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would not have been in issue. The issue in fact raised by the defendants was closely similar to this. They raised no question as to the rate of rent payable. Their plea was, in substance, that, whatever the rent payable might be, it was by virtue of a particular contract not to be paid in to the plaintiffs' hands, but appropriated in a special manner, namely, the discharge of the plaintiffs' liability to pay interest due under the mortgage. If the mortgagee had been a third person, the plea would obviously have been one of payment. As the mortgagee alleged to be entitled to interest was also the tenant from whom rent was claimed, it was in the nature of a set-off of the interest due against the rent repayable, and it impliedly admitted that whenever the rent payable ceased to be applicable by the defendants in satisfaction of the interest, the zamindars would be entitled to recover it. It is difficult to distinguish in principle such a plea from a plea that the rent payable in respect of the years in suit had been in effect paid or otherwise satisfied in full, and in this view of the case we think, having regard to the ruling, that the rent payable by the tenant was not a matter in issue, that the decision of Mr. Justice Dillon was right, and that this appeal must be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

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February 20

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Knox.

DONDH BAHADUR RAI AND OTHERS (PLAINTIFFS) *v.* TEK NARAIN RAI AND OTHERS (DEFENDANTS).*

Mortgage—Usufructuary mortgage—Suit for redemption—Non-payment at proper time of the whole mortgage money—Dismissal of suit—Second suit for redemption accompanied by payment in full—Res judicata—Act No IV of 1882 *(Transfer of Property Act) sections* 92, 93.

Held that a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage money at a time authorized by the deed, did not have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the

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* Appeal No. 43 of 1898, under section 10 of the Letters Patent.

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deed expressly authorizing redemption on payment of the mortgage money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second. *Inman* v. *Wearing* (1), *Marshall* v. *Shrewsbury* (2), *Curtis* v. *Holcombe* (3), *Collinson* v. *Jeffery* (4), *Karuthasami* v. *Jaganatha* (5), *Nainappa Chetti* v *Chidambaram Chetti* (6), *Roy Dinkur Doyal* v. *Sheo Golam* (7), *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (8) and *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (9) referred to. *Hay* v. *Raziuddin* (10) distinguished.

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

Munshi *Gobind Prasad* for the appellants.

Munshi *Haribans Sahai* for the respondents.

STRACHEY, C. J.:—The question raised by this appeal is whether a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not prior to its institution paid or tendered the whole of the mortgage money at a time authorized by the deed, has the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the deed expressly authorizing redemption on payment of the mortgage money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second.

The mortgage of which redemption was sought was a usufructuary mortgage of a fixed rate holding, and was executed by the tenants on the 25th May 1872, to secure the sum of Rs. 200. It provided that the principal money with interest should be paid in the month of Jeth, 1280 Fasli, and that if after that date the mortgagors should pay the whole amount due in any future month of Jeth in any year, they would be entitled to get redemption of the property. It also provided that the mortgagors were to pay to

(1) (1850) 3 De. G. and S., 729, at p. 734.
(2) (1875) L. R., 10 Ch. A, 250.
(3) (1837) 6 L J. (N. S.) Ch. 156; 34 R. R., 30.
(4) L. R., 1896, 1 Ch., 644.
(5) (1885) I. L. R., 8 Mad., 478.
(6) (1897) I. L. R 21 Mad., 18.
(7) (1874) 22 W. R., C. R., 172.
(8) (1889) I. L. R., 11 All., 386.
(9) (1871) N.-W. P., H. C. Rep., 1871, p. 62.
(10) (1897) I. L. R. 19 All., 202.

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the zamindar the rent due in respect of the holding, but did not provide for the event of their making default in such payment. In 1894 the mortgagors brought a suit for redemption, alleging that Rs. 200 only was due, and that the mortgagee had refused to accept their tender of that amount. The defendant mortgagee did not contest the right of the plaintiffs to redeem, but claimed to be entitled to add to the mortgage debt sums exceeding Rs. 700, which he alleged that he had paid to the zamindar as arrears of rent for the holding in default of payment by the mortgagors, and that as this part of the mortgage money had not been paid or tendered in accordance with the deed in the month of Jeth, the suit should be dismissed. The Court of first instance found that all that remained due on the mortgage, besides the Rs. 200 principal tendered by the plaintiffs, was Rs. 25, interest for one year, and on the 9th March 1895 it passed a decree for redemption conditional upon the plaintiffs paying this further Rs. 25 in the next month of Jeth, which ended on the 7th June 1895. From this decree the defendant mortgagee appealed, and the appellate Court reversed the decree and dismissed the suit, on the ground that the plaintiffs had not paid or tendered the whole Rs. 225 due in the Jeth preceding the suit. Considering that the whole of the principal had been tendered; that only a trifling sum representing one year's interest remained; and that the defence pleaded by the mortgagee was clearly unfounded, it was, to say the least, taking a very strong course to dismiss the suit outright instead of allowing the plaintiffs, as the first Court had done, to redeem conditionally on their making good the deficiency in Jeth in accordance with the deed. However, the plaintiffs did not appeal, so that on the 18th May 1896, the suit for redemption stood finally dismissed. A week later, on the 25th May, which fell within the month of Jeth, the plaintiffs tendered to the defendant the whole sum of Rs. 225, which in the previous suit had been found due on the mortgage. The defendant again refused to accept the tender, and the plaintiffs having, on the 27th May, deposited the Rs. 225 in Court under section 83 of the

