words "insufficient stamp" in paragraph 2 of s. 54 refer to or include a wholly unstamped paper. If this view were correct a litigant on the last day of limitation with what purported to be a plaint or memorandum of appeal written on a plain paper might come to a Court and insist on the Court receiving it for the purpose of making an order under s. 54, and thereby obtain an extension of the period of limitation. I think whenever insufficient stamps are used the Court may consider the memorandum of appeal under s. 54; but in this case the paper had no stamp, therefore it was not a memorandum of appeal and never became a memorandum of appeal until, at the earliest, the 26th August 1889, when Rs. 10 was paid into Court, though probably, strictly speaking, not till the 19th September, when it was filed and registered. Consequently, as there was no memorandum of appeal, we hold that the orders of the Judge of the 27th May and 13th June, were of no effect and that the filing and registration of the 19th September was long beyond the period of limitation. The appeal is dismissed with costs.

Appeal dismissed.

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

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NASRAT-ULLAH (PLAINTIFF) *v.* MUJIB-ULLAH AND OTHERS (DEFENDANTS).*

Act XIX of 1873 (*N.-W. P. Land Revenue Act*) *s.* 113 — *Civil Procedure Code s.* 13 — *Question of title arising on an application for partition before a Revenue Court, how to be determined—Suit for declaration of right to partition—Res judicata.*

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforcible, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. Such a suit will not be barred by reason of the former decree for partition, though that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been, raised in the suit in which it was passed.

If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of s. 113

* First appeal No. 27 of 1889 from a decree of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 28th February 1888.

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of Act XIX of 1873. If it disposes of the application otherwise than in the manner contemplated by s. 113, its proceedings are *ultra vires* and will not debar the parties from suing in a Civil Court for a declaration of their right to partition.

THE facts of this case are briefly as follows :—One Kadir Bakhsh, the common ancestor of the parties, was the owner of the property in dispute consisting of twenty-seven villages. He died leaving a will by which he divided his whole estate into five equal shares. According to the plaintiff the villages were divided by private arrangement with the exception of four, namely, Ganeshpur, Rekua, Mahadeva and Aspur, which remained joint. In 1860 Miran Bakhsh, the father of the plaintiff, obtained a decree for partition to the effect that any inequality in the shares held by the various members of the family should be made up from the four villages above-mentioned, and the residue should be divided into five equal shares. It appears that that decree was never acted upon. In 1871 another order for partition was obtained by one of the share-holders, but that too seems to have remained inoperative. In 1883 the present plaintiff and others applied for the partitioning of Ganeshpur, and another share-holder, Musammat Hamira Bibi, for the partitioning of Rekua. Both these villages were divided, the partitioning of Ganeshpur being effected subsequently to the institution of the present suit. In 1887 the plaintiff brought the present suit alleging that his share was deficient by 300 bighas and praying that the deficiency might be made up out of the villages Ganeshpur, Aspur and Mahadeva, and that after the cancellation of the order for the partition of Rekua all four villages might be divided into five equal shares, or that the whole estate might be divided into five equal shares and one-fifth of it allotted to him. The Court of first instance dismissed the plaintiff's claim on three grounds :—(1) that as to the partition of Ganeshpur and Rekua the Court was not competent to interfere with the proceedings of the Revenue Court; (2) that the claim of the plaintiff was *res judicata*; and (3) that the suit was barred by limitation. The plaintiff then appealed to the High Court.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *D. Banerji* and Maulvi *Mehdi Hasan*, for the respondents.

