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might be dealt with. That contention would place an appeal under s. 10 of the Letters Patent in the same position as an appeal to which Chapter XLII of Act No. XIV of 1882 applies. Chapter XLII limits the right of appeal from a decree passed in appeal by a court subordinate to the High Court, and only applies when the appeal is one from a decree passed in appeal by a court subordinate to the High Court. The appeal to this High Court having been a first appeal, and not an appeal to which Chapter XLII of Act No. XIV of 1882 applies, the parties to the appeal are entitled to question not only the law, but the findings of fact of the Judge of this court from whose judgment or decree this appeal has been brought under s. 10 of our Letters Patent. It would be otherwise if the appeal to this court had been an appeal to which Chapter XLII of Act No. XIV of 1882 applied. Then the Bench sitting in the Letters Patent appeal would be bound by the same rule which bound the single Judge from whose decree or order the appeal was brought. We hold that an appeal lay from the judgment or order of our brother Knox, and that the parties were entitled to have this Bench consider not only the law, but the evidence in the case.

[The court then proceeded to consider the case on the merits, and arriving at the same estimate of the evidence as that taken in the judgment under appeal, dismissed the appeal. The remainder of the judgment, consisting solely of a discussion of the evidence, is unnecessary for the purposes of this present report.—Ed.]

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

IMDAD ALI (JUDGMENT-DEBTOR) v. JAGAN LAL AND ANOTHER (DECREE-HOLDERS).\*

*Execution of decree—Civil Procedure Code, s. 244—Objection by representative of party to the suit to the jurisdiction of the court which passed the decree.*

Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a

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\* Appeal No. 57 of 1894, under s. 10 of the Letters Patent from a judgment of Burkitt, J., dated the 8th November 1894.

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decree after it has been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

The question of the competency of the court charged with the execution of a decree to determine whether the court which passed the decree had jurisdiction to pass it, considered. *Muhammad Sulaiman Khan v. Fatima* (1) and *Haji Musa, Haji Ahmed v. Furmanand Nursey* (2) referred to.

THE facts of this case are fully stated in the judgment of the court.

Maulvi *Ghulam Muhib* for the appellant.

Mr. *Roshan Lal* and Munshi *Madho Prasad* for the respondents.

EDGE, C. J., and BANERJI, J.—The respondents to this appeal under the Letters Patent brought a suit against one Muhammad Jalil and one Musammat Hamid-un-nissa for possession of certain property. Musammat Hamid-un-nissa died before the decree was made in that suit, and the decree was made as against her and Muhammad Jalil without any representative of Musammat Hamid-un-nissa being brought on the record. The decree was in favour of the plaintiffs for possession of the property in suit. After that decree was made the heir and legal representative of Musammat Hamid-un-nissa, who is the appellant here, Kazi Muhammad Imdad Ali, brought an appeal from that decree. That appeal was dismissed without costs, on the ground that Muhammad Imdad Ali had no *locus standi* to appeal, as he had not been made a party to the record of the suit. After the dismissal of that appeal the decree-holders, respondents here, presented an application to the court which had passed the decree, asking to be put in possession in execution of that decree. In that application they described Imdad Ali as the legal representative of Musammat Hamid-un-nissa, deceased. No notice was issued or given to Imdad Ali on that application for execution, and behind his back the order for execution was made. It was enforced by ousting him from possession of and putting the decree-holders in possession of the property. Subsequently Imdad Ali presented an application to the court which had executed the decree, asking the

(1) I. L. R., 11 All., 314.

(2) I. L. R., 15 Bom., 219.

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court to hold that the decree was null and void and incapable of execution, and to restore him to the possession of which he had been deprived. In that application he described himself as the heir of Hamid-un-nissa, and he alleged that the decree-holders had knowingly and intentionally omitted to make him a party to the suit after the death of Hamid-un-nissa. He described his application as one made under s. 332 of the Code of Civil Procedure. The Munsif dismissed that application, holding that the dismissal of Imdad Ali's appeal precluded him from questioning the right of the decree-holders to the decree which they had obtained.

