

PRIVY COUNCIL.

P. C.
1902
June 10, 11.
July 22.

PARTAB BAHADUR SINGH, MINOR, BY HIS NEXT FRIEND JAGMOHAN SINGH (DEFENDANT) *v.* GAJADHAR BAKHSH SINGH (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Suit for redemption—Stipulation for interest until principal paid off—Mortgagee in possession and in receipt of rents and profits—Reduction of mortgagee's security by acts beyond mortgagor's control—Acquiescence of mortgagee.

The plaintiff mortgaged to the defendant twelve villages, and stipulated in the mortgage deed that "until delivery of possession of the afore-said villages I shall pay interest at the rate of 2 per cent. on the mortgage money," and that "until I pay up the Rs. 5,600 on account of principal with interest to the very last pie the mortgagee shall continue in possession and occupation of the villages." Possession of the villages was given to the mortgagee at the time of the execution of the mortgage; but a reduction in the number of villages in his possession was caused by a grant by the native Government in 1853, and settlements in 1858 and 1864 in favour of other persons. By a lease executed at the same time as the mortgage some of the villages were leased to the plaintiff who thus became the tenant of the mortgage, and paid rent in lieu of interest. *Held* in a suit for redemption that the interest referred to in the mortgage deed was only interest until possession was given of the mortgaged property: the mortgagee after possession took the rents and profits instead of interest, and the plaintiff was entitled to redemption on payment of the principal sum of Rs. 5,600 only.

Held also that no difference to this result was caused by the reduction in the number of villages held by the mortgagee, which did not constitute a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property such as entitled the mortgagee to claim interest in lieu of the rents and profits of those villages of which he was so dispossessed. The settlements were final as to the ownership of the mortgaged property, and the mortgagee having brought no suit, as he might have when his security became diminished, must be taken to have acquiesced in his dispossession.

APPEAL from a decree (20th November, 1897) of the Court of the Judicial Commissioner of Oudh, which varied in favour of the respondent a decree (30th April, 1895) of the Subordinate Judge of Sultanpur, in a suit brought by the respondent.

The plaintiff, as representative of one Indarjit Singh, sued the defendant as representative of Raja Sarnam Singh, Taluqdar of Gaura Katari, to redeem a mortgage of the following five villages, (1) Hargaon, (2) Ahed, (3) Macharia, (4) Bahadurpur, (5) Poorab Pershad Badal.

Present:—Lord DAVRY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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On the 15th of June, 1851, Indarjit Singh borrowed Rs. 5,600 from Sarnam Singh, and as security mortgaged to him the above five villages together with seven others, viz. (6) Poorab Adhar, (7) Ajabgarh, (8) Rudgarh, (9) Kapasi, (10) Sheogarh or Sheo-pur, (11) Baghiapur, and (12) Poorab Kohli. The material clause in the mortgage deed is set out in their Lordships' judgment.

On the same date Raja Sarnam Singh executed a perpetual lease of the first-named five villages and of Poorab Adhar in favour of Indarjit Singh at a yearly rental of Rs. 2,801, from which amount Indarjit was to be allowed Rs. 800 per annum as *nankar* or subsistence allowance. The lease was to take effect from 1259 Fasli = the 11th of September, 1851.

On the 18th of September, 1853, one Hanuman Prasad obtained lease from the King of Oudh of the whole taluqa of Bhawan Shahpur, in which the above-named 12 villages were incorporated, and forcibly took possession of them, which he retained until the annexation of Oudh in 1856. At the first summary settlement the villages leased on the 15th of June, 1851, were settled with Indarjit Singh, but the other six villages were settled with other persons. After the confiscation of Oudh in March, 1858, the second summary settlement was made on the basis of proprietary right, and at this settlement a decree for the five villages in suit was passed in favour of Indarjit Singh. Poorab Adhar was settled with other persons, and the remaining six villages included in the mortgage were decreed to Babu Sitla Bakhsh, taluqdar of Bhawan Shahpur. Raja Sarnam Singh had petitioned for settlement of the twelve villages by virtue of the mortgage of the 15th of June, 1851, but his claim was rejected. At the regular settlement in 1864 he sued again for a recognition of his rights, and on the 30th of June judgment was delivered as follows:—

