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proceed in accordance with law. The learned Judge felt some difficulty in applying section 115, as the matter was still pending before the Munsif, but interfered under section 107 of the Government of India Act. That case was of a peculiar nature, and it is not necessary to consider in this case whether it was rightly decided, particularly as the learned Judge was bound to follow the previous Division Bench rulings.

In view of the decisions of the Full Benches of this Court and the practice which has prevailed so far, it is impossible for us to interfere under section 107 of the Government of India Act. The application is accordingly dismissed with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1935 *March*, 7

SHAHZADI BEGAM (APPLICANT) *v.* ALAKH NATH AND OTHERS (OPPOSITE PARTIES)*

Letters Patent, section 10—"*Judgment*"—*Order dismissing application for extension of time for filing an appeal or application—No appeal lies—Civil Procedure Code, order XLIV, rule* 1—*Application for leave to appeal* in forma pauperis, *accompanied by memorandum of appeal and copies of judgment and decree—Rejection of application is not rejection of appeal—Rules of High Court, chapter I, rule* 1, *clauses* (x) *and* (xii)—*Powers of a single Judge in dealing with an application for leave to appeal* in forma pauperis.

An order dismissing an application under section 5 of the Limitation Act and refusing to extend the time for filing an appeal or an application, as the case may be, is not a judgment within the meaning of section 10 of the Letters Patent, and accordingly no appeal lies from the order.

Such an order does not involve an automatic dismissal of the appeal in itself; the two matters, namely the appeal filed beyond time and the application for extension of time, are distinct and separate. The granting or rejection of the application, according as a sufficient cause for the delay is or is not made out to the satisfaction of the court, is not an adjudication upon the rights and liabilities of the parties, but is of the nature of an interlocutory order in a pending matter; the

*Appeal No. 14 of 1933, under section 10 of the Letters Patent.

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appeal itself has to be admitted or dismissed by a separate order.

The rejection of an application under order XLIV, rule 1 of the Civil Procedure Code for leave to appeal as a pauper is not the rejection of the appeal itself; nor is the appeal necessarily to be rejected for want of court fee, and if the proper amount of court fee is subsequently allowed by the court to be paid, then by section 149 of the Code the effect is as if the court fee had been paid in the first instance.

Where the application for leave to appeal is, as required by order XLIV, rule 1, accompanied by a memorandum of appeal, but copies of the judgment and the decree are not filed, the memorandum of appeal can not constitute a complete appeal in itself and is no more than an annexure to the application; and if the application is rejected, the whole matter falls through and there is no longer any matter pending before the court. But where copies of the judgment and the decree have also been filed, the rejection of the application leaves a properly constituted appeal pending, the only defect in the appeal being want of court fee which can be subsequently rectified under section 149.

There is a distinction between the expression "a motion to admit an application" in clause (*xii*) of rule 1 of chapter I of the Rules of the High Court and the expression "an application" in clause (*x*) of the same rule. What the rule intends is that even though the application itself may be cognizable by a Bench of two Judges and could not, therefore, be dismissed unless it was put up before and considered by such a Bench, it may be admitted by a single Judge but not dismissed by him. An application for leave to appeal *in forma pauperis* can, therefore, be admitted by a single Judge, but not rejected by him if the appeal itself is such as would be beyond his jurisdiction to dispose of, being exclusively within the jurisdiction of a Bench of two Judges.

Mr. *S. B. L. Gaur*, for the appellant.

Mr. *G. S. Pathak*, for the respondents.

