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to whom the Indian Articles of War applied. Act V of 1869 was described as the Indian Articles of War—a description also continued in the amended Act XII of 1894. Both of the Acts have been repealed, and the present Act is Act No. VIII of 1911, to which we have just referred. That is styled the Indian Army Act. So that there is no doubt that the reference in the Civil Procedure Code, wherein the statutes are described as the Indian Articles of War, must now be regarded as referring to Act VIII of 1911.

In these circumstances we are of opinion that this revision must be allowed and that the salary of this Assistant Surgeon was not attachable.

The money which has been paid under protest by the Controller of Military Accounts, Meerut, must be refunded.

Revision allowed.

APPELLATE CIVIL.

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June, 19.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.

TAJAMMUL HUSAIN (PLAINTIFF) *v.* BANWARI LAL AND OTHERS (DEFENDANTS).*

Landlord and tenant—Sale of houses in abadi—*Custom—Evidential value of sale deeds and transfers in favour of strangers.*

Held that the existence of a large number of sale-deeds, extending over a period of some sixty years, whereby tenants owning houses in the *abadi* had transferred them to strangers, without any objection on the part of the zamindars, was evidence upon which the High Court, in second appeal, might find the existence of a custom established, although the lower courts had negatived its existence.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single judge.

* Appeal No. 29 of 1924, under section 10 of the Letters Patent.

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The facts of the case sufficiently appear from the judgement under appeal, which was as follows :—

These two appeals arise out of two suits brought by the co-sharers of the village Kawwal for the recovery of possession of certain houses by the removal of the materials standing thereon. The allegation of the plaintiffs was that the said houses were occupied by *ryots*, who had no power of transfer, and the sales effected by them in favour of other persons without the permission of the zamindars were invalid. The defence was that the village Kawwal was not an agricultural village and the residents of that village had a right to transfer houses belonging to them, including the right of occupancy, to any person they liked. They relied in support of that contention on various sales, which had taken place since 1862. The *wajib-ul-arz* of the village was also produced. In one of the cases the trial court came to the conclusion that the custom set up by the defendants was not established. In the other case, which was tried later by a different Judge, it was found that the said custom was established. Appeals from both these decisions were heard at different times by the same Subordinate Judge, and in each case the finding of the trial court was affirmed.

As pointed out in *Ram Bilas* v. *Lal Bahadur* (1), where a question arises as to the existence or non-existence of a particular custom, the question of the sufficiency of the evidence adduced to establish that custom is one of law; and it has to be determined in each case in the light of the evidence produced therein in support or failure of such a custom. The village Kawwal is described by the courts below as a large and important village containing a dispensary and a school. There is much trade in grain and cloth; and markets are held there twice a week. It is, according to the evidence, occupied by people of all castes and professions, and is by no means a purely agricultural village in any sense of the term. The learned Subordinate Judge points out in one of the cases that the witnesses for the plaintiffs admitted that the transfer of houses was a matter of daily occurrence, that the village was no longer a purely agricultural village, and that one of the witnesses, Manglu, estimated that the number of such transfers was about 200. He also refers to a judgement

(1) (1908) I.L.R., 30 All., 311.

of the 29th of July, 1865, in which the existence of the custom of transfer by *ryots* was recognized. The defendants filed 91 sale-deeds, covering a period of nearly 60 years, evidencing transfers made by *ryots* of the houses belonging to them. Some of those transfers are stated to have been made in favour of the zamindars themselves, but the remainder were made in favour of strangers or other residents of the village; and the right of the vendees to occupy the houses purchased by them was never challenged by the zamindars and they have remained in possession since. There is nothing to show that those transfers were made with the permission of the zamindars. On the other hand, the witnesses adduced stated that they had been made from time to time without the permission of the zamindars, in pursuance of the custom which authorized such transfers. In fact one of the zamindars, Joti Prasad, who was examined on behalf of the defendants, stated that there was a custom to that effect in the village.

