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others and he did not obtain the leave of the court in respect of the reliefs which he had omitted. The present claim therefore stands clearly barred under order II, Rule 2, as the cause of action in the two suits is exactly the same.

BY THE COURT:—

The appeal therefore prevails and we allow it. The decree of the lower court is set aside and the claim of the plaintiffs is dismissed with costs in both courts. The objections filed by the plaintiffs as regards the amount disallowed by the court below are also dismissed with costs.

Appeal decreed.

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July, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Rafiq.

KUNDAN LAL (PLAINTIFF) *v.* JAGANNATH (DEFENDANT).*

Act No. IX of 1872 (*Indian Contract Act*), *sections* 59—61—*Appropriation.*

An appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation the law appropriates the payment to the earliest debt.

Sections 59 to 61 of the Indian Contract Act enacted the rule of the Civil Law as laid down in *Clayton's case* (1) with certain modifications.

THE material facts were as follows:—

The bond in suit was executed on the 10th of September, 1910. The defendant pleaded payment by cheque. The plaintiff alleged that there were several debts due to the plaintiff from the defendant and that payment was made in respect of debts other than that in suit and that the documents paid off had been returned to the defendant. The court below held that at the time of the payment neither party had appropriated the money to a particular debt and as the debt earliest in time was the debt in suit the law appropriated the payment to this particular debt under section 61 of the Contract Act. The suit was therefore dismissed.

The Hon'ble Munshi *Gokul Prasad* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

The bond in suit remained with the plaintiff even after payment by cheque was made by the defendant. The presumption is that there was some other debt in respect of which the money,

* Second Appeal No. 1056 of 1914, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 15th of April, 1914, reversing a decree of Kali Das Banerji City Munsif of Moradabad, dated the 13th of December, 1913.

(1) (1816) 1 Mer., 572 (604).

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was paid. The plaintiff says that there were other bonds which were returned. It is therefore for him to show that there was no other debt due by him to the plaintiff. The court below has not decided this question. The court below is wrong in holding that the law appropriated the payment to this particular debt. The debtor, no doubt, has the first option. But when he fails to appropriate, the creditor may make the appropriation even up to the last moment. There is no limit of time fixed by the Contract Act within which the appropriation is to be made. The creditor can exercise his right whenever he pleases. The rule of English Law is that a creditor can exercise his option even up to the time when the case goes to the jury. The fact that he sues upon the bond amounts to an election, viz. that he did not appropriate it to the debt about which the suit was brought, *Seymour* v. *Pickett* (1). The rule laid down by *Clayton's Case*, (2) is no longer good law. In any event it applies to current accounts only, which is not the case here: *Cory Brothers and Company Limited* v. *The Owners of the Turkish Steamship Mecca* (3).

Pandit *Kanlash Nath Katju*, for the respondent:—

The nature of the transaction was that the plaintiff advanced money to the defendant from time to time, accepted money whenever defendant paid it and struck the balance every year and carried it to next year's account. There was only one debt payable. In any case the payment not having been appropriated by the parties the rule laid down by the Indian Contract Act would apply. Section 61 enacted that the payment must be applied to the debt earliest in date which was the debt in suit. The Legislature did not contemplate that the creditor could make the appropriation whenever he pleased. The appropriation must be made when the money is received by the creditor. The provisions of section 61 are imperative. If the creditor was at liberty to make an appropriation whenever he liked section 61 might be taken out of the statute-book, for the right of the creditor to appropriate would exist for ever. The right to appropriate could not therefore be given a retrospective effect.

(1) (1905) 1 K. B., 715. (2) (1816) 1 Mer., 572 (604)

(3) (1897) A. C., 286.

It is no doubt true that recent authorities in England have held otherwise and have gone so far as to hold that the creditor may exercise his right of appropriation at any time before the verdict of the jury. But the provisions of the Indian Contract Act which was enacted in 1872 should not be construed in the light of these recent cases in England. Even in England at one time there was considerable divergence of opinion, and the Indian Legislature has clearly adopted the view embodied in sections 60 and 61 of the Contract Act in preference to the other, and has thereby followed the rule of the Roman Law with certain modifications. See *Clayton's case* (1) for a full discussion of the state of authorities at that time. This case is, however, well within the English authorities. The course of dealings between the parties shows that all debts formed part of one continuous running account, and the payment made by the debtor was entered without any specification on the credit side, and went to discharge the earliest items on the debit side: *Bodenham* v. *Purchas* (2); *In re Sherry. London and County Company* v. *Terry* (3).

The Hon'ble Munshi *Gokul Prasad*, was heard in reply.

