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grant of the easement claimed by the plaintiff would be properly implied, no such right can be implied in the case of a partition by the act of a Court of law. The question so suggested appears to us one of considerable difficulty; but it is not, we think, necessary to decide it in the present case. The defendant's predecessors in title entered upon the share allotted to her, on the strength of the original partition decree of the 14th March, 1871, and the order of the 19th December, 1872. By the decree either party could insist upon mutual conveyances; she was, therefore, bound to execute a conveyance whenever required, and she could not in equity be allowed to deal with the land in such a way as would defeat any conveyance called for. And the present defendant who takes through her, and from the very nature of the case with full notice, is in no better position, so that, for the present purpose, the case is the same as if there had been conveyances. And the terms of the subsequent order very much strengthen the case. It expressly authorised the then plaintiff, the now defendant's predecessor, to "raise partition walls." That goes far to negative the right to raise any other obstruction; and we agree with the learned Judge in thinking that, when open spaces are spoken of, "partition walls" do not mean blocks of building, but such walls as are used for partitioning open spaces. The first objection to the decree therefore fails.

[The other contention as to the rejection of evidence was also decided against the appellant.]

Attorney for the appellant: Baboo *Bolie Chunder Dutt.*

Attorney for the respondent: Mr. *M. Dover.*

K. M. C. *Appeal dismissed.*

PRIVY COUNCIL.

MYLAPORE IYASAWMY VYAPOORY MOODLIAR (PLAINTIFF) *v.* YEO KAY AND OTHERS (DEFENDANTS.)

P. C.* 1887 *June* 14.

[On appeal from the Court of the Recorder of Rangoon.]

Limitation Act, 1877, *s.* 19 *and Art.* 140—*Claim to share in immoveable property under will—Acknowledgment of liability—Basis of decision of case.*

The right to property left by will (assuming that the testator had power to dispose of it) falls into possession, by Hindu law, immediately upon the

* *Present*: LORD HOBHOUSE, SIR B. PEACOCK, SIR R. BAGGALLAY, and SIR R. COUCH.

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death of the testator; and, therefore, a claim, making title to shares in immovable property under a will, is barred by time, unless brought within twelve years from the date of the testator's death under Art. 140 of Act XV of 1877, Sch. II.

Acknowledgment of liability, in order to be within the meaning of s. 19 of the same Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through whom he claims.

The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. *Eshen Chunder* v. *Shama Churn Bhutto* (1), referred to.

APPEAL from a decree (24th June, 1884) of the Recorder of Rangoon.

The suit out of which this appeal arose was brought by the present appellant against the respondents to obtain a declaration that the appellant in his own right, also as executor of the will of M. I. Mooroogasum Moodliar, deceased, and as administrator of the estate of M. I. Kristnasami Moodliar, deceased, was entitled to the possession of two-fifths of one half of five separate lots of land and buildings situate in Rangoon, formerly belonging to Mooroogasum.

The question now raised was whether the suit was not barred by the law of limitation, Act XV of 1877, Sch. II, Art. 140. Mooroogasum died at Madras on the 19th September, 1864, having by his will, dated the same day, appointed his five brothers, who all survived him, his executors, and having bequeathed to them, equally, his residuary estate in these words: "I will and bequeath that all the rest, residue, and remainder, of all my property, movable and immovable, of which I may die possessed (all being my sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike."

The five brothers of the testator were respectively named Coomarasami, Ramasami, Kristnasami, Soobroy, and Vyapoory, the last named being the present appellant.

Soobroy on the 25th August, 1865, and Ramasami on the 7th June, 1866, obtained probate of the will from the High Court of Madras; and on the 21st October, 1870, the Recorder of Ran-

(1) 11 Moore's I. A., 7.