SULAIMAN, C.J., NIAMAT-ULLAH and RACHHPAL SINGH, JJ.:—Three questions have been referred to this Full Bench for an expression of opinion, by a Division Bench before which a Letters Patent appeal from an order of a single Judge of this Court dismissing an application under section 5 of the Limitation Act came up for

hearing. On the 2nd of May, 1932, the appellant filed an application in this Court before a single Judge for leave to appeal *in forma pauperis* and that application, as required by order XLIV, rule 1, was accompanied by a memorandum of appeal containing the grounds of objections and also a prayer for the appeal being allowed. No court fee was, of course, at that time paid on the memorandum of appeal. Both the application and the memorandum of appeal were received by the learned Judge and registered as a Miscellaneous Case, and were later on put up again before him on the 9th of May, 1932, with an office report that the application was beyond time. On that date the applicant was not present in the court room and her application for leave to appeal was rejected. No separate order was passed on the memorandum of appeal treating it as being in itself a separate appeal. On the 23rd of May, 1932, an application was filed on her behalf by a counsel, purporting to be under section 5 of the Limitation Act, accompanied by an affidavit and praying that the delay in the filing of the "appeal" be condoned. This application was dismissed by the learned Judge on the 13th of February, 1933, after notice to the opposite party had been given. The learned Judge came to the conclusion that at that time there was, properly speaking, no appeal before the Court at all, and that therefore he could not extend the time. It is from this order that a Letters Patent appeal has been preferred.

The learned counsel for the applicant states before us that the application for extension of time was really for extension of time for leave to appeal and not for extension of time for the filing of the appeal, although inadvertently the word "appeal" instead of "application" was used in it.

The first question which has been referred to us by the Division Bench is as to whether an appeal lies under clause 10 of the Letters Patent from the order passed by a single Judge under section 5 of the Indian

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Limitation Act refusing to extend the time for filing an appeal.

An appeal would lie if the order in question were a "judgment" within the meaning of clause 10 of the Letters Patent. It has been held in numerous cases that as the Letters Patent were drafted long before even the earlier Code of 1882 was passed, the word "judgment" used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word "judgment" does not include every possible order, final, preliminary or interlocutory, passed by a Judge of the High Court. In several cases the word has been given a narrower and more restrictive meaning. In *Ghasi Ram* v. *Musammat Nuraj Begam* (1) it was held that an order remitting issues to a subordinate court was not a judgment. In the case of *Banno Bibi* v. *Mehdi Husain* (2) it was laid down that an order refusing leave to appeal *in forma pauperis* was not a judgment and was not appealable under the Letters Patent. It was incidentally remarked in that case that an order which is not made appealable if passed by a lower court would not be a judgment within the meaning of Letters Patent. But that was a rough rule of interpretation and cannot be considered to be an exact definition of judgment. In the case of *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (3) it was laid down that an order directing the amendment of a decree passed by a learned Judge of this Court was not a judgment which would be appealable under the Letters Patent. Similarly in the case of *Mansab Ali* v. *Nihal Chand* (4) it was held that an order dismissing an appeal for default of appearance was not a judgment and could not be appealed against.

In the case of *Wall* v. *Howard* (5) it was held that no appeal under the Letters Patent would lie from an order of a single Judge refusing an application under the

(1) (1875) I.L.R., 1 All., 31. (2) (1889) I.L.R., 11 All., 375.
(3) (1892) I.L.R., 14 All., 226. (4) (1893) I.L.R., 15 All., 359.
(5) (1895) I.L.R., 17 All., 438.

Indian Companies Act for extension of time for serving notice of an appeal under that Act, inasmuch as such an order would not be a judgment within the meaning of clause 10. In that case several cases were referred to, showing that the word "judgment" had been interpreted in a narrower sense. In the case of *Piari Lal* v. *Madan Lal* (1) it was held that no appeal lay from an order dismissing an appeal from an order refusing to set aside a sale under order XXI, rule 90.

On the other hand, in the case of *Kura Mal* v. *Ram Nath* (2), an appeal from an order refusing to extend time under section 5 of the Indian Limitation Act was actually entertained, but the judgment does not indicate that any objection was taken on behalf of the respondent that the appeal did not lie, for there is certainly no reference to any such point in the judgment. It also does not appear that the earlier case of *Wall* v. *Howard* (3) was cited before the Bench or considered. The case, therefore, is no clear authority for the proposition that an appeal lies. It only decided the point that where a client *bona fide* accepted the advice of a counsel as to the proper procedure to adopt in the course of litigation and was misled by that advice, there was sufficient cause for the delay.

