could have produced at the proper time, but did not choose to produce. He might well have produced all the evidence which he now wishes to produce, when the case was being tried by the Court below. I therefore concur in dismissing the appeal with costs.

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Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Straight.

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BALWANT SINGH (DEFENDANT) *v.* GOKARAN PRASAD (PLAINTIFF).*

Co-sharers—Rents collected by one co-sharer in respect of another's share—Intermeddler—Suit for recovery of rents—Intermeddler not liable for more than amount actually collected less collection expenses.

The lessee of two-thirds of a five biswas zamíndári share asserted and exercised a right of collecting rents in respect not only of the two-thirds but also of the remaining one-third. It appeared that he made these collections not as a matter of contract, but as an intermeddler, and in defiance of the wishes of the holder of the one-third share. Subsequently a suit was brought against him by a purchaser of the five biswas for recovery of rents so collected, the claim extending to rents which the defendant might have collected but neglected to collect, and which were consequently lost to the plaintiff.

Held that the defendant, not having been under any obligation to collect the rents of the one-third share, could not be made liable for any of such rents which he had not actually collected, and that as the collection expenses had exceeded the amount collected, the suit must be dismissed.

THE facts of this case were as follows:—Three persons, Paras Ram, Lal Singh and Bhupat, each held one-third of a five-biswas share in a village. The two former executed a joint lease of their shares in favour of one Hukm Singh, who died, his rights devolving upon his son, Balwant Singh. After this lease had been granted, the rights and interests of Paras Ram, Lal Singh and Bhupat were sold in execution of a decree obtained against them by one Gokaran Prasad. The decree-holder himself was the purchaser at the execution sale.

Prior to the execution of the lease, Paras Ram had, as lambardár of the five biswas, collected rents on behalf of his co-sharers and himself. After the lease, Hukm Singh and, after his death, Balwant Singh, asserted and exercised a right of collecting rents in

* Second Appeal No. 1805 of 1885 from a decree of J. W. Muir, Esq., District Judge of Mainpuri, dated the 3rd September, 1885, confirming a decree of A. Shakespeare, Esq., Assistant Collector of Mainpuri, dated the 9th June, 1885.

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respect of Bhupat's share, as well as of the two-thirds of the five biswas of which they were lessees The present suit was brought against Balwant Singh, in 1885, by Gokaran Prasad, for recovery of rents for the years 1289, 1290 and 1291 fasli, collected by the defendant in respect of the share formerly held by Bhupat. The claim was not confined to the rents actually collected by the defendant, but extended to those which he might have collected, but neglected to collect, and which were consequently lost to the plaintiff. The Court of first instance (Assistant Collector of Mainpuri) decreed the claim. The Court observed:—"I have no hesitation in saying that the ordinary rule must be carried out in this case, *viz.*, that as the knowledge can alone be with the defendant collecting, it is for him to prove clearly that such and such items are not possible of collection." In another part of its judgment the Court observed:—"The defendant puts his collection at very much less than the *nikasi*. He has failed to show that any item is irrecoverable."

On appeal, the District Judge of Mainpuri affirmed the Assistant Collector's decree.

The defendant appealed to the High Court. It was contended on his behalf that the Courts below ought to have determined the amount of the actual and not of the possible collections, and that he could not properly be held liable for any rents which he had not actually collected.

The Hon. Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

Pandit *Bishambar Nath*, for the respondent.

EDGE, C. J.—A difficulty has been caused in this case by the somewhat vague way in which the claim is preferred. It may be doubtful whether the plaintiff intended to imply that the defendant had collected the rents of the one-third share as a volunteer, or whether he had undertaken to collect them as a matter of contract.

If as a volunteer, he could not be made liable for any greater amount than he actually collected. As volunteer, there would have been no contract to collect. If, on the other hand, he undertook to collect as a matter of agreement based on consideration, it appears to me that he would be liable for the rents he actually

collected, subject to all just deductions, and also liable in damages for any rents he undertook to collect, and which by reason of his negligence were lost to the plaintiff at the commencement of the action, either by reason of their being barred by statute, or some other cause.

