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and direct him to dispose of the applications and objections of the three persons named above, according to law. The costs of this appeal shall abide the event.

*Appeal allowed.*

## PRIVY COUNCIL.

BATUK NATH (DECREE-HOLDER) v. MUNNI DEI AND OTHERS  
(JUDGEMENT-DEBTORS.)

[On appeal from the High Court of Judicature at Allahabad.]

\*P.C.  
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February, 17,  
18.  
March, 11.

*Act No. XV of 1877 (Indian Limitation Act), section 4, and schedule II, article 179, clause 2—Limitation—Application for execution of decree—Practice of Privy Council—Order for dismissal for want of prosecution of appeals to Privy Council—Order of 15th June, 1853, Rule V—Dismissal of appeal for want of prosecution without order made in the appeal.*

Under rule V of the Order in Council of 15th June, 1853, \* where for a period specified in the order the appellant to His Majesty in Council, or his agent, has not taken any effectual steps for the prosecution of the appeal, it stands dismissed without further order.

Such a dismissal for want of prosecution is not the final decree of an appellate court within the meaning of article 179, clause 2, of schedule II of the Indian Limitation Act, 1877, from which a period of limitation can be reckoned under that article in support of an application for execution of a decree.

In this case the application for execution having been made more than three years after the decree of the High Court was therefore barred by lapse of time, and should have been dismissed on that ground under section 4 of the Limitation Act.

APPEAL from a judgement and decree (4th June, 1910) of the High Court at Allahabad, which affirmed a judgement and decree (8th September, 1908) of the Court of the Subordinate Judge of Agra, made on an application for execution of a decree.

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\* Order in Council, dated 15th June, 1853: Rule V:—"That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the cape of Good Hope, or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad, and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively the appeal shall stand dismissed without further order."

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\* Present:—Lord SHAW, Lord SUMNER, Sir JOHN EDGE and Mr. AMBER ALI.

The appellant was the purchaser of a decree, dated the 29th of March, 1898, made in a suit to enforce a mortgage bond instituted in the court of the Subordinate Judge of Agra against the mortgagor by one Sheo Narain, to which suit the puisne mortgagees, the prior mortgagees and the purchasers of the equity of redemption were made parties. The decree was made conditional on Sheo Narain making certain payments to the prior mortgagees within a specified time, in default of which his suit was to stand dismissed with costs. Sheo Narain appealed to the High Court against that part of the decree which made it conditional on the payments to the prior mortgagees, but his appeal was dismissed and the decree affirmed on the 12th of February, 1900. The High Court, however, extended the time for making the payments until the 9th of August, 1900. Sheo Narain preferred an appeal to His Majesty in Council, but it was eventually dismissed for default of prosecution on the 15th of December, 1904. Meanwhile Sheo Narain had, on the 26th of September, 1901, assigned the decree to the appellant, who made several applications, which resulted in extensions of time being granted up to the 20th of March, 1902, for making the payments under the decree. Any further extension was refused by an order on that date, and a review of that order was rejected on the 7th of June, 1902. The result was that, the appellant having failed to pay the sum due to the prior mortgagees within the time prescribed by the Court, his suit stood dismissed with costs under the terms of the decree.

The appellant, on the 2nd of October, 1907, made the present application for a decree absolute under section 89 of the Transfer of Property Act (IV of 1882) and for an order that certain specified properties might be sold in execution of the decree of the 29th of March, 1898.

The respondents filed objections, the first of which was that the application for execution was barred by limitation.

The Subordinate Judge held that the application was not barred by limitation, which, under article 179, clause 3, of schedule II of the Limitation Act, 1877, began to run from the final decree of the appellate court, which he held to be the dismissal of the appeal by the Privy Council on the 15th of December, 1904, within three years from the present application. But he dismissed the

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application on the ground that, the payments to the prior mortgagees not having been made either within the original period or the extended time, the suit stood dismissed under the terms of the decree, and that decision was affirmed by the High Court (KARAMAT HUSAIN and E. CHAMIER, JJ.).

In the course of the argument for the appellant on the merits his Lordship Mr. AMEER ALI asked whether the application was not barred by limitation.

*De Gruyther, K. C.* and *J. M. Parikh* for the appellant contended that it was not barred. The question of limitation was decided by the Subordinate Judge in the appellant's favour on the ground that the period of limitation (three years) began to run from the dismissal of the appeal to His Majesty in Council for want of prosecution, as being the final decree of the appellate court, and that dismissal was within three years of the present application. The District Judge did not notice the question of limitation, but he affirmed the decision of the Subordinate Judge dismissing the application on the merits of the case.

*Sir Erle Richards, K. C.*, and *B. Dube* for the respondents (purchasers of the equity of redemption) contended that the application was barred by limitation. No order in Council dismissing the appeal for want of prosecution had been drawn up or made in the appeal. None indeed was necessary, because, under rule V of the order in Council, dated the 15th of June, 1853, when an appeal has been admitted and nothing has been done under it by the appellant or his agent for a period specified in the order the appeal stands dismissed without further order. There was no decree or order from which limitation could run; the decree of the High Court was not affirmed by this Board. The three years within which this application should have been made began to run from the 12th of February, 1900, the date of the High Court decree, which was the final order or decree of the appellate court, and even if the extension of time is taken into consideration the application is barred as not having been made within three years.