“I decree proprietary right of the following—Macharia, Bahadurpur, Hargaon, Poorab Pershad, and Ahed—in favour of Indarjit Singh, and direct that Raja Sarnam Singh's name be entered, as in possession under bond, dated the 15th of June, 1851, while Indarjit Singh is entitled to hold lease of the villages in question according to the terms of the deed of agreement (the

lease of the 15th of June, 1851), which must be considered as binding on the parties. I presume Indarjit Singh will be able to redeem any time within 30 years."

From the 30th of June, 1864, the taluqdar was paid the rent, *viz.* Rs. 2,001 per annum, reserved by the lease. By order of the 26th of September, 1867, the lessee was directed to pay a further sum of Rs. 166 as pay of chaukidars.

Raja Sarnam Singh died in 1877 and Indarjit Singh in 1884.

The suit out of which the present appeal arose was brought on the 25th of June, 1894, by the representative of Indarjit Singh, to redeem the mortgage of the five villages. In his plaint the plaintiff stated "that Raja Sarnam Singh, while holding possession as mortgagee of villages Ajabgarh, Rudgarh, Kapasi, Sheogarh, Baghiapur, and Poorab Kohli allowed Babu Jageshar Bakhsh Singh to take possession of the said villages and to include them in his taluqa, although he ought to have protected Babu Indarjit Singh's rights in the aforesaid villages, and continued his possession until redemption as provided in the mortgage deed. Hence, having failed in his duties as mortgagee in possession, Raja Sarnam Singh allowed Babu Indarjit Singh's rights in the said villages to be lost". The plaintiff, therefore, claimed to set off the value of these villages against the mortgage money. He also alleged that possession of the whole of the mortgaged property was delivered to the mortgagee on the 15th of June, 1851, and contended that on the true construction of the mortgage deed no interest was payable, even though the whole or a portion of the security had been lost.

The defendant, who was the representative of Sarnam Singh, in his written statement denied that Indarjit Singh ever had any title to the villages mortgaged other than those in suit. He denied that possession of all the mortgaged villages was delivered to him in pursuance of the mortgage. As he had been deprived of a great portion of the security, he claimed on redemption to charge interest at the rate of 2 per cent. per month on the principal, and credit to the mortgagor all payments made by him in excess of the Government revenue and cesses. He also claimed the sum of Rs. 105 per annum, from the 30th of June, 1864, to the year 1868, payments made by him to the Government.

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He also denied any responsibility for the loss of the six villages not covered by the lease.

The Subordinate Judge decided that only the villages in suit, and Poorab Adhar were the property of Indarjit Singh, and that he had never had any title to the remaining six villages; that those six villages were not lost in consequence of any negligence for which the mortgagee could be responsible; that the loss could be considered in a suit for redemption, and that the value of the six villages was at least Rs. 14,160. He was of opinion that the mortgagee was not put into possession of these six villages and of Poorab Adhar on the execution of the mortgage deed. He held that there was no proof of any payments in the years 1259 Fasli and 1260 Fasli, and that the mortgagee could not charge Rs. 105 per annum from 1864 to 1868. He decided that the mortgagee not having been put into possession of the entire property mortgaged, he was entitled to charge as interest or damages 2 per cent. per mensem on the principal, giving the mortgagor credit for payments made in excess of the Government revenue and cesses; and as there were no such payments, he decreed redemption on payment of Rs. 5,600 principal, Rs. 57,792 interest up to the 13th of June, 1894, and the costs of the suit.

