

aside an injunction. An examination of the other clauses of s. 588 shows that when it was intended to limit an appeal to an affirmative order or to a negative order that was expressly done. Clauses (20) and (25) may be cited as examples. Further, the decision in the case of *Nubbi Buksh v. Chasni* (1), although not a decision on cl. (24), decides the principle which we think applies here. We hold that the order in question was appealable under s. 588, cl. (24), of the Code of Civil Procedure. As to the merits it is said on behalf of the appellants that they had pulled down the house before the order for the injunction was made. The injunction restrains them from pulling down the house or building, and it is in our opinion eminently a case in which it was proper that such an order of injunction should be made, as the suit was one for partition. We dismiss the appeal with costs.

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ZABADA JAN  
v.  
MUHAMMAD  
TAIAB.

*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.*

NIJAZ GUL KHAN (DEFENDANT) v. DURGA PRASAD AND ANOTHER  
(PLAINTIFFS).\*

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July 2.

*Civil Procedure Code ss. 111 and 216—Set-off—Cross-claims of the nature of set-off.*

The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not of the quality contracted for. *Held* that in such a suit the defendant might claim by way of set-off compensation for the loss which he had incurred in the re-sale of that portion of the timber, the subject of the contract, of which the plaintiffs had failed to take delivery.

S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off.

*Stephen Clark v. Rakkarloo Chetti* (2), *T. Kistnasamy Pillay v. The Municipal Commissioners for the Town of Madras* (3), *Kishorekand Champalal v. Ma-*

\* Second Appeal No. 431 of 1889, from a decree of T. R. Redfern Esq., District Judge of Bareilly, dated the 24th December 1883, confirming a decree of Maulvi Muhammad Abdul Qayyum, Subordinate Judge of Bareilly, dated the 20th June 1888.

(1) I. L. R., 6 Calc. 168. (2) 2 Mad. H. C. Rep. 296.  
(3) 4 Mad. H. C. Rep. 120.

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*Mahowji Visram* (1), *Pragi Lal v Maxwell* (2), *Bhagbat Pandit v Bundeob Panda* (3), *Chisholm v. Gopal Chander Surma* (4) referred to.

NIYAZ GUL  
KHAN  
v.  
DURGA  
PRASAD.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Eal* and Maulvi *Ghulam Muftaba*, for the appellants.

Mr. *D. Banerji* and Babu *Jogindro Nath Chaudhri*, for the respondents.

EDGE, C. J., and BLAIR, J.—The plaintiffs contracted to buy from the defendant and to take delivery of certain timber. They paid a large portion of the contract price beforehand and took delivery of about two-thirds of the timber, and then wrongfully, as it is found, refused to take delivery of the balance and brought this suit to recover from the defendant the amount advanced by them in excess of the price of the timber of which they had taken delivery, and also for damages, alleging that the timber which was actually delivered was not up to contract. The defendant pleaded a set-off, alleging that there had been a fall in the market price of timber and that he had been put to considerable expense owing to the plaintiff's breach of contract, and he denied the plaintiff's right to maintain the suit against him. It has been found that the timber which was delivered was according to contract and that the only breach of contract was the breach on the part of the plaintiffs in declining to further perform the contract and to take delivery of the balance of the timber. The defendant's set-off was disallowed, it having been regarded as sounding in damages. There is a series of decisions showing that in the view of the Courts in India a right to set-off may arise under circumstances under which the right would not arise in England and under circumstances under which a right to set-off under s. 111 of the Code of Civil Procedure, 1882, would not arise. Some of those decisions are—*Stephen Clark v. Rutknawaloo Chetti* (5), *T. Kistnasamy Pillay v. The Municipal Commissioners for the Town of Madras* (6), *Kishorchand Champalal v. Mahdowji Vis-*

(1) I. L. R., 4 Bom. 407.

(4) I. L. R., 16 Calc. 711.

(2) I. L. R., 7 All. 284.

(5) 2 Mad. H. C. Rep. 296.

(3) I. L. R., 11 Calc. 557.

(6) 4 Mad. H. C. Rep. 120.

ram (1), *Pragi Lal v. Maxwell* (2), *Bhagbat Pandu v. Bamdeb Panda* (3), and *G. Chisholm v. Gopal Chander Sarma* (4). Section 216 of the Code of Civil Procedure, as amended by Act No. VII of 1888, recognises that a right of set-off which would not be admissible under s. 111 of that Code might be otherwise admissible and that a defendant pleading it might be entitled to a decree on it as against the plaintiff. Under these circumstances the Court should have gone into the question of the defendant's set-off, as it arose out of the same transaction; but inasmuch as it appears to us that if the question of set-off were gone into the parties would be put to the expense of a remand with the result that the defendant would succeed in the suit, and inasmuch as Pandit *Sundar Lal* is willing to forego any claim in excess on the set-off, we have allowed him to object to the maintenance of the suit at all in this appeal although that point was not specifically raised. In our opinion upon the findings below the plaintiff's suit should have been dismissed. We allow this appeal and dismiss the plaintiff's suit with costs. Pandit *Sundar Lal* on behalf of his client abandoning the set-off, the set-off is dismissed, but without costs. The defendant will have the costs of the suit in all Courts.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

### QUEEN-EMPRESS v. BHAGWANTIA.

*Act XLV of 1860, ss. 191 and 193—Criminal Procedure Code, ss. 161—False evidence—Statement made to a police officer investigating a case—Mode of recording such statements.*

It is not necessary that the statement of a witness recorded under s. 161 of the Code of Criminal Procedure, 1882, should be elicited and recorded in the form of alternate question and answer. It is sufficient if such statement is substantially an answer to one or more questions addressed to the witness before the statement is made.

The provisions of ss. 191 and 193 of the Indian Penal Code do apply to the case of false statements made under s. 161 of the Code of Criminal Procedure, 1882.

- (1) I. L. R., 4 Bom. 407.      (3) I. L. R., 11 Cal. 557.  
 (2) I. L. R., 7 All. 234.      (4) I. L. R., 16 Cal. 711.

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 July 9.

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 NIAZ GUL  
 KHAN  
 v.  
 DURGA  
 PRASAD.