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tion 110, because such observations should only be construed with reference to the particular facts of each case. The Evidence Act offers little or no assistance for the hearing of such cases, which depend on a common-sense view of the evidence. It may generally be stated that any evidence which enables a court to come to a decision that a person is or is not an habitual offender is admissible.

Ashworth, J.

BY THE COURT:—We accept the application, set aside the order of the Additional Sessions Judge and restore the order of the Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.

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July, 10.

BASDEO NARAIN (PLAINTIFF) *v.* MUHAMMAD YUSUF AND OTHERS (DEFENDANTS).*

Joint Hindu family—Alienation by manager—Permanent lease of agricultural lands—Suit by minor brother for avoidance and possession—Benefit to the estate—Extent of relief against agricultural lessees—Act (Local) No. III of 1926 (Agra Tenancy Act), section 45.

The manager (elder brother) of a joint Hindu family granted a permanent lease of agricultural lands, being joint family property, to tenants at a favourable rate of rent, having taken from them a certain sum as *nazrana*. A minor brother sued for avoidance of the lease and for possession.

Held (1) that a permanent lease was an "alienation" of the property;

(2) that the validity of the alienation was to be judged not from whether it was a good business transaction but from whether the permanent lease or the cash *nazrana* was for the benefit of the family;

*Second Appeal No. 2223 of 1925, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 14th of September, 1925, reversing a decree of Vishun Ram Mehta, Subordinate Judge of Allahabad, dated the 26th of May, 1924.

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(3) that the alienation being held to be invalid, the relief obtainable by the plaintiff was not that of possession by ejectment of the lessees, who were not trespassers but had become agricultural tenants, but that of getting a proper rent fixed under section 45 of the Agra Tenancy Act, 1926.

Palaniappa Chetty v. *Sreemath Daivasikamony Pandara Sannadhi* (1), referred to. *Jagat Narain* v. *Mathura Das* (2), followed. *Abdul Rahman* v. *Sukhdayal Singh* (3) and *Ram Chand* v. *Raj Hans* (4), distinguished.

THE facts of the case sufficiently appear from the judgement of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

KENDALL and NIAMAT-ULLAH, JJ. :—This second appeal arises from a suit brought by a minor son in a joint Hindu family for a declaration that a perpetual lease of ten agricultural plots granted by one of his brothers in 1922 is null and void as against the plaintiff, and praying to be put in possession of the property. The trial court decreed the suit on the ground that the lease was not executed for the benefit of the family in that it was not for the payment of any debts binding on the family. The lower appellate court has reversed this finding on the ground that the lease was a sound business transaction.

The facts are that this brother, Dhanwant Narain, acting as manager of the family, executed the lease at a rental of Rs. 70 a year, whereas the property had previously been leased and at any time may be leased at a rental of Rs. 125 a year. It has, however, been found though no mention of the fact is made in the lease itself, that the lessees gave the lessors what is called a *nazrana* of Rs. 1,200. It is on the strength of this *nazrana* that

(1) (1917) I. L. R., 40 Mad., 709. (2) (1928) I. L. R., 50 All., 969
(3) (1905) 2 A. L. J., 507. (4) (1906) 3 A. L. J., 517.

the lower appellate court has found that the lease was an "excellent business transaction distinctly favourable to the family." The issue before the learned Judge, however, was not whether the transaction was a good one from a business point of view, but whether the lease was executed for the benefit of the family.

It has been argued for the respondents that the lease was only an agricultural lease, and was not an alienation and it is true that there is a clause in the lease by which the lessees become liable to ejectment if they should fall into arrears with their rent beyond a certain period, and if they are ejected on this ground they lose the *nazrana*. We do not believe, however, that this permanent lease can be regarded in any other light than as an alienation, to support which it was necessary to prove legal necessity or the benefit of the joint family estate. It goes further in the way of alienating the property than a usufructuary mortgage would have done, for the property is removed entirely from the control of the family, provided that the lessees pay the favourable rate of rent to which they have bound themselves. In the case of a usufructuary mortgage the mortgagor still retains the initiative and can recover the property by payment of the mortgage debt. No such initiative is left to the lessor under this lease. It is not denied before us that usufructuary mortgages have always been held by the courts to amount to alienations of property, and we should for this reason have held this lease to be an alienation. If any authority for such a conclusion were needed it would be supplied by the case of *Palaniappa Chetty* v. *Sreemath Daivasikamony Pandara Sannadhi* (1) in which it was held by their Lordships of the Judicial Committee that a permanent lease by a *shebait* of land dedicated to the worship of an idol, of which he was the trustee, was invalid on the ground that he was not

(1) (1917) I. L. R., 40 Mad., 709

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constrained to make the lease by any necessity or by the consideration of any benefit accruing to the estate from it.