If the Court below finds he was merely a volunteer, it appears to me that the question of negligence cannot be inquired into, and the only account to be taken would be as to whether, after all just deductions, the defendant has actually accounted for the rents which he did, as a matter of fact, receive. If, on the other hand, the collections were based on contract, the lower Court should find whether he was guilty of negligence; and, if guilty of negligence, whether the plaintiff lost his right to recover at the date of the commencement of the action any and which of the rents by reason of such negligence. In the latter event, in the event of its being found that there were rents relating to the one-third, which the defendant had contracted to collect, and which had been lost to the plaintiff at the date of the commencement of this action by reason of the negligence of the defendant, the defendant should be held liable for those rents, less such fair allowances as would have to be made if such rents had been collected; and also for the rents, if any, of the one-third which he has collected and not accounted for, less the amount of revenue, cess, &c., together with reasonable expenses, and a reasonable allowance for the trouble of collecting. Ten days will be allowed for any objections.

OLDFIELD, J.—I concur in the order of remand.

On the remand, the District Judge recorded findings in the following terms :—

"Neither the defendant Balwant Singh nor his father was appointed lambardár when the lease was given, but they continued to assert their rights to collect the rents of Bhupat's share as well as of the two-thirds of which they were lessees. It was not incumbent on the defendant to collect the rent of Bhupat's share: he might have refused to have anything to do with it, and if he had, he could not have been forced to collect. In this light, therefore, the defendant collected as a volunteer. If the defendant be looked on as a volunteer, and therefore liable only for the rents he

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is shown to have realized, nothing is due to the plaintiff for the years in suit, for it appears from the evidence that in each of the years the actual collections fell short of the expenses. I do not think it can be contended that the defendant collected in pursuance of a contract or agreement, either express or implied. On the contrary, it appears from the documentary evidence that the plaintiff has all along, but in vain, endeavoured to assert his right to collect from Bhupat's one-third. .....It should be mentioned that there is no actual division of the land or tenants into shares: the tenants are common to the *thoke*: joint collections are made and profits divided according to the shares, after deduction of expenses. I would submit that the defendant is not a mere volunteer who undertook, owing to the plaintiff's apathy, to collect the rents of his shares as well as of his own. Nor did he collect in pursuance of a contract. He is more in the position of an intermeddler who collected in defiance of the plaintiff's wishes. If I am restricted to the alternative indicated in the judgment of the High Court, I find that the defendant collected as a volunteer, and that nothing is due from him to the plaintiff. But if I am not so restricted, I find that the defendant collected neither as a volunteer nor as a matter of agreement based on consideration, but as an intermeddler, and that he was rightly held liable by the Assistant Collector for profits calculated on the rent-roll, minus 10 per cent. allowed him for cost of collection."

Upon the return of these findings the case came before Edge, C. J., and Straight, J., for disposal.

The parties were represented as before.

EDGE, C. J.—We must take these findings as they are, that the collection expenses exceeded the amount collected. An intermeddler cannot be liable for the money he has not collected. He can only be liable for the money not collected if there was any duty cast upon him to collect that money. But here, from the very commencement of the suit, it appears that the defendant was not a lambardár, and cannot be made liable. The appeal is decreed with costs in accordance with the remand.

STRAIGHT, J.—The defendant in this suit stands in the position of an ordinary person who has received money for and on account

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of another, and upon whom vests the obligation and duty to pay to such other the amount of money so received. Such person may acquit himself of it in one of two ways: either by paying the actual money received, or by paying an equivalent sum of money to such person. In the present case the findings are that no doubt the defendant collected and received profits on the plaintiff's behalf, but nevertheless that the expenses in regard to the collection of those profits were far in excess of the amount of profits so collected. Upon that finding I think the plaintiff's claim is sufficiently answered; and having regard to the rule of law laid down by the learned Chief Justice in the order of remand, we must accept the findings, and upon these findings the plaintiff's suit failed and the appeal must succeed, and, the decision of the lower Court being reversed, the plaintiff's suit in regard to those profits will stand dismissed with costs in all the Courts.

Appeal allowed.

APPELLATE CRIMINAL.

1887
April 25.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* KIRPAL SINGH AND OTHERS.

Jurisdiction—Criminal Procedure Code, s. 180—Dacoity committed in British territory—Dishonest receipt of stolen property in foreign territory.

Certain persons, who were not proved to be British subjects, were found in possession, in a native State, of property the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under s. 412 of the Penal Code.

Held that no offence was proved to have been committed within the jurisdiction of a British Court.

In this case three persons, Kirpal Singh, Kehri Singh and Harbhan, were tried before the Commissioner of Jhánsi upon charges under s. 396 of the Penal Code (dacoity with murder) and s. 412 (dishonestly receiving property stolen in the commission of dacoity). A fourth person, Zahir Singh, was tried at the same time for abetment of the offence punishable under s. 396.

The dacoity in which the prisoners were alleged to have taken part was committed on the 16th April, 1887, at Maheshpura, a