

was made, that purpose has failed. He declined to accept it on the terms on which it was offered to him. There has, therefore, been a total failure of consideration and, in accordance with the language of the old pleaders, the money is money in the hands of the defendant received by him to the use of the plaintiff, or, in other words, it is *contra æquum et bonum* that he should retain it. This is a cause of action as old as the hills and is really what the plaintiff was asserting. The decision is obviously right and the appeal must be dismissed with costs.

Appeal dismissed.

1927

MAHBUB
ALI
v.
MUHAMMAD
HUSAIN.

*Before Sir Grimwood Mears, Knight, Chief Justice and
Mr. Justice Lindsay.*

NARSINGH DAS (PLAINTIFF) v. GOKUL PRASAD AND
ANOTHER (DEFENDANTS).*

1927
May, 11.

*Act No. 1 of 1872 (Indian Evidence Act), section 33—
Witness—Effect of death of witness before cross-examination is complete.*

If a witness under examination by a court dies before his cross-examination is completed, no part of his evidence can be made use of. *Boisagomoff v. The Nahapiet Jute Company* (1), followed.

The facts of this case sufficiently appear from the judgement of the Court.

Mr. B. E. O'Connor, for the appellant.

Dr. Surendra Nath Sen, Babu Durga Charan Banerji, Babu Piari Lal Banerji and Munshi Narain Prasad Ashthana, for the respondents.

MEARS, C. J. and LINDSAY, J. :—This was a suit originally instituted to recover the value of ornaments alleged to be worth Rs. 5,993 and to recover Rs. 6,007 which was alleged to have been taken out of court by the

* First Appeal No. 49 of 1923, from a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Allahabad, dated the 25th of October, 1922.

(1) (1901) 5 C.W.N., (Notes), p. ccxxx.

1927

NARSINGH
DAS
v.
GOKUL
PRASAD.

defendants, on the ground that they were accountable in both these respects to the plaintiff.

The learned Subordinate Judge dismissed the suit and when this matter came up in argument in First Appeal, it became apparent that complete justice could not be done between the parties if the claim was limited in the manner in which the plaintiff by his plaint had limited it. We, therefore, sent the matter down to the lower court to consider particularly the state of account in respect of certain zamindari property. It was alleged that a lady, Musammat Chandrawal, the mother of Narsingh Das, owned zamindari property, and that for a period of some eight years, from 1908 to 1916, that zamindari property had been managed by the defendants. The findings have been returned to us, and in this Court even wider arguments have taken place on both sides, and in the result we have had, upon very scanty material, to go into the whole of the transactions between these parties, to arrive at the best and fairest decision we can.

The first difficulty that we have been met with is this. On the 15th of February, 1922, Musammat Chandrawal was examined on commission and had on that day concluded her examination-in-chief and had been under cross-examination for a considerable period. Her cross-examination, we are told, occupied some seven pages of print. By that time 9 o'clock in the evening had arrived, and not unnaturally the parties wished to separate. Musammat Chandrawal was not well at that moment. There arose a discussion as to when next her cross-examination should be continued, and whilst the pleader for Narsingh Das was willing for the lady to be examined on the next or any of three or four subsequent days, the pleader for the defendants had other engagements and the matter was left open. In that state of affairs Musammat Chandrawal died on the 19th of February, 1922—it is said she died of plague. The plaintiff naturally wished

that evidence to be used in the lower court and here. It was excluded in the lower court and we have been obliged to exclude it here, being guided by the decision which is reported in *Boisagomoff v. The Nahapiet Jute Company* (1) and on a consideration of the terms of section 33 of the Evidence Act, and we have had to decide that the evidence cannot be received because the evidence was not concluded. That is to say, although her examination-in-chief was concluded, it was open to the defendants to argue that a subsequent cross-examination would have destroyed to a great extent the effect of the evidence-in-chief, and therefore one could not take an incomplete deposition of the lady and pay any attention to it. We have no doubt that the argument put forward by the defendants was a good argument, and we did decide to exclude her incomplete statement, and it has not been presented to us.

[The judgement then proceeded to discuss the other evidence and concluded as follows :—]

We therefore reverse the decision of the learned Subordinate Judge and give to each side proportionate costs according to success and failure in all courts.

Before Mr. Justice Boys and Mr. Justice Kendall.

RAM PRASAD, SHIAM SUNDAR LAL AND OTHERS
(DEFENDANTS) *v.* RAMJI LAL (PLAINTIFF).*

1927
May, 11.

Act No. IX of 1872 (Indian Contract Act), sections 23 and 30
—Principal and agent—Wagering contract—Suit between
principal and agent.

In the United Provinces a claim by a principal against an agent or by an agent against his principal arising out of a contract is not affected by the circumstance that, as between the principal and the other party to the contract, it may be a

* Second Appeal No. 22 of 1925, from a decree of Har Govind Baijal, Additional Subordinate Judge of Meerut, dated the 23rd of October, 1924, reversing a decree of R. Saran, Additional Munsif of Meerut, dated the 31st of May, 1924.

(1) (1901) 5 C.W.N., (Notes), p. ccxxx.