*De Gruyther, K. C.*, in reply contended that an appeal to His Majesty in Council was not effective before the appeal was lodged. When it is lodged the appeal can be dismissed only by an order in Council. Rule V of the order of the 15th of June, 1853, says the

appeal shall stand dismissed "without *further* order in Council;" that meant, it was submitted, that the appeal was automatically dismissed on the expiry of the time stated in the rule, by the order in Council of 1853.

1914, *March 11th*:—The judgement of their Lordships was delivered by Sir JOHN EDGE:—

This is an appeal from a decree, dated the 4th of June, 1910, of the High Court of Judicature at Allahabad, which dismissed an appeal by the appellant here from a decree of the Subordinate Judge of Agra, dated the 8th of September, 1908, dismissing an application which had been made on the 2nd of October, 1907, to the court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th of March, 1898.

The decree of the 29th of March, 1898, had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act, 1882, for sale of certain immovable property. By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage debt within five months from the 29th of March, 1898, his suit should stand dismissed with costs. From that decree of the 29th of March, 1898, an appeal was brought to the High Court of Judicature at Allahabad. That appeal was dismissed by the High Court by its decree of the 12th of February, 1900, but in dismissing the appeal the High Court extended the time for payment of the prior mortgage debt to the 9th of August, 1900. It has not been alleged or proved that any certified copy of the decree of the 29th of March, 1898, was registered within the meaning of article 179 of the second schedule of the Indian Limitation Act, 1877. From the decree of the 12th of February, 1900, of the High Court an appeal to His Majesty in Council was brought. On the 15th of December, 1904, the appeal to His Majesty in Council stood dismissed for non-prosecution under rule V of the Order in Council of the 13th of June, 1853, without further order.

On the 26th of September, 1901, Sheo Narain had assigned his decree of the 29th of March, 1898, to Babu Batuk Nath. During the pendency of the appeal to His Majesty in Council some orders had been made by the court of the Subordinate Judge of Agra

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extending the time for the payment of the prior mortgage debt, but the last application for an extension of time for the payment of the prior mortgage debt which was made to his court was dismissed by the then Subordinate Judge of Agra by his order of the 20th of March, 1902, and on the 7th of June, 1902, the Subordinate Judge dismissed an application for a review of his order of the 20th of March, 1902.

In making his decree of the 8th of September, 1908, dismissing the application of the 2nd of October, 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to His Majesty in Council, that is to say, from the 15th of December, 1904, and consequently that the application for execution had been made within time; he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal. The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage debt imposed by the decree of the 29th of March, 1898, not having been complied with within the extended time, the suit by the terms of that decree had stood dismissed. The attention of the learned Judges of the High Court does not appear to have been drawn to the question of limitation; they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge.

It appears to their Lordships that the application of the 2nd of October, 1907, was made after the period of limitation prescribed for such an application by article 179 of the second schedule of the Indian Limitation Act, 1877, had expired, and that the application should, in accordance with section 4 of that Act, have been dismissed, unless the dismissal of the 15th of December, 1904, for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of His Majesty in Council made in the appeal. There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under rule V of the Order in Council of the 13th of June, 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.

As their Lordships hold that the application of the 2nd of October, 1907, was barred by limitation, and should on that ground have been dismissed, they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

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*Appeal dismissed.*

Solicitor for the appellant: *Edward Dalgado.*

Solicitors for respondents Lala Kishan Lal (16) and Lala Beni Prasad (17): *Barrow Rogers and Nevill.*

J. V. W.

## APPELLATE CIVIL.

*Before Mr. Justice Tudball and Mr. Justice Muhammad Raftiq.*

KHURSHED HUSAIN (DEFENDANT) v. FAIYAZ HUSAIN (PLAINTIFF) AND  
FIZZA BEGAM (DEFENDANT).\*

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February, 26.

*Muhammadan law—Shias—Marz-ul-maut—Disease of more than one  
year's duration—Gift.*

Under the Shia Law a gift made in marz-ul-maut holds good to the extent of only one-third of the donor's estate in spite of delivery of possession prior to his death.

Under the Shia Law if a person dies of a disease of more than one year's duration such disease is not considered a death-illness. But there is this condition attached to it that if the illness increases to such an extent as to cause, or another supervenes which causes an apprehension of death in the mind of the donor the increase or the new disease is a death-illness. The nature of the gift does not change even if the donor had intended prior to death illness to transfer the property to the donee.

THE facts of this case were as follows:—

One Tajammul Husain was the owner of the properties in dispute. He died on the 8th of July, 1911, leaving the plaintiff and defendant No. 1, his brothers, and defendant No. 2, his sister, surviving him. Four days before his death he had executed a deed of gift for consideration (*hiba bil ewaz*) in favour of one of his brothers, defendant No. 1, and remitted the price. The plaintiff alleged that Tajammul Husain was about 80 years old at the time and was incapable of understanding the nature of the transaction and that he was suffering at the time of the gift from an illness,

\* First Appeal No. 377 of 1912 from a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 31st of July, 1912.