From this decree the plaintiff appealed to the Court of the Judicial Commissioners of Oudh. That Court decided that the title of Indarjit Singh was limited to the five villages in suit; that the loss of the remaining villages was not due to any neglect on the part of the mortgagee, and that he was, therefore, not responsible to the mortgagor. The Judicial Commissioners reversed the finding of the Subordinate Judge in this respect, and held it proved that on the execution of the mortgage deed Raja Sarnam Singh was placed in possession of all the twelve villages as mortgagee. On the construction of the mortgage they were of opinion that the mortgagor covenanted to pay interest at 2 per cent. per mensem until possession of the mortgaged villages was delivered to the mortgagee, after which interest ceased, the mortgagee being then entitled to the rents and profits of the property in lieu of interest, and that redemption was to be effected on payment of the principal sum Rs. 5,600 together with such interest as might have accrued until delivery of possession.

As to this, and as to the legal effect of the mortgagee being deprived of the rents and profits in lieu of interest in consequence of the failure of the mortgagor to secure his possession, the Judicial Commissioners said :—

“Both the parties admit that their respective rights and liabilities should be determined under the provisions of Act IV of 1882.

“It appears to me that under the provisions of this Act the defendant cannot successfully contest the claim to redeem the mortgage of the property in suit on payment of the principal sum alone (Rs. 5,600).

“Had possession of only a part of the mortgaged property been given to the mortgagee, interest would, I think, have been payable by the plaintiff under the terms of the mortgage, from the date of the mortgage up to the date of suit, as contended by the defendant, an account being taken of that portion of the mortgaged property of which the mortgagee was placed in possession. This, I may observe, was the only ground upon which the interest of Rs. 57,792 was claimed by the defendant in his written statement. But in the present case possession of the entire mortgaged property was delivered to the mortgagee. Under the terms of the contract of mortgage the mortgagor covenanted to pay interest at 2 per cent. per mensem up to the date of delivery of possession of the mortgaged property (*i.e.* the entire mortgaged property). He did not agree to pay interest after delivery of possession, the arrangement being that after such delivery of possession, the mortgagee should enjoy the rents and profits. There was thus no question of accounts after delivery of possession; and the mortgage was redeemable at any time on payment of the principal together with such interest as might have accrued until delivery of possession. It appears to me that in a mortgage of this nature, the mortgagor is, under sections 60 and 62 of Act IV of 1882, entitled to redemption on payment of the principal only (no interest having accrued between the date of the mortgage and delivery of possession), irrespective of the fact that subsequent to delivery of possession he failed to secure to the mortgagee continuance of possession in regard to part of the mortgaged property: there being no provision in the deed for the payment of interest after delivery of possession, or if, after obtaining possession, the mortgagee was deprived of the possession of the whole or any portion of the mortgaged property. The mortgagee on being deprived of the possession of the whole or part of the mortgaged property had his remedies by suit against the mortgagor for the recovery either of the possession of the property, or of the mortgage-money, with perhaps damages (section 68 of Act IV of 1882). I can find no provision in Act IV of 1882 which authorizes him to charge against the mortgagor in the suit for redemption the rents and profits which he would have obtained, had his possession not been disturbed, or interest, as damages, on account of such loss of profits. The mortgagee in the present case was well aware in 1864 that he could not possibly recover possession of the six villages which were settled at the second summary settlement with the Taluqdar of Bhawan Shahpur. He brought no suit then, or at any time subsequently, to recover his mortgage-money [section 68(c) of Act IV of 1882], but appears to have remained

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satisfied for 31 years with the diminished security, and the possession of the remaining six villages; and I do not think that the redemption of the mortgage of these villages in suit is subject to the payment by the mortgagor, in addition to the mortgage-money, of a sum of money in compensation for the loss of the profits and rents of the other six mortgaged villages, of the possession of which the mortgagee was deprived in 1231 Fasli (1854 A.D.).

In the result a decree was made for redemption of six villages on payment of Rs. 5,600 only, and each party was directed to pay his own costs in both courts.

From the decree of the Judicial Commissioners the defendant appealed to His Majesty in Council.