RICHARDS, C. J., and RAFIQ, J. :—This appeal arises out of a suit upon foot of a simple money bond, dated the 10th of September, 1910. The defendant pleaded payment. The court of first instance decreed the plaintiff's claim. The lower appellate court found that the defendant had made a payment by a cheque; that the plaintiff had not made any appropriation of the payment, and that accordingly the payment should be credited to the earliest debt then due by the defendant to the plaintiff which was the bond sued upon. The lower court says that the way the accounts were kept between the plaintiff and the defendant was that on the one side all advances made by the plaintiff to the defendant were entered and on the other side all the payments that were made to the plaintiff by the defendant. He seems to have been prepared to hold that from the way the account was kept the plaintiff must be deemed to have from time to time appropriated the payments to the earliest debts. The case, however, was really decided on

(1) (1816) 1 Mer., 572 (604). (2) (1818) 2 B and A., 39.

(3) (1884) 25 Ch. D., 692.

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the assumption that there had been no appropriation by either party and it is on this basis that the case has been argued before us.

Section 60 of the Contract Act is as follows :—" Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether the recovery is or is not barred by the law in force for the time being as to the limitation of suits."

Section 61.—" Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing the payment shall be applied in discharge of each proportionately."

The learned Additional Judge considered that if there had been no appropriation by either the debtor or the creditor the payment must be applied to the earliest debt which was the bond in suit.

It is contended on behalf of the appellant that a creditor can make his election as to the appropriation of the payments " up to the last moment " and he cites the case of *Seymour* v. *Pickett* (1) as showing that the appropriation can even be made when the plaintiff is being examined at the trial of the case. On the other hand, the respondents contend that under the provisions of section 61 of the Indian Contract Act, where there is no appropriation made by the debtor when paying the money or the creditor when receiving it, the law itself appropriates the payment in the manner provided by the section 61. The learned vakil refers to *Clayton's case* (2). At page 605 of the report the Master of the Rolls says :—" This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. These rules we probably borrowed in the first instance from the Civil Law. The leading rule, with regard to the option given, in the first place to the debtor and to the creditor in the second, we have taken literally from thence. But,

(1) (1905) 1 K. B., 715. (2) (1816) 1 Mer., 604.

according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor *in re praesenti; hoc est statim atque solutum est:—cæterum, postea non permittitur.* If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the actual intention of the debtor that would, in the first instance, have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt, to one that carried interest rather than to that which carried none,—to one secured by a penalty rather than to that which rested on a simple stipulation,—and if the debts were equal, then to that which had been first contracted."

Clayton's case was one in which there was a current account, and it was held that the payments must be appropriated to the debts earliest in date. Clayton's case was discussed in *Seymour* v. *Pickett* (1) and also in the case of *Cary Bros. and Co.* v. *The Owners of the Turkish Steamship "Mecca"* (2). At page 293 of the report of the last mentioned case Lord Macnaghten says:—"In 1816 when *Clayton's case* was decided there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the Civil Law, or at any rate within a reasonable time, whatever that expression in such a connection may be taken to mean."

It seems to us that what the Indian Legislature did by sections 59—61 of the Indian Contract Act, was to adopt the rule of Civil Law with certain modifications. Unless the meaning of section 60 is that the debtor is to make his appropriation (if any) at the time of paying and the creditor to make his appropriation (if any) at the time of receiving the money, it is difficult to conceive what is the meaning of section 61 or how it could be applied. We think that the view taken by the court below was correct. If by reason of the manner in which the plaintiff kept the account, he is to be

(1) (1905) 1 K. B., 715. (2) (1897) App. C., 286.

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deemed to have appropriated the payment to the debt of earliest date, there is an end to the case. If on the other hand there was no appropriation by either debtor or creditor, the payment must be applied to the earliest debt due by the defendant to the plaintiff. This was the bond in suit. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

TULSHI RAM *v.* ABRAR AHMAD AND OTHERS.*

Criminal Procedure Code, sections 145 and 522—Possession—Ouster—Jurisdiction of Magistrate in exercise of powers under section 145 to dispossess one person and put another in possession.

1915
July, 10.

Under section 145 of the Code of Criminal Procedure a Magistrate of the first class has no power to oust one person and to place another in possession of a disputed property. Therefore the order of the District Magistrate in his capacity as the head of the Police, declining to carry out such an order is not open to revision by the High Court.

The only provision in the Code of Criminal Procedure which entitles a Magistrate to dispossess a person of property and replace him by another who is entitled, is section 522 of the Code, and for the purpose of exercising the powers therein granted, it is necessary that there should have been a conviction for an offence.

THE facts of this case are fully set forth in the judgement of the Court.

Babu *Satya Chandra Mukerji*, for the applicant.

Dr. *S. M. Sulaiman*, for the opposite parties.

The Assistant Government Advocate (Mr. *R Malcomson*) for the Crown.

TUDBALL, J.—The applicant has come to this Court on revision in the following circumstances:—There is a certain house which is in dispute between him and the opposite party and he applied to a Magistrate to take action under section 145 of the Code of Criminal Procedure. On the 5th of December, 1914, the Magistrate passed an order under section 145 calling upon the parties concerned in the dispute to attend his court and to put in written statements of their respective claims. The Magistrate proceeded to make his enquiry and he came to the conclusion that Tulshi Ram had

* Criminal Revision No. 450 of 1915, from an order of L. M. Stubbs, District Magistrate of Bijnor, dated the 19th of May, 1915.