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money lent? And it seems to me that he could not have done so till he had lent the money, which was when the cheque was cashed on the 21st of June." Applying the principle laid down in this case to the case before us, we are of opinion that no suit could have been maintained for the recovery of the amount of the hundis lent by the plaintiff until the hundis had been realized and money had come to the hands of the defendant. If that were not so, and it so happened that the hundis proved valueless through the insolvency of the persons responsible for their payment, the borrower would be liable for the amount of them though he had not received any advantage from them.

As regards then the appeal of Komal Prasad, we allow the appeal, set aside the decree of the Court below, and dismiss the suit as against him with half costs in this Court, seeing that both of the appellants are represented by the same advocate, and full costs in the Court below, in which Court we understand he was separately represented. As regards the appeal of Prag Narain it is dismissed, also with half costs in this Court.

Appeal of Komal Prasad allowed.

Appeal of Prag Narain dismissed.

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May 16.

Before Mr. Justice Knox.

HEM BAN (DECREE-HOLDER) *v.* BIHARI GIR (JUDGMENT-DEBTOR)*.

Act No. IV of 1882 *(Transfer of Property Act), section* 99—*Mortgage—Suit for sale—Compromise resulting in a money decree—Mortgagee not competent to sell mortgaged property in execution of such decree.*

A mortgagee brought a suit for sale on his mortgage. The suit was compromised, and the mortgagee took a money decree, in which, however, the property originally hypothecated to him was set out as being charged. *Held* that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree, but, if he wished to do so, he would have to institute a suit under section 67 of the Transfer of Property Act on the decree. *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1) followed.

THE facts of this case were as follows: One Sukh Lal Gir mortgaged some 33 bighas odd of land to Hem Ban. Hem Ban

* Second Appeal No. 1282 of 1904, from a decree of J. S. Campbell, Esq., District Judge of Bareilly, dated the 16th of September 1904, confirming a decree of Babu Udit Narain Singh, Munsif of Bareilly, dated the 13th of July 1904.

(1) (1895) I. L. R., 22 Calc., 859.

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brought a suit for sale on his mortgage. The suit was compromised, and, according to the compromise, a decree was passed in favour of the mortgagee for payment by instalments of the sum of Rs. 700, and the mortgaged property was charged in the decree. After the death of Sukh Lal, the decree-holder sought to execute the decree against his representative, Bihari Gir, by attachment and sale of the mortgaged property. The Court of first instance (Munsif of Bareilly) dismissed this application, holding that the property could not be brought to sale otherwise than by means of separate suit and this decision was upheld in appeal by the District Judge. The decree-holder appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

KNOX, J.—This appeal arises out of execution proceedings. The decree-holder, who has obtained a money decree, seeks in satisfaction of his decree to bring to sale certain property mortgaged to him. The Courts below have disallowed the application on the ground that he cannot bring this property which is hypothecated to him to sale in execution of the decree otherwise than by instituting a suit under section 67 of the Transfer of Property Act. They cite as an authority section 99 of the Transfer of Property Act and the case of *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1). The learned vakil for the appellant tries to distinguish this case from the Calcutta case by contending that he has already instituted a suit under section 67, and section 99 therefore does not stand in his way. It is true that he did institute a suit under section 67 and that the decree he seeks to enforce sprang from that suit, but, without waiting to have that suit determined by the Court, he entered into a compromise with the defendants and consented to the passing in his favour of a money decree. In that money decree the property originally hypothecated to him was set out as being charged under the decree. But all the same, the decree with which he remained content and for satisfaction of which he has now taken out proceedings is nothing but a money decree. Section 99 is in very general terms, and I do not see

(1) (1895) I. L. R., 22 Calc., 859.

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that the appellant has made out a case which falls outside those terms. This being so, he is not entitled to bring the property to sale otherwise than by instituting a suit under section 67 upon his decree.

The appeal is dismissed with costs.

Appeal dismissed.

[See also *Madho Prasad Singh* v. *Baij Nath*, Weekly Notes, 1905, p. 152.—Ed.]

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May 26.

Before Mr. Justice Banerji and Mr. Justice Richards.

JAGDAM SAHAI (DEFENDANT) v. MAHABIR PRASAD AND OTHERS (PLAINTIFFS) AND BIHARI RAI AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Muhammadan law—"Intiqal."

Where in a wajib-ul-arz it was recorded merely that "the custom of pre-emption prevails," it was *held* that in the absence of any special custom different from or not co-extensive with the Muhammadan law of pre-emption, the Muhammadan law must be applied. *Ram Prasad* v. *Abdul Karim* (1) followed.

The term "*intiqal*" occurring in the pre-emptive clause of a wajib-ul-arz covers all kinds of transfers, mortgages as well as sales.

BIHARI RAI and Rajkumar Rai executed a usufructuary mortgage of three shares in their villages, Ahrauli, Chak Rukn-ud-din and Chak Latif, in favour of Mahabir Prasad and others. Jagdam Sahai brought a suit claiming a right under the village wajib-ul-arz to have himself substituted for Mahabir Prasad and others as mortgagee. The wajib-ul-arz of the villages Chak Rukn-ud-din and Chak Latif provided merely that "the custom of pre-emption prevails" in these villages. The plaintiff asserted that he had performed the necessary demands preliminary to a claim for pre-emption. The defence traversed this allegation and pleaded that the custom of pre-emption provided for in the wajib-ul-arz meant the Muhammadan law of pre-emption, and that, inasmuch as that law did not provide for any such right as pre-emption in the case of a

* Second Appeal No. 243 of 1903 from a decree of Maulvi Muhammad Shafi, Additional Subordinate Judge of Ghazipur, dated the 12th of December 1902, confirming a decree of Babu Ramchandra Sakseni, Officiating Munsif of Muhammadabad, dated the 18th of July 1902.

(1) (1887) I.L.R., 9 All., 513.