Mr. *DeGruyther*, for the appellant, contended that the respondent, the mortgagor, had failed to secure possession to the appellant of the whole of the villages mortgaged, and as he did not therefore get the benefit of the rents and profits as it was intended he should do, of those of which he was dispossessed, he was entitled to interest, which was expressly stipulated for in the mortgage deed, in lieu of the profits of such of the villages as he had been deprived of. An implied contract must be inferred that the mortgagee was to repay himself by taking the profits which is the case in usufructuary mortgages [see section 58, clause (d) of the Transfer of Property Act, IV of 1882]. The mortgagor having failed to keep the appellant in possession of a portion of the mortgaged property, should not have been allowed to redeem without payment of either interest or damages for breach of covenant. [LORD DAVEY : Ought not a suit to have been brought for the mortgage money and interest when, according to the appellant's case, it was found that possession of some of the villages could not be secured? If it was a condition that the mortgagor was to guarantee title and that failed, and the appellant did not then sue, is that not a waiver of his rights (if any) leading to the inference that he advanced the money for better or worse, and, if so, can he now claim what he has given up?] Assuming the property to have been totally lost, it is submitted that the mortgagor would have had to bear the loss, as there is in the contract an express stipulation to repay the money with interest. The appellant was not entitled to sue for damages in 1864; but now that a suit is brought against him to recover the property, it is submitted that he, having suffered loss from being deprived

of possession of part of the property, is not to continue to suffer loss by the mortgagor being allowed to recover the property on payment of only the principal money advanced. The Transfer of Property Act is not exhaustive as to the law; it expressly states that it is intended to amend part of the law. The appellant, therefore, should not suffer for failing to exercise his rights under section 68, which merely gives an additional remedy to the mortgagee. Moreover, in Oudh if there is no express law on any point, the case is to be decided according to equity and good conscience. The case of *Narain Singh v. Shimbhoo Singh*, (1) was referred to. Redemption should only be decreed on payment by the respondent, for the time during which the appellant was not in possession of the entire mortgaged property, of interest at 2 per cent. per month on Rs. 5,600, calculated up to the time of redemption, or on payment of a sum equivalent to the profits of that portion of the mortgaged property the possession of which was not secured to the mortgagee. The decree of the Judicial Commissioner is also erroneous in awarding possession of six villages, though possession of five only is claimed in the plaint.

Mr. *Herbert Cowell* for the respondent submitted that the right construction had been put on the mortgage-deed by the Judicial Commissioner. The appellant was not entitled to put forward a contention which had never before been raised or suggested in the transaction until the respondent sued, and which, if successful, would give him interest for a long period at 24 per cent. There was no defect in the respondent's title, nor was it by any cause subject to his control that the appellant had been deprived of possession of some of the mortgaged villages. The proper remedy of the appellant was to have had the arrangement altered in 1864, if he was then dissatisfied with it. He ought to have exercised his option then, when he knew there was no chance of his recovering the portion of the property of which he had been dispossessed: he must in fact be considered to have done so. He then elected to wait, and by such action he confirmed rather than repudiated the mortgage. The decree appealed from is, it is submitted, correct in allowing the respondent to redeem

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(1) (1876) I. L. R., 1 All., 325 (330, 332); L. R., 4 I. A., 15(21).

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on payment of no more than the amount of the principal sum due on the mortgage.

Mr. *DeGruyther* replied:—

1902, July 22.—Their Lordships' judgment was delivered by SIR ANDREW SCOBLE:—

The father of the respondent, one Indarjit Singh, a zamindar of Oudh, in the year 1851, mortgaged twelve villages in which he had proprietary rights to Raja Sarnam Singh, the ancestor of the appellant, to secure an advance of Rs. 5,600. The mortgage-deed is dated on the 15th of June, 1851, and the material clause is in these terms:—

“I do hereby mortgage the following villages to the said Raja Sarnam Singh at Rs. 2 per cent. interest, and promise and put down in writing that until delivery of possession of the aforesaid villages to the Raja Sahib mentioned above, I shall pay interest at the rate of Rs. 2 per cent. on the abovementioned mortgage money; that, until I pay up the sum of Rs. 5,600 on account of principal, with interest to the very last pie, Raja Sarnam Singh shall continue in possession and occupation (of the aforesaid villages), and that I shall put forward no excuse or objection.”

