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by a subsequent suit in the Civil Court, and a Revenue Court could not pass a decree for rent against the intervenor, who does not occupy the position of a tenant. With these remarks, I concur in the decision of the learned Chief Justice.

BRODHURST, J.—The lower appellate Court obviously should not have decreed the claim both against Gobind Ram—a co-sharer, made a defendant under s. 148 of the Rent Act—and the tenants. With reference to the ruling of a Bench of this Court in *Madho Prasad* v. *Ambar* (1), the lower appellate Court should, under no circumstances, have decreed the claim against Gobind Ram, a defendant under s. 148, and on its finding that the rent had not been paid to any one but was still due to the plaintiff lambardar, it should have passed a decree against the tenants, and against them alone.

Gobind Ram only has appealed. As the lower appellate Court's decree against him is wrong, I concur in allowing his appeal, and in modifying the decree of the lower appellate Court to that extent, and in ordering that each party pay his own costs.

Appeal allowed.

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February 10.

CIVIL REVISIONAL.

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

SHIELDS (DEFENDANT) *v.* WILKINSON (PLAINTIFF)*

Bailment—Hiring—Accident—Negligence—Evidence—Burden of proof—Act I of 1872 *(Evidence Act)*, s. 106—*Act IX of* 1872 *(Contract Act,)* ss. 150, 151, 152, —*High Court's powers of revision—Civil Procedure Code*, s. 622.

A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree, it is liable to be set aside in revision under s. 622 of the Civil Procedure Code. *Maulvi Muhammad* v. *Syed Husain* (2) and *Sarnam Tewari* v. *Sakina Bibi* (3) referred to.

The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases,

* Application No 242 of 1886 for revision of a decree of Babu Promoda Charan Banerji, Judge of the Court of Small Causes, Allahabad, dated the 16th September, 1886.

(1) I. L. R., 5 All. 503.
(2) I. L. R., 3 All. 203. (3) I. L. R., 3 All. 417.

from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *primâ facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *primâ facie* improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence.

S hired a horse from *W*, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit by *W* against *S* to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that, for some time previously, it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property; that he must have used his whip freely, or done something else which caused the horse to bolt; and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim.

Held by EDGE, C. J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *primâ facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under s. 622 of the Civil Procedure Code.

Per BRODHURST, J., that as the decree was not only unsupported by proof but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of s. 622.

Collins v. *Bennett* (1), *Byrne* v. *Boadle* (2), *Gee* v. *The Metropolitan Railway Company* (3), *Scott* v. *The London Dock Company* (4), *Manzoni* v. *Douglas* (5), *Colton* v. *Wood* (6), *Davey* v. *The London and South Western Railway Company* (7), and *Hammack* v. *White* (8), referred to.

THIS was an application, under s. 622 of the Civil Procedure Code, for revision of a decree of the Judge of the Court of Small Causes at Allahabad, dated the 16th December 1886. The judg-

(1) 46 New York Reports.
(2) 2 H. and C. 722; 33 L. J., Exch. 13.
(3) L. R., 8 Q. B. 161; 42 L. J., Q. B., 105.
(4) 3 H. and C. 596; 34 L. J., Exch. 220.
(5) 6 Q. B. D. 145.
(6) 8 C. B., N. S. 569; 29 L. J., C. P. 333.
(7) 12 Q. B. D. 70.
(8) 11 C. B., N. S. 588; 31 L. J., C. P. 129.

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ment of the Judge, in which the material facts of the case were stated, was as follows:—

"On the 6th November last the defendant hired a mare belonging to the plaintiff for a ride. When the mare was in his possession, she died. The plaintiff claims Rs. 400 as the value of the mare.

"The defendant pleads non-liability on the ground that the death of the mare was a pure accident, and that he took as much care of her as a man of ordinary prudence would take of his own property under similar circumstances. He also objects to the value claimed.

"Under s. 152 of the Contract Act, the defendant, who was a bailee for hire, would not be responsible for the death of the mare if he took such care of her as a man of ordinary prudence would have done of his own animal. The burden of proving the exercise of proper care is on the defendant. Beyond his own statement there is no evidence whatever on his behalf on the point.

