cannot be successfully impeached by the appellant, his case must necessarily fail.

The argument of the appellant's counsel satisfied their Lordships that the decision of the third issue one way or another mainly depended upon the credit which ought to be given to oral testimony of a conflicting character; and that the finding of the Commissioner upon that evidence was substantially a finding of fact.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed with costs. The appellant must pay to the respondents their costs of this appeal.

Appeal dismissed.

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

Solicitor for the respondents: Mr. *Thomas Ingle.*

C. B.

LACHMESWAR SINGH (DEFENDANT) *v.* MANOWAR HOSSEIN AND OTHERS (PLAINTIFFS).

*P. C.** 1891 *November 27 and December 18.*

[On appeal from the High Court at Calcutta.]

Joint Ownership—Ijmali land, use of, as between co-owners—Rights among themselves of co-owners of joint property, where there is a profitable use of it by some or one of them, without the others being excluded—Ferry worked by one of the co-owners of village lands—Second appeal, question of mixed law and fact.

Property does not cease to be joint merely because it is used so as to produce more profit to one of the joint owners, who has incurred expenditure for that purpose, than to the others, where the latter are not excluded.

Joint property being used consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the work, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit.

The defendant, a co-sharer in village lands, without claiming to restrain competition, acted upon the right that a ferry may be established in India by a person on his own property, taking toll from strangers, and that he may acquire such a right, by grant or user, over the property of others,

* *Present:* LORDS HOBHOUSE, HERSCHELL and MORRIS, SIR R. COUCH, and LORD SHAND.

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whether a co-sharer with them or not. He used property that he owned jointly with the plaintiffs, his co-sharers, excluding none of them. As no grant was ever made to him, he could only have set up an exclusive right by showing that he had either dispossessed them, or had had adverse possession, for twelve years, or that he had used the ferry for twenty years as of right. The question, however, of any exclusive right in the defendant had not arisen. For the parties being co-owners, the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession.

Watson & Co. v. *Ramchund Dutt* (1) distinguished in regard to the exclusion of co-sharers, which there took place, and referred to as to caution to be exercised by Courts in interfering with the enjoyment of joint estates as between their co-owners.

The decision that the defendant's possession had been adverse having been an inference from fact in the Courts below, the correctness of this, as a legal conclusion to be drawn or not, was a question open to second appeal, and the High Court was not precluded from deciding to the contrary.

Costs refused, as the defendant had set up, as his defence, an exclusive title, in which he had failed.

APPEAL from an order (3rd August 1888), reversing a decree (12th September 1887), made on appeal by the Second Subordinate Judge of Muzaffarpur, who affirmed a decree (30th March 1887) of the Munsif of Madhubani.

The suit out of which this appeal arose was brought against the Maharaja of Darbhanga in reference to a ferry over the river Bagmati, near the Kamtowl Indigo Factory, of which the Manager, Mr. M. Halliday, on behalf of the Maharaja who had purchased it, was made a defendant. As purchaser of the factory, the Maharaja had become a proprietor of a two annas share in village Baigra (which village Kamtowl adjoined) and of the ferry, where the channel and the landing places were on the ijmali lands of Baigra. The plaintiffs were the owners of the remaining fourteen annas of this mauza, and they brought this suit, valued at Rs. 500, for a declaration of their right to profits of the ferry proportionate to the amount of their shares in the village; also claiming to have the principal defendant restrained by injunction from "opposing the possession" of the plaintiffs. The defence of the Maharaja was that he had an exclusive right to the ferry by prescription.

(1) I. L. R., 18 Calc., 10; L. R., 17 I. A., 110.

The Manager's written statement was, in effect, that he ought not to have been joined in this suit, as he had no personal interest in the subject-matter of it.

The principal question on this appeal was as to the right of co-owners of undivided property, where part of it was profitably used by one of them, in regard both to continuance of possession by all, and their right to share in the profits made by the use of the property common to all.

On the ground that the Maharaja and his predecessors in the ownership of the factory, and of the two annas share in mauza Baigra, had for more than twenty years worked the ferry, thus acquiring a prescriptive right to do so, the suit was dismissed in the Munsif's Court.

This was affirmed by the Second Subordinate Judge, Babu Gris Chunder Banerji, to whose Court both parties appealed. He found that the river and the landings on both sides were on the ijmali land of mauza Baigra; that the owner of the Kamtowl Factory had been in exclusive possession of the profits of the ferry for more than twenty years; and that there had been no express permission on the part of the plaintiffs, neither could implied permission be inferred. Passage free of toll, both in the time of the bridge and of the ferry, had been allowed to the plaintiffs. But this was distinct from the right of ferry itself. It was one thing to ply a ferry taking the full profits, and another thing to be allowed to pass free by it. No act of dominion, exercised by the plaintiffs over the ferry itself, within the last twenty years before the suit, had been shown; and the possession of the defendant was not permissive. It was adverse possession, and the suit was barred by time.