In the case of *Sadiq Ali* v. *Anwar Ali* (4) it was held that a Letters Patent appeal would lie from an order of a single Judge rejecting an application to set aside the abatement of an appeal. In that case one respondent had died on the 13th of June, 1920, and an application was made on the 4th of January, 1921, to set aside the abatement. The Bench took it for granted that the appeal abated six months after the date of the death of the respondent and that the application for setting aside the abatement was made within the time prescribed by law for such an application. Proceeding on these assumptions, it considered that an appeal lay, because the order refusing to set aside the abatement was a judg-

(1) (1916) I.L.R., 39 All., 191. (2) (1906) I.L.R., 28 All., 414.
(3) (1895) I.L.R., 17 All., 438. (4) (1922) I.L.R., 45 All., 66.

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ment within the meaning of clause 10 of the Letters Patent. In the course of the judgment the Bench relied on the case of *Tuljaram Row* v. *Alagappa Chettiar* (1), and quoted with approval the remark of the learned Chief Justice of the Madras High Court that "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause." The Amending Limitation Act under which the period for the application for substitution of names was reduced to three months had come into force on the 1st of January, 1921, but this circumstance was apparently overlooked at the time. Therefore that case is distinguishable as the Bench had proceeded on the assumption that the application for the setting aside of the abatement was in time, and it is, therefore, not necessary for us to examine the correctness of that decision. We would like to point out that the test laid down by the learned CHIEF JUSTICE of the Madras High Court is put in too wide a language and cannot be accepted as laying down the correct criterion. This is now particularly so, as their Lordships of the Privy Council in the later case of *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (2), referring to the Letters Patent of the Bombay High Court, remarked: "The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense." Of course, their Lordships did not mean to lay down that no appeal would lie under clause 39 of the Bombay High Court Letters Patent except from a decree and not from a final

(1) (1910) I.L.R., 35 Mad., 1(7). (2) (1925) 23 A.L.J., 555 (558).

order. That has been made clear by a Full Bench of this Court in the case of *Sital Din* v. *Anant Ram* (1); but their Lordships certainly intended to make it clear that the word "judgment" used in the Letters Patent is not to be taken in its widest scope.

No doubt the Bombay High Court in the case of *Ramchandra Gangadhar* v. *Mahadev Moreshvar* (2), followed in the case of *Nagindas Motilal* v. *Nilaji Moroba* (3), has taken a view in favour of the appellant, but a contrary view was expressed earlier by a Full Bench of the Calcutta High Court in the case of *Gobinda Lal Das* v. *Shiba Das Chatterjee* (4), from which the Bombay High Court dissented. That Full Bench decision, although to some extent doubted in the case of *Brajagopal Ray Burman* v. *Amar Chandra* (5), has not been overruled by that High Court.

It seems to us that when an appeal is filed, which is *prima facie* beyond time, and along with it an application is made for extension of time under section 5 of the Limitation Act, there are two matters before the court. The appeal on the face of it is barred by time and would have to be dismissed unless time were extended. The application has to be considered on its merits and has to be allowed or disallowed. The application must, therefore, be considered in the first instance, and if it is allowed, the delay is condoned and the defect of limitation which would otherwise be in the appeal is cured. The appeal would then be admitted by a separate order. If, on the other hand, the time is not extended, then the result is that the application for extension of time under section 5 is dismissed, but that does not involve an automatic dismissal of the appeal itself, although undoubtedly the appeal would in the long run have also to be dismissed by a separate order. It may be that an application for extension of time under section 5 is in some cases cognizable by a single

(1) (1933) I.L.R., 55 All., 326. (2) (1917) I.L.R., 42 Bom., 260.
(3) (1924) I.L.R., 48 Bom., 442. (4) (1906) I.L.R., 33 Cal., 1323.
(5) (1928) I.L.R., 56 Cal., 135.

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Judge, while an appeal, although barred by time, is cognizable by a Division Bench, in which event the single Judge would merely dismiss the application for extension of time, leaving the appeal to be dismissed formally by a Bench of two Judges. The two matters, therefore, are undoubtedly distinct and separate, and it is impossible to say that the order passed on one application necessarily involves the dismissal of the appeal itself.