"The defendant states that he rode the mare quietly at first, that after going a short distance, he urged her into a trot, that she thereupon plunged a good deal and galloped for a little distance, that he pulled her up and got her to walk quietly as far as Mr. Porter's gate, that she tried to back into the gate, and plunged, and then bolted off, that he had no control over her, that she galloped furiously for about two miles, and then collapsed, fell down and died.

"It has been proved by the evidence of Mr. Blenkinsop, a Veterinary Surgeon, that death was caused by rupture of the diaphragm, and that the cause of the rupture was over-exertion with a loaded stomach. That the mare over-excited herself there can be no doubt, as she admittedly galloped furiously at the rate of 25 miles an hour for about two miles. It is evident that the mare was in a healthy and sound condition when she was thus ridden by the defendant, and it has not been proved that she had any vice. The evidence is rather the other way. The plaintiff and his witnesses have sworn that the animal was not given to bolting, and that she was a quiet animal to ride or drive. There is no evidence whatever to prove the contrary. Such being the case, something must have occurred to excite her, and to induce her to bolt off furiously at a gallop. The probabilities of the existence of a cause to excite the mare seem to have been the greater in this case, inas-

much as we have the evidence of Mr. Blenkinsop to the effect that a horse with a full stomach (which the plaintiff's mare is stated to have been) would not be inclined to bolt without an exciting cause.

"Now, what was the cause in this case to excite the mare? The defendant does not say that anything occurred on the road to excite her. He admits that when the mare became frisky and plunged near the bridge on the Papamhow road, he could manage her and walk her quietly as far as Mr. Porter's gate. It was at this place that she plunged again, and it was from this place that she bolted off furiously at a gallop. Something then must have occurred at this place, and what was that thing? It is not stated that she saw anything on the road to excite her. Something then must have been done to her by the defendant to excite her. He says that he may have used the whip at this place, and it is very likely that he did so and did so freely, in such a manner as to excite the mare inordinately. Otherwise the conduct of the mare is inexplicable. I do not think there was any justification for the free use of the whip. The defendant was under the impression that the mare had a hard mouth. He had seen that she had plunged and galloped, and that she was in all probability an excitable animal. A person of ordinary prudence ought not to have done anything to excite her, and therefore the free use of the whip was improper. I of course assume that the whip was used freely, as it is not likely that a single cut or a gentle cut could have excited the mare. Even if it be granted that the whip was not used freely, the cause for exciting the mare must have been something done to her by the defendant himself, and in doing that thing the defendant could not have acted with due care and caution. He has therefore failed to establish that he took that care of the animal which a man of ordinary prudence would have done in the case of his own property, and he is liable for the value of the mare.

"As for the value, the evidence adduced by the plaintiff shows that he got an offer of Rs. 350, and that he refused that offer. The value he himself put on it was Rs. 400, and the evidence of the witness Ahmad Shah shows that it was not unfair or excessive. I hold the value of the mare to have been Rs. 400, and I accordingly decree the claim with costs."

The plaintiff appealed to the High Court for revision of this decree.

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Mr. *J. D. Gordon*, for the petitioner.

Mr. *C. H. Hill*, for the respondent.

A preliminary objection was taken by Mr. *Hill* that the Court had no jurisdiction to entertain the application. He referred to *Muhammad Suleman Khan* v. *Fatima* (1).

Mr. *J. D. Gordon*, for the petitioner.—The Judge's finding that the petitioner had used his whip freely or done something else which caused the mare to bolt is a mere assumption not based on any evidence. He had no jurisdiction to pass a decree founded on no evidence at all. The case therefore falls within s. 622 of the Civil Procedure Code.

In the next place, the Judge has improperly laid the burden of proof upon the defendant. It was for the plaintiff to prove negligence on the part of the defendant. Negligence is not sufficiently proved by the mere happening of an accident: *Hammack* v. *White* (2). That case is closely in point. See also *Manzoni* v. *Douglas* (3), and in particular the observations of Lindley, J., who said that to hold that the mere fact of a horse bolting was *per se* evidence of negligence, would be mere reckless guess-work.

