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construction which the Presidency Court has given to the law laid down by the Privy Council is not only that a twelve years' possession by a wrong-doer extinguishes the title of the rightful owner, but confers a good title on the wrong-doer. The Presidency authority is cited. In the case to which reference is here made the suit was to recover possession of certain rooms in a house, the whole of which the plaintiff admitted once to have belonged to the defendant, but which he says was sold by the defendant to his (plaintiff's) brother in the year 1857 or 1858, and from which the defendant subsequently dispossessed the plaintiff. This suit resembles the one before us as comprehending something less limited than the Judge has allowed to the word land. The plaintiff failed to establish the title on which he based his claim, but he showed that he had been in possession of the property for upwards of twelve years. It was held that, this fact being determined in his favour, the defendant's title was extinguished.

Before Mr. Justice Pearson and Mr. Justice Straight.

LAL BAHADUR SINGH (PLAINTIFF) v. DURGA SINGH AND OTHERS
(DEFENDANTS).*

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Pre-emption—Minor—Guardian.

The circumstance that a co-sharer of a village was a minor at the time of the preparation of the *wajib-ul-arz* and that document was not attested on his behalf by a guardian or duly authorized representative is not a reason for excluding him from the benefit of the provisions of that document relating to pre-emption.

The guardian of a minor is competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and the minor is bound by his guardian's act if done in good faith and in his interest.

The plaintiff in this suit, a minor, sued by his next friend, his brother and guardian, Antar Singh, to enforce his right of pre-emption in respect of a certain share in a certain mahál, basing his claim upon an agreement relating to the right of pre-emption which was recorded in the administration-paper of the mahál. That document contained the following entry regarding the right of pre-emption of co-sharers:—"If any of the co-sharers wishes to sell or mortgage

* Second Appeal, No. 537 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 2nd March 1880, reversing a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 15th December, 1879.

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his share, he shall do so in the first place to his near co-sharer: then to the co-sharers in his thoke: then to the co-sharers in the other thokes: should none of these take the share, he may transfer to a stranger." The share in suit was a share of the thoke in which the plaintiff was a co-sharer. The purchasers of the share, Durga Singh and certain other persons, were strangers. The plaintiff alleged, *inter alia*, in support of his claim that the vendor had sold the share without making him an offer of it. The defendants-vendees set up as a defence to the suit, *inter alia*, that the vendor was not bound to offer the share to the plaintiff as he was a minor, and there was no competent guardian of the plaintiff to whom an offer could have been made of the share. The Court of first instance, without deciding the question raised by this defence, gave the plaintiff a decree. On appeal by the defendants-vendees the lower appellate Court disallowed the plaintiff's claim on the ground that he was not a party to the administration-paper and consequently could not claim thereunder. The plaintiff appealed to the High Court. The Division Bench before which the appeal came for hearing (Pearson, J., and Straight, J.,) reversed the decision of the lower appellate Court and remanded the case for the trial of the issue whether, at the time of the sale, there was any person competent, as the plaintiff's guardian, to receive and accept or refuse an offer of the share in suit on his behalf. The order of remand was as follows:—

PEARSON, J. (STRAIGHT, J. concurring).—The ground upon which the lower appellate Court has disallowed the plaintiff's claim, *viz.*, that he was a minor at the time of the preparation of the *wajib-ul-arz* which was not attested on his behalf by any guardian or duly authorized representative is, in our opinion, untenable. The vendor of the share in question was bound by the provisions of that document by his contract with the other sharers, if not with the plaintiff, to offer the share to a co-sharer before selling it to a stranger; and it is not denied that the plaintiff is and was even at the time of the preparation of the *wajib-ul-arz* a co-sharer not only in the mahál, but in the very thoke in which the vendor is a sharer. The circumstance that the plaintiff was not a party to the *wajib-ul-arz* is no reason for excluding him from the benefit of the provision which

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was designed to prevent the introduction of strangers into the mahál. By the institution of this suit he has intimated his assent to that provision and will be bound by it in future. The material question for inquiry and determination is whether or not at the time of the sale there was no person competent on behalf of the plaintiff to receive an offer of the share from the vendor. If there was such a person, and presumably the minor was living under some guardianship, the vendor was bound to have made the offer to him. Having regard to the circumstance that the present suit for the enforcement of the plaintiff's pre-emptive right is brought by a person styling himself the plaintiff's guardian, it is not obvious to us why an offer of the share could not have been made to the same person on the plaintiff's behalf at the time of the sale. He may be the *de facto* and under the Hindu Law the *de jure* guardian of the minor. But as the question has not been tried by the lower Courts although raised by Durga Singh's pleadings in both the lower Courts, we think it better to remit it for trial to the lower appellate Court. The question is, as above indicated, whether at the time of the sale there was any person competent as the plaintiff's guardian to receive and accept or refuse an offer of the share in question on his behalf. On submission of the finding, a week will be allowed for objections.

The lower appellate Court found upon the issue remitted that at the time of the sale the plaintiff was living with, and under the care of, his elder brother Autar Singh, who was his natural guardian and as such competent to receive and accept or refuse an offer of the share in suit on his behalf.

On the return of this finding to the Division Bench (PEARSON, J., and STRAIGHT, J.),

Mr. *Spankie* for the defendants-vendees, respondents, contended that the guardian, natural or legal, of a Hindu minor was not competent to purchase immoveable property on behalf of the minor, and a purchase of immoveable property by him might be repudiated by the minor when he came of age. The guardian cannot therefore assert a right of pre-emption, and if he does the minor may repudiate his acts. It was not intended by the co-sharers in this case that a share should be offered to a person whose authority

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to enter into the contract of purchase might be subsequently questioned, and it was not equitable to compel a co-sharer to make a sale which was liable to be questioned. He referred to Tagore Law Lectures, 1877, Minority, (Trevelyan), Lecture X., Powers of Guardians, and *Nubo Kant Doss v. Abdool Fuleel* (1).

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellants.

The Court delivered the following judgment:—

PEARSON, J.—We cannot accept as sound the objections taken by the learned counsel for the respondent Durga Singh to the finding of the lower appellate Court on the question referred to it by our order of the 26th August last. We entertain no doubt that the guardian of a minor is fully competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and that the minor would be bound by his guardian's act if done in good faith and in his interest. Accordingly we decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

Appeal allowed.

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 January 24.

Before Mr. Justice Pearson and Mr. Justice Straight.

KHURRAM SINGH AND ANOTHER (DEFENDANTS) v. BHAWANI BAKHSH
 (PLAINTIFF.)*

Bond—Interest—Penalty.

A bond for the repayment of money lent provided that such money should be repaid on a certain date; that interest at the rate of Rs. 7-8-0 per cent. per annum should be paid at the end of every year; and that, if default were made in the payment of interest, such money should be repaid with interest at the rate of Rs. 37-8-0 per cent. per annum. The bond contained an hypothecation of immoveable property as collateral security. In a suit on the bond the obligee, the obligor having failed to pay any interest, claimed interest from the date the bond became due to the date of institution of the suit at Rs. 37-8-0, the defaulting rate. *Held*, following the principle laid down in *Dansidhar v. Bu Ali Khan* (2), that the provisions of the bond, as regards the rate of interest payable on default of the payment of interest, were in their nature penal and so excessive that, as a matter of equity, they should not be enforced.

*Second Appeal. No. 771 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mairpur, dated the 15th May, 1880, affirming a decree of Munshi Mahabir Prasad, Munsif of Etah, dated the 5th September, 1879.

(1) 20 W. R., 372.

(2) I. L. R., 3 All., 260.