

deed in my judgment is in terms and effect a deed of sale, and I have no materials for forming an opinion whether any, or what, occult meaning or design may underlie these terms. I therefore concur in the order of the learned Chief Justice.

KNOX, J.—I entirely concur with all that has been said by the learned Chief Justice with reference to the interpretation that should be put upon the document and upon the consequences which should follow from that interpretation. I need not allude to the language in which the document is couched, because it has been given in full by my brother Tyrrell, and I agree with him in the interpretation which he has placed upon the words of the document. Whatever may have been the real nature of the transaction, I am of opinion that it was intended by the executants of the document that it should bear to the world the face of a deed of sale and not that of a deed of gift. It was, under the law then current and directing what stamp such deed should bear, stamped as a deed of sale and not as a deed of gift. It was registered, and it seems to me that any person who sought to know under what liabilities the property stood, or to ascertain who was entitled to it, would have had no means of knowing the nature of the transaction except from the deed now before us, and, on this ground, as well as on the grounds already stated, I think it would most inexpedient to put upon it any interpretation other than that of a deed of sale. I therefore concur in the order which the learned Chief Justice and my brother Tyrrell propose to pass in the case.

*Appeal decreed.*

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brod-  
hurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

JANGU AND OTHERS (DEFENDANTS) v. AHMAD ULIAH AND OTHERS (PLAINTIFFS).

*Muhammadan law—Public mosque—Right of all Muhammadans without distinction of sect to use such mosque for the purposes of worship—Right to say “amin” loudly during worship.*

Where a mosque is a public mosque open to the use of all Muhammadans without distinction of sect, a Muhammadan who, in the *bona fide* exercise of his religious

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duties in such mosque, pronounces the word "*ámín*" in a loud tone of voice, according to the tenets of his sect, does nothing which is contrary to the Muhammadan ecclesiastical law or which is either an offence or civil wrong, though he may by such conduct cause annoyance to his fellow-worshippers in the mosque. But any person, Muhammadan or otherwise, who goes into a mosque not *bona fide* for religious purposes, but *malá fide* to create a disturbance there and interferes with the devotion of the ordinary frequenters of the mosque, will render himself criminally liable.

The plaintiffs in this case, members of a sect of Muhammadans calling themselves *Mowahhids* or *Gair Mokallids*, sued the defendants, who were of another sect, called *Hanafis* or *Mokallids* for a declaration that they were entitled to worship in a certain mosque, and, in the course of prayers in such mosque, to pronounce the word '*ámín*' audibly. The defendants pleaded that the suit was not cognizable by a Civil Court; that the plaintiffs had no concern with the mosque, which had been built by Hanafis, and in which they, as Hanafis, had a right to worship to the exclusion of other sects. The Court of first instance (the Munsif of Meerut) found that the suit was cognizable by a Civil Court, and gave the plaintiffs a decree in the following terms:—"It is therefore ordered that the plaintiffs are entitled to say the word '*ámín*' loudly, but not at the top of their voice, nor so as to trouble the ears of a fellow-worshipper."

On appeal by the defendants, the Subordinate Judge, agreeing with the Court of first instance that the suit was cognizable by a Civil Court, found that the mosque was a public mosque, built about 400 years ago by a person whose sect was unknown, and that neither party had established an exclusive right, by prescription or in any other way, to worship in it; but that both parties as members of the Muhammadan community had an equal right to perform their prayers and worship there according to the rites and ceremonies of their respective sects. The Subordinate Judge accordingly modified the decree of the Munsif in so far as that decree restricted the tone of voice in which the plaintiffs were entitled to say '*ámín*,' and gave the plaintiffs the decree which they prayed for: also granting an injunction against the defendants restraining them from interfering with the plaintiffs going into the mosque and worshipping there according to the usages of their sect. The defendants then appealed to the High Court.

The appeal came on for hearing before Mahmood and Brod-hurst, J.J., who, by their order of the 8th June 1887, referred it to the Full Bench for disposal.

Pandit *Sundar Lal* for the appellants.