The present case, however, has arisen out of an application for leave to appeal which was barred by time. The learned counsel for the respondent urges before us that there was, in fact, no appeal filed at all, but only an application, and the memorandum of appeal which accompanied it was an appendix or an annexure to it and was not any separate document which could be entertained independently of the application and that, accordingly, since the application itself was dismissed, this second document fell through and no document which can be treated as an appeal is now in existence. This is the view which appears to have appealed to the learned Judge of this Court who dismissed the application on the 13th of February, 1933.

There is a distinction drawn between the institution of a suit by a pauper and the filing of an appeal by a person who is unable to pay the fee required for the memorandum of appeal. Under order XXXIII of the Civil Procedure Code there is only one application which is required to be filed, and if that application is allowed, then under rule 8 it is to be numbered and registered and has to be deemed the plaint in the suit and the suit is then to proceed in all other respects as a suit instituted in the ordinary manner. On the other hand, if the application filed by the plaintiff is dismissed, there is no other document left before the court which can be proceeded with. On the other hand, in order XLIV there is a provision that a person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an applica-

tion accompanied by a memorandum of appeal and may be allowed to appeal as a pauper, etc. Thus two documents have to be filed, one is the application for leave to appeal as a pauper and the other is the memorandum of appeal itself. But order XLIV, rule 1 does not require that the applicant should file copies of the decree and the judgment, which are necessary for ordinary appeals under order XLI, rule 1, though an applicant, as in the present case, may file them also.

It is noteworthy that order XXII, rule 9, which deals with the procedure for setting aside abatements, provides that if it is proved that the person claiming to be the legal representative was prevented by any sufficient cause from continuing the suit, the court *shall* set aside the abatement and dismissal upon such terms as to costs or otherwise as it thinks fit, and it is provided that the provisions of section 5 of the Limitation Act would apply to applications for the setting aside of the abatement. On the other hand, section 5 of the Limitation Act provides that an appeal or application may be admitted after the period of limitation prescribed therefor, when the applicant satisfies the court that he had sufficient cause for not preferring the appeal or application within the period fixed. Thus there is a distinction in section 5 and even where sufficient cause is shown, the court has a discretion in not allowing the application to be filed beyond time, although, of course, such discretion has to be exercised judicially and reasonably. But the extension of time is a matter of concession or indulgence to the applicant who has come late and cannot be claimed as of right. The reason obviously seems to be that in a case of limitation the person ought to be knowing the period prescribed by law for preferring an appeal and he should take sufficient care and precaution to see that through no accident that period expires; whereas in cases of abatement, a person may be entirely unaware of the death of his opponent, in which case if he proves to the satisfaction of the court

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that he was prevented by sufficient cause from continuing the suit, the court has no discretion but to set aside the abatement or dismissal.

It follows accordingly that where the court has some discretion in the matter and allows an appeal or application to be filed beyond time as a matter of concession on being satisfied that there is sufficient cause for the delay, it is not really deciding the rights of the parties nor adjudicating upon their rights and liabilities. The order is in the form of an interlocutory order in a pending matter and the disposal of this matter does not automatically put an end to the appeal itself, which is to be dismissed subsequently.

If we were to accept the contention urged on behalf of the appellant that every order passed by a single Judge which puts an end to or terminates the proceeding, or which has by implication the necessary effect resulting in such a termination, is a judgment, the result would be that appeals would be permissible from dismissal for default, or dismissal for want of prosecution, or dismissal on non-payment of costs of printing, translation, etc. or on failure to furnish security. To hold this would be going against several decisions of this Court. We are, therefore, of opinion that the order of the learned single Judge dismissing an application under section 5 of the Limitation Act and refusing to extend time is not a judgment within the meaning of clause 10 of the Letters Patent and accordingly no appeal lies from that order.

The second question referred to us is whether in spite of an order rejecting the application for leave to appeal *in forma pauperis*, an appeal is deemed to be still pending so long as it is not rejected for being insufficiently stamped or is dismissed on the ground of limitation.

