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property only, not that of the objector, that would become thus vested. The application must be entertained, and if it be found that the property in question had been attached in execution of a decree against the insolvent, the Court below will have next to determine the issue of fact raised by the objector under s. 278, and determine the case accordingly. The case is remanded under s. 562 to be disposed of as above indicated, and the costs so far will be costs in the cause.

Cause remanded.

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January 12.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHIAM SUNDAR (PLAINTIFF) v. AMANANT BEGAM (DEFENDANT). *

Pre-emption—Wajib-ul-arz—Co-sharers—Effect of perfect partition—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 191—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 10—“Physical possession”—Purchase of equity of redemption by mortgagee in possession—Aequiescence—Equitable estoppel.

The *wajib-ul-arz* of three villages which originally formed a single mahal gave a right of pre-emption to co-sharers in case of transfers of shares to strangers. Afterwards the shares in these villages were made the subject of a perfect partition, and divided into separate mahals. Subsequently, by two deeds of sale executed on the 13th January, 1884, and registered on the 17th January, 1884, some of the original co-sharers sold to strangers their shares in all three villages. At the time of the sale, the shares in two of the villages were in possession of the vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in the third village was, at the time of the sale, in possession of another of the original co-sharers under a possessory mortgage. On the 17th January, 1885, this last-mentioned co-sharer brought a suit against the vendors and the vendees to enforce his right of pre-emption under the *wajib-ul-arz* in respect of the shares sold in the three villages.

Held that, notwithstanding the partition of the village into separate mahals, the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and govern the separate mahals, until it was shown that a new one had been made. *Gopal Singh v. Mannu Lal* (1) referred to.

* *Held* that in the case of the sale of an equity of redemption by the mortgagor to the mortgagee in possession, which has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagee, it cannot

* First Appeal No. 185 of 1885, from a decree of Maulvi Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 17th June, 1885.

(1) L. L. P. 7 AB. 772.

properly be said that any property is sold which is capable of "physical possession" within the meaning of art. 10, sec. ii, of the Limitation Act. In a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word "physical" implies some corporeal or perceptible act done which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. An equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and a pre-emptor impeaching such a sale has one year from the date of registration of the instrument of sale within which to bring his suit.

Held, therefore, that the period of limitation began to run from the date of the registration of the deed of sale, and that the suit was within time.

Held also that the Court below was wrong in holding that the plaintiff, by reason of his having omitted in a suit previously brought against him for redemption of his mortgage and dismissed for want of jurisdiction, to set up in defence any right of pre-emption or to express any desire to purchase, was equitably estopped by acquiescence in the sale from asserting his pre-emptive right.

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of three villages, Kamalpur, Muhammadpur Mai, and Kalupur. The clause of the *wajib-ul-arz* relating to pre-emption was as follows :—

"In the event of a shareholder wishing to sell or mortgage his share, or, if a mortgagee, wishing to sub-mortgage his mortgagee right, he should, at the time of such transfer, give notice to his co-sharer, and, on his refusal, to another sharer in the village, and sell or mortgage it for a proper price. On the latter's refusal to take the share or pay the proper price, the former shall be at liberty to transfer it to any one he likes, and after that no claim for pre-emption will be entertainable."

At the time when the *wajib-ul-arz* was made the plaintiff was a co-sharer with the vendors in the three villages, which then formed a single mahal. In 1879, the shares of the plaintiff were made the subject of a perfect partition and formed into a distinct and separate mahal.

The sale in respect of which the suit was brought, took place on the 13th January, 1884, in favour of strangers, and was effected by two deeds of sale, which were registered on the 17th January, 1884. It related to the shares held by the defendants-vendors in all three villages, and the consideration expressed on the face of the

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deeds amounted to Rs. 17,000. At the time of the sale, the shares in Kamalpur and Kalupur were in possession of the defendants-vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in Muhammadpur Mai was at the time of the sale in the possession of the plaintiff under a possessory mortgage.

