tention is correct. If a fresh advance in cash or in kind is made the transaction will be a loan. But the section does not say that a transaction in which no such advance is made can never be a loan. On the other hand the section is quite comprehensive and it contemplates cases in which there has been no such advance but which would nevertheless be loans. If this were not so, then there would have been no need to say in the definition "and shall include any transaction which is in substance a loan". I hold that the transaction evidenced by the second promissory note is in substance a loan within the definition given in section 2, clause (10)(*a*) of the Agriculturists' Relief Act.

The result is that the revision fails and is dismissed with costs.

MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Allsop

CHANDLER (PETITIONER) *v.* CHANDLER (RESPONDENT)* 1939 *May*, 1

Divorce—Alimony—Subsequent unchastity of wife—Effect on alimony—Order granting alimony not containing a dum sola et casta *clause—Such clause can not be implied.*

If there is no *dum sola et casta* clause in the order granting alimony to the wife upon her obtaining a decree absolute for divorce, such a clause can not be inferred or implied, and the order granting alimony should not be varied or discharged on the ground of subsequent unchastity of the wife.

Mr. *S. M. Faizullah,* for the applicant.

Mr. *S. N. Seth,* for the opposite party.

COLLISTER and ALLSOP, JJ.:—These are two cross petitions. One is by Annie Chandler praying that the alimony which was allowed to her by this Court be increased from Rs.12-8 per mensem to Rs.20 per mensem, and the other is by Thomas Henry Chandler praying that the order of alimony be discharged or modified on the ground of unchastity on the part of Annie Chandler.

*Application in (Matrimonial) First Appeal No. 388 of 1926.

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Annie Chandler petitioned for dissolution of her marriage, or, in the alternative, for judicial separation, in the court of the District Judge of Cawnpore. The District Judge, on the 27th of March, 1926, dismissed the petition for dissolution of marriage, but granted a decree for judicial separation and directed the respondent to pay his wife Rs.10 per mensem as maintenance. There was an appeal by the petitioner, i.e., Annie Chandler, to this Court, and on the 11th April, 1927, the appeal was allowed and a decree *nisi* was granted. In the course of their order the learned Judges said:

"By section 36 our powers of granting alimony are limited, until the decree is made absolute, to the sum of Rs.10, which is the sum awarded by the court below. We have no power under section 37 to grant permanent alimony until the decree is made absolute, which cannot happen until after the expiration of six months. But in order to save the parties further expenditure we express the decided opinion that when the decree is made absolute there are no grounds upon which the court ought to increase the permanent alimony to a sum larger than that which has been fixed for the alimony *pendente lite*."

At the end of their order the learned Judges said that the payment of Rs.10 a month would only continue while the petitioner remained chaste and unmarried.

The decree *nisi* was made absolute by another Bench of this Court on the 5th July, 1929. The alimony was fixed at Rs.12-8 per mensem, being Rs.2-8 in excess of the amount which had been fixed *pendente lite;* and the order of this Court confirming the decree *nisi* contained no clause to the effect that this alimony should only be paid during chastity.

It is obvious that the observations of the Bench which passed the decree *nisi* to the effect that alimony could only be paid so long as the then petitioner remained chaste and unmarried could have no effect beyond the period of interim alimony and would not be binding on

the Bench which confirmed the decree *nisi* and which passed orders as regards permanent alimony; and as we have shown, the order under which the decree *nisi* was made absolute contains no "*dum sola et casta*" clause. In *Collins* v. *Collins* (1) it was held that where, upon a decree absolute being obtained by a wife on a petition for divorce against her husband, an order is made for the payment of a fixed sum for her maintenance by the divorced husband, and in such order there is no *dum sola et casta* clause inserted, the court cannot vary the order as made where the divorced husband alleges that his wife has been guilty of adultery. The *dum sola et casta* clause must be inserted in the order; it will never be inferred. The Court observed: "The argument of the respondent's counsel really amounts to this, that in every order of the present kind which is made a *dum sola et casta* clause ought to be included; if, in fact, such a clause is inserted, it is expressed; if by any chance it is not inserted, it ought to be inferred. I cannot think that such a contention is right. When an order of this kind is made, all the circumstances of the case are considered and it is then determined, subject to any appeal that may be made, whether the *dum sola et casta* clause should be inserted; and I think that there is no more reason now for varying that order than for saying that an order which does not contain the clause ought by implication to be held to contain it. It is not suggested that the means of the husband have been altered. The only question before me is the alleged misconduct of the wife. About that I know nothing and say nothing, and in any case it is not enough to entitle the present motion to succeed."

This is authority for the proposition that if there is no *dum sola et casta* clause in the order granting alimony to the wife, that order should not be varied or discharged on the ground of subsequent unchastity. In

(1) (1910) 103 L.T. 80.

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the present case, as we have already shown, there was no such clause or condition in the order of 5th July, 1929, under which the decree *nisi* was made absolute and the amount of permanent alimony was settled. In the circumstances the petition of Thomas Henry Chandler fails and is dismissed with costs.

As regards the application of Annie Chandler for enhancement of the amount of alimony, there is an affidavit by Thomas Henry Chandler containing an averment to the effect that he has been discharged by the company in whose service he was; and in view of this affidavit learned counsel on behalf of Annie Chandler states that he does not press his application. In the circumstances this application also is dismissed with costs.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

BHAIRO KUMAR PRASAD (APPLICANT) *v.* MARKANDE GIR AND OTHERS (OPPOSITE PARTIES)*

1939

May, 2

Agra Tenancy Act (Local Act III of 1926), *section* 242(3)(*a*)—*Question of proprietary right in issue between parties claiming such right—Defendant claiming to be perpetual lessee or thekadar—Not a claim of proprietary right—Appeal—Forum.*

Where in a suit for ejectment under section 44 of the Agra Tenancy Act the defendant admits that the plaintiff is the proprietor of the holding but claims that he himself is not a trespasser but a perpetual lessee or thekadar, there is no question of proprietary right in issue between the parties claiming such right, within the meaning of section 242(3)(*a*) of the Agra Tenancy Act, and the appeal therefore does not lie to the District Judge but to the Commissioner.

Messrs. *Haribans Sahai* and *Janki Prasad*, for the applicant.

Mr. *K. L. Misra*, for the opposite parties.

IQBAL AHMAD and BAJPAI, JJ.:—This is a reference by the District Judge of Ghazipur under section 267 (2) of the Agra Tenancy Act. The reference has been made in connection with an appeal pending in his court. The suit had been dismissed by a revenue court and

*Miscellaneous Case No. 391 of 1938.