The plaintiffs appealed to the High Court, of which a Division Bench (O'KINEALY and MACPHERSON, JJ.) gave judgment as follows:—

"In this suit the plaintiffs claimed an account from one of their co-sharers. They stated that they were the fourteen annas shareholders of a certain village in which the defendant owned two annas, and that the owner of the two annas was not content with having a ferry boat himself, but that he had let out the right to levy a toll

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on a ferry to an ijardar, and it was found that the place from where the ferry started, the river itself, and the land on the other side were joint property. They therefore said, and fairly enough, 'Here is a joint-shareholder of a small share, who, although he is not spending himself any money upon it, gets the whole of the proceeds of a portion of the joint property, while a fair measure of what he ought to get is only his share of the ijara rent.' We do not think that that is a proposition that can be contested. In answer the defendants pleaded that the ferry had been run for a long time by the Kamtowl Factory in the time of Mr. Anderson; that this fact had been practically admitted in the plaint, and that the land on the other side of the river was not joint but separate. That point has been found against them, and so in substance they raised no title to the ferry. Mr. Anderson, whatever rights he may have acquired, left the place and abandoned the ferry, and the property with all its interests went back to the real owners, that is, to the co-sharers in the village; and as the defendants have only run the ferry at most since 1881, they have acquired no right by user to it whatsoever; but apart from that, it is impossible to hold, on the findings of the lower Court, that this ferry was ever held exclusively or adversely to the other co-sharers by Mr. Anderson or by the factory. What the lower Court has found is, that the landing place of the ferry in question is on joint land of mauza Baigra, and that the bed and the western bank of the river Bagmati are also on joint lands of village Baigra; that a bridge was constructed by the Kamtowl Factory some thirty years ago, and when that bridge fell through a ferry was started and tolls levied by the factory, but not to the exclusion of the plaintiffs; but, on the contrary, that the maliks of Baigra and their men were allowed to pass over free of toll; that is, one man established the ferry at his own expense and levied the tolls, but he never assumed that he had exclusive rights over it, and the arrangement was that the other co-sharers and their men should be carried across free of charge. It seems to us that when they had a right to go across as a right and free of toll, the possession of the factory cannot be said to be exclusive.

"We are, therefore, of opinion that the decree of the Lower Court should be set aside, and that it should be declared that the

river Bagmati and the ghat or ferry of the river at Baigra are within mauza Baigra in pargana Jarail, and that the defendants are only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mauza Baigra. We further direct that the said defendants do account for the profits of that ferry from date of suit to the present date, and for this purpose that the record be sent down to the Judge in the lower Court, and that he do assess the profits; and we further direct that the plaintiffs recover their costs in all the Courts. This case will remain on the file of this Court pending the assessment of the profits by the lower Court."

No decree was drawn up, as no assessment of profits was in fact made. But the judgment and order were treated as a judgment and decree, whereupon the appellant obtained leave to appeal.

Mr. *T. H. Cowie*, *Q.C.*, and Mr. *J. H. A. Branson*, for the appellant. The principal points in their argument were that the use of the common property by the defendant, and his predecessors in estate, involved no act on their part entitling the plaintiffs to such a decree as had been made by the High Court, which had limited the defendant to taking profits from the work, in the proportion only of his two annas share, to the plaintiffs fourteen. The Maharaja was entitled to work the ferry, using the common land for that purpose, to take toll from strangers, and to have the profits, whatever claim the respondents might have to be ferried over the river free of expense. From the latter advantage they had not been excluded. The High Court had been in error in stating that the former Manager had abandoned the ferry, and had wrongly inferred that the defendant had only worked it since 1881, and that he had acquired no prescriptive right to the easement by previous long user exercised by the factory. Besides being wrong in their conclusion as to the fact, the High Court, as a Court of second appeal could not interfere with a finding of fact arrived at in the Court below.

