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THE ORIENTAL BANK CORPORATION v. T. F. BROWN & CO., LD.

[Mr. *Hill* suggests, "correspondence with the attorneys containing instructions for the conduct of this suit." The documents could be placed in books and numbered A, B, C, &c., in fact most of the letters, &c., are in books.]

PIGOT, J.—That can be done, and they should be described as I have indicated. Let costs be costs in the cause. Let all the documents be numbered as directed in *Bewicke* v. *Graham* (1).

Solicitors for the plaintiffs: Messrs. *Barrow & Orr.*

Solicitors for the defendants: Messrs. *Sanderson & Co.*

P. O'K.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

SHAMBHU NATH NATH AND ANOTHER (DEFENDANTS) *v.* RAM CHANDRA SHAHA AND OTHERS (PLAINTIFFS.)*

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Limitation Act (*XV of* 1877), *s.* 19—*Limitation Act* (*IX of* 1871), *s.* 20—*Contents of acknowledgment of debt, Secondary evidence of—Evidence Act* (*I of* 1872), *s.* 91.

Para. 2, s. 19 of the Limitation Act, 1877, belongs to that branch of the law of evidence which is dealt with by s. 91 of Act I of 1872, and ought not to be read in derogation of the general rules of secondary evidence so as to exclude oral evidence of the contents of an acknowledgment which has been lost or destroyed.

THIS was a suit for the recovery of a sum of money due on a balance of accounts. The plaintiffs alleged that the defendants had given a written acknowledgment of the debt. The material issue upon the pleadings was whether there was any such acknowledgment. The Munsiff dismissed the suit, being of opinion that, as the acknowledgment, which was the only means of avoiding limitation, was said to have been lost, secondary evidence of its contents could not be received (para. 2, s. 19 of the Limitation Act). On appeal the Subordinate Judge decreed the claim, observing

* Appeal from Appellate Decree No. 1863 of 1884, against the decree of Baboo Dwarka Nath Bhuttacharji, Additional Subordinate Judge of Tipperah, dated the 19th of July 1884, reversing the decree of Baboo Protap Chandra Mozoomdar, Munsiff of Muradnagore, dated the 25th of September 1883.

(1) 7 Q. B. D., 400.

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that the words of s. 19, namely, "oral evidence of the contents of an acknowledgment shall not be received in evidence," did not mean to override the general rule on the production of secondary evidence in case of loss or destruction of a document.

The defendant appealed to the High Court.

Baboo *Girish Chundra Chowdhri*, for the appellants.

Baboo *Hari Mohun Chakrabati*, for the respondents.

The Court (WILSON and BEVERLEY, JJ.) delivered the following judgment:—

The only point discussed before us on this appeal is, whether secondary evidence of the contents of an acknowledgment used to keep alive a cause of action beyond the ordinary period of limitation, can be given, where the original is proved to have been lost or destroyed, or whether the effect of paragraph 2 of s. 19 of the present Limitation Act XV of 1877 is absolutely and always to exclude secondary ovidence in such a case.

This section first provides for keeping alive a claim by acknowledgment, and requires that such acknowledgment shall be in writing and signed, and shall be given before the claim is barred by limitation. Then in the second paragraph it is said: "When the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received." Now, the question is, what is the meaning and effect of these words?

In the former Limitation Act (Act IX of 1871) the corresponding section is s. 20; which said that no promise or acknowledgment should have the effect of excluding limitation unless certain conditions were complied with. Then subsection (*c*) is this: "When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

When that Act was passed the present Evidence Act was not in existence; and there was no section in any Act relating to evidence defining clearly the cases in which secondary evidence of a document could be given; but it was known law that amongst

the grounds which authorized the admission of secondary evidence was the loss or destruction of the original. In the sentence just read, the only case referred to is the destruction or loss of the document. The effect clearly was to exclude *oral* evidence of an acknowledgment if tendered on either of these grounds; but nothing was said about the case where the document is in the possession of the opposite party, or is a public document, or beyond the jurisdiction of the Court; or the other cases in which secondary evidence of the contents of a document may ordinarily be given.

Then came the Evidence Act. That Act has defined the cases in which secondary evidence is admissible. The first section is s. 64, in which the general rule of law is laid down, that "documents must be proved by primary evidence except in the cases hereinafter mentioned." Then s. 65 gives the various cases in which secondary evidence may be given. The first is when the document is in the possession or power of the opposite party, or of any person out of the reach of, or not subject to, the process of the Court, or of any person legally bound to produce it but who fails to produce it when required. The second, when the contents are admitted by the opposite party. The third, when the original is destroyed or lost. The fourth, when the original is a public document. The fifth, when the document is one of which a certified copy can be used. And so on.