The Hon'ble Mr. *Conlan* and Mr. *Amir-ud-din* for the respondents.

EDGE, C.J.,—This was a suit which originated in an order passed by the Magistrate of Meerut in 1884, by which he bound the parties before him over to keep the peace, and prohibited the plaintiffs from repeating aloud, in a certain mosque, the word '*ámin*' at the end of the prayer.

The plaintiffs brought this suit for a declaration of their right to repeat the word aloud in the mosque, and to restrain the defendants from interfering with them in the performance of their religious duties. There was another question, namely, as to raising the hands, which does not arise in the appeal before us. The plaintiffs succeeded in the Munsif's Court, which decided that they were entitled to say the word '*ámin*' loudly, but not at the top of their voice, nor so as to trouble the ears of their fellow-worshippers—a decision probably right enough in intention, but so vague as to leave the parties very much where they were before; beyond giving the plaintiffs a right to repeat the word '*ámin*' aloud. There was an appeal by the defendants from the decree of the Munsif, and objections were filed to the portion of the Munsif's decree which limited apparently the tone of voice in which the word '*ámin*' might be repeated. In first appeal the Subordinate Judge of Meerut found as a fact that the mosque in question was a public mosque, in which all the Muhammadans were entitled to say their prayers. The defendants here contend that the mosque was one the use of which had been restricted to those Muhammadans who followed doctrines or ritual of Imam Abu Hanifa. The finding of the Subordinate Judge disposed of this contention, and that finding is in the following terms:—

“The conclusion I arrived at is that the mosque was originally built some 400 years ago by some Muhammadan, whose name no

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one is able to give, nor is it known to which particular sect he belonged, and that it has been since used as a public place of worship without distinction by all the Muhammadans who cared to go there."

Now this is a finding that it is a public Muhammadan mosque : as I read the written statement of the defendants, it is not suggested that the plaintiffs *malâ fide* repeated aloud during their devotion the word "*âmin*." It is only alleged that the plaintiffs dissented from the ritual which had been observed. It is found as a fact that the plaintiffs are Muhammadans, and it is not found that they either did or desired to do anything in the mosque which was contrary to the Muhammadan ecclesiastical law. I am of opinion, therefore, that the appeal must fail. There can be no doubt that a Muhammadan or any one else who went into a mosque not *bonâ fide* for religious purposes, but *malâ fide* to create disturbance there, and interfered with the devotion of the ordinary frequenters of the mosque, would bring himself within the reach of the criminal law. The only order which we pass here is that the appeal be dismissed with costs.

*Straight, Brodhurst, and Tyrrell, J.J.*, concurred.

MAHMOOD, J.—I entirely agree in what has fallen from the learned Chief Justice, and should not have added anything but for the circumstances that I was a party to the order of reference and also because the case relates to a subject upon which, on a former occasion, I was unfortunately unable to agree with the late learned Chief Justice of this Court and his honorable colleagues, who delivered their judgments in *Queen-Empress v. Ramzan* (1) without having had an opportunity of considering the views which I expressed in my judgment in the same case. I have referred to that case, though it came before this Court in its Criminal Jurisdiction, because the point there raised was identical with the one which has arisen here in the form of a civil suit, and which we in the Full Bench are now called upon to determine. The principle of deciding the question must, however, be the same in both cases.

(1) I. L. R., 7 All., 461.

The main object of the suit is to obtain a declaration that the plaintiffs are entitled to worship in the mosque pronouncing the word 'ámin' audibly in the course of the prayers, and also an injunction restraining the defendants from obstructing the plaintiffs in performing worship in the mosque according to their tenets.

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The suit was resisted by the defendants mainly upon the ground that the suit was not cognizable by the Civil Court, that the plaintiffs were heretics and were not entitled to say 'ámin' aloud in the mosque.