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EDGE, C. J. and KNOX, J.—The appellant here was the plaintiff below. All the defendants below were respondents here. The group of the defendants below No. 2 are represented here by Mr. *Banerji* and Mr. *Mehdi Hasan*. The other defendants-respondents have not appeared here and have not been represented. The suit was brought to obtain a declaration of the plaintiff's right to partition. His father had, in 1860, obtained a decree for partition against the persons whose representatives the defendants to this suit are. According to the plaint that decree for partition of 1860 was never carried into effect, and no partition took place. Whether that is true or not we need not now decide. The plaint further alleges that the defendants grouped as No. 2 conspired to prevent the plaintiff getting his full share, and, having colluded together, obtained an order for the partition of mauza Rekua in a manner contrary to his rights. The plaint also alleges, amongst other things, that the defendants caused the patwáris in the villages to record separate possession in respect of the joint villages. Some of the defendants admitted in their written statements the plaintiff's right to the partition, others disputed it. The defendants grouped as No 2 alleged that the claim was bad under s. 42 of the Specific Relief Act, and was barred by s. 13 of the Code of Civil Procedure. They alleged that in 1841, that is, long prior to the decree of 1860, the whole *ilaka* was privately partitioned. They further alleged, in paragraph 4, that their ancestor in his lifetime and they were in proprietary and exclusive possession. There are other allegations which it is not necessary to allude to now. The Subordinate Judge tried this case. He dismissed the plaintiff's claim on two main grounds. The first main ground being that s. 13 of the Code of Civil Procedure applied, the other main ground being limitation. He also apparently held that a partition which was made by the Revenue Court could not be interfered with by a Civil Court. To deal with the last point first.—A question of title was raised by the plaintiff in a partition proceeding before a Revenue Officer. That Revenue Officer had two courses open to him. Under s. 113 of Act XIX of 1873, he could have refused to proceed with the partition until the question of title and proprietary right which was

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in dispute between the parties had been decided by a competent Court, or he could have proceeded to inquire into the merits of the objection as to title. In the latter case he was bound himself to make the necessary inquiry, to take such evidence as might be produced, and to record a proceeding declaring the nature and extent of the interest of the parties applying for the partition and of any other party or parties that might be affected thereby. The procedure he was bound to follow in the latter case was the procedure laid down in the Code of Civil Procedure for the trial of original suits. He might, with the consent of the parties, refer any question arising in such case to arbitration. If he had proceeded to inquire into the merits of the objection in accordance with s. 113, his decision, when given, would, under s. 114, have been a decision of a Court of Civil Jurisdiction and would be open to appeal to the District Court or the High Court, as the case might be. Now the Collector adopted neither of those courses. He made some inquiry from the Settlement Department, and on the result of that inquiry, whether conducted by him or not we do not know, he came to the conclusion that the village he was dealing with, namely, Ganeshpur, was one of imperfect pattidári tenure and he proceeded to partition the village on that basis. We need not inquire at present whether the village was in fact one of imperfect pattidári tenure or not. That is a question yet to be decided in this suit. The plaintiff alleged that the village was one of pure zamíndári tenure. Coming to the conclusion at which he arrived, the Collector really was deciding a question of title. Mr. *Banerji* has contended that the Civil Court has no power to interfere in a case of a partition. The Civil Court is a Court of competent jurisdiction to decide questions of title. The Collector or Assistant Collector is not a Court of competent jurisdiction to decide questions of title unless he proceeds in the manner specified in s. 113 of the Land Revenue Act. In the case of *Muhammad Abdul Karim* v. *Muhammad Shadi Khan* (1) the question of the jurisdiction of the Collector in such matters was considered. The decision of the Collector under the

(1) I. L. R. 9, All., 429.

above circumstances cannot disentitle the plaintiff to have his legal right declared in the Civil Court. The course adopted by the Collector precluded the plaintiff from questioning his decision by appeal to the District Judge or to this Court. That remedy not having been open to the plaintiff, he is entitled, under the circumstances, to maintain this suit and have his legal right declared. The next question is as to whether s. 13 of the Code of Civil Procedure applies in this case. Undoubtedly the decree of 1860 operates as *res judicata* to any claim or defence that was set up, or should have been set up, at that date, as for instance the allegation in the third paragraph of the written statement of the group of defendants No. 2, namely, "In 1248 fasli the whole of the *ilaka* was divided privately by the ancestors of the parties and from the date of the partition each party has held proprietary possession of the entire divided villages Ganeshpur, Rekua and Aspur without the interference of any other." That defence is not now open to the defendants. If that were a true statement of fact, it would, in the suit of 1860, have afforded grounds of defence. Whether it were then made or not is immaterial. To put it more plainly, the decree of 1860 settled the rights of the parties as they were at that date and cannot now be questioned. But that decree cannot operate as *res judicata* on any question arising as to rights of the parties acquired since that date. As for instance the defendants would be entitled to show that since that date they had obtained adverse possession, or that there was a partition in which no question of title was raised or other similar defences. It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right