The main point was that the defendant, as co-owner with the plaintiffs, had not "opposed their possession" of the common property, as they said in their plaint, and had not acted in denial of their title to the part of it used by him. Therefore, he could contend that in the work which was, though in varying

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degrees, for the benefit of all the co-owners, he, who alone was at the cost and trouble, was entitled to all the profits. *Watson & Co.* v. *Ramchund Dutt* (1) was an authority showing that where co-owners were not excluded from the common property, they could not put a stop to the use of part of it by one of their number, provided that there was no denial of their title as co-owners, and no exclusion from compensation. Reference was made to the judgment in *Mahomed Ali Khan* v. *Khajah Abdul Gunny* (2) as to the matter of possession, and whether it was permissive or adverse, as between co-owners, upon the evidence. The defendants were not entitled to share in the profits in a work to which they had contributed neither capital nor labour, merely because it involved the use of common land from which they had not been excluded.

The respondents did not appear.

Afterwards, on December 18th, their Lordships' judgment was delivered by—

LORD HOBHOUSE.—The respondents instituted this suit against the appellant in respect of a ferry worked by him across the river Bagmati, at a point where it flows through the mauza Baigra. The plaintiffs are proprietors of fourteen annas of that mauza, and the other two annas are vested in the defendant, who is also the proprietor of a factory and land in the adjoining mauza of Kamtowl. The lands are held in several pattis, but the river-bed and the landings of the ferry have never been divided, and are still ijmali land of the mauza.

In the plaint it is alleged that a public road lies to the east of the river, and close by the river to the west lies the Kamtowl Factory; that during the rainy season the river is impassable without bridge or boat; that formerly a bridge had been constructed over the river on the part of all the proprietors; that it came down for want of repairs; that a boat was then kept there, and the management and supervision thereof was entrusted by all the proprietors to Mr. Anderson, the former holder of the defendant's share in Baigra; that the ferry did not yield any adequate income or profit, and whatever profit it yielded was applied to the expenses on account of the boat, &c. It then went on to state

(1) I. L. R., 18 Calc., 10; L. R., 17 I. A., 110.

(2) I. L. R., 9 Calc., 744.

that the defendant had let out the ferry to ticcadars, had appropriated the rent, and had refused to pay any share to the plaintiffs.

The prayer of the plaintiffs is—

"1*st*.—That a decree may be passed in favour of your petitioners, plaintiffs, declaring that the river Bagmati and the ferry on the said river lie within the circumference and area of mauza Baigra, pargana Jarail, and that the first party defendant is entitled to hold possession and appropriate the profits of the said ferry in proportion to the extent of his proprietary right in the said mauza Baigra.

"2*nd*.—That as a result of the above finding, your petitioners, plaintiffs, may be declared to be entitled to get the profits of the said ferry in proportion to the extent of their share, and the defendant may be restrained from offering opposition to the possession of your petitioners."

By his written statement the defendant alleged that the plaintiffs had been out of possession of the ferry for twelve years, and that he and his predecessors in title had held possession for upwards of twenty years; that the landing place on the west of the river was part of Kamtowl, and the landing place on the east was part of the patti allotted to the defendant in Baigra. He alleged that the bridge and the boat were maintained at the sole expense of the proprietor of the Kamtowl Factory, and the tolls taken by him.

The cause was tried before the Munsif, who, by decree, dated 30th March 1887, dismissed the suit with costs. His reason was that the defendant had established exclusive use and possession by himself and his predecessors in title at least since the year 1856; and that it was adverse to the plaintiffs and their predecessors. Apparently he considered that the case falls within the 26th section of the Limitation Act of 1877, relating to the acquisition of easements.

Both parties appealed to the Subordinate Judge. The defendant's appeal was entirely misconceived, and, having been dismissed with costs, need not be further noticed now. The plaintiffs' appeal was also dismissed with costs, and it is important to see on what grounds. Their Lordships are now sitting in appeal from a decee of the High Court made on a regular second appeal from that of the Subordinate Judge under section 584 of

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the Code. No leave to appeal from the decree of the Subordinate Judge direct to Her Majesty in Council has been asked for, so that the present hearing must be based upon the materials which were open to the High Court, and the findings of the Subordinate Judge on matters not involving questions of law must be taken as conclusive.

After showing that the plaintiffs had failed to make good their allegations with respect to the erection and maintenance of the bridge and boat, and the application of the receipts, the learned Judge proceeds as follows:—

"The facts stand thus: The bed of the river Bagmati is on the ijmali land of the village of Baigra; the road which comes up to the east landing is sirkari or Government road in village Baigra; the jalkar of the river is enjoyed by the maliks of Baigra as a body; the western bank or brink of the river is also village Baigra; the bridge on the river was constructed and laid by the Kamtowl Factory more than thirty years ago; that, when the bridge fell through, a boat was placed on its site and plied, when necessary, by men employed by the kuti; that a toll was levied at the crossing ghat exclusively by the kuti; that the kuti uninterruptedly enjoyed the profit and maintained the ferry to the exclusion of the plaintiffs for more than twenty years, but the maliks of Baigra and their men, &c., were allowed to cross free of tax."