The controversy thus raised between the parties is exactly of the same nature as that which I had to consider in the case of *Queen-Empress v. Ramzan* (1); but the original Arabic authorities which I quoted in delivering my judgment in that case are not to be found in the published report. The original judgment, however, is now before me, with the original authorities, and I wish to repeat them here, with such introductory passages from my judgment as are equally pertinent to this case. In introducing those texts, I said (at p. 470) that the word *ámin* is of Semitic origin, being used both in Arabic and Hebrew, and has been adopted in prayers by Muhammadans as much as by Christians.

The word does not occur in the *Kurán*, but, in conformity with the "*Sunna*," or the practice of the Prophet, it is regarded by Muhammadans as an essential part of the prayers, as a word representing earnestness in devotion. The word is pronounced at the end of the first chapter of the *Kurán*, which consists of the following prayers:—

"Praise be to God, the Lord of all creatures; the most merciful; the king of the day of judgment. Thee do we worship, and of thee do we beg assistance. Direct us in the right way, in the way of those to whom Thou hast been gracious, not of those against whom Thou art incensed, nor of those who go astray."

I then went on to point out that the *Sunnis*, or followers of the Prophet's traditions, recognize as great exponents of the orthodox doctrines four principal *Imáms* or founders of the schools of juris-

(1) I. L. R., 7 All., 461.

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prudence, namely *Abu Hanifa*, *Sháfai*, *Málík*, and *Hanbal*, all of whom flourished within the first two centuries of the Muhammadan era, and whose doctrines have been accepted by the bulk of the Muhammadan population of the world.

The doctrines of these *Imáms* proceed upon the same principles, and the differences of opinion are limited only to matters of detail, such as the form or manner of the performance of religious rituals.

In the case of *Queen-Empress v. Ramzan* (1) (see p. 471) I held, what I hold now, that it is an indisputable matter of the Muhammadan ecclesiastical law that the word ‘*ámín*’ should be pronounced in prayers after the *Sura-i-Fáteha* or the first chapter of the *Kurán*, and that the only difference of opinion among the four *Imáms* is, whether it should be pronounced aloud or in a low voice. The *Hedaya*, which is the most celebrated text-book of the Hanafi school of law, lays down the rule in the following terms:—

“When the *Imám* (leader in prayers) has said ‘nor of those who go astray,’ he should say “*ámín*,” and so should those who are following him in the prayers, because the Prophet has said that when the *Imám* says ‘*ámín*’ you must say ‘*ámín*’ too. But this saying of the Prophet does not support *Málík* as to the distinction (between saying ‘*ámín*’ aloud and saying it in a low voice) because the Prophet after saying ‘when the *Imám* says—*nor of those who go astray*—you should say ‘*ámín*,’ also added that the *Imám* should pronounce it, and they (*i.e.*, followers in the prayers) should repeat it inaudibly. Such is the tradition which has been related by *Ibn-i-Masud*; and, moreover, the word is a prayer, and should therefore be pronounced in a low voice.” \*

\* إذا قال الإمام ولا الضالين قال آمين و يقولها الموتم لقوله ع إذا امن الإمام فامنوا أولا متمسك لما لك في قوله ع إذا قال الإمام ولا الضالين فقولوا آمين من حيث التمسك لانه قال في آخره فان الإمام يقولها و يخفونها لما روينا من حديث ابن مسعود و لانه دعاء فيكون ميتناه على الاخفاء (هداية جلد اول)

That this doctrine is the result of weighing the authority of conflicting traditions is apparent from the commentary of *Ibn-i-Hu-mām*, a celebrated author of the *Harafi* school, on the passage of the *Hedaya* which I have quoted above, and I wish to quote the commentary also in order to show the manner in which such questions are dealt with in the Muhammadan ecclesiastical law. The commentary runs as follows:—

“He (author of the *Hedaya*) says that the followers in the prayer should also say it (*i.e.*, *āmīn*): this doctrine is common to prayers which are repeated aloud and prayers which are repeated in a low voice when audible; but as to the latter class of prayers some have maintained that it (*āmīn*) should not be said, since loudness of voice is not applicable to them.”\*