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to partition and desiring to partition has his right challenged it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforcible. In the partition suit questions have arisen which could not have been determined in the suit which ended in the decree of 1860. The Subordinate Judge relied on certain decisions to which he refers in his judgment. On the question of *res judicata* it appears to us those authorities either do not apply or do not support the view which he adopted. The first of those in order of date is *Kishen Singh* v. *Dabeer Singh* (1). All that case decided was that a partition in the Revenue Court could not be enforced on a decree which by reason of lapse of time had become inoperative. The next case is *Doolee Singh* v. *Jowkee Ram* (2). That case to some extent supports the contention of the plaintiff here. There the Court decided that, notwithstanding that the plaintiffs had obtained a prior decree for possession, they would be entitled to maintain a suit for partition and separate possession, if since the date of the first decree they had been in possession of the undivided half share by that decree decreed to them. The next case was *Yaqoob Ali* v. *Khajeh Ubdoolrahman* (3). That case the Subordinate Judge has misunderstood. It has no application. The same observation may be made as to the fourth case relied on by him, namely, the case of *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (4). In the course of argument we have been referred to the case of *Jagat Singh* v. *Durjan Lal* (5), which has some bearing on the questions dealt with by the Subordinate Judge. We have no doubt that if the plaintiff had drawn his plaint alleging the decree of 1860, and showing how he and the defendants were bound by it, that is, that they were representatives of the parties to it, and alleging that the state of things of 1860 continued up to the present, and alleging that the defendants or some of them resisted his right of partition, and asked for a declaration of his right to partition, that would be a claim to which even this Subordinate Judge would not have applied s. 13 of the Code

(1) N.-W. P. H. C. Rep., 1867, p. 272.
(2) N.-W. P. H. C. Rep., 1868, p. 381.
(3) N.-W. P. H. C. Rep., 1868, p. 383.
(4) N.-W. P. H. C. Rep., 1871, p. 62.
(5) Weekly Notes, 1884, p. 2.

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of Civil Procedure. The present claim is in effect such a claim as I have referred to, although not so in form. The last point we need refer to is that of limitation. The Subordinate Judge held that this suit was barred by limitation, because the defendants in the suit of 1860 had denied the plaintiff's right of partition and set up an adverse possession. He overlooked the fact that those issues were decided by the decree in that suit adversely to the defendants there. The question of limitation does not arise on the point suggested by the Subordinate Judge. It may be that some question of limitation arises from circumstances subsequent to 1860 and may have to be decided in this suit. We have not got the materials before us to express any opinion as to whether a question of limitation does arise. The Subordinate Judge in truth did not try the rest of the case, but he disposed of it on those preliminary points to which we have referred. That being so, we set aside his decree, and, under s. 562 of the Code of Civil Procedure, remand the case for trial on the merits and on such points of law as really arise. The costs here and hitherto will abide the result.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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NAMDAR CHAUDHRI (PLAINTIFF) *v.* KARAM RAJI AND OTHERS (DEFENDANTS).*

Mortgage—Prior and puisne incumbrancers—Puisne incumbrancer not made a party to suit upon prior incumbrance—His right to redeem not thereby affected.

If a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage into suit, join the puisne incumbrancer as a party, that puisne incumbrancer's right to redeem will not thereby be affected.

Mohan Manor v. *Togu Uka* (1); *Muhammad Sami-ud-din* v. *Man Singh* (2); and *Gajadhar* v. *Mul Chand* (3) referred to.

THE facts of this case are fully stated in the judgment of Straight, J.

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* First appeal No. 200 of 1889 from a decree of Maulvi Ahmad Hasan, Subordinate Judge of Gorakhpur, dated the 8th July 1889.

(1) I. L. R., 10 Bom. 224. (2) I. L. R., 9 All. 125.
(3) I. L. R., 10 All. 520.