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goon granted to Ramasami letters of administration with the will annexed. On the 4th January, 1873, Ramasami died in Madras. In 1882 administration, with the will annexed, of the property and credits of Mooroogasum was granted by the Recorder of Rangoon to Vyapoory, the present appellant. None of the other brothers ever took out administration in Rangoon to the estate of Mooroogasum, and no distribution of the respective shares given to the brothers under the will was made. In fact, the whole of the five lots of land and buildings had been, along with other lands, in the year 1869, mortgaged by Ramasami to Mr. Cephas Bennet, a resident in Rangoon, in pursuance of a prior equitable mortgage by deposit of title deeds, in favor of the latter, made by Ramasami. To this it was said that Mooroogasum had consented, he having been surety for the mortgage debt.

Bennet also in 1870 obtained a decree (19th December, 1870) against Ramasami for the mortgage debt, amounting to Rs. 35,283; and in execution brought to sale the right, title, and interest of Ramasami in the lots above mentioned, purchasing the same himself at the auction, having obtained leave to bid. Afterwards (2nd April, 1874) Bennet, as the duly empowered agent of Soobroy and Coomarasami, sold and conveyed the half share in the same lots to Bee Moh Chan and Company, and others, who afterwards assigned to certain of the defendants in this suit.

Kristnasami died at Madras on 21st September, 1882, Vyapoory (also called Mylapoor) the plaintiff in this suit, obtaining administration of his estate. The plaint which was filed on 12th September, 1883, admitted that the shares of Ramasami, of Soobroy, and of Coomarasami, might have been validly transferred, but claimed the remaining two-fifths. The defence was the transfer above stated, with the assignments from the firms, which had purchased, to some of the defendants who had transferred part of the purchased lots to others of the defendants; all of whom, however, relied on the law of limitation in Act XV of 1877, Sch. II, Art. 140.

Issues were settled, of which the principal raised the question of limitation, and of the validity of the defendants' title, either absolutely, or as purchasers for value, without notice. The

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Recorder of Rangoon (Mr. W. F. Agnew) dismissed the suit, with costs, as barred under Art. 140, Sch. II, Act XV of 1877, stating his reasons as follows :—

"It is not necessary for me to trace the steps by which the "property sought to be recovered came into the hands of the defendants; the first question is whether the suit is not barred "by limitation. For the defendants it is argued that the case is governed either by Art. 140 or Article 144 of the second "Schedule to the Limitation Act, and that, whichever may be "held to apply, the suit is barred. Article 140 prescribes a "period of twelve years for a suit by a devisee for possession "of immovable property, to be computed from the time 'when "his estate falls into possession.' That must begin from the "time when the devisee became entitled to possession of the "property, which would be not later than one year after the death "of the testator. Article 144 prescribes a period of twelve "years for a suit 'for possession of immovable property or any "interest therein not hereby otherwise specially provided,' to "be computed from the time 'when the possession of the de-"fendant becomes adverse to the plaintiff.' The possession of "Mr. Bennet became adverse to the plaintiff at all events on "the 24th of April, 1871, when he obtained his certificate of "purchase from this Court.

"The plaintiff has not shown any reason for his delay, and it "is proved that he was in Rangoon from January, 1870, to "August, 1872, and he must have been cognizant of the exe-"cution proceedings, for he says that he lived with his brothers, "but whether he was cognizant or not is, in my opinion, im-"material, for I consider that his suit is barred under Article "140 of the Second Schedule to the Limitation Act.

"Mr. Porter has argued that s. 10 of the Act applies, and "that the plaintiff's co-executors were trustees for him. The "devise was to the testator's five brothers, to be divided equally "between them share and share alike. These words created a "tenancy in common between the brothers (Jarman, 4th edi-"tion, 257). I am not aware of any authority for holding "that tenants in common are trustees for each other. The "fact that the testator's brothers were also appointed his

"executors does not, in my opinion, make them trustees for a "specific purpose within the meaning of s. 10 of the Limitation "Act. The suit must therefore be dismissed with costs."

On this appeal Mr. *J. D. Mayne* and Mr. *Laing*, appeared for the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *A. Young*, for the respondents.