The commentator then mentions the names of various traditionists who have differed as to whether the word *āmīn* should be pronounced aloud, and finally points out that the author of the *Hedaya* has only preferred the tradition as to its being pronounced in a low voice. He does not, however, say that the other traditions are untrustworthy or should be absolutely rejected. Indeed he could not say so, as these traditions are to be found in the most authoritative and celebrated collections of traditions (*Sihā*) of *Bukhari* and *Muslim*, both equally acknowledged as accurate traditionists by all the schools of *Sunni* Muhammadans. The former of these in the chapter relating to the pronouncing of *āmīn* has the following:—

“*Ata* has said that *āmīn* is a prayer, and it was pronounced by *Ibn-i-zubair* and those who were behind him (in prayers), so much so that the mosque resounded. *Abu Huraira* used to ask the *Imām* aloud not to forsake him in pronouncing ‘*āmīn*.’ *Nafe* has said that *Ibn-i-Umar* never omitted ‘*āmīn* ;’ and used to induce

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\* قوله يقولها المومن هذا اعم من كونه في السرية إذا سمعه اوفي الجهرية  
 و في السرية منهم من قال لاان الجهر لا عبرة به ( ابن حمام حاشية هداية  
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others to say it, and that he had heard favourably about it from him as to its being beneficial." (1)

*Sahib Muslim* has the following tradition in regard to saying *ámín* :—

"*Harmala bin Yahya* related to us that it was related to him by *Ibn-i-Wakab*, who said that he had been informed by *Amru*, that he had been told by *Abu Yunus*, who had heard from *Abu Huraira*, that the Prophet has said : 'Whenever any one among you says '*ámín*' in prayers whilst the angels in heaven are saying it, and the two coincide with each other, then his past sins will be forgiven.'"—(2)

This passage of *Sahib Muslim* is fully explained in his celebrated commentary of *Nawawi*, which deserves quotation here, as it explains exactly how the Muhammadan ecclesiastical law stands as to the pronouncing of *ámín* in prayers :—

"In these traditions (*hadis*) is enjoined the pronouncing of '*ámín*' after the *Sura-i-Fátcha* (first chapter of the *Kurán*) both for the leader in prayer as well as those who follow him and also for him who may be praying singly. It is proper that the pronouncing of '*ámín*' by the followers should be simultaneous with that of the leader in prayer, that is, neither before nor after, because the Prophet has said :—'When he (*Imám*) says—*nor of those who go astray*—you should say '*ámín*.' By saying when the *Imám* says '*ámín*' you should also say it, is meant when he is

(1) باب جهرا الامام بالتامين قال عطية امين دعاه امن ابن الزبير و من ورائه حتى ان للمسجد لتكبة و كان ابو هريرة ينادي الامام لا تغثنى بامين و قال نافع كان ابن عمر لا يدعة و يتكفهم و سمعت منه في ذلك خيرا (صحيح بخاري)

(2) حدثني حمالة بن يحيى قال حدثني ابن وهب قال اخبرني عمرو ان ابا يونس حدثه عن ابي هريرة ان رسول الله ص قال اذا قال احدكم في الصلوة آمين والملائكة في السماء آمين فوافق احديها الاخرى غفر له ما تقدم من ذنبه

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about to say it. It is the *Sunna* or the Prophet's precept both for the *Imám* and the person praying singly to say '*ámín*' loud, and the same applies to the follower in prayer according to the correct doctrine. This is an explanation of our doctrine; and there is a general consensus of opinion among the faithful that for the person praying singly, as well as for the *Imám* and the followers in prayers which are repeated in a low voice; the word '*ámín*' should be pronounced; and a vast number have maintained that the same is the rule for prayers which are repeated aloud. There is a statement of the opinion of *Malik* that the *Imám* should not say '*ámín*' in prayers which are repeated aloud. *Abu Hanifa* and the *Kufis* and *Malik* in one of his statements of opinion maintain that '*ámín*' should not be pronounced aloud; but there is a vast number who hold that it should be pronounced in a loud voice."\*

This commentary on the *Sahib Muslim* is according to the *Sháfi* school; but none the less is it considered orthodox and authoritative by all *Sunni* Muhammadans, which the parties to this suit are. The defendants state themselves as belonging to the *Hanafi* school, and it is only upon this ground that they obstruct the plaintiffs from worshipping in the mosque.