In the present case it so happened that the applicant filed not only the memorandum of appeal along with his application for leave to appeal but also filed certified

copies of the decree and the judgment. It was, therefore, possible to treat his memorandum of appeal as an appeal preferred, but without payment of proper court fees.

Before 1908, the view which prevailed in this Court as a result of the Full Bench decision in the case of *Balkaran Rai* v. *Gobind Nath Tiwari* (1) was that when a document which is insufficiently stamped is filed, it is a wholly invalid document, which cannot be treated as an appeal at all, and accordingly, as the court fee had not been paid, it is not any memorandum of appeal which can be considered. On the other hand, some of the other High Courts took a contrary view and held that it was open to the court to rectify the defect. Accordingly, in the new Code section 149 was added, under which express provision has now been made conferring power on a court, where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, to exercise its discretion at any stage and allow the person by whom such fee is payable to pay the whole or part as the case may be of such court fee, and upon such payment the document in respect of which such fee is payable is to have the same force and effect as if such fee had been paid in the first instance. This enactment undoubtedly has the effect of superseding the view expressed in the Full Bench case of this Court. The document, therefore, which does not bear the full court fee is not necessarily a mere nullity and waste paper, which cannot be looked at and dealt with at all. Thus although the document is defective, its defect can be cured if the court exercises its discretion in favour of the person from whom fee is payable; and once the fee has been allowed to be paid, the document has the same effect as if the fee had been paid at the time when the document was filed. In view of this addition in the Code, a Bench of this Court in *Muhammad Farzand Ali*

(1) (1890) I.L.R., 12 All., 129.

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v. *Rahat Ali* (1) laid down that the rejection of an application under order XLIV, rule 1 of the Code of Civil Procedure for leave to appeal as a pauper is not the rejection of the appeal itself and it is, therefore, no ground for rejecting a subsequent application for permission to pay the full court fee on the appeal. This case has not so far been dissented from by any other Division Bench, and we are of the opinion that it laid down the correct law, if it be assumed that in that case the appellant had filed copies of the decree and the judgment along with the memorandum of appeal. If, however, copies of decree and judgment are not filed at all, then the position is different and will be discussed under the next head.

So far as the deficiency in the amount of court fee paid is concerned, the position seems to be this. The learned Judge before whom it is sought to be presented may decline to receive the appeal altogether on the ground that it is insufficiently stamped. He would be perfectly justified in doing so in view of the provisions of section 6 of the Court Fees Act, under which no document of any kind specified as chargeable in the first or second schedule of the Court Fees Act shall be filed, accepted or recorded in any court of justice or shall be received or furnished by any public officer unless in respect of such document the court fee has been paid in full. It is, therefore, open to a single Judge to decline to receive the document which is insufficiently stamped, on the ground that he cannot receive it. But where the document has been received and has been accepted as having been properly presented, a single Judge should not reject the document later on, on the ground of insufficiency of court fees, unless the matter were within the jurisdiction of a single Judge. If a Division Bench alone can reject the appeal on the ground of insufficiency of court fees, then the matter should be laid before such a Division Bench.

(1) (1918) I.L.R., 40 All., 381.

The third question is whether a single Judge has jurisdiction to reject a memorandum of appeal on the ground of deficiency in the amount of court fees paid, or dismiss it on the ground of limitation, when the memorandum of appeal is not separately filed but merely accompanies the application for leave to appeal *in forma pauperis*.

The answer in the first instance depends on an interpretation of the words "a motion to admit an application" in chapter I, rule 1, sub-rule (*xii*) of the Rules of this Court. The learned advocate for the respondent relies on these words and contends before us that a motion to admit an application is distinct from the application itself and that inasmuch as such a motion is cognizable by a single Judge, the latter has jurisdiction to dismiss the application itself at the very outset. On the other hand, the learned counsel for the appellant relies on sub-rule (*x*) of rule 1 and urges before us that an application under order XLIV, rule 1 of the Code of Civil Procedure for permission to appeal *in forma pauperis* can be entertained by a single Judge only when the appeal would be within his jurisdiction and not otherwise, and that, therefore, the learned Judge should not have dismissed this application.