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Transfer of Property Act, brought the present suit for redemption on the 30th July. In their plaint they set forth the proceedings in the former suit. In his written statement the defendant again pleaded that the plaintiffs were not entitled to redeem except on payment of Rs. 737, which he had paid as arrears of rent to the zamindar, in addition to the Rs. 225 deposited. He did not plead that the suit was barred by the dismissal of the former suit. The Court of first instance, holding that the defendant was not entitled to add any part of the Rs. 737 to the mortgage money, and that the Rs. 225 which had been deposited was all that was due on the mortgage, passed a decree for redemption. The defendant appealed from the decree, but confined his appeal to the matter on which he had failed in the first Court, and did not suggest that the claim was barred by the dismissal of the former suit. The lower appellate Court agreed with the Court of first instance and dismissed the appeal; and the defendant then brought a second appeal to this Court in which he for the first time raised the plea of *res judicata*, upon which his appeal has been allowed and the suit for redemption dismissed. Against that dismissal the plaintiffs have now appealed under section 10 of the Letters Patent.

It is obvious that the defendant has no defence on the merits; that his only plea in the Courts below was wholly unsustainable; and that he has succeeded only upon a technical ground taken for the first time in second appeal in this Court. The plaintiffs have done all that their deed required as the condition of redemption, and their chief mistake appears to have been their not appealing against the appellate decree in the former suit. The question is whether, not having done so, they are in consequence for ever barred from redeeming the property. The right to redeem belonging to every mortgagor, including usufructuary mortgagors like the plaintiffs, is conferred by section 60 of the Transfer of Property Act, 1882. It exists "at any time after the principal money has become payable." It arises "on payment or tender at a proper time and place of the mortgage money." What is a proper time for payment or tender depends upon the

terms of the mortgage deed. Here the mortgage deed expressly authorized the mortgagors to redeem on payment in the month of Jeth in any year after the mortgage money became payable. The plaintiffs are found to have tendered to the defendant in the month of Jeth prior to the institution of the suit the full amount due upon the mortgage. They are therefore *primâ facie* entitled to a decree for redemption. But their right to redeem is, of course, subject to the proviso to section 60: "provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court." So long as there has been no such act or order, so long as the relation of mortgagor and mortgagee exists, the right to redeem is inseparable from that relation, and may be enforced by suit. There is no suggestion that the right has here been extinguished by act of the parties. The only order of a Court which, it is suggested, has extinguished the right is the dismissal of the previous suit for redemption. If the dismissal of that suit has had that effect, it can only be by virtue of some provision of the Transfer of Property Act, or of some other enactment. It has been suggested that the dismissal of the previous suit has extinguished the right to redeem, first, because it operates as a foreclosure of the mortgage, and, secondly, because it operates as *res judicata* by virtue of section 13 of the Code of Civil Procedure. As regards the first point, it is necessary to see what are the orders of a Court which, under the Transfer of Property Act, extinguish the right to redeem, and under what circumstances, if any, a usufructuary mortgage is foreclosed. The only orders to which the Act expressly gives the effect of extinguishing the right to redeem are orders absolute for foreclosure under section 87 in a mortgagee's suit for foreclosure under section 86, orders absolute for sale under section 89 in a mortgagee's suit for sale under section 88, and orders for foreclosure or sale under section 93 in a mortgagor's suit for redemption under section 92. As under section 67 a usufructuary mortgagee as such cannot sue for either foreclosure or sale, and as under sections 92 and 93 no order for foreclosure of a usufructuary