Mr. *C. H. Hill*, for the respondent.—The question is whether the petitioner took as much care of the mare as a man of ordinary prudence would under similar circumstances take of his own property (Contract Act, s. 151). Unless he can show this, he is liable under s. 152. The rule of the burden of proof contained in s. 106 of the Evidence Act applies to the case. It was for the Judge to decide whether the petitioner had discharged the burden or not, and he had jurisdiction to decide this in the negative, if he considered the petitioner's evidence untrustworthy. *Collins* v. *Bennett* (4), referred to in Story On Bailments, p. 413, and *Byrne* v. *Boadle* (5), are authorities which show that the defendant must give evidence to account for the happening of the accident, and so to show that it was not due to his negligence. The Judge was fully competent to regard the petitioner's explanation as unsatisfactory, and hence there are no grounds for revision under s. 622 of the Civil Procedure Code.

(1) *Ante*, p. 104.
(2) 11 C. B., N. S, 588; 31 L. J., C. P. 129.
(3) 6 Q. B. D. 145.
(4) 46 New. York Reports.
(5) 2 H. and C. 722; 33 L. J., Exch. 13.

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Mr. *J. D. Gordon*, in reply, referred to *Colton* v. *Wood* (1), *Maulvi Muhammad* v. *Syed Husain* (2), and *Sarnam Tewari* v. *Sakina Bibi* (3).

EDGE, C. J.—This was an application to this Court to exercise its powers of revision under s. 622 of the Civil Procedure Code in respect of a judgment and decree passed by the Judge of the Small Cause Court of Allahabad on the 16th December last. The action in the Small Cause Court was one in which the plaintiff sought to recover damages against the defendant for an alleged breach of a contract of bailment. The facts shortly were these. On the 6th November last the plaintiff let a horse on hire to the defendant for the purpose of being ridden by the defendant on the afternoon of that day. That horse was not returned to the plaintiff, and it was ascertained that the horse, while in the custody of the defendant and while being ridden by him, had died from rupture of the diaphragm. The evidence on behalf of the plaintiff in the Small Cause Court was that the horse was a quiet horse, which he had had for several years, during which time it had not bolted with him, and that the horse had had some exercise on the day in question prior to its being sent to the defendant's house. The plaintiff denied that the horse was fed immediately before it was let out for hire to the defendant. On the other hand, there was the evidence of the defendant, of Mr. Blenkinsop and of another witness. The defendant's statement was that, shortly after he started on his ride, the horse became restive and jumped about, that he brought it under control, and that shortly afterwards it began again to jump about and tried to back into the gateway of Mr. Porter's compound. The defendant then goes on to say that he may have then touched the horse with his riding cane. Whether he did so or not is not quite certain, and if he did use the cane moderately it was nothing more than what a man of ordinary prudence and care would have done under the circumstances. According to the defendant, the horse, after jumping about at Mr. Porter's gateway, bolted with him and ran away, and he lost control over it, and after the horse had gone about two miles he got it under control, when it trotted for a short distance, and then fell down and died.

(1) 8 C. B., N. S., 569; 29 L. J., C. P. 333.
(2) I. L. R., 3 All. 203.
(3) I. L. R., 3 All. 417.

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Mr. Blenkinsop's evidence was that the horse's stomach contained undigested food eaten by the horse shortly before it was taken out for the ride, and that the horse died from rupture of the diaphragm, the result of over-exertion on a loaded stomach. Mr. Blenkinsop also stated that a quiet horse was not likely to bolt after a meal without an exciting cause.

The evidence of the defendant's other witness was that he went to the plaintiff's stable to order the horse, and found the horse eating grain. This was substantially the evidence given below.

The Judge of the Small Cause Court came to the conclusion that the defendant had used the whip freely, or done something else which caused the horse to bolt, and that the defendant, in freely using the whip, had not taken such reasonable care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own horse, and that the death of the horse had resulted from such want of care, and gave the plaintiff a decree for Rs. 400 and costs.

Under these circumstances the first question that arises is whether we have power, under s. 622 of the Civil Procedure Code to entertain this application for revision. That depends, I think, upon the consideration whether there was any evidence upon which the Judge of the Small Cause Court might make the decree which he did. It appears to me that no Judge of the Small Cause Court, any more than a Judge of the High Court or any other Court, has any power, or in other words jurisdiction, to pass *in a contested suit* a decree adversely to a defendant where there is no evidence or admission before him to support the decree. I am not speaking of cases in which there is a balance of evidence or some evidence to support the finding upon which a decree is based, but of cases in which there is no evidence at all which the Judge should take into consideration or submit to a jury if the case was before a jury. In such a case the provisions of s. 622 of the Civil Procedure Code will apply. For the Judge, in passing a decree which is not supported by any evidence on the record, has taken upon himself a jurisdiction not vested in him by law. The Judge is bound to pass a decree only in accordance with the law; and if he passes a decree

which the law does not give him any power to pass, such as a decree adverse to a defendant in a contested suit when there is no evidence and no admission to support the decree, he exercises a jurisdiction not vested in him by law. In saying this I am not alluding to cases in which, from the nature of the case, the whole burden of proof was, and continued to be, upon the defendant, of which the present case is not, in my opinion, one.