There is no doubt that there is a distinction between the two expressions "motion to admit an application" and "an application" in rule 1 of our Court. What the rule intends is that even though the application itself may be cognizable by two Judges and that therefore it could not be dismissed unless it was put up before and considered by a Bench of two Judges, it may be admitted by a single Judge sitting alone. A motion to admit such an application can be made before a single Judge and he can admit it; but this does not imply that he can also reject the application. If he is of opinion that the applicant has made out a *prima facie* case, and the application is fit to be admitted, he may admit it. But if, on the other hand, he is doubtful and does not consider

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that the application should be admitted, he has no power to reject it, but should order it to be put up before a Bench of two Judges, which would then finally consider whether the application should be admitted or rejected. Sub-rule (x) restricts the jurisdiction of a single Judge to dispose of an application under order XLIV, rule 1 of the Code of Civil Procedure for permission to appeal *in forma pauperis*, to only such cases in which the appeal itself would be within his jurisdiction and does not authorise a single Judge to dismiss an application for leave to appeal *in forma pauperis*, for instance, First Appeal, which can be heard and disposed of by a Bench of two Judges only. We are, therefore, of the opinion that the present matter was one which was exclusively cognizable by a Division Bench, and the application for leave to appeal *in forma pauperis* could not have been dismissed by a single Judge sitting alone, although it could have been admitted by him. We are, therefore, of opinion that a single Judge would have no jurisdiction to dismiss an application for leave to appeal on the ground that it is barred by limitation, if the valuation of the appeal is such that it is beyond his pecuniary jurisdiction.

Where, however, copies of the decree and the judgment are not filed, it is impossible to regard the memorandum of appeal as constituting a complete appeal in itself. In such an event no appeal has really been preferred, but only an application for leave to appeal has been made. If that application is granted, then there are no further requisites, and the applicant would not be called upon to furnish copies of the decree and the judgment. But if the application is rejected, the whole matter falls through, and there is no longer any appeal pending before the court. An appeal can only be preferred from a decree, and when the decree is not filed, no appeal can be considered to be pending. The memorandum of appeal in such a case must be considered as a mere appendix to the application and the

rejection of the application puts an end to the whole proceeding.

These are our answers to the three questions referred to us.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Harries and Mr. Justice Rachhpal Singh

NAND RANI (DEFENDANT) *v.* KRISHNA SAHAI AND OTHERS (PLAINTIFFS)*

1935 *March*, 11

Hindu law—Funeral expenses—Medical charges—Lien—Charge—Mother inheriting to her son—Mother's funeral expenses and medical charges paid by her daughter—Right to recover such payments—No lien or charge over the estate in respect of such payments—Succession Act (XXXIX of 1925), section 320.

In a Hindu family governed by the Mitakshara, on the death of the last male holder his widow, and after her death, his mother succeeded to the estate. The mother executed a will in favour of her daughter which, at the suit of the reversioners, was declared to be invalid. On the mother's death the expenses of her funeral were defrayed by the daughter, who was living with her, and the daughter had also advanced money for the medical treatment of the mother who had been ailing a long time before her death. In a suit by the reversioners for possession of the estate against the daughter she set up the defence that she had a lien over the estate in respect of the medical charges and funeral expenses which had been paid by her and the plaintiffs were not entitled to recover possession without paying her the money. *Held* that the defendant had no lien or charge over the estate in respect of the money spent or advanced by her.

The funeral expenses as well as the expenses of *shradh* ceremonies of the mother, or the widow, of the deceased last male holder are in the nature of legal charges, and if a person is obliged to defray those charges then the estate of the last male holder is liable to him for them. Further, if such person was in lawful possession of the estate, e.g., under a gift from the widow or the mother which is valid during her life, and during that possession he is obliged to incur such expenses, which are binding on the estate, then, possibly, he might claim a lien in

*Second Appeal No. 285 of 1931, from a decree of Muhammad Zamiruddin, Subordinate Judge of Bareilly, dated the 18th of November, 1930, confirming a decree of Ghulam Nazir, City Munsif of Bareilly, dated the 8th of July, 1929.