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few tolahs of liquor beyond the legitimate ser are found in a person's possession. But in the present instance there was no such evidence, and the Judge very reasonably argues that the Bareilly ser being about ninety-five tolahs and the liquor discovered in Cheda Khan's possession only weighing ninety-six, the presumption of guilty knowledge should not be drawn. It is not very clear what is the precise weight intended by the expression "one ser" as mentioned in s. 19 of the Excise Act. I think it would be reasonable to assume that it contemplated the ordinary and generally accepted ser of eighty tolahs or in other words the weight of eighty rupees. It seems to me that this is a more comprehensible standard of weight by which to be guided and certainly one much more likely to be understood by the natives of this country than the "*Kilogramme des Archives*" referred to in s. 2 of Act XI of 1870. I am unaware whether this last-mentioned Act, though it has become law, has been put into practical operation, and whether the authorizations, notifications, and rules to be made under it by the Governor-General in Council have ever been issued. Under any circumstances it would seem to me expedient that for the purpose of working the penal provisions of the Excise Act as to the possession of liquor, the weight of the ser therein mentioned should be statutably defined. The appeal is dismissed.

Appeals dismissed.

APPELLATE CIVIL.

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January 4.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

BEHARI LAL (PLAINTIFF) *v.* BENI LAL (DEFENDANT).*

Mortgage—Foreclosure—Demand for payment of mortgage-debt—Power of a minor to take a mortgage—Regulation XVII of 1806, *s.* 8.

A conditional mortgagee applied for foreclosure omitting previously to demand from the mortgagor payment of the mortgage-debt. On foreclosure of the mortgage he sued for possession of the mortgaged property. The lower appellate Court dismissed the suit on the ground that the foreclosure proceedings were invalid and ineffective by reason of such omission, and in so doing directed that the demand which the mortgagee should make prior to a fresh application for

* Second Appeal, No. 1208 of 1879, from a decree of P. White, Esq., Deputy Commissioner of Jalaun, dated the 11th June, 1879, reversing a decree of Munshi Kalka Prasad, Tahsildar of Jalaun, dated the 16th December, 1878.

foreclosure should be limited to a certain amount. *Held* that the foreclosure proceedings were invalid and ineffective by reason of such omission and the suit had been properly dismissed; and that it was not competent for the lower appellate Court to put any limitation on the amount to be demanded by the mortgagee prior to a fresh application for foreclosure.

Observations by STUART, C. J., on the competency of a minor to take a mortgage.

THIS was a suit for possession of a one-anna share of a certain village. On the 30th December, 1873, one Mata, the proprietor of this share, executed a deed of conditional sale of it in favour of Behari Lal, a minor, on whose behalf the present suit was instituted by his mother. The term of the conditional sale expired on the 1st May, 1874. On the 13th December, 1874, Mata died leaving a minor son Beni Lal, the defendant in the present suit. At his death nothing had been paid on account of the mortgage-debt. On the 26th April, 1876, an application was made on behalf of Behari Lal for foreclosure of the conditional sale. This application did not state that payment of the mortgage-money had been demanded, but merely stated that the term of the conditional sale had expired and nothing had been paid. Notice of foreclosure was served on the 16th May, 1876, on Beni Lal's mother, the amount claimed being Rs. 289-9-0, being Rs. 181 principal and Rs. 108-9-0 interest. The money not having been deposited within the year of grace the present suit was instituted on the 3rd September, 1878. The Court of first instance gave the plaintiff a decree for possession of the property. On appeal by the defendant it was contended that the conditional sale was invalid, having been made to a minor, and that the foreclosure proceedings were invalid, as no demand for the mortgage-money had been made as required by law previously to the application for foreclosure. The lower appellate Court held that the conditional sale could not be repudiated because it had been made to a minor; and that the foreclosure proceedings were invalid, as no demand for the payment of the mortgage-money had been made previously to the application for foreclosure. It directed that, on fresh proceedings for foreclosure being taken, interest should not be claimed after the death of Mata. The material portion of its decision was as follows:—"As to the foreclosure proceedings, I observe that there is no mention or proof of the debt

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having been fruitlessly demanded before notice was issued: this preliminary is required by the law, and Macpherson's Treatise on Mortgages lays stress upon it as absolutely necessary: the amount claimed in the notice is Rs. 289-9-0, *i.e.*, principal Rs. 181 and interest Rs. 108-9-0, but as I have stated the bond matured on the 1st May, 1874, and Mata died on the 13th December following, and yet the plaintiff took no proceedings until now when his minor son has succeeded to the property: I think in equity no interest should be allowed after the date of Mata's death: the interest up to that date is Rs. 49-1-0, which added to the principal makes the whole amount demandable Rs. 230-1-0: for the omission above indicated, *viz.*, for basing the application for foreclosure simply on the fact that the stipulated date for payment had expired (see petition of 26th April, 1876,) without asserting or proving unavailing demands for payment, I declare the notice last issued to be void, and that a further notice of the usual one year's grace must, after all due preliminaries, be issued before suit can be brought for making the conditional sale absolute and for obtaining possession: the demand must also be limited to Rs. 230-1-0 as above stated: as Beni Lal is a mere child of some nine years old, the notice can be served on his mother Rajjo in the capacity of natural guardian."