It is contended by Mr. *Hill* on behalf of the plaintiff that the onus of proof in this case was upon the defendant. He contends that although in this case if it had been tried in England the onus of proof might have been upon the plaintiff, s. 151 and the subsequent sections of the Indian Contract Act cast the burden of proof upon the defendant. For this it is necessary to see what those sections are. S. 151 says :—"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed." S. 152 says :—"The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." Mr. *Hill* has contended that it was for the defendant to show that he had taken as much care of the horse as a man of ordinary prudence would have taken of his own horse under similar circumstances. What these circumstances were must depend in this case upon the uncontradicted evidence of the defendant. The development of Mr. *Hill's* contention is that it was for the Judge to consider whether the defendant's evidence was reliable, and whether he had established that he had taken such care as is referred to in s. 151 of the Indian Contract Act, and that the Judge's finding on that question is conclusive. Mr. *Hill* cited the case of *Collins* v. *Bennett* (1) referred to by Story in his work on Bailments, page 413. He also referred to the case of *Byrne* v. *Boadle* (2) where the plaintiff, while walking in a street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window, and where it was held that the mere fact of the accident without any proof of the circumstances under which it occurred was evidence of negligence. That class of authorities

(1) 46 New York Reports. (2) 2 H. and C. 722 ; 33 L. J., Exch. 13.

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shows that in some cases, from the nature of the accident, it lies upon the defendant to account for the happening of the accident, and thus to show that he had not been guilty of negligence. That is a proposition which I do not dispute. Each case, must, however, be looked at from its own particular circumstances. In some cases the very happening of the accident may be *primâ facie* evidence that some want of care or some negligence must have taken place to cause the accident, as was held by Brett, J., in *Gee* v. *The Metropolitan Railway Co.* (1). In *Scott* v. *The London Dock Company* (2) Erle, C. J. said: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It appears to me that the two cases referred to by Mr. *Hill* were examples of the class of cases which were referred to by Erle, C. J., in the passage from his judgment which I have quoted. The mere fact of a barrel of flour coming out of an open window was, until accounted for, *primâ facie* evidence that there was some want of care in those who had the control of the barrel, because the barrel could not have fallen out of the window of its own accord: there must have been something to have put it in motion. In such a case it lies upon the defendant to show how the accident actually happened.

In the case of *Collins* v. *Bennet* (3) which is more like the present case, the horse when delivered to the defendant was sound, and when returned was found to be foundered. In that case it was held that it was for the defendant to show how the horse, which was perfectly sound when taking out, was foundered when returned. That is a case which probably would come under s. 106 of the Indian Evidence Act, as an example of a case in which the burden of proof lies on the person who has special knowledge of the facts. These cases to my mind only show this, that in such cases it is for the defendant to give a *primâ facie* explanation in order to shift the burden of proof on the other side.

(1) L. R. 8 Q. B. at p. 175; 42 L. J., Q. B. 105.

(2) 3 H. and C. 596; 34 L. J., Exch. 220.

(3) 46 New York Reports.