It may here be noted that the learned Judicial Commissioner found that possession of the entire mortgaged property was delivered to the mortgagee on the execution of the mortgage, and that this finding was not disputed before their Lordships.

By an instrument of even date with the mortgage deed, Raja Sarnam Singh the mortgagee leased to the mortgagor, Indarjit Singh, six of the mortgaged villages at a consolidated rental of Rs. 2,801 per annum, less Rs. 800 per annum allowed to the lessee as *nankar*. The lease was to take effect from the 11th of September, 1851.

On the 18th of September, 1853, one Hanuman Prasad obtained a *kabuliat* from the King of Oudh of the taluqa of Bhawan Shahpur, in which the twelve mortgaged villages were included, and forcibly dispossessed Raja Sarnam Singh, the mortgagee and previous *kabuliat*-holder. The circumstances of this transaction are not very clear; but Charan Singh, one of the witnesses for the plaintiff, gives a characteristic explanation:—

"In *Nawabi* might was the right, and *kabuliats* were executed by anyone. There was none to hear any grievances, and the *kabuliatar* forcibly ejected the previous holder." Whatever his title may have been, Hanuman Prasad remained in possession until the annexation of Oudh by the British Government in 1856.

The procedure adopted by that Government for the purpose of ascertaining rights of property in land in the territories annexed is matter of history, and has frequently formed the subject of consideration by this Committee. The first summary settlement was made with the persons actually in possession, and decided nothing as to ownership. At the second summary settlement, which was made in 1858, on the basis of proprietary right, the name of Indarjit Singh was entered in respect of the five villages now in suit, while of the remaining seven villages of the twelve originally mortgaged, six were entered in the name of the Taluqdar of Bhawan Shahpur, and one (Poorab Adhar) in the names of Hubdar Singh and Sukram Singh, who claimed under a mortgage of earlier date than that to Sarnam Singh. On the 11th of December, 1858, Sarnam Singh filed a petition in the Settlement Court, praying that the settlement of the whole twelve villages might be made with him; but his application appears to have been made too late, for it was ordered that "as the settlement of this village is over, and the applicant did not appear at the time the settlement was going on, and as it appears from the application and the statement of the applicant that this matter relates to a mortgage, hence it is ordered that if the applicant has any claim, he must sue in the Civil Court."

Sarnam Singh took no proceedings in the Civil Court, and no further action was taken until the regular settlement, which was made in 1864, when both mortgagor and mortgagee claimed to be proprietors of the twelve mortgaged villages. After inquiry the Assistant Settlement Officer, on the 3rd of June, 1864, decreed proprietary right of the five villages, now in question in favour of Indarjit Singh, and directed that Raja Sarnam Singh's name be entered as in possession under the mortgage bond of the 15th of June, 1851, while Indarjit Singh was declared

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entitled to hold lease of the five villages according to the terms of the agreement of the same date, "which must be considered as binding on the parties." This decision was appealed against, but was eventually confirmed by the Superior Revenue Authorities with the result that the parties remained in the relation constituted by the mortgage-bond and lease, with the exception that the mortgagee was left with five villages only, instead of twelve, as security for his advance.

In 1866 and 1867 there was litigation between the mortgagor and mortgagee as to liability for certain charges upon the land, in which both parties relied on the mortgage-bond and lease as constituting the contract between them; and it is admitted that, after the determination of their respective rights by the decrees of the Settlement Courts, the rent reserved by the lease and the charges allowed were paid by the respondent and his predecessor in title to the appellant and his predecessors in title.

Raja Sarnam Singh died on the 18th of May, 1877, and Indarjit Singh died on the 2nd of May, 1884. The appellant and respondent are their heirs respectively.

On the 25th of June, 1894, the respondent filed the present suit to redeem the mortgage, and the sole question now between the parties is as to the terms on which redemption should be decreed—the respondent contending that he is entitled to redeem on payment of the amount originally advanced, while the appellant claims in addition interest at the rate of 2 per cent. per month upon that amount for the period during which the mortgagee was not in possession of the entire mortgaged estate up to the date of redemption.