The plaintiff appealed to the High Court, contending that the mere omission to demand payment of the mortgage-money before application for foreclosure was not a ground for reversing the decision of the Court of first instance on the merits of the case; and that the ruling of the lower appellate Court that interest should be limited to a particular period was improper.

Munshi *Hanuman Prasad*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

The following judgments were delivered by the Court:—

STRAIGHT, J.—It appears to me that the first ground of appeal has no force. The lower appellate Court finds that no demand for the amount of the mortgage-debt was ever made on the representatives of the mortgagor by the mortgagee, and that there was no

refusal by them to discharge it prior to the issue of the notice of foreclosure. The mere fact that the period limited by the bond had expired without its being satisfied did not absolve the mortgagee from the obligation of making a demand for its payment, and having failed to do so, I think the foreclosure proceedings were ill-founded and should be ineffective. They will therefore have to be recommenced *de novo*, as pointed out by the Deputy Commissioner in his judgment. To this extent therefore it appears to me that this appeal must be dismissed. With regard to the second ground urged by the appellant, I do not think it was competent for the Deputy Commissioner, in decreeing the appeal and therefore dismissing the plaintiff's claim *in toto*, to put any limitation upon the amount to be demanded by him of the mortgagor prior to the issue of fresh notice of foreclosure. The appellant, mortgagee, now stands in the same position as if he had never brought any suit or taken any steps for foreclosure, and he should be at liberty to make any such demand as he may be advised or think proper. If he asks an excessive or incorrect amount, he will do so at risk of a second failure. I therefore think that the appellant's second objection has force, and that the appeal, so far, must be allowed, and the judgment of the lower appellate Court modified, by striking out such portions of it as limit the demand to be made by the plaintiff-appellant on the defendant-respondent to the sum of Rs. 230. In this Court the parties will pay their own costs. In the appellate Court they will be paid as ordered by the Deputy Commissioner.

STUART, C. J.—Mr. Justice Straight has correctly examined this appeal on its merits, and I approve the order he proposes. But I wish to add a few remarks on a question that was mentioned at the hearing although it is not made the subject of an objection or plea in cross appeal. This question relates to the capacity of a minor or infant to enter into a mortgage transaction, and briefly stated it is whether in fact a minor can be a mortgagee. As a general rule a minor cannot contract excepting for necessaries; but there are numerous cases in the books where the contract of a minor which was clearly beneficial to him was held to be binding. This is on the general principle which is well stated in Chitty's

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Law of Contracts, 6th edition, by Russell, 1857, p. 147, s. 5, where it is said:—"It is laid down as a general rule that infancy is a personal privilege, of which no one can take advantage but the infant himself; and that, therefore, although the contract of the infant be voidable, it shall bind the other party; for, being an indulgence which the law allows to infants, to protect and secure them from the fraud and imposition of others, it can be intended for their benefit only, and is not intended to be extended to relieve those with whom they contract from liability on such contracts. Were it otherwise, the infant's incapacity, instead of being an advantage to him, might in many cases turn greatly to his detriment." Now on the just and reasonable principle thus clearly stated where a minor lends money, or is the party to whom a mortgage is taken, on terms advantageous to him, it would plainly be absurd to listen to any plea by his debtor against the validity of the contract on the score of the mortgagee's minority. And I observe it has been expressly ruled in America that an infant may be a mortgagee, and that whether he is the original grantee or takes by descent he is bound by the conditions of the deed.—Hilliard on Mortgages, 1872, vol. 1, p. 17, s. 20. The case is of course different where the minor is made the mortgagor, the advantage or disadvantage in that case depending on circumstances which cannot be appreciated or taken into account at the commencement of such transaction, and the law allows a minor as mortgagor, or as a party to any other contract where he is made the obligor, a period of three years after his coming of age in order that he may determine for himself whether he will confirm or repudiate the contract. Whether where he repudiates a Court of Equity would nevertheless step in and maintain the contract is a question I need not here discuss. It is obvious however that a different principle applies where, as in the present case, the infant or minor is simply the acceptor and holder of a pecuniary acknowledgment which in his interest it is sought to enforce, and which it clearly does not lie in the mouth of his debtor to repudiate. Of the validity therefore and binding character of the mortgage in the present case there can be no doubt, and the argument that was suggested against it must be disallowed. The appeal is dismissed without costs, but the appellant will pay the costs decreed against him by the lower appellate Court.