed out by the very first words of the statute, which are 'for quieting of men's estates and avoiding of suits.' It is therefore that this statute and all others of this description are termed by Lord Kenyon 'statutes of repose.' The same phrase has been employed and similar opinions have been expressed by the Courts of the United States." Now, whilst there is a conflict of decisions in the English Courts, as to whether the statutes of limitation are to be construed *liberally* or *strictly* in the sense in which these words are technically understood, we find a learned judge and jurist of such high rank as Holloway, J., saying from the Bench of an Indian High Court in *Syed Ali Saib* v. *Sri Raja Sanyasiraz Peddabhyra Simhulu Bahadur* (1) with reference to the matter :—"For myself I wholly repudiate interpretations, strict or liberal, according to the object-matter of the law. A barbarous code of penal laws was the parent of these doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too." These observations are no doubt original and deserve the highest respect; but with all due deference to the eminent authority from which they proceed, I am unable to accept them, partly because they contradict the almost universally recognised rules of the interpretation of statutes, and partly because our Indian Statute Book is still full of legislative enactments which require an ample application of the principle of interpretation which Holloway, J., repudiated. Moreover, that principle constitutes no infringement of the general rule of placing the ordinary grammatical construction upon the language of statutes, but comes into operation only when there is an ambiguity or indistinctness of meaning; for I suppose no one would maintain that where the language of the statute itself is

(1) 3 Mad. H. C. Rep. 5.

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express and clear, effect is not to be given to the words which indicate the intention of the Legislature. And I am prepared to accept for the interpretation of our Indian enactments the language used by Pollock, C.B., with reference to the distinction which Holloway, J., repudiated, that "it is unquestionably right that the distinction should not be altogether erased from the judicial mind"—a distinction which was recognised by the Calcutta High Court in *Empress* v. *Kola Lalang* (1) in interpreting a penal statute.

The question which still remains to be disposed of is whether, in this state of authority, our Limitation Act should be subjected to the rule of strict construction against its operation; and I have already said that, according to my view, the application of s. 14 of the Act to this case depends upon the decision of the question which I have just indicated. And because the matter is of such a consequence, I may say that I feel myself justified, as an Indian Judge sitting here, to resort to foreign authorities for the purpose of supporting my views upon a question in regard to which the Indian common law is silent, and which has not yet been made the subject of legislation. Under these circumstances it is necessary for me to refer to American authorities, and in the first place to a passage in Angell on the *Law of Limitation*, p. 17, and then to the *dictum* of Mr. Justice Story in *Bell* v. *Morrison* (7 Peters (U.S.) R. 360), and another of Mr. Justice M'Lean, both of which are referred to at p. 20 (4th ed.) of the same work:—"A statute of limitation," says Mr. Justice Story, "instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of Justice as would have made it, what it was intended emphatically to be, a *statute of repose*." Mr. Justice M'Lean, in giving the opinion of the Supreme Court of the United States in 1830, says:—"Of late years the Courts in England and in this country have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The Courts do not now, unless compelled by the force of the former decisions, give a strained construction, to evade the effect of those statutes." Again, there is the authority of Story, whose works are universally refer-

(1) I. L. R., 8 Calc, 214.

red to with respect in English Courts. At s. 576 of his *Conflict of Laws* the following passage occurs:—"In regard to statutes of limitation or prescription of suits and lapse of time, there is no doubt that they are questions strictly affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper *forum* within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal:—*Ne autem lites immortales essent, dum litigantes mortales sunt*". I adopt every word of the rules of substantial justice here laid down as distinguished from merely technical rules of procedure.

Applying these principles, I have no doubt, although the view is somewhat opposed to the doctrine recognised in England, and partly countenanced in this country, in the case of *Shah Keramut Hossein* v. *Golab Koonwur* (1), that in India, in interpreting Acts of Limitation, we are not bound by the rules established by a balance of authority in England. I may refer to the express provisions of s. 4 of the present Act, which place it beyond the power of the judge, as well as beyond that of the defendant, to ignore or waive

(1) 3 W. R., 401.