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What we have to consider here is whether such a *primâ facie* explanation was given. The only evidence as to how this happened, that is how the horse happened to run away, was the evidence of the defendant himself. The defendant's evidence is not contradicted on any point; it is not inconsistent with what ordinarily happens in the life of everyone accustomed to ride or drive horses; there is nothing improbable in his statement; and under these circumstances is a Judge justified in holding that the defendant did not act as a reasonable man would have acted, and that he must have done something to cause the horse to bolt? What is the evidence upon which the Judge below has founded his judgment? He assumes that the horse undoubtedly must have been freely whipped to such an extent as to cause it to run away, or that there must have been some other cause within the knowledge of the defendant for the horse running away. His finding is based purely and solely upon speculation and assumption. In my judgment no Judge has any right to make or act upon such an assumption where there is no evidence to support it, and the evidence of the defendant on this point is uncontradicted, and is not within our common knowledge improbable. There was no evidence to contradict the defendant's evidence. There was nothing to show that it was even improbable that the horse had bolted and run away under the circumstances deposed to by him; still the Judge makes the assumption that something must have happened which had not been deposed to. If the burden of proof was upon the defendant, I think that burden was shifted on to the plaintiff by the defendant's uncontradicted and not *primâ facie* improbable evidence. I must say that I thoroughly agree with the opinion expressed by Lindley, J., in *Manzoni* v. *Douglas* (1), when he said:—"To hold that the mere fact of a horse bolting is *per se* evidence of negligence, would be mere reckless guess-work." What the Small Cause Court Judge had to find was whether the defendant had or had not taken as much care of the horse as a man of ordinary prudence would have taken of his own horse under similar circumstances. He found that the defendant had not taken such care. What was there on the evidence here which showed that the defendant had not taken such care? There is nothing to support that finding, except per-

(1) 6 Q. B. D. 145.

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haps the mere fact that the horse was a quiet horse. I think this case falls exactly within the words of Lindley, J., above quoted. It does not cease to be anything less than mere reckless guess-work because the Judge has, contrary to the evidence and without any evidence, come to the conclusion that the defendant had freely used the whip. It appears to me that that is an assumption which is unsupported by evidence, and is mere reckless guess-work.

If I were trying the case with a jury, it is quite clear to me that there was no evidence here which would justify me in leaving the case to the jury. If there is in a case tried by a Judge with a jury no evidence which the Judge ought to submit to the jury as against the defendant, it is the duty of the Judge to direct the jury to find a verdict for the defendant, and that would be a direction which the jury would be bound to act upon. Similarly, when the Judge is trying such a case without a jury, as was the case here, he is bound in law to find for the defendant. The cases to which I am going to refer show the principles on which a Judge is or is not justified in leaving a case of this kind to a jury. In *Cotton* v. *Wood* (1) Gill, C. J., said :—"To warrant a case being left to the jury it is not enough that there may be some evidence ; a mere scintilla of evidence is not sufficient, but there must be proof of well-defined negligence." In *Davay* v. *The London and South Western Railway Co.*, (2) it was held that if there is no reasonable evidence of negligence occasioning the injury, the Judge is bound to direct a verdict for the defendant. In *Hammack* v. *White* (3) it is said :—"The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the plaintiff must give some affirmative evidence of negligence on the part of the defendant."

It was also held in that case that the mere bolting of a horse in itself was no evidence of the negligence of the person who had care of the horse, nor was it evidence that the horse was improperly brought into the street.

As I have said, there was in this case no evidence of any want of care within the meaning of s. 151 of the Indian Contract Act. There is no evidence which would have entitled the Judge of the Small Cause Court to submit this case to the jury had he been

(1) 8 C. B. (N.S.) 568 ; 29 L. J., C. P. 333.
(2) 12 Q. B. D. 70.
(3) 11 C B. (N. S.) 588 ; 31 L. J., C. P. 129.

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trying the case with a jury. In fact he would have been bound to withdraw the case and direct the jury to find a verdict for the defendant. On the evidence before the Judge of the Small Cause Court, he had, in my opinion, no jurisdiction or authority in law to make the decree which he did. It is not necessary, in the view which I take of this case, to consider whether the Small Cause Court Judge should not have taken into consideration the effect on this case of s. 150 of the Indian Contract Act. Under the circumstances it appears to me that in this case it is our duty to exercise our jurisdiction under s. 622 of the Civil Procedure Code. Under that section of the Code we may pass such order as we think fit: *Maulvi Muhammad* v. *Syed Husain* (1), *Sarnam Tewari* v. *Sakina Bibi* (2). The order which I propose to make in this case is that the judgment and the decree of the Small Cause Court be set aside, the plaintiff's suit be dismissed, and judgment be entered for the defendant with costs below and costs here.