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mortgage can be made in a redemption suit, it is obvious that in the case of a usufructuary mortgage, the right to redeem cannot be extinguished by any express order for foreclosure. The reason of this, as Mr. Justice Shephard points out in his commentary on the Act, is that the usufructuary mortgage does not effect a transfer to the mortgagee of the legal ownership of the land: "foreclosure implies that the property is vested in the mortgagee subject to a condition, and that an equity only remains to the mortgagor." The only order which under the Act expressly extinguishes a usufructuary mortgagor's right to redeem is the order for sale which under sections 92 and 93 may be made in a redemption suit, though the usufructuary mortgagee could not have sued for sale any more than for foreclosure. If then the usufructuary mortgagee cannot sue for foreclosure, if on default of payment under a decree for redemption an order for foreclosure is expressly excluded, and if in the case of such default there is no provision for the extinguishment of the right to redeem except on the passing of an order for sale on the mortgagee's application, why should the usufructuary mortgagor's failure to obtain a decree for redemption put the mortgagee in any better position, or give him a right for which he never bargained? It is true that in England if a mortgagor files his bill for the redemption of a legal mortgage and it is dismissed for any reason except want of prosecution, the dismissal operates as a decree for foreclosure against him: *Inman* v. *Wearing* (1), *Marshall* v. *Shrewsbury* (2), and other cases cited in Fisher on the Law of Mortgage, (4th ed., p. 1002). It is also true that the rule in England has been applied to the case of a Welsh mortgage, the incidents of which closely resemble those of a usufructuary mortgage under the Indian Transfer of Property Act, and in connection with which it has been held that, although the mortgagee has no right to foreclose, the mortgagor, upon failure to pay the amount due under a decree for redemption, will be foreclosed: *Curtis* v. *Holcombe* (3). It is to be observed

(1) (1850) 3 De. G. and S., 729 at p. 734. (2) (1875) L. R., 10 Ch. A., 250.
(3) (1837) 6 L. J. (N. S.), Ch. 156; 34 R. R., 305.

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that in that case the bill for redemption was not dismissed in the first instance, but decreed, and the ground of the decision was that the mortgagor "ought not to be allowed to obtain a decree for redemption and afterwards avail himself of the peculiar form of the deed to decline a redemption." There was a decree for redemption in the usual terms, "but in default of the plaintiff so redeeming the said mortgage by the time aforesaid, the plaintiff's bill was from thenceforth to stand dismissed out of this Court, with costs to be taxed by the Master." That has little or no resemblance to the present case where the plaintiffs were not, in the former suit, "allowed to obtain a decree for redemption." It is more analogous to the case of default by a usufructuary mortgagor in payment of the amount due under a decree for redemption, with this difference, that under sections 92 and 93 of the Transfer of Property Act the consequence of such default is not, as in England, a further order for absolute dismissal of the suit—*Collinson* v. *Jeffery* (1), or foreclosure of the mortgage, but, if the mortgagee applies for it, an order for sale. However this may be, there is no reported Indian case adopting the broad English rule that the dismissal of a suit for redemption for any reason except want of prosecution operates as a decree for foreclosure. The absence of any such rule from the Transfer of Property Act indicates, we think, that the Legislature did not intend it to be adopted in India. We think that its application to a usufructuary mortgage would be inconsistent with the incidents of such a mortgage and with the provisions of the Act to which we have referred. So far then as the Act is concerned, the dismissal of the former suit for redemption does not, in our opinion, bar the present.

While in the only reported case in which the English rule was applied to a Welsh mortgage the decision was put on the ground that the plaintiff could not get a decree for redemption without the usual penalty in case of default, the decisions applying it to other kinds of mortgage are based on the same principle as the rule of *res judicata*. "The mortgagor," said Lord Justice James in

(1) L. R., 1896, 1 Ch., 644.

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Marshall v. *Shrewsbury*, "by filing the bill admits the title of the mortgagee and admits the mortgage debt, and the dismissal of the bill operates as a decree for foreclosure because he cannot afterwards file another bill for the same purpose; he is not allowed thus to harass the mortgagee." In this country the question of *res judicata* depends on section 13 of the Code of Civil Procedure. Was the matter directly and substantially in issue in the present suit directly and substantially in issue and heard and finally decided in the former suit? To see what was directly and substantially in issue in both suits, one must look at the contentions of the parties and the judgments and decrees of the Courts. The existence of the plaintiff's right to redeem on payment of the mortgage money in Jeth of any year was not a matter in issue in the former suit. The matter in issue in the first Court was what the mortgage money must be considered to include, whether it included the arrears of rent paid by the mortgagee, whether the plaintiffs were entitled to redeem on payment of Rs. 200, as they alleged, or of over Rs. 700, as the defendant contended. The matter decided by that Court was that the mortgage money was Rs. 225 only, and did not include the arrears of rent, and that the plaintiffs were entitled to redeem on payment of Rs. 25, the unpaid balance, in the following Jeth. The only matter decided by the appellate Court was that the plaintiffs were not entitled to get a decree for redemption in that suit, as they had not prior to its institution paid or tendered the Rs. 225 in the month of Jeth. So far as this decided the fact that the mortgage was unpaid, and the principle that it could only be redeemed on payment or tender in a Jeth prior to a suit for redemption it, had, no doubt, the effect of *res judicata*. But it did not decide that there could under no circumstances be any redemption except on payment or tender in some Jeth prior to that particular suit, or in any other particular Jeth. It decided nothing inconsistent with the continuance of the mortgage relation or with the mortgagors' right to sue again for redemption, provided that before doing so they paid or tendered the full amount due in a Jeth. In the present suit the matter then heard and