In a subsequent passage he deals with an allegation by the plaintiffs that they had given express permission to the defendant and his predecessors to use the ferry as they did, and finds that there was no such express permission. He also states that the landings of the ferry are the ijmali land of Baigra. On this state of facts the Subordinate Judge came to this conclusion:—

"The owner of the Kamtowl Factory has been in exclusive possession of the profits of the ferry for a period extending over twenty years, and there was no express permission on the part of the defendants. The profits, as the books of the defendants show, were not inconsiderable, and I do not think that the plaintiffs (written defendants by mistake) of their own accord and free will allowed the kuti to derive this profit. This possession by the

kuti must have been against the wishes of the defendants, and therefore adverse. There was no express trust; and implied permission cannot, under the circumstances, be inferred."

With regard to the use of the bridge and ferry by the maliks of Baigra, the Subordinate Judge looks upon it as a privilege not affecting the right to the ferry. He says that no act of possession was exercised by the plaintiffs over the ferry itself within the last twenty years before the date of suit. He also takes the view of the Munsif, that the case falls within section 26 of the Limitation Act.

On the second appeal the High Court differed from the Subordinate Judge on two grounds. The first was that the defendant had only run the ferry since 1881, and therefore could not plead any bar by time against the plaintiffs. On this point their Lordships are clear that the facts found show a continuity of enjoyment by the owners of the Kamtowl Factory and of the two-anna share in Baigra, which was not broken by the defendant's purchase from the former owners. The plea of limitation or prescription therefore is just as available for the defendant as it would have been for his vendors had their possession continued unchanged. The second ground taken by the High Court is, that the owners of Kamtowl never had exclusive possession, because there was an arrangement that the maliks of Baigra and their men should be carried across free of charge, and they had a right to go across "as a right, and free of toll."

The High Court discharged the decree of the lower Court, and pronounced the following decree:—

"That it should be declared that the river Bagmati and the ghat or ferry of the said river at Baigra are within the said mauza Baigra in pargana Jarail, and that the defendants, 1st party, are only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mauza Baigra. We further direct that the said defendants, 1st party, do account for the profits of that ferry from date of suit to the present date, and for this purpose that the record be sent down to the Judge in the lower Court, and that he do assess the profits; and we further direct that the plaintiffs recover their costs in all

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the Courts. This case will remain on the file of this Court pending the assessment of the profits by the lower Court."

It appears to their Lordships that, in saying that the maliks of Baigra used the ferry "as a right," the High Court departed from the findings of pure fact by the Subordinate Judge, which they appear to be resting on. He only found that the maliks were allowed to cross free of tax. That does not point to any arrangement or to any right. Nor is there any suggestion made by the plaintiffs of such an arrangement, which, indeed, would be contrary to the case of the plaintiffs, who allege that, first the bridge, and afterwards the boat, were set up on their behalf. Still the effect of their actual use of the ferry remains to be considered. And it appears to their Lordships that, though the question appears to be trifling as regards money value, it is of a very peculiar kind, and presents considerable difficulties.

Whatever the defendant may think himself entitled to, he has not in this suit claimed to possess a ferry in any such sense as would entitle him to restrain competition. It is recognized law in India that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others; and, except as affecting the proof of his acquisition of title, it can make no difference whether he is a co-sharer with those others or not. That is common ground to the Munsif, the Subordinate Judge, and the High Court in this case. But the defendant is not using his own property, except that he owns it jointly with the plaintiffs; and, as no grant ever was made to him, he can only set up exclusive right against the plaintiffs by showing either that he has dispossessed them for twelve years, or that he has held possession adversely to them for twelve years, or that he has enjoyed what he claims, for twenty years, as an easement and as of right.

It is true that the Subordinate Judge finds that the defendant's possession for twenty years was adverse to the plaintiffs. The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law, or a mixed question. Their Lordships have no wish to restrict the range of a rule which is designed to lessen the expense of litigation in cases of small value commenced in the Munsif's Court. But in this case the

Subordinate Judge himself appears, quite rightly as their Lordships think, to have treated the question of adverse possession apart from his findings on simple fact, and as the proper legal conclusion to be drawn from those findings. Moreover, the Subordinate Judge lays down the right of ferry to be a right in the nature of an easement, and to require an uninterrupted exercise during twenty years for its acquisition. But the terms of his ultimate finding are not fitted to those of the Statute. Section 26 of the Limitation Act says nothing about adverse possession, and the Subordinate Judge does not say that the defendant enjoyed the ferry as an easement, and as of right, which is what the Statute requires. For these reasons their Lordships think that the High Court were at liberty to come to conclusions different from those of the Subordinate Judge on this point.