The Subordinate Judge of Sultanpur, before whom the suit came in the first instance, found in favour of the appellant on this point; but his decree was reversed on appeal by the Judicial Commissioners of Oudh, who decreed the claim for the redemption of the mortgage of the villages in suit on payment of Rs. 5,600 only.

It appears to their Lordships that this decision is right. The only provision in the mortgage bond as to interest is in these words:—"Until delivery of possession of the aforesaid villages to the Raja Sahib. . . I shall pay interest at the rate of 2 per

cent. on the abovementioned mortgage-money", and the subsequent words "until I pay up the sum of Rs. 5,600 on account of principal, with interest to the very last pie," must be read to refer to interest as previously stipulated, namely, until possession was given of the mortgaged property. The mortgage was of the class known as usufructuary mortgages, which are not uncommon in India, and in which possession of the mortgaged property is delivered to the mortgagee who takes the rents and profits in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money [Act IV of 1882, section 58(d)]. In this case the arrangement between the parties was completed by the execution of a lease, under which the mortgagor became the tenant of the mortgagee, and paid rent in lieu of interest. Under such a mortgage the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond, and the mortgagor is entitled to redeem on repayment of the mortgage-money.

But it was contended that, although possession of the twelve villages originally mortgaged was given at the time of the execution of the mortgage, the reduction of their number to six in 1853 by the grant to Hanuman Prasad, and to five by the settlements of 1858 and 1864, constituted a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property, which entitled the mortgagee to claim interest in lieu of the rents and profits of the property of which he was dispossessed. In the opinion of their Lordships, it is a sufficient answer to this argument to say that the mortgagee appears to have acquiesced in his dispossession by Hanuman Prasad (as to which he probably had no alternative), and that the decisions of the Settlement Courts in 1858 and 1864 were final as to the ownership of the mortgaged property. As the learned Judicial Commissioner observes, "the mortgagee was well aware in 1864 that he could not possibly recover possession of the villages . . . which were settled at the second summary settlement. He brought no suit then, or at any time subsequently, to recover his mortgage-money, but appears to have remained satisfied for 31 years with the diminished security, and the possession of the

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remaining villages." It may be added that he made no attempt to enhance the rent of the villages which were left to him, and that they constitute an ample security for the whole amount of his claim.

In the judgment of the Judicial Commissioner, it is inadvertently stated that the villages now in suit are six in number; but this is erroneous. As already pointed out, at the Settlements of 1858 and 1864, Indarjit Singh was confirmed in the proprietorship of five only, and the decree must be varied accordingly. Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh, so far as it relates to the five villages of Hargaon, Ahed, Macharia, Bahadurpur, and Poorab Pershad Badal, should be confirmed, and this appeal dismissed. The appellant must pay the respondent's costs of this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent—Messrs. *Barrow, Rogers, & Nevill.*

J. V. W.

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FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji, and Mr. Justice Burkitt.

JAMNA BIBI (APPLICANT) v. SHEIKH JHAU AND ANOTHER
(OPPOSITE PARTIES).*

Civil Procedure Code, sections 2, 372, 588(21)—Application to be brought on to record of appeal as assignee of deceased appellant—Application rejected—No appeal from order rejecting application.

Held that no appeal would lie from an order rejecting the application of a person who claimed to be brought on to the record of an appeal as being the assignee of the deceased sole appellant. Lalit Mohan Roy v. Shebock Chand Chowdhry (1) followed. Moti Ram v. Kundan Lal (2) overruled. Indo Mati v. Gaya Prasad (3) explained and distinguished.

THE facts out of which this appeal arose were as follows:—

One Musammat Bholi Bibi brought a suit against Sheikh Jhau and Baijnath Prasad for a declaration that certain property

* First Appeal No. 124 from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 17th August, 1901.

(1) (1900) 4 C. W. N., 403. (2) (1900) I. L. R., 22 All., 380.
(3) (1896) I. L. R., 19 All., 142.