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to satisfy the requirements of s. 258 of the Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist. This is not a sufficient compliance with the provisions of s. 258, and therefore, without deciding what was the intention expressed by the agreement, I hold that the certification of the adjustment was inadequate, and that we cannot recognise it in executing the decree. This question leaves the parties their mutual rights under the agreement, but in connection with the execution of the decree, I concur in the order passed by my learned brother Oldfield.

*Appeal dismissed.*

*Before Mr Justice Oldfield and Mr. Justice Mahmood.*

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February 5.

JASWANT SINGH AND OTHERS (JUDGMENT-DEBTORS) v. DIP SINGH AND OTHERS  
(DECREE-HOLDERS.)\*

*Reversal of decree—Repayment of money realized—Restitution—Interest—Question for Court executing decree—Fresh suit—Civil Procedure Code, ss. 244, 583.*

In a suit for redemption of a mortgage, a decree was passed for possession by redemption on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest. X

*Held* that the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree, and not by separate suit, being expressly provided for by s. 583 of the Civil Procedure Code.

X *Held* also that the decree-holder was entitled to restitution of the amount with interest. X

*Roger v. The Comptoir d'Escompte de Paris* (1) referred to. *Ram Ghulam v. Dwarka Rai* (2) distinguished by MAHMOOD, J.

The facts of this case are stated sufficiently for the purposes of this report in the judgment of Oldfield, J.

\* First Appeal No. 41 of 1884, from an order of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 29th March, 1884.

(1) L. R. 3 P. C. 465. (2) *Ante*, p. 170.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Ajudhia Nath* and Pandit *Nand Lal*, for the respondents.

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OLDFIELD, J.—The respondent instituted a suit against the appellant for redemption of a mortgage. A decree was made for possession by redemption on the respondent paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to institution of the suit, the appellant had taken proceedings to foreclose in the Judge's Court under the Regulation, and the respondent paid the above sum into that Court for the appellant, who took it out. The respondent instituted an appeal in this Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the debt payable on redemption was reduced to Rs. 22,155. The respondent then took out execution of the decree to recover from the appellant the difference between the two sums with interest. Execution has been allowed, and the appellant contends in appeal that there was no remedy in the execution department, and interest could not be given. Both objections fail. The matter in dispute is clearly one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge, or satisfaction of the decree, under s. 244, Civil Procedure Code.

\* The payment was directed by the decree of the first Court, and was made under it, and the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree, which was disallowed by the appellate Court's decree, and the question was clearly one for determination by the Court executing the decree, and not by separate suit, and is expressly provided for by s. 583. Further, the decree-holder-respondent was entitled to restitution of the amount with interest. ✕ On both these points the case of *Roger v. The Comptoir d' Escompte de Paris* (1) is an authority in support of the view here taken. The appeal is dismissed with costs. ✕

MAHMOOD, J.—I am of the same opinion, and have only a few words to add. The conclusion arrived at by my brother Oldfield appears to me to be perfectly consistent with the opinion expressed

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by himself and myself in the recent Full Bench case of *Ram Ghulam v. Dwarka Rai* (1). The learned Chief Justice gave expression, in his judgment, to certain opinions which I did not altogether adopt, and for that reason I delivered a separate judgment. To prevent that judgment from being misunderstood, I may say that what distinguished my opinion from that of the Chief Justice was, that I held that the mesne profits which were the subject matter in litigation in that case were not realized in execution of the decree or of any mandate therein, and that the matter could therefore be litigated again, and that such subsequent litigation was not barred by s. 244 of the Code. But in this case the circumstances leave no doubt that a surplus of Rs. 21,470-7-0 was realized over and above what should have been realized by the decree-holder, and was therefore a payment made strictly under the decree, and that distinguishes the present case from *Ram Ghulam v. Dwarka Rai*. Again, s. 583 of the Code provides that "when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits." It appears to me that the present case depends upon the meaning which we are to attach to the words "by way of restitution or otherwise," and this meaning has, as my brother Oldfield has observed, been explained by their Lordships of the Privy Council in *Roger v. The Comptoir d'Escompte de Paris* (2). I am anxious to incorporate the passage in which their Lordships deal with this question in my own judgment, in order that it may be made accessible to the Mufassal Courts, which seldom possess copies of the Privy Council reports. It is as follows:—

"It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury—and very grave injury—will be done to the petitioners. They will, by reason of an act of the Court, have

(1) *Ante*, p. 170. (2) L. R. 3 P. C. 465.

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paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and wrongfully obtained possession of the money under a judgment which has been reversed. So far, therefore, as principal is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

“It is said, however, that there is no authority for ordering the payment of interest. The cases of writs of error which have been referred to can hardly be considered as precedents for a case of the present kind. The proceeding upon them was of a highly technical character. It was a matter of great rarity for a writ of error not to suspend execution in any case, where execution had not actually taken place before the writ of error was brought. Restitution no doubt was ordered, and it may well be that under the term ‘restitution,’ in the case of a money payment, interest was not given by the Court which carried the restitution into effect. But whether that be so or not, their Lordships do not think it necessary to inquire further into that matter. Upon proceedings which are much more analogous to the present, undoubtedly interest has been given. One case has been mentioned in the House of Lords, the case of *Blake v. Mowatt*, in which money, which had been ordered to be paid under a decree—money consisting itself of principal and interest—that decree having been reversed in the House of Lords—was ordered by the Court below to be restored, together with interest upon the capital sum. It probably would be found that that case is by no means a solitary case in the practice of the House of Lords. Their Lordships have reason to believe that the practice of the Courts in India, when there has been a reversal in this country, and when money has

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been ordered in India to be paid back in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favour of a restitution of the money with interest. They are quite satisfied that this practice is in accordance with the true principle to be applied to this case and with what the justice of such a case demands, and they think that it is pre-eminently so in a case in which the money, in the first instance, was ordered to be paid by the defendants in the action, with interest, during the time that the money had been in the defendant's possession after the conversion of the goods."

I have no more to say except that I concur in the order passed by my learned brother Oldfield.

*Appeal dismissed.*

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.*

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February 23.

NIDHI LAL (DEFENDANT) v. MAZHAR HUSAIN AND OTHERS (PLAINTIFFS)\*.

*Mortgage—Transfer of mortgaged property by mortgagee in exchange for similar property—Right of mortgagor to property acquired by exchange.*

In 1865, *N* was in possession of six shops in a market-place at Etawah. He was in possession of two as mortgagee, and of the remaining four as proprietor. The Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged with *N* to take the sites of his six shops in the old market-place, and to give him in lieu of them sites for six shops in the new. Under this arrangement, he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money and cost of constructing the shop.

*Held* that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made.

THE facts of this case were as follows:—In 1865 the defendant in this suit, Nidhi Lal, was in possession of six shops in a market-

\* Second Appeal No. 1176 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 17th May, 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th January, 1883.