The suit was instituted on the 17th January, 1885. The defendants pleaded that the provisions of the *wajib-ul-arz*, and among them that which gave a right of pre-emption, ceased to have effect after the perfect partition of the property to which they related. It was also pleaded that the suit was barred by limitation under sch. ii, No. 10 of the Limitation Act (XV of 1877), and that the plaintiff had lost his right of pre-emption (assuming it to have been otherwise valid), by refusal to purchase and acquiescence in the sale. It was alleged by the plaintiff that the consideration was wrongly stated in the deed of sale.

Upon the first point, the Court of first instance (Subordinate Judge of Sháhjahanpur) observed:—"The villages in dispute were joint at the time the contract was entered into. The Court must now see how long was this contract intended to remain in force. It is true that the complete partition which took place in respect of the villages in dispute does not affect the meaning of the word 'mauza.' The partnership and the nature of the co-parcenary which existed at the time of the contract are no longer in existence, and the state of co-parcenary has changed; but according to a judgment of the High Court—*Gokal Singh v. Mannu Lal* (1)—which must be respected, the contract which was made before the partition should be considered applicable to the state of things remaining after the partition. The Court therefore admits the plaintiff's right under the *wajib-ul-arz* contract."

Upon the question of limitation the Court drew a distinction between the sale of the shares in Kamalpur and Kalupur on the one hand and of the share in Muhammadpur Mai on the other. It was of opinion that the defendants-vendees, who were previously in possession of the former shares under a mortgage, should be deemed to have acquired "physical possession" in their character

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of vendees at the time of the sale. So far, therefore, as these villages were concerned, the Court held that limitation ran from the 13th January, 1884, and that the suit was consequently barred by limitation. In regard, however, to the share in Muhammadpur Mai, the Court held that as the plaintiff was in possession thereof as mortgagee at the time when it was sold, the defendants could not obtain "physical possession" of it until the mortgage had been redeemed, that the share sold, therefore, did not admit of "physical possession" in the sense of sch. ii, No. 10 of the Limitation Act, and that as consequently time must run from the 17th January, 1884, when the instrument of sale was registered, the suit for pre-emption, so far as it related to Muhammadpur, was within time.

Upon the question of the plaintiff's acquiescence in the sale, the Court found that the evidence of his having refused to purchase was untrustworthy, but that in a suit for redemption of his mortgage, which was brought against him in 1884 and dismissed for want of jurisdiction, he did not in his defence set up any right of pre-emption or express any desire to purchase, and that under the circumstances his conduct must be treated as a relinquishment of the right. The Court accordingly dismissed the suit.

The plaintiff appealed to the High Court. It was contended on his behalf that limitation should have been calculated from the 17th January, 1884, the date of registration, and therefore no portion of the claim was barred; and that the facts mentioned by the Court below in its judgment did not prove any relinquishment on his part of his pre-emptive right.

The Hon. Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the respondent.

STRAIGHT and TYRRELL, JJ.—There are four questions raised in regard to this appeal, the first of which relates to the right of the plaintiff to maintain the suit at all. Assuming this to be answered in the affirmative, then we must determine whether the Subordinate Judge was right in holding the suit out of time, *quoad* the share in Kamalpur, and wrong in his view that he is estopped

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by conduct as to the share in Muhammadpur Mai; and lastly, what was the actual consideration paid by the vendees to the vendors in respect of the shares in those villages.