It is therefore necessary to consider whether they have any real or just cause of complaint against the plaintiffs. Upon this point I may repeat what I said in *Queen-Empress v. Ramzan*, (1) as the

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\* في هذه الأحاديث إستنباط التاميين عقب الفاتحة للامام والمأموم والمنفرد وأنه ينبغي أن يكون تامين المأموم مع تامين الامام لا قبله ولا بعده يتكرر ص إذا قال والضايقين فتقولوا آمين وامه روايته إذا امن فامنوا فمعناها إذا أراد التامين ويسن للامام والمنفرد التمجير بالتامين وكذا للمأموم على المذهب الصحيح هذا تفصيل من ههنا وقد اجتمعت الامتد على أن المنفرد يؤمن و كذلك الامام والمأموم في الصلوات السرية وكذلك قال الجمهور في التجهيرية وقال مالك في روايته لا يؤمن الامام في التجهيرية وقال ابو حنيفة والكوفيون و مالك في روايته لا يجهر بالتامين وقال الاكثرون يجهر (نوازي شرح مسلم جلد اول)

(1) I. L. R., 7 All., 461.

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observations which I then made are equally applicable to the circumstances of the present case. In that case I said :—

“The prosecutor states himself and the founder of the mosque to be *Hanafis*, that is the followers of *Imám Abu Hanifa's* doctrines. One of the highest authorities of that school is the *Durr-i-Mukhlátar*, in which the strongest text is to be found against saying ‘*ámín*’ aloud; but the text itself falls far short of substantiating the rule of ecclesiastical law, upon establishing which the case for the prosecution in my opinion depends. The text is as follows: ‘It is in accord with the practice of the Prophet to say ‘*ámín*’ in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment.’\* Even this passage only relates to the efficacy or validity of the prayer of the person who says ‘*ámín*’ aloud or in a low tone. There is absolutely no authority in the *Hanafis* or any other of the three orthodox schools of Muhammadan ecclesiastical law, which goes to maintain the proposition that if any person in the congregation says the word ‘*ámín*’ aloud at the end of the *Sura-i-Fáteha*, utterance of the word causes smallest injury, in the religious sense, to the prayers of any other person in the congregation, who, according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries like Turkey, Egypt and Arabia itself, *Hanafis* and *Sháfais* go to the same mosque, and form members of the same congregation, and, whilst the *Hanafis* say the word ‘*ámín*’ in a low voice, the *Sháfais* pronounce it aloud. To say that the utterance of the word ‘*ámín*’ aloud, after the *Imám* has recited the *Sura-i-Fáteha*, causes the disturbance in the prayers of a congregation, some or many of whom say the word in a low tone, is to contradict the express provisions of the Muhammadan ecclesiastical law as explained by all the four orthodox *Imáms*. I now pass to the next step in the case, namely, whether the accused in this case had the legal right to

\* سنہا التامین سرا ترک السنۃ لا یوجب فسادا ولا سہوا بل اسانکتہ  
(در مختار)

enter into and worship in the mosque with the congregation according to their own tenets. There is absolutely no evidence in the case to substantiate the accusation brought by the prosecutor against them that they are 'no longer Muhammadans.' They call themselves 'Muhammadi,' which is the Arabic for 'Muhammadan,' and although the prosecutor brands them as '*Wahábis*,' there is nothing to prove that they belong to any heterodox sect. Indeed, the only tangible ground upon which the prosecutor objects to their worshipping in the mosque, and calls them '*Wahábis*,' is their saying the '*ámín*' aloud, a practice which, as I said before, is commended by three out of the four orthodox *Imáms* of the *Sunni* persuasion and which, according to the doctrine of *Imám Abu Hanifa* himself, does not vitiate the prayers. Now, it is the fundamental principle of the Muhammadan law of *wakf*, too well known to require the citation of authorities, that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God (to use the language of the *Hedaya*) 'in such a manner as subjects it to the rules of Divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures.' A mosque once so consecrated cannot in any case revert to the founder, and every Muhammadan has the legal right to enter it, and perform devotions according to his own tenets, so long as the form of worship is in accord with the recognized rules of Muhammadan ecclesiastical law. The defendants therefore were fully justified by law in entering the mosque in question and in joining the congregation, and they were strictly within their legal rights, according to the orthodox rule of the Muhammadan ecclesiastical law, in saying the word '*ámín*' aloud."