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decided is not again in issue. The suit is based on a tender and deposit of the whole Rs. 225 found to be due in a Jeth prior to its institution, as the former judgment decided was necessary. The only matter directly and substantially in issue in the Courts below was whether the Rs. 225 alone or the Rs. 225 *plus* the arrears of rent constituted the mortgage money. That matter was in the former suit decided by the first Court adversely to the defendant: the appellate Court did not decide it at all, but dismissed the suit on another ground. It appears to us that in this state of the facts section 13 of the Code does not bar the present suit. The plaintiffs admittedly have a right to redeem in a Jeth of any year. The dismissal of the former suit appears to us to be equivalent to a decision that that particular suit was prematurely brought, and does not affect the plaintiff's right to sue for redemption upon tender prior to suit of the full amount due in a Jeth subsequent to the dismissal. This view is supported by the judgment of the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (1). That was a suit, prior to the Transfer of Property Act, for redemption of a usufructuary mortgage; and their Lordships said of a decree in a previous suit for redemption, "that decree in fact did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited. According to the course and practice of the Courts in India, the only point to be determined in such a suit is whether the mortgage-debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit." Nothing has happened to terminate the relation of mortgagor and mortgagee, and hence the right to redeem, which is an essential part of that relation, has not been extinguished by any order within the proviso to section 60 of the Transfer of Property Act and this suit to enforce it is not barred.

(1) 12 Moo., I. A., 404 at p. 412.

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We were much pressed by the pleader for the respondent with the judgment of Sir John Edge, C. J., and Mr. Justice Burkitt in *Hay* v. *Raziuddin* (1). That case is obviously distinguishable from the present. There the first suit for redemption, instead of being, as here, wholly dismissed, was decreed, though the decree did not comply with section 92 of the Transfer of Property Act, in that it did not specify what should take place in case the mortgage money was not paid within the prescribed period. The terms of the usufructuary mortgage are not fully stated in the report. No payment of the mortgage money was made, the decree was allowed to lapse, and it was held that the mortgagor could not again sue for redemption. The principle of that decison, when read with the Full Bench ruling of this Court which it follows, and with the Bombay ruling which it approves, is that the mortgage is merged in the decree for redemption and the original cause of action thus extinguished; that the mortgagor's failure to comply within time with his decree for redemption cannot give him a fresh cause of action; that the decree thenceforth alone regulates the relations of the parties, and the mortgagor's sole remedy is by execution, a second suit on the same cause of action and for substantially the same relief being barred by sections 13 and 244 of the Code; and that consequently if by his own neglect he allows execution of the decree to become barred by limitation, no remedy by redemption is left, and the mortgage is thus virtually foreclosed. That decision can have no application to a case where there has been no decree for redemption merging the mortgage, extinguishing the cause of action, or substituting a remedy by execution which by the mortgagor's neglect has become barred by limitation, where therefore section 244 does not apply, and where the cause of action upon which the second suit is based is not the mortgagor's failure to comply with any decree in his favour, but his right under the deed to redeem in a Jeth subsequent, as well as in one prior, to the dismissal of the first suit. The observation in the judgment cited that "it was the intention of the Legislature as

(1) (1897) I. L. R., 19 All., 202.