BRODHURST, J.—The learned counsel for the plaintiff, opposite party, has taken a preliminary objection that there is no ground either under s. 9 or s. 15 of the Royal Charter Act, or under s. 622 of the Civil Procedure Code, for entertaining the defendant-petitioner's application. I, however, concur with the learned Chief Justice in overruling this objection, for in my opinion the finding of the lower Court is not only unsupported by any proof, but it is, moreover, opposed to the evidence on the record, and I therefore consider that the lower Court has "acted in the exercise of its jurisdiction illegally," so as to bring the application within the meaning of s. 622 of the Civil Procedure Code.

The statement of the defendant-petitioner was recorded on oath. It may be said to be unrefuted, and it is in my opinion reliable. The plaintiff's mare was ridden by the defendant on the evening of the 6th November 1886, and then died. It is admitted by the plaintiff that he left Allahabad for Hamirpur about four days before the 6th November, that he returned to Allahabad on the morning of the 6th, that when he started for Hamirpur he left orders that the mare was merely to have walking exercise during his absence, and that on the 6th, prior to her being sent to the defendant, she was not worked at all beyond being driven between the Railway

(1) I. L. R., 3 All. 203. (2) I. L. R., 3 All. 417.

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Station and the plaintiff's house. The plaintiff's witness and relative, H. M. Gordon, deposed that he had often ridden the mare, and that she had neither a hard nor a soft mouth; but from the evidence of the defendant, it is, I think, clearly proved that the mare had a hard mouth, and that she ran away with him for two miles or more in spite of his utmost endeavours to restrain her.

Admittedly the mare had been out of work for about four days prior to the 6th November, and had had very little work on the latter date, and, as might be expected, she was very fresh when ridden by the defendant on the evening of the 6th November. Almost immediately after she was mounted she became restive and plunged, and after galloping for a short distance and then being pulled up, she again plunged and tried to back into the Collector's compound. If under these circumstances the defendant hit her with his riding-cane, he did nothing more, in my opinion, than he should have done. There is proof that the defendant was not wearing spurs. There is not a particle of evidence that he made "free use of the whip," there is no ground for assuming that he even made use of his riding-cane otherwise than in a moderate and proper manner; and from such evidence as there is on the record I see every reason to believe that the defendant took as much care of the mare as a man of ordinary prudence would, under similar circumstances, have taken of her had she been his own property.

Mr. Blenkinsop, of the Army Veterinary Department, who held a *post-mortem* examination of the mare, deposed that there were no external marks of violence on the body; that, on opening the carcase, he found that the diaphragm was ruptured; that the stomach contained undigested food; that the mare must have eaten shortly before she died; that the stomach was distended with undigested food; and if a horse gallops with a full stomach the probabilities are that he would have some internal injury such as rupture of the diaphragm; that the cause of the mare's death was rupture of the diaphragm; and that in his opinion, the animal was not in a fit state to be galloped or ridden fast. In addition to the above evidence there is the deposition of the witness Ram Prasad, who deposed that when he went to Mr. Wilkinson for the mare she was at the time (4-10 or 4-20 P. M.) eating gram.

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It is, I think, obvious that the mare was restive owing to want of a proper amount of work for some days prior to the time that she was let to the defendant for hire; that she consequently plunged and backed and then ran away with the defendant in spite of all his efforts to restrain her; and that the cause of death was rupture of the diaphragm owing to the mare having galloped when her stomach was distended with food which had been given her in the plaintiff's stables shortly before she was let to the defendant for hire. Under these circumstances, the plaintiff alone was, I consider, responsible for the mare's death; and I therefore concur in allowing the application and in reversing the decree of the lower Court with all costs.

Application granted.

APPELLATE CIVIL.

1887
February 11.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

BALDEO SINGH (JUDGMENT-DEBTOR) *v.* KISHAN LAL AND ANOTHER (DECREE-HOLDERS.)*

Execution of decree—Civil Procedure Code, ss. 311, 312,—*Objection to sale—Limitation—Legal disability—Act XV of* 1877 (*Limitation Act*) *s.* 7—*Order confirming sale before time for filing objections has expired—Appeal from order.*

Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute.

An application under s. 311 of the Civil Procedure Code, on behalf of a judgment-debtor who was a minor was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which no proper application of objection had been filed. From this order the judgment-debtor appealed.

* First Appeal No. 205 of 1886 from an order of Maulvi Saiyyid Muhammad, Subordinate Judge of Aligarh, dated the 2nd August, 1886.