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Viewing the authorities which I have quoted and referred to, I have no doubt that under the Muhammadan law of *wakf*, and the Muhammadan ecclesiastical law, which we are bound to administer in such cases under s. 24 of the Civil Courts Act (VI of 1871), the provisions of which have been reproduced in s. 37 of Act XII of 1887, a mosque when public is not the property of any

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particular individual or even a body or corporation or any other human organization which in law has a personality. In the eye of the Muhammadan law a mosque is the property of God, it must be recognized as such, and subject only to such limitations as the Muhammadan ecclesiastical law itself provides; it is public property, being the property of God for the use of his servants, and every human being is entitled to go and worship there so long as he conforms to the rules of the Muhammadan ecclesiastical ritual of worship.

This being so, the plaintiffs in this case, who are obviously Muhammadans, and as to whom even Pandit *Sundar Lal*, for the appellants, has foregone the contention that they are not *Musal-mans*, have a right to enter the mosque and to use it for Divine worship and to say the word 'ámín' aloud or in a low voice in their prayers, since the Muhammadan ecclesiastical law permits them to have their choice as to the tone of voice in which the word is to be pronounced.

I am anxious to point out that the question as to the exact vocal scale or notes of the octave of the human voice is nowhere dealt with in the Muhammadan law of ecclesiastical ritual, and Pandit *Sundar Lal* for the appellants has conceded that no definition or statement in this respect is to be found in the sacred traditions *Hadis* or authoritative legal texts, and it follows that the matter must necessarily be left to the ear of the person who pronounces the word 'ámín' aloud, and the powers of hearing which those who may be close or at a distance from him may happen to possess.

There is, however, as the learned Chief Justice has mentioned, a statement in the judgment of the Court of first instance, to the effect that the decree which was to follow upon that judgment was a decree requiring that the plaintiffs should pronounce the word 'ámín' loudly, but not at the top of their voices, nor in such a manner as to trouble the ears of the fellow-worshippers in the congregation. But this is a matter which depends upon the powers of hearing possessed by the fellow-worshippers, and cannot form the subject of a restriction or limitation of the right decreed.

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This being so, I expected that some argument would be addressed to us in opposition to what I said in the case of *Queen-Empress versus Ramson* (1), that according to the tenets of *Imam Azam*, that is, *Imam Abu Hanifa* himself, there is no such rule in the Muhammadan ecclesiastical law as would render it illegal to pronounce the word 'ámín' at the top of the voice or in any other note in the octave of the human voice. I was anxious to hear some such argument, because if it were true that according to the doctrines of *Imam Abu Hanifa* the pronouncing of the word 'ámín' in a voice audible to any of the fellow-worshippers is a matter which, in the spiritual or religious sense, not only vitiates the prayers of the person who pronounces it aloud, but also of those who hear it, I should have been inclined to hold that some such limited decree should be passed as that passed by the Court of first instance. But, as I have shown, no such limitations as to the tone or note of the voice are required by the Muhammadan ecclesiastical law of ritual, and I am glad to find that this view recommends itself to the approval of the learned Chief Justice and my learned brethren.

I only wish to add that, on the opening of the case, I felt that it might possibly be a difficult question whether the action was maintainable or not; but Pandit *Sundar Lal*, on behalf of the appellants, has expressly relinquished all arguments upon the point, and I think that he was right in doing so.

I agree with the learned Chief Justice in passing the decree which he has pronounced.

*Appeal dismissed.*

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(1) I. L. R., 7 All., 461.