For the appellant it was argued that the claim was not barred by limitation. Bennet's possession from February, 1871, till April, 1874, was not adverse to any one except perhaps Ramasami, through whom no title could be made except in respect of his own share by those who relied on the transfer from Bennet. Ramasami may have had possession; but, if so, it was, as regards the four brothers, only as agent in respect of their interests as tenants in common, and as distinguished from his own one-fifth. Only the interests of the brothers who assented to the sale could pass to Bennet, who was aware of other persons having interests in the property, and, on behalf of such others, he became only agent, holding the property. Both the conveyances of 1874 were acknowledgments that Bennet's only right, or title, was as agent of Soobroy, who could not dispose of the whole estate. Reference was made to *Umr-un-nissa* v. *Muhammad Yar Khan* (1).

Counsel for the respondent were not called upon.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—The learned Judge in this case has decided that the suit was barred by limitation under the 140th, or the 144th article of the Second Schedule of the Limitation Act, XV of 1877. He stated that, in his opinion, it is barred by Art. 140. Their Lordships are of opinion that the learned Judge was right in the conclusion that the suit was barred by Art. 140 of that Act.

In order to ascertain whether the suit was so barred or not, we must look to what was the nature of the case which the plaintiff made.

By the Act of 1882, which was the Civil Procedure Code in force when the suit was commenced, the plaintiff must show

(1) I. L. R., 3 All., 24.

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the grounds, &c., the cause of action, and when that cause of action accrued.

In the case of *Eshen Chunder* v. *Shama Churn Bhutto* (1), Lord Westbury, who delivered the judgment, said: "This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made."

Now what is the case made out by the pleadings, or what is involved in, or consistent with, the claim which is thereby made? The plaintiff alleges in the plaint that Mooroogasum died on the 19th September, 1864, having made a will, the 6th paragraph of which was in the words following: "All the rest, residue, and remainder of all my property, movable and immovable, of which I may die possessed (all being my own sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike." The five brothers included Vyapoory, the present plaintiff, and Kristnasami, another brother, to whose interest in the estate Vyapoory, the plaintiff, claims to have succeeded; he therefore claims to have two of the five shares devised by Mooroogasum. He rests his title upon Mooroogasum's will, and claims that the will gave him a right to recover possession, and to have a declaration of his right to possession of two-fifths of the estate, and also to have a partition. He does not allege in distinct terms that Mooroogasum had an estate in this property, but it is to be implied from, or rather is involved in, the statement which he made in the plaint. At paragraph 16 of the plaint he says: "Coomarasami and Soobroy"—those are two of the other brothers—"had no right, power, or authority, to sell more than their respective one-fifth shares in the land, set out in paragraph 7 of this plaint." But when he says that they had no right to sell more than their two shares, it implies that they had the right to sell those two. Then he says, in paragraph 18, "that there remains undivided the respective one-fifth shares or interests of Vyapoory"—that is the plaintiff

(1) 11 Moore's I. A., 7.

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himself—and Kristnasami, deceased, in each of the several pieces or parcels of land set out in paragraph 7 of this plaint." He could not have been entitled, nor could his brother have been entitled, to one-fifth, unless the testator had the property to dispose of; and then, having made out, or professed to make out, a title under the will, he declares that he is entitled to possession of those two-fifths, and he asks to have it declared that he is entitled to them, and to have a partition of the estate.

Now when did his title arise, assuming that the testator had the estate, and had the power to devise it? It arose on the death of Mooroogasum on 19th of September, 1864. The Judge in his judgment puts it one year later, and says he must at least have had a title at the expiration of one year from the death of the testator. It appears to their Lordships that according to the Hindu law he became entitled to his one-fifth on the death of the testator.