On appeal the District Judge set aside the order of the Munsif and granted Imdad Ali's application. From that order of the District Judge an appeal was brought to this court by the decree-holders. The learned Judge, before whom that appeal came, held that as the application of Imdad Ali purported to be one under s. 332 of the Code of Civil Procedure, no appeal lay to the District Judge from the decision of the Munsif, and he set aside the order of the District Judge and restored the order of the Munsif. From that order of the Judge of this court this appeal has been brought under s. 10 of the Letters Patent.

It was contended by Mr. *Roshan Lal* for the decree-holders, respondents, that the application of Imdad Ali was in fact an application under s. 332, and consequently that Imdad Ali's sole remedy was by a suit; and he further contended that s. 244 of the Code of Civil Procedure did not apply in this case, as the decree had been fully executed.

Now it appears to us, having regard to the object of s. 244, that that section would apply as well to a dispute arising between the parties contemplated by that section, in relation to the execution of the decree after it had been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

We think, for instance, that it was not the intention of the Legislature that a dispute between the parties to the suit, or

their representatives, as to the amount for which the decree was to be executed, should, if it arose, be decided under s. 244, and that a dispute subsequent to the execution of the decree, between those same parties, as to whether the decree had been executed for a greater amount than the decree-holder was entitled to under the decree, should not be decided under s. 244. To take an example, let us assume that the decree having been fully executed, the court, in error, proceeds to execute the decree again by handing over to the decree-holder the amount deposited in court by the judgment-debtor. We cannot conceive that it was the intention that in such case the judgment-debtor should be forced to bring a suit for the recovery of the amount so handed over in excess, and should not have his remedy under s. 244. There is no doubt that Imdad Ali described his application to the Munsif as made under s. 332 of the Code of Civil Procedure. It was, in our opinion, an application which could not succeed under s. 332 of the Code of Civil Procedure, as that section cannot apply where s. 244 applies. Section 244 applies to the representative of the party to the suit in which the decree was made. Imdad Ali was a representative of the party to the suit in which the decree was made, although that party died before the decree was made; and further, although it is not essential to our judgment in this case, there is the fact that the application for execution of the decree was made as against Imdad Ali as representative of the deceased Hamid-un-nissa. A representative of a party to a suit in which a decree has been made, when there is a dispute between him and the decree-holder as to the execution of the decree, cannot oust the jurisdiction of the court under s. 244 by making an application under s. 278 or s. 332, unless, indeed, he claims the property as trustee for a third party. The Munsif in the present case was bound by s. 244 to deal with the application in question here, no matter under what section it was headed, as an application coming under clause (c) of s. 244, and as a matter which had to be determined by an order of the court executing the decree, and not by a separate suit. The point here was that the proceedings in execution were null and

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void, and that the decree was incapable of execution, and that it had never been legally executed against Hamid-un-nissa and her estate. The question as to whether the decree is capable of execution is a question relating to the execution of decree, and, in our opinion, the very nature of the objections raised by Imdad Ali precluded any contention that the decree had been validly executed. There can be no doubt, in our opinion, that the court charged with the execution of a decree can consider the question as to whether the court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question. We think that that proposition follows from the principle in *Muhammad Suliman Khan v. Fatima* (1), and it is recognised by Farran, J., in *Haji Musa, Haji Ahmed v. Purmanand Nursey* (2). In this case the decree having been made against Hamid-un-nissa and her estate after she had died, and when no representative of hers was on the record, was, so far as her representative and her interest in the property are concerned, a void decree and incapable of execution; and it follows that the proceedings in execution of that decree, so far as Hamid-un-nissa's property was concerned, were *ultra vires* and without jurisdiction. That being so, and it being quite clear that the application of Imdad Ali, although described as made under s. 332, was one to be dealt with under s. 244, we hold that the appeal lay: and we also hold that, the order in execution being *ultra vires* and without jurisdiction, Imdad Ali was entitled to have those proceedings in execution, so far as the property of Hamid-un-nissa was concerned, set aside, and we make an order accordingly and direct that an order be made that he be put in possession. The appellant will have his costs in all courts.

*Appeal decreed.*

(1) I. L. R., 11 All., 314.

(2) I. L. R., 15 Bom., at p. 219.