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the plea of limitation. The policy of that section is different from that adopted in the English law; for in England the law of limitation comes under the category of those rules, whether created by the statutes or by the common law, which exist for the benefit of parties, and which, like the plea of minority, may be waived by the person entitled to the benefit. I am not prepared to accept this view as applicable to India. According to our law, the rule of limitation cannot be waived. If this is so, the Limitation Acts are not to be construed as imposing burdens. They are emphatically "*statutes of repose*," especially where, as in India, the absence of effective registration laws, as to many important incidents (such as births, marriages, deaths, and adoptions), would make the preservation of testimony and the ascertainment of facts in many cases next to impossible. In the case of *Mohummud Buhadoor Khan* (1) the Privy Council would not allow any exception to the general Law of Limitation to operate in favour of a minor at the time whose property had been confiscated during the mutiny. This shows that the interpretation to be placed on such laws must be strict in favour of their operation. How then is s. 14 of the Limitation Act to be understood? The original section on the subject was s. 14 of the Act of 1859, which ran thus:—"In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." Here the most important expression is "*same cause of action*" and also "defect of jurisdiction or *other cause.*" These words, however, are ambiguous. The section was reproduced in s. 15 of the Limitation Act of 1871; and while its language was more or less preserved, the expression "same cause of action" was changed to "same right to sue." The expression "other cause"

(1) L. R., 1 Ind. Ap., 167.

was changed to "other cause of a like nature," and the words "is unable to try it" were added. This phraseology, however, still created considerable doubt, which was manifested in a number of cases, and finally, s. 14 of the present Act again reverts to the old expression "same cause of action" instead of "same right to sue," and changes "is unable to try it" into "is unable to entertain it." I venture to say that if ever there was an ambiguous clause it is this. In the first place, "cause of action" is a phrase which has given rise to more difficulty than almost any other. It may mean the title *plus* the injury, or, as it is often used in England, only *injuria* or the violation of right. Then the words "unable to entertain it" are almost equally vague, and the Legislature might well have added illustrations to make them definite. If I were to interpret s. 14 in a liberal sense, I should hold that the present claim refers to the same cause of action, *i.e.*, relates to the same dispute as the former litigation. This, however, it is not necessary for me to rule. But I base my judgment upon the words "good faith" and "other cause of a like nature." I am of opinion that the former litigation, so far as it related to the item now in suit, was not conducted in *good faith*, because I interpret that expression to mean with due care and caution; and if the plaintiffs had taken proper care, they might easily have known that they could not deduct from the mortgage-money the sum due upon a totally different account. Moreover, in that litigation it was found that the agreement set up by the plaintiffs was not proved. In the second place, having chosen to take the course they did, the plaintiffs were not "prosecuting a claim" as those words are used in s. 14. "Prosecuting" does not mean appropriating payments or accounts, as in this case, but endeavouring to recover by legal proceedings money or other rights which a defendant declines to recognise. Again, the plaintiffs having chosen to bring those items into litigation in that way, the Court in that case did deal with it as a matter subject to its jurisdiction. There is consequently no question as to "any cause of a like nature" as contemplated by s. 14.

For these reasons I am of opinion that the plaintiff is not entitled to the benefit of s. 14. I may before concluding refer to the judgment of Peacock, C. J., in *Chunder Madhub Chuckerbutty* v.

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*Bissessuree Debea* (1), where he shows that no defect arising from the plaintiff's ignorance of law constitutes a *bonâ fide* delay.

Again, my view is supported by the decision of the Calcutta High Court in *Rajendro Kishore Singh* v. *Bulaky Mahton* (2) and of the Bombay High Court in *Pirjade* v. *Pirjade* (3). The nearest authority is perhaps *Hafizunnessa Khaton* v. *Bhyrab Chunder Das* (4), where it was held that the pleading of a set-off by a defendant was not prosecuting a remedy within the meaning of s. 14 of the Limitation Act. I need only add that a plea of set-off is nothing but a plea to bar the plaintiff's decree *pro tanto*, unless, indeed, the set-off exceeds the amount claimed in value. In the present case there was no such set-off pleaded by a defendant, and the plaintiff cannot be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court, which, for want of juridiction or cause of a like nature, was unable to entertain the claim.

For these reasons I am of opinion that the first Court was right in dismissing the suit as barred by limitation, and I concur in the order proposed by the learned Chief Justice.

*Appeal allowed.*

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*May* 31.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

BISHEN DAYAL AND OTHERS (DEFENDANTS) *v.* UDIT NARAIN (PLAINTIFF).*

*Mortgage—Words creating simple mortgage—Bond—Interest after due date—Measure of damages.*

A suit was brought in 1884 upon a hypothecation-bond executed in April, 1875, in which the obligors agreed to repay the amount borrowed with interest at Re 1-8 per cent. per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision :—"Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond.

*Held* that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the

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* Second Appeal No. 876 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Ghâzipur, dated the 17th February, 1885, reversing a decree of Pandit Kashi Nara in, Subordinate Judge of Ghazipur, dated the2 0th December, 1884.

(1) 6 W. R., 184.
(2) I. L. R., 7 Calc., 367.
(3) I. L. R., 6 Bom, 681.
(4) 13 Calc. L. R., 214.