The words of Art. 140 are: "Suit by a remainder man, or a reversioner (other than a landlord), or devisee for possession of immovable property"—which this is: he is claiming as a devisee of immoveable property. Then it says the suit is to be brought within 12 years from the time when his estate falls into possession. Now, from 1864, he was entitled to possession, but Mr. Bennet had the possession; and it is said now that Mr. Bennet had not an adverse possession, because he was holding as in the nature of a mortgagee, and that the testator was not absolutely entitled to the estate. There is nothing, however, in the plaint from which anything of that kind can be inferred. It is to be inferred that the case rests upon the title of the testator to devise the estate, and upon that title only.

The issues are: "(1) Does the plaint disclose a good or sufficient cause against the defendants, or any or either of them?" It does not strictly show a good cause of action, for there is no allegation that the testator was entitled; but whatever cause of action it does show is a cause of action derived from the will of the testator and from the death of the testator, and the title accrued at that time. Then comes the

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issue No. 2: "Is the plaintiff's claim, or any portion thereof, barred by limitation?" Now, if his title accrued in 1864 then it is clear that the judgment of the learned Judge was correct, and that the suit which was not brought till the 12th September, 1883, is barred.

Then it was contended that by virtue of s. 19 of the Limitation Act, an admission had been made which gave a further period from which the right of bringing the action was to be dated. Section 19 is this: "If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liabilty in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed." But, what liability does this mean? It must mean a liability to the person who is seeking to recover possession, or some person through whom he claims. Was there any admission made in this case by Mr. Bennet at any time, or by any of the defendants? The admission is said to have been made by Mr. Bennet in the conveyance which was executed in 1874. It is contended that in that conveyance Mr. Bennet admitted that he was liable in respect of the property. The only admission is that he was acting as agent for one of the executors in selling the estate. He was selling the estate for the purpose of getting paid out of the proceeds of the sale. He does not admit that he was liable to be turned out of possession, or that anyone had a right of possession as against him, nor does he make any admission at all to the plaintiff or to any one through whom he claims. Under those circumstances the clause does not apply. No liability has been admitted to take the case out of the statute of limitations; and under those circumstances Art. 140 must prevail, and the decision of the learned Judge was correct upon that point.

Under these circumstances their Lordships will humbly advise

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Her Majesty to affirm the decision of the Court below, and to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *Frank Richardson & Sadler.*

Solicitors for the respondents: Messrs. *Sanderson & Holland.*

C. B.

FULL BENCH.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Norris.

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IN No. 1443.

KINU RAM DAS (ONE OF THE DEFENDANTS) *v.* MOZAFFER HOSAIN SHAHA (PLAINTIFF) AND OTHERS (DEFENDANTS).

IN No. 1535.

KINU RAM DAS (ONE OF THE DEFENDANTS) *v.* HUJJATULLA SHAHA (PLAINTIFF) AND OTHERS (DEFENDANTS).

IN No. 1536.

KINU RAM DAS (ONE OF THE DEFENDANTS) *v.* KAMARUDDIN SHAHA AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

Co-sharers—Payment of arrears of revenue by one co-sharer; Effect of—Charge—Act XI of 1859, *s.* 9; *Construction of—Lien.*

Held (MITTER and NORRIS, JJ., dissenting),—There is no general rule of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer.

Enayet Hossein v. *Muddunmoonee Shahoon* (1), overruled; *Nogenderchunder Ghose* v. *Kamini Dasi* (2), explained and distinguished; *Kristo Mohini Dasi* v. *Kaliprosono Ghose* (3), approved; *In re Leslie* (4), relied on.

MOZAFFER HOSAIN SHAHA, Hujjatulla Shaha and Kamaruddin Shaha were co-proprietors of Kismut Pargana Jahangirpur with

* Full Bench Reference in Appeals Nos. 1443, 1535 and 1536, against the decrees of C. A. Kelly, Esq., Judge of Dinajpur, dated the 31st of May, 1886, affirming the decrees of Baboo Jugobondhu Ganguli, Subordinate Judge of that district, dated the 30th November, 1885.

(1) 14 B. L. R., 155.
(2) 11 Moore's I. A., 258.
(3) I. L. R., 8 Calc., 402.
(4) L. R., 23 Ch. Div., 552.