Their Lordships further concur with the High Court as to the effect of the use of the ferry by the maliks of Baigra and their men. The Subordinate Judge quotes a passage from a decision [*Mahomed Ali Khan* v. *Khajah Abdul Gunny* (1)], in which Mr. Justice Wilson points out that many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land would between joint owners naturally bear a different construction. Whether the facts found in this case would, as between strangers, raise the inference of adverse possession or of enjoyment of the ferry as an easement and as of right, is a question which need not be discussed. For the parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that, even in the time of the bridge, there has been any obstruction at the landing places. It is not alleged that the defendant's proceedings have prevented anyone else from setting up a boat for himself or his men, or even from carrying strangers for payment. So far from inflicting any damage upon the joint owners, the defendant has supplied them gratuitously with accommodation for passage. All that is complained of is

(1) I. L. R., 9 Calc., 744.

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that he has expended money in a certain use of the joint property, and has thereby reaped a profit for himself. But property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or risk for that purpose.

Their Lordships then agree with the High Court in thinking that the defendant has not acquired any easement or any title by adverse possession. But inasmuch as their conclusion is founded on the view that the joint possession has been continuously maintained, they cannot concur in the decree appealed from. There seems to be but little authority in decided cases to shew how far courts of justice will interfere to control the use of property as between joint owners, or how far they will leave those who are dissatisfied with its use to seek a remedy by partition. The case of *Watson & Co.* v. *Ramchund Dutt* (1) is that which throws the most light on the subject.

In that case Messrs. Watson & Co. were co-owners of a joint estate. They had procured leases of a plot of land from the others, had built a factory, and had produced indigo. After the expiry of their leases they went on in the same way. The other co-owners wished to grow oil-seeds, and they sued for an injunction to restrain the Watsons from growing indigo on ijmali land. The District Judge granted the injunction prayed for. On appeal the High Court varied the form of the injunction by restraining the Watsons from excluding the plaintiffs from the enjoyment of ijmali land. On appeal to Her Majesty in Council this Committee made the following observations:—

"It seems to their Lordships that if there be two or more tenants in common, and one (*A*) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (*B*) attempts to come upon the said part for the purpose of carrying on operations there, inconsistent with the course of cultivation in which *A* is engaged and the profitable use by him of the said part, and *A* resists and prevents such entry, not in denial of *B*'s title, but simply with the object of protecting

(1) I. L. R., 18 Calc., 10; L. R., 17 I. A., 110.

himself in the profitable enjoyment of the land, such conduct on the part of *A* would not entitle *B* to a decree for joint possession. . . . In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course in large estates, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

The decrees below were discharged, and the decree made in lieu thereof gave the plaintiffs compensation for the exclusive use of the joint land by the Watsons.

Their Lordships have not referred to the case of the Watsons in order to follow the decision, for the facts of that case and of this are very different; but for the purpose of showing authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases.

Now in this case the High Court has not granted any injunction, but it has made a declaration with respect to the possession and profits of the ferry, and has directed an account of the profits accordingly. But if the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any,

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and none have been earned by the exclusion of them from possession, as was done by the Watsons in the case cited. By the defendant's acts they have lost nothing, and have received some substantial convenience. It will be time enough to give them remedies against him when he encroaches on their enjoyment.

But then they ask to have it declared that the river and the ferry are within mauza Baigra, and that the defendant may be restrained from offering opposition to their possession. If the defendant had not denied their title, it would clearly not have been proper to give them any such relief. Should it make any difference in this respect that, when asked to account for the profits of the ferry, the defendant has sought to protect himself by setting up a title in himself to the profits of the ferry and to the landing places? With some doubt their Lordships think not. It does not appear that the plaintiffs, even before the suit, asked for anything but a share in the profits, and though they now ask for removal of opposition to their possession, they themselves state, and their Lordships now hold, that all the co-sharers have been in possession all along. No such decree therefore is needed. But the costs of the suit have been seriously aggravated by the defendant's claim of exclusive ownership; and as this claim is unfounded, he ought not to have the costs which otherwise would have been awarded to him. Throughout this litigation the plaintiffs have been asking too much and the defendant conceding too little. There should be no costs in any of the Courts, nor of this appeal.

The proper course will be to discharge all the decrees below, and to dismiss the suit. Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: Messrs. *Sanderson, Holland* and *Adkin*.

C. B.