Then came the Limitation Act of 1877 with which we are now dealing. The language of s. 19 is altogether different from the language of the prior Act of 1871. The language of the prior Act of 1871, so far as oral evidence is concerned, was necessarily in direct conflict with s. 65 of the Evidence Act, because, according to the Evidence Act, secondary evidence is admissible of the contents of a document generally, if the original is lost or destroyed, but according to the Act of 1871 oral evidence of the contents of an acknowledgment would not be admissible in such a case.

The words now used are different. One branch of the law of Evidence is that already referred to. It is contained in s. 64 and the following sections of the Evidence Act, and it determines the cases in which secondary evidence may be given of the

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contents of a document not produced. Another branch of that law is contained in s. 91, and the following sections. It deals with the question how far *oral* evidence, or evidence of oral communications, may be given to vary, control, or add to the effect of a document.

The first part of the paragraph before us clearly belongs to the latter branch of the law. And, it would seem, the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence to alter the effect of documents might not exclude oral evidence of the date of an undated document, where the date is an essential matter. Accordingly it is said that oral evidence of the date of the document may be given. The paragraph then proceeds: "but oral evidence of its contents shall not be received." These latter words are introduced with a "but," and they speak not of secondary evidence but of oral evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repealing s. 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition that the prior words interfere with the general rules as to oral evidence further than the express words require.

The alternative view which we are asked to adopt is to read the words as excluding secondary evidence, oral or otherwise, not only in the cases mentioned in the Act of 1871 but in all cases whatsoever.

There is nothing in the terms of the Act constraining us so to hold, and the consequences of doing so would be serious.

If we interpret s. 19 of the Limitation Act as excluding secondary evidence when the original document is lost or destroyed, it must also exclude secondary evidence of the contents of a document in every one of the cases mentioned in s. 65 of the Evidence Act. For example, the party objecting to secondary evidence, may have the original in his pocket, and when called upon to produce it may pertinaciously refuse to do so. If secondary evidence cannot be given, justice will be frustrated.

So again an acknowledgment may be in the form of a public

record, as was apparently the case in *Daia Chand* v. *Sarfraz* (1). Or the document may be out of the jurisdiction and control of the Court.

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We think that the words in question in s. 19 ought not to be read as excluding secondary evidence of the contents of an acknowledgment which has been lost or destroyed, and that, therefore, the view taken by the lower Appellate Court is right. The appeal will be dismissed with costs.

K. M. C. *Appeal dismissed.*

Before Mr. Justice Field and Mr. Justice O'Kinealy.

MOSHINGAN (ONE OF THE DEFENDANTS) *v.* MOZARI SAJAD (PLAINTIFF.)* 1885 *July* 6.

Appeal—Valuation of suit—Costs—Return of plaint—Jurisdiction—Code of Civil Procedure, ss. 15 *and* 57.

On the hearing of a suit in the Court of first instance, the Court came to the conclusion that the value of the property in dispute placed the claim beyond the jurisdiction of the Court; the suit was therefore dismissed with costs. On appeal this decision was reversed with costs, on the ground that the plaint ought to have been returned to the plaintiff for presentation in the proper Court. The defendant appealed to the High Court.

Held, that the defendant ought to have been allowed his costs in both Courts, and that he was entitled to an appeal on that ground.

THIS was a suit for the recovery of land. The first issue was "whether the present suit is cognizable by this Court with reference to the value of the property in dispute or not?" The Court of first instance took evidence on this point, and found that the value of the property in dispute was over Rs. 1,200; and that consequently he had no jurisdiction to entertain the suit. He thereupon dismissed the suit with costs, holding, on the authority of *Jagjivan Javherdas Seth* v. *Magdum Ali* (2), that he was precluded from returning the plaint for presentation to the proper Court after the Court-fee stamp was punched. On appeal, the Subordinate Judge held that the Munsiff's finding as to the valuation of

* Appeal from Order No. 21 of 1885, against the order of Baboo Mathura Nath Gupta, Subordinate Judge of Patna, dated 22nd October 1884, reversing the order of Moulvie Amir Ali, Munsiff of Behar, dated the 21st of January 1884.

(1) I. L. R., 1 All., 117. (2) I. L. R., 7 Bom., 487.