As to the first point, it is admitted that the plaintiff was, prior to 1879, a co-sharer with the vendors in the villages of Kamalpur, Muhammadpur Mai, and Kalapur, jointly answerable along with them for the Government revenue, and subject, in common with them, to the conditions of the *wajib-ul-arz* applicable thereto. It is also conceded that the shares of the plaintiff in those villages have been made the subject of a perfect partition, and that they have been divided off into a distinct and separate mahal, of which he is the sole proprietor. It is also a fact that the sale he now seeks to impeach was made upon the 13th January, 1884, long after such partition, and the point that arises is whether, this partition having taken place, the conditions of the *wajib-ul-arz* which subsisted prior thereto, and which has not been replaced by another, are still effectual and binding on all the persons who were originally co-sharers in the villages. The question is by no means without difficulty, and, were it *res integra*, we should have had some doubts in deciding it. There are, however, two rulings of Division Benches of this Court—one *Gokal Singh v. Mammul Lal* (1), and the other, an unreported case—F. (A. No. 69 of 1882—the former of which has been followed in the present suit by the Court below, that are directly in point. We are not prepared, as at present advised, to reconsider the rule therein laid down, to the effect that, despite the partition of the village into separate mahals, the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. We may add that this view is supported by the terms of the second paragraph of s. 191 of the Revenue Act of 1873. With regard to the second question, the point to be determined is, whether a mortgagee in possession, who purchases the equity of redemption of his mortgagor, purchases anything which is capable of physical possession in the sense of art. 10 of the Limitation law; and if so, whether such physical possession is complete when the contract of sale is executed, or whether the case falls within the alternative provision of the article which makes the date of registration of the instrument of sale the point from which time begins to run.

(1) I. L. R., 7 All. 772.

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Now, an equity of redemption is the right now defined by statute, which entitles the mortgagor, at the proper time and place, upon satisfaction of the mortgage-debt, either by payment of the amount to the mortgagee in possession, or after his realization of it from the usufruct of the mortgaged estate, to require him to deliver up possession to the mortgagor, and to execute an instrument re-transferring it, or to have registered an acknowledgment in writing that the mortgage has been extinguished. It follows therefore that when, as in the case before us, the mortgagee is in possession, the sale by the mortgagor to the mortgagee of such right to redeem has the effect of extinguishing such right; or, in other words, there is a merger of the two estates in the mortgagee, who therefore became proprietor of the property mortgaged. We do not think, in a transaction of this description, it can properly be said that any property is sold which is capable of "physical possession" within the meaning and intention of art. 10 of the limitation law. It seems to us that in a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word "physical" implies some corporeal or perceptible act done, which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. We are of opinion that an equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and that for the purposes of pre-emption a pre-emptor impeaching such a sale has one year from the date of registration of the instrument embodying it within which to bring his suit. As the sale contract in the present case was registered on the 17th of January, 1884, the present suit was in time, and we differ from the Subordinate Judge for these reasons, by holding that it was not barred by limitation. Upon the third point, we dissent from the view of the Subordinate Judge, that the plaintiff should fail as regards the share in Muhammadpur Mai. He is undoubtedly in time, so far as limitation is concerned, in respect of that share; and in the absence of any proof that it was offered to him and that he refused to purchase it, we see nothing to warrant us in holding that he is equitably estopped by

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acquiescence in the sale from asserting his right. There remains the question, which formed the fourth issue in the Court below, namely—"What is the actual price of the property in dispute, and what sum has passed between the vendor and vendee, and whether any fraud has been practised on the sale-deed as regards consideration?"

The Court below did not determine these matters, having dismissed the suit on preliminary grounds. But this treatment of the case has not excluded evidence on these questions. All the evidence of the parties is on the record, and it is therefore incumbent on us to try this issue and decide it on the materials before us. The plaintiff tendered no evidence as to the actual value of the property or of the fraudulent exaggerations he imputed to the sale-deed. The defendants, on the other hand, gave evidence, which has not been questioned or contradicted, in support of the correctness and good faith of the recitals of the instrument of sale. This being so, we have no alternative but to determine the issue of price in favour of the respondents. The appellant therefore will get a decree, entitling him to purchase the shares sold in the villages mentioned above, on condition of his paying for them the sale-deed prices within thirty days from the date when this decree shall have been certified in the Court below. Failing to make such payment, his suit will stand dismissed.

The appeal thus stands decreed, with costs proportionate to the success of the parties respectively.

Appeal allowed.

CRIMINAL REVISIONAL.

1887,
January 15.

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

QUEEN-EMPRESS v. NARAIN.

Maintenance—Wife—Criminal Procedure Code, s 488—Breach of order for monthly allowance—Warrant for levying arrears for several months—Imprisonment for allowance remaining unpaid after execution of warrant—Act I of 1868 (General Clauses Act. s. 2 (18)—"Imprisonment."

Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate, acting under