expressed in sections 92 and 93 of the Transfer of Property Act that there should be one suit only for redemption," when read with the preceding and following sentences, must, we think, be construed as meaning one suit for redemption in which a decree for redemption is passed. It cannot indeed be said that, even thus understood, the proposition is absolutely settled law. Apart from the Madras decisions to the contrary mentioned in the judgment (to which may be added *Karuthasami* v. *Jaganatha* (1), and *Nainappa Chetti* v. *Chidambaram Chetti* (2), and the decision of the Calcutta High Court in *Roy Dinkur Doyal* v. *Sheo Golam* (3), the judgment is admittedly in conflict with *Muhammad Samiuddin Khan* v. *Mannu Lal* (4), where it was held that the ruling of the Full Bench in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (5), was not binding since the passing of the Transfer of Property Act, and that as in a decree for redemption of a usufructuary mortgage foreclosure could not be directed, such decree could not operate to deprive the mortgagor of the right to redeem. It is, however, unnecessary for us to express any opinion upon this conflict of authority. It is sufficient to say that, in our opinion, the principle of *Hay* v. *Raziuddin*, assuming it to be good law, does not apply and should not be extended to a case where no decree for redemption has been passed prior to the suit before the Court. In the judgment now under appeal it is observed that if the present suit could be maintained, "the plaintiffs might institute a fresh suit for redemption upon every Jeth for the whole period for which the mortgage might subsist, and upon their failure to pay into Court the full amount due, might have their suit dismissed, and then be in a position in the following year to commence another suit." Even if the liability to pay costs were not an effectual deterrent, the provisions of sections 92 and 93 of the Transfer of Property Act would probably be sufficient to prevent the course supposed. The proper course for the Court to

(1) (1885) I. L. R., 8 Mad., 478.
(2) (1897) I. L. R., 21 Mad., 18.
(3) (1874) 22 W. R., 172.
(4) (1889) I. L. R., 11 All., 386.
(5) (1871) N.-W. P. H. C. Rep., 1871, p. 62.

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take in that case would be not to dismiss the suit,—for, as pointed out by Mr. Justice Shephard, the usual practice is not now, as it appears to have once been, to dismiss a redemption suit outright because the money has not been paid or even tendered,—but to pass a conditional decree for redemption in the terms of section 92, and then in the event of default of payment within the time fixed, the mortgagee could under section 93 obtain an order for sale extinguishing the right to redeem and preventing any future suit of the kind. The danger of repeated suits for redemption is thus hardly a practical one. In any case we think that there was nothing to bar the present suit.

The only other point relates to an objection which the present respondent raised in his memorandum of appeal to this Court, and which Mr. Justice Blair decided against him. One of the provisions of the mortgage deed was, as we have mentioned, that the mortgagors should pay the rent of the fixed rate holding to the zamindar. That is the construction placed upon the deed by the defendant mortgagee both in his written statement and in his memorandum of appeal to the lower appellate Court. The mortgagors did not pay the rent, and the mortgagee consequently did so. In both suits for redemption the defendant claimed to add the Rs. 700 odd so paid to the mortgage debt. Upon this point the lower appellate Court found in effect that the payments of rent were made by the mortgagee voluntarily and were not necessary to preserve the mortgaged property from forfeiture or sale. We agree with Mr. Justice Blair that this finding of fact is a conclusive answer to the objection in second appeal. The respondent relies on section 76 (*c*) of the Transfer of Property Act. As it is his own case that there was in the mortgage deed "a contract to the contrary" providing that the mortgagors and not the mortgagee should pay the rent, it is obvious, without going any further, that section 76 cannot help him. The only other ground upon which he could claim to add the amount of these payments to the mortgage debt is section 72 (*b*), which authorizes a mortgagee in possession to spend such money as is necessary for the preservation

of the mortgaged property from destruction, forfeiture or sale. That ground, however, is disposed of by the lower appellate Court's finding of fact that the payments were not necessary for any such purpose.

The result is that we must allow this appeal, set aside the decision of the learned Judge of this Court, and restore that of the lower appellate Court with costs.

Appeal decreed.

APPELLATE CRIMINAL.

1899
March 23.

Before Sir Arthur Strachey, Knight, Chief Justice.

QUEEN-EMPRESS *v.* MAHABIR TIWARI.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 34, 397—*Dacoity—Commission of grievous hurt in the course of a dacoity—Person liable under section* 34, *liable also under section* 397.

Held, that the words "such offender" in section 397 of the Indian Penal Code include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of section 34 of the Code.

THE material facts of this case are as follows:—On the night of the 24th of February 1898, one Gajraj was sleeping at his threshing floor. He was awakened by a noise and saw some five or six thieves going off with loads from his threshing floor, while some others were engaged in picking up loads for themselves. Gajraj at once caught one of them, the appellant Mahabir. The other men then attacked him and beat him with lathis until he was forced to let Mahabir go, whereupon Mahabir also beat him. Meanwhile the other men at the threshing floor had been aroused and approached near enough to see and recognize the thieves. Two of these men also received lathi blows and they ran off and hid themselves among the stacks on the threshing floor. Two men then came running up from their fields close by, and on their approach the thieves ran away. Gajraj was carried away from the threshing floor insensible, and on examination it was found that one of his arms was broken, but

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* Criminal Appeal No. 126 of 1899.