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the guardian of a minor is fully competent to assert a right of pre-emption, and to refuse or accept an offer of the share in pursuance of such right, and that the minor would be bound by his guardian's act if done in good faith and in his interest. Here the refusal of the guardian is treated as binding the minor in the same way and to the same extent as an acceptance would do; and if that is correct, we think it must be held that an acquiescence in the sale, if in good faith, and in the minor's interest, would stand upon the same footing as an express refusal to accept the property in pursuance of the pre-emptive right. It has not been contended that here the guardian's act was not done in good faith, and in the minor's interest, and indeed the Courts below virtually find that the act was done in good faith, and expressly find that it was in his interest. The result is that this appeal must be dismissed with costs.

Appeal dismissed.

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January. 10.

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

KALYAN SINGH (PLAINTIFF) *v.* RAHMU AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, sections 373, 561—*Appeal—Right of appellant to withdraw his appeal at any time before judgment.*

Where no objections under section 561 of the Code of Civil Procedure have been filed by the respondent, an appellant has an absolute right to withdraw his appeal at any time before judgment; but where such objections have been filed, the appellant, if he wishes to withdraw his appeal, must do so before the hearing of the appeal has commenced. *Allah Bakhsh* v. *Niamat Ali* (1) and *Jafar Husain* v. *Ranjit Singh* (2) referred to. *Venkataramanaiya* v. *Kuppi* (3) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (4) distinguished.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

STRACHEY, C. J.—The question is, whether an appellate Court is entitled, after the hearing of the appeal has been concluded,

* Second Appeal No. 666 of 1898, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 21st July 1898, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koil, dated the 1st November 1897.

(1) Weekly Notes, 1892, p. 58.
(2) (1895) I. L. R., 17 All., 518.
(3) (1867) 3 Mad., H. C. Rep., 302.
(4) (1884) I. L. R., 9 Bom., 28.

but before judgment, to refuse to allow the appellant to withdraw his appeal, the first Court's decree having been wholly in favour of the respondents, and there being consequently no objections filed by the respondents under section 561 of the Code of Civil Procedure. The appellant here brought this suit, in which he claimed, first, to eject the defendants from a house which he alleged that they occupied as his tenants, and of which they had denied his title as landlord; and secondly, the demolition of a wall built by the defendants on land near the house which the plaintiff alleged belonged to him. The defence was that both the house and the land on which the wall was built, belonged absolutely to the defendants and not to the plaintiff. The Court of first instance in its judgment decided the questions of title in the plaintiff's favour on both points, but dismissed the suit, the main ground being, as regards the house, that the plaintiff had not served notice to quit on the defendants in accordance with section 106 of the Transfer of Property Act, 1882; and as regards the wall, that though built on land belonging to plaintiff, it was merely built in the place of an old *kachcha* wall that had for a long time stood on the land. The decree of the first Court wholly dismissed the plaintiff's suit. Against that decree the plaintiff appealed to the Court of the District Judge. No objections to the decree were filed by the defendants under section 561 of the Code. As the decree was wholly in their favour, they could not have filed such objections, any more than they could have brought a cross-appeal against the decree. They were, under the first part of section 561, entitled to support the decree of the first Court upon any ground decided against them in the Court below; that is, they were entitled to contend, and the judgment now under appeal shows that they did contend, that the first Court ought to have decided the questions of title in their favour and to have dismissed the suit on that ground. After the argument on the appeal had been concluded, but before judgment had been delivered, the appellant presented an application which was somewhat ambiguously worded, but which the Judge took to be an application for permission to withdraw the appeal. The application was expressly described as one under section 373 read with section 582 of the Code. In it the appellant did not ask the

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Court to grant him permission to bring a fresh suit or a fresh appeal. Its prayer was that the appeal might be dismissed; but, having regard to the context, I think that the learned Judge was clearly right in his view that what the appellant wanted was to withdraw the appeal. No doubt he wanted to do so because he was afraid that the Judge was going to dismiss the suit, not upon the first Court's grounds, but upon the questions of title, and he did not want to have the suit dismissed in a manner which would operate as *res judicata* upon those questions. The learned Judge, however, refused to allow the appeal to be withdrawn. He gave judgment dismissing the appeal and the suit on the ground that the plaintiff had failed to establish his title to either the house or the land occupied by the wall, and that the defendants had acquired a title by twelve years' adverse possession. He gave his reasons for refusing to allow the appeal to be withdrawn as follows:—"I may add that appellant has filed an application after arguments were heard, asking for leave to withdraw his appeal. This cannot be allowed against the wish of the respondents, as the application has obviously been made in order to prevent a decision of the title against the appellant. The appellate Court, after an appeal has been heard, is seised of the case, including the respondent's objections, and the appeal cannot be withdrawn so as to prevent these objections being heard and determined. I refer to the cases of *Venkataramanaiya* v. *Kuppi* (1) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (2)." The plaintiff now appeals against the dismissal of his suit by the lower appellate Court, on the ground that the learned Judge ought to have allowed him to withdraw the appeal, and ought not to have passed a decree dismissing it. In the first place, I think that no application for leave to withdraw the appeal was necessary. Subject to a qualification which I shall mention presently, I think that an appellant has an absolute right to withdraw his appeal at any time before the decision. That a plaintiff has an absolute right to withdraw his suit without any permission from the Court was held in the case of *Allah Bakhsh* v. *Niamat Ali* (3). An appellant has a similar right to

(1) (1867) 3 Mad., H. C. Rep., 302. (2) (1884) I. L. R., 9 Bom., 28.
(3) Weekly Notes, 1892, p. 53.