* * * *

Judged by the standard laid down by the recent Full Bench decision in *Jagat Narain* v. *Mathura Das* (1), we are of opinion that the permanent lease in the present suit cannot be upheld. There is nothing to show that it was for the benefit of the family that it should be deprived of the chance of deriving benefit in the future from an enhanced rent. There is in fact nothing to show that ready money was wanted at all, or that the manager did not intend to spend the amount of the *nazrana* on his own pleasures. In the Full Bench case to which we have referred above a small portion of the joint family property had been sold, for a very good price, because it was difficult and expensive to manage and the object of selling it was stated to be that other land might be bought in a more convenient position, and the Bench held that this was a transaction which was for the benefit of the family estate. In the present case there is not shown to have been either any advantage in giving a permanent lease of the land or in realizing ready money. We have no doubt, therefore, that the decision of the learned District Judge on this point must be reversed and that of the trial court restored.

A further question that has arisen here is this. The plaintiff prayed for possession of the leased property, and the trial court granted this prayer. It has been strenuously argued on behalf of the appellant that this part of the decree of the trial court should also be affirmed. In the case of *Palaniappa Chetty* v. *Sreemath Daivasikamony Pandara Sannadhi* (2) immediate possession was given to the plaintiff. It was not, however, agricultural land that was there in dispute. Other

(1) (1928) I. L. R., 50 All., 969. (2) (1917) I. L. R., 40 Mad., 709.

cases that have been relied on by the appellant are those of *Abdul Rahman* v. *Sukhdayal Singh* (1) and *Ram Chand* v. *Raj Hans* (2). In the first of these cases the property belonged to a ward and a sale-deed was executed on his behalf without the sanction of the court. In the second case a usufructuary mortgagee had granted a lease for a period which extended beyond the period of the possession of the mortgagee. It was held that the vendee in the first case and the lessee in the second could be dispossessed by the owners. In these cases, however, the transferor was not legally vested with the right to transfer the property at all, and in the second case there was no relationship of landholder and tenant between the plaintiff and the mortgagee's lessee. In the present case it must be conceded that the manager had the power to grant leases to tenants in the ordinary course of management of the zamindari property, and there would have been nothing to prevent his granting an ordinary lease to the present lessees. It was only by granting a permanent lease that he exceeded his power. It has been suggested that the whole of the lease becomes null and void and the lessees under it, therefore, become trespassers. We have to consider, however, that the manager admitted these lessees to the occupation of the land as long ago as 1922, and that the lessees have presumably been in possession since and have been paying rent regularly. We have also to consider that the manager had legal authority to admit them to the occupation of the land. In these circumstances it seems to us that it would be altogether wrong to regard them as trespassers merely because the manager exceeded his power in executing a permanent lease. Under section 45 of the Agra Tenancy Act of 1926 "whenever any person has been admitted to the occupation of land, or permitted to retain possession of land, by anyone having

(1) (1905) 2 A. L. J., 507. (2) (1906) 3 A. L. J., 517.

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a right to admit or permit him with the intention that a contract of tenancy should thereby be effected, but without any rent being fixed, either he or the person so admitting or permitting him may at any time during the period of his occupation or within three years after the expiry of such period sue to have rent fixed thereon." It appears to us that the position of the lessees is analogous to that of persons who have been admitted to the occupation of the land in this way. It is true that when they were admitted to the land it was not intended that the contract of tenancy should be effected by the mere admission, but by a written contract which has been held to be invalid. But it was intended that a contract of tenancy should be effected, and we think that it would be doing violence to the meaning of the words if in these circumstances we were to regard the lessees as trespassers and to eject them from an agricultural holding. There can be no doubt that the relationship of landlord and tenant has been established between them.

The result is that we allow the appeal in part and give the plaintiff appellant a declaration that the permanent lease is null and void and ineffectual as against him, but we dismiss the suit in regard to the prayer for possession. It will be for the parties to settle their rights and liabilities as to rent in the revenue court. As regards the *nazrana* it is not clear from the findings of the courts below whether the amount has been repaid to the lessees, but if not they will be able to recover it in a regular suit. The plaintiff appellant will receive half his costs throughout from the respondents.

Decree modified.