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*rain Bhagwant Kuar* (decided on the 27th January 1891), is that when a period is fixed, as in that case it was fixed, by order of the Court under s. 521 of the Code of Civil Procedure for delivery of an award, and that period has elapsed, a subsequent granting of another period cannot amount to an extension of time already elapsed.

Applying the principle of that ruling to the present case, I am of opinion that after the lapse of 60 days allowed by the decree of the 2nd October 1888, which decree became final, the decree-holders, respondents, forfeited their right to execute the decree, and that the order of deposit made so late as 21st May 1889, by the Court executing the decree, could not cure the effect of the lapse of the period.

The proper order to be made in this case was that the application for execution should stand dismissed.

I make that order now by saying that I decree the appeal, and, reversing the decrees of both the lower Courts direct that application for execution stand dismissed, and that the decree-holders, respondents, do pay the costs of this litigation in all the Courts to the judgment-debtors, appellants.

*Appeal decreed.*

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*Before Mr. Justice Straight.*

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*June* 15.

USUF KHAN AND OTHERS (DEFENDANTS) *v.* SARVAN AND OTHERS (PLAINTIFFS).*

*Occupancy holding, transfer of—First and second mortgages of occupancy holding—Suit by second mortgagee to eject first mortgagee in possession.*

Where an occupancy holding was mortgaged under two successive mortgage deeds to different parties, and the mortgagees under the first mortgage having been put in possession, the mortgagees under the second mortgage sued to eject them.

*Held* that, both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants, who were in possession, had a right, as against the plaintiffs, to retain possession.

The fact of this case are fully stated in the judgment of Straight, J.

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* Second appeal No. 1557 of 1888 from a decree of Maulvi Sayyid Akbar Husain, Officiating Subordinate Judge of Ghâzipur, dated the 16th July 1888, confirming a decree of Sayyid Zain-ul-Abdin, Munsif of Korantâdih, dated the 28th April 1888.

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Mr. *Amir-ud-din*, for the appellants.

Babu *Durga Charan*, for the respondents.

STRAIGHT, J.—This appeal has reference to a suit brought by the plaintiffs-respondents upon a basis of a mortgage for a period of ten years of an occupancy holding of Musammat Sugra, dated the 30th September 1886.

Musammat Sugra apparently acquired the occupancy right of one Basawan on the 5th May 1874, and that person had, prior to the sale to her, mortgaged possessorily the occupancy holding under two mortgages. On the 10th March 1885 Musammat Sugra mortgaged the occupancy holding with possession to the defendants-appellants for the sum of Rs. 599-10-6, which amount included the sum of Rs. 85-10-6 paid in respect of one prior mortgage and Rs. 299 paid in respect of the other, and there was a present advance of Rs. 115 in cash. Now I have said that under the mortgage of the 10th March 1885, the defendants-appellants became entitled to possession of the occupancy holding, and we must take it from the form the decrees of the two lower Courts have taken that they were of opinion that the defendants got possession and were in possession at the date of suit. This explains the alternative prayer of the plaintiffs to their claim for declaration of title, if in possession, namely, that if found to be out of possession their title be declared, and they be given possession. Both the Courts below have found for the plaintiffs and have given a decree for ejectment of the defendants. This appeal is preferred to this Court by the defendants, and the ground upon which it has been put, and which seems to me to be a substantial and sound ground, is that the plaintiffs on the one hand by a later document being transferees from an occupancy tenant, and the defendants on the other hand by an earlier document being transferees of an occupancy tenant and in possession of the occupancy holding, they cannot be disturbed by a party like the plaintiffs who have an infirmity in their created by the provisions of s. 9 of the Rent Act; that is to say, if the plaintiff is a transferee of an occupancy tenant as prohibited by s. 9 of the Rent Act he has no title that he can sustain in a

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Court of justice. Now I am committed to this view that a lessee for a term of years, as in this case for a term of 10 years, is a transferee of the right of occupancy. I have already expressed the view tha I take upon the point in *Wali Muhammad* v. *Raghubar* (1) and *Nugpal* v. *Sital Puri* (2) and also expressed my views in the Full Bench ruling in *Abadi Husain* v. *Jurawan Lal* (3) which views, I may remark in passing, were not given expression to without due advertence to s. 117 of the Transfer of Property Act. According to these rulings I am committed to the opinion that a lease of an occupancy holding of a term of years is a transfer, in other words, that, as contemplated by s. 9 of the Rent Act, it is a transfer of a right of occupancy, that is to say, of a right to occupy the land. Now s. 9 was, in my opinion, framed in the interests of the persons who were jointly interested in the cultivation with those who had the occupancy right, and it was intended to limit the transfer of the occupancy right within a certain circumscribed area of persons who are mentioned in the section. As I pointed out to the learned pleader for the plaintiffs-respondents, if a lease was made by an occupancy tenant for a period of 10 or 20 years, as the case might be, of an occupancy right, the interest of the persons who would be entitled upon the occupancy tenant's death to take the occupancy holding might be very seriously prejudiced. In the present case a *parda-nashin* lady was the occupancy tenant and it might well be that the party who would succeed upon her death would be a male who would wish for his personal advantage and profit to cultivate the occupancy holding with his own hand. I have heard nothing in the course of the discussion of the case which leads me to depart from the opinion that I have expressed in the two rulings to which I have referred. I think therefore that where there is a conflict between two wrongdoers, as the plaintiffs and the defendants are, the person who is in possession of the property is entitled to be maintained in possession, and that the plaintiffs in this case are not entitled to succeed. This being so, I

(1) Weekly Notes 1889, p. 145. (2) Weekly Notes 1890, p. 3.
(3) I. L. R. 7 All. 866.

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decree the appeal, reverse the decrees of both the Courts below, and dismiss the plaintiffs' suit with costs in all the Courts.

KNOX, J.—As regards the facts of the case I will not recapitulate them, as I agree entirely with my brother Straight in the view that he has taken of them, and I only propose adding what I consider to be the state of the law as it now stands. As regards the question whether or not the right of occupancy which the law has conferred upon occupancy tenants is capable of transfer by way of lease or not, I hold that there can be no other interpretation of the word transfer than the one which includes the process whereby one person conveys to another for consideration the right to cultivate the land, whether the right be so conveyed for one or more years. Under Act XII of 1881, s. 9 it is expressly stated that "The right of tenants at fixed rates may devolve by succession or be transferred. No other right of occupancy shall be transferable in execution of a decree, or otherwise than by voluntary transfer between persons in favor of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein."

I do not intend now to discuss what was the object in view of those who framed the law. I have to deal with the words of the Act as they stand, and I can find nothing in the Act which entitles me to construe the word transfer otherwise than it is generally accepted in all statutes so far as I know. It is contended that the chapter relating to leases contained in Act IV of 1882, so far as these provinces are concerned, is not applicable to agricultural leases, and the contention is that the definition of lease contained in s. 105 is therefore not applicable to agricultural leases; but I do not see how this alters the question. Granted that the definition contained in s. 105 is not to be applied to agricultural leases we are driven back to the construction of the words transfer and transferable in the way such words are ordinarily interpreted. I also concur in holding that in the case of two wrong doers the person in possession is entitled to be maintained in possession.

For these reasons I entirely concur in the order made by my learned brother.