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withdraw his appeal. That is only common sense. Why should a Court compel an unwilling plaintiff or an unwilling appellant to proceed with the suit or appeal? If no permission is given to him to sue again he cannot do so, and the result in the case of an appeal is that the decree of the first Court remains, and matters are just as if no appeal had been preferred at all. Section 373 of the Code requires the permission of the Court, not for the withdrawal but for the bringing of a fresh suit or appeal, and paragraph 2 shows that a suit or appeal may be withdrawn without permission, the result being that in that case a fresh suit or appeal in the same matter cannot be brought. Therefore I think that the Judge ought to have treated the appellant's application, not as an application for permission to withdraw the appeal, but as an intimation of withdrawal, and should not have proceeded to decide the appeal. The cases referred to by the learned Judge deal with a very different state of things. In each of them the first Court's decree, instead of, as here, being wholly in favour of the respondent, was in part against him, and the respondent had taken objections under section 561, or under the corresponding section 348 of the Code of 1859. The cases show that where a respondent has under section 561 taken objections to the first Court's decree, which he could have taken by way of appeal against a decree partly against him, then, if the hearing has begun, the appellant cannot withdraw the appeal so as to prevent the respondent's cross-objections being heard, though he could have done so at any time before the hearing began. The cases are collected in *Jafar Husain* v. *Ranjit Singh* (1). The reason is that cross-objections under section 561 are in the nature of an appeal—a remedy which a respondent has against a decree which is partly unfavourable to him, and although they so far differ from a cross-appeal that they depend on the hearing of the appeal, and cannot be heard if the appeal is not heard, yet if the hearing has commenced, the Court becomes seised of the cross-objections, and the respondent cannot then be deprived of his remedy because the appellant chooses to abandon his. But in no case has it been held that where, the decree being wholly in the respondent's favour, he could neither appeal nor file objections under section 561, the appellant cannot exercise his

(1) (1895) I. L. R., 17 All., 518.

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ordinary right to withdraw his appeal at any time up to its actual decision. Mr. *Gokul Prasad* contended that the principle laid down in the cases is applicable where the respondent, though not filing objections under the second part of section 561, supports the decree under the first part of the section on any of the grounds decided against him in the Court below. I think that is clearly not so. Where the decree is wholly in favour of the respondent, his right to contest any of the conclusions in the first Court's judgment is only for the purpose of supporting the decree, and if the appeal is withdrawn that purpose is fully secured, because the decree is left standing, and the right to dispute the conclusions in the judgment is no longer of any use to him. To withdraw the appeal in such a case does not, as in the case of cross-objections filed under the second part of section 561, deprive the respondent of any remedy whatever. For these reasons it appears to me that the learned Judge ought to have treated the appeal before him as withdrawn, and that we ought now to give effect to that withdrawal by allowing the present appeal, setting aside the decree of the lower appellate Court, and restoring that of the Court of first instance. The appellant will have the costs of this appeal, and will pay the respondent's costs in the lower appellate Court. As to the costs in the first Court, they are provided for in that Court's decree, which we restore.

BANERJI, J.—I am entirely of the same opinion. I think the learned Judge of the Court below was wrong in holding that he was competent to refuse leave to the appellant to withdraw his appeal. Had the appellant asked the Court to allow him to withdraw from the appeal with liberty to bring a fresh suit or appeal, certainly the leave of the Court would have been necessary; but as his application was for a withdrawal from the appeal without any reservation of a right to bring a separate suit, the Court was bound to record the withdrawal, and it had no power to refuse to allow the appellant to withdraw. The learned Judge appears to have confused the two classes of cases referred to in section 561 of the Code of Civil Procedure. Under that section a respondent may support the decree of the Court of first instance upon grounds which may have been decided against him by that Court, and if a part of the decree is adverse to him he has the

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right to object at the hearing of the appeal to that part of the decree without filing a separate appeal. The learned Judge seems to think that both these cases are of an analogous character. In the case of the decree of the first Court being partially adverse to the respondent, the section allows him the right to take objections to that part of the decree, and when he has done so and the appeal has proceeded to hearing, the Court, being seised of the objections, is bound to decide them, although the appellant may have withdrawn from the appeal; but where the respondent has preferred no objections under the second paragraph of the section, the Court cannot refuse to allow the appellant to withdraw the appeal because the result may be that the respondent will not be able to challenge the findings of the Court below which are adverse to him. As has been pointed out by the learned Chief Justice, the respondent does not suffer, and is not prejudiced in any way, by the withdrawal. He could have supported the decree upon grounds other than those on which the decree was passed. But when the appellant withdraws the appeal the decree remains as it is, that is, as a decree in favour of the respondent, and the respondent has no occasion to support it upon any grounds other than those on which the Court of first instance passed it. That being so, the learned Judge was wrong in proceeding to hear the appeal and in deciding it on the merits. I agree in the order proposed.

Appeal decreed.

Before Mr. Justice Aikman.

1901 *January* 11.

T. H. SMITH (JUDGMENT-DEBTOR) *v.* THE ALLAHABAD BANK, LD. (DECREE-HOLDER).*

Civil Procedure Code, section 266—*Execution of decree—Attachment of money payable to an auctioneer by purchasers of goods sold by him at auction.*

Held that money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment-debtor had a disposing power over which he could exercise for his own benefit; and further, that if such money was attached the auctioneer was a proper person to raise the objection that it was not attachable under section 266 of the Code of Civil Procedure.

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* First Appeal No. 218 of 1900 from an order of Syed Muhammad Sirajuddin, Judge of the Court of Small Causes, exercising powers of a Subordinate Judge, at Allahabad, dated the 2nd August 1900.