On behalf of the plaintiffs the *wajib-ul-arz* of 1872, and three decisions, two of which were based on compromises, have been referred to. The *wajib-ul-arz* states that the *ryots* had a right to mortgage and sell the materials (malwa) of their houses, but that statement is only a negation of their right to mortgage or sell the land; and in common parlance it does not imply that the vendee or mortgagee would have no right to occupy the land or, in other words, to keep the house or its materials intact there. The materials therein referred to manifestly mean the standing materials with the right of occupancy attaching to them and not the dismantled materials which would be of little value to the mortgagee or vendee, particularly in the case of kachcha houses, after their removal. It does not mention that the mortgagee or vendee would have removed the materials after the mortgage or sale by the demolition of the house; and the construction sought to be put on it, namely, that the mortgagee or purchaser cannot keep the materials standing and enjoy the benefit of the houses they constitute, is unreasonable and cannot be sustained. If the intention had been that the mortgagee or vendee in such a case should remove the materials, some such terms would obviously have been used to indicate it.

In any case, even if the *wajib-ul-arz* be treated as ambiguous, there is sufficient evidence, to which the lower court

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has referred, to establish that the right of the *ryots* to transfer their houses in this village has been recognized, and that transfers have taken place during the last 60 years under which the transferees have remained in possession. It is contended on behalf of the plaintiffs, that it is possible that these transfers may have been made with the consent of the zamindars or under some special agreement with the tenants made at the time when the occupancy of the houses began. But if there were any such circumstances attending those transfers, they should have been brought out in the evidence. In the absence of any proof of such circumstances, the transfers must *primâ facie* be taken to prove that a custom of the kind set up was recognized in the village.

The decision in *Ram Bilas* v. *Lal Bahadur* (1) and *Mohammad Vilayat Ali Khan* v. *Mohammad Liyaqat Ali Khan* (2) have been cited to show that such transfers are by themselves not sufficient evidence of the existence of the custom. But where a question of fact is at issue, each case must be decided on its own merits, and the finding arrived at on the evidence adduced in one case cannot be used to guide the decision of a kindred issue in another case, not heard with it. As a general rule the more frequent the transfers and the greater the period covered by them, the stronger the inference, resting indirectly on the conduct of the zamindar, in favour of such a custom. In *Girraj Singh* v. *Hargobind Sahai* (3) where a great number of documents, both sale deeds and mortgages, were produced besides certain decrees in which the existence of the custom was recognized, it was held that in the face of those documents the decision of the courts below that the custom set up did prevail could not be regarded as based on insufficient or illegal evidence. In *Faiyaz Ali* v. *Rekhab Das* (4), where in support of such an alleged custom, by which the tenants in a village could transfer their houses, several sale-deeds and certificates evidencing such transfers were produced besides other evidence, it was held that it was for the zamindars to explain them away and to show under what circumstances those transfers were made and that they were such as could in no way prove the custom. It is true that in the latter case the *wajib-ul-arz* was not produced; but a judgment was produced in which the existence of the custom had been

(1) (1908) I.L.R., 30 All., 311.
(2) (1910) 6 Indian Cases, 580.
(3) (1909) I.L.R., 32 All., 125 (128).
(4) (1920) 19 A.L.J., 104.

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recognized. But in this case the *wajib-ul-arz* does not necessarily negative the existence of such a right or custom; and instances of transfers to which no exception was taken during the last sixty years afford corroborative evidence of the existence of such a custom. Indeed it is hardly likely that had no such custom existed or that the *wajib-ul-arz* meant that the mortgagee or vendee should remove the materials as soon as the mortgage or sale was effected, the zamindars would not have taken steps to challenge the transfers and got the transferees evicted from the houses so acquired. Customs usually grow out of instances and acquire force and sanctity as instances multiply. Such instances have been proved in these cases. While there is a decision of 1912 in which the existence of such a custom was negatived, there is another decision of 1865 in which the existence of such a custom was recognized. It cannot be said what evidence was forthcoming in either of those cases. The findings in the present suits must proceed on the evidence adduced in these cases, which, as has been pointed out, is sufficient to establish the existence of the custom which the defendants set up. Second Appeal No. 802 of 1922 must therefore be allowed.

On an appeal being brought against the decision, under section 10 of the Letters Patent, it was held by the CHIEF JUSTICE and Mr. JUSTICE SULAIMAN that the evidence was sufficient in law to establish the custom, and that the decision was right.

Appeal dismissed.

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June, 26.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.

DARSHAN DAS (PLAINTIFF) *v.* BIKRAMAJIT RAI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXII, rule 4 (3)—Appeal—Death of one of the defendants respondents—Abatement, whether in whole or in part.

Where there are several respondents to an appeal, and one of them dies during the pendency of the appeal and the appellant omits to bring his heir on the record within time,

* Appeal No. 144 of 1924, under section 10 of the Letters Patent.