lant had not been a year absent from his home when the debt was contracted, and he appears to have gone only to the neighbouring district of Bareilly. It is only now since his return that they seek to enforce a liability which never entered into their consideration at the time they lent their money. The appeal is decreed by exempting appellant and his property from liability, and he will have his costs in all Courts.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

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August 6.

DARSU PANDEY AND ANOTHER (PLAINTIFFS) *v.* BIKARMAJIT LAL AND ANOTHER (DEFENDANTS) *

Hindu law—Alienation of joint undivided family property by Father—Rights of sons.

Z, a member of a joint Hindu family consisting of himself and his sons, in January, 1869, in order to raise money to pay off family debts and for family necessities, conveyed a two-anna share out of an eight-anna share of a village belonging to the family to *B*, who sued him on such conveyance for possession of the two-anna share, and obtained a decree, and possession of such share. In June, 1879, the sons and the grandson of *Z* sued *B* to recover such share. *Held*, with reference to the ruling of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), that the suit was not maintainable.

THIS was a suit by the two sons and the grandson of one Zauk Lal for possession of a two-anna share out of an eight-anna in a certain village. This eight-anna share was joint ancestral property, and a two-anna share of it had been transferred by sale to the defendants in this suit by Zauk Lal by an instrument dated the 11th January, 1869. In this instrument Zauk Lal described himself as the owner of the eight-anna share, and the instrument recited that the purchase-money, which purported to be Rs. 1,199, was required for the payment of debts and for family necessities. The defendants sued Zauk Lal upon this instrument for possession of the two-anna share, and on the 17th June, 1869, Zauk Lal having confessed judgment, obtained a decree. The defendants subsequently obtained possession of the two-anna share, and after that event Zauk Lal died. The present suit was instituted on the 2nd June, 1879. The plaintiffs claimed the two-anna share and the cancelment of the sale-deed of the 11th January, 1869, on the ground, amongst

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* Second Appeal, No. 430 of 1880, from a decree of D. M. Gardner, Esq., Judge of Gorakhpur, dated the 3rd February, 1880, reversing a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 16th September, 1879.

(1) I. L. R., 5 Calc., 148.

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others, that the sale was made without lawful necessity and without consideration. They stated as follows:—"According to Hindu law, this act of the plaintiffs' ancestor cannot be valid without the acquiescence of the plaintiffs, as the said ancestor and the plaintiffs had equal shares according to Hindu law, in the ancestral property, the transfer by the ancestor without necessity and without consideration is quite illegal." The defendants set up as a defence to the suit, *inter alia*, that Zauk Lal was "the sole master and manager of business, that the plaintiffs carried on business and lived jointly with him, that it was on the advice of his sons that Zauk Lal executed the deed of sale for a legitimate purpose; and that the plaintiffs had benefited by the consideration-money." They also set up as a defence to the suit that Zauk Lal had not transferred to them more than his legal share of the ancestral property, and that he was competent to transfer such share.

The Court of first instance dismissed the suit for reasons which it is not material to state. On appeal by the plaintiffs the lower appellate Court fixed the following issues for trial, amongst others, *viz.*, "(i) Is there any proof that the plaintiffs were parties to the sale: (ii) Is their acquiescence to be inferred from their not sooner bringing suit: (iii) Was there necessity for the sale: (iv) Had the plaintiffs' father a right to dispose of his own share." The decision of the lower appellate Court on these issues was as follows:—"On the next issue there is no proof whatever that the plaintiffs were parties to this sale: if they were parties, why were not their names conjoined; if they were present, as one of the witnesses attesting the deed affirms, why did not the vendee get them to attest as witnesses: it was surely his business not to pay away his money unless upon a deed which he knew to be valid. With regard to acquiescence of plaintiff, the case of *Duleep Singh* v. *Sree Kishoon Panday* (1) brought forward by the appellant's pleader and other decisions of the High Court show that, where a period of limitation has been fixed by law for bringing a suit, acquiescence is not to be inferred by the parties not bringing a suit at some earlier period. On the next issue, the necessity of sale, the case of *Nathu Lal* v. *Chadi Sahi* (2) above quoted and of *Bheknarain*

(1) H. C. R., N.-W. P., 1872, p. 83. (2) 4 B. L. R., A. C., 15.

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Singh v. *Janak Singh* (1) show that the purchaser is bound to make inquiries and ascertain necessity, which seems to imply that he must be in possession of some means of subsequently proving the necessity should it be denied; but so far is that from being proved in this case, that the lower Court itself thought the consideration itself could not be proved. In the deed itself the declaration of necessity is of the vaguest kind; there is said to have been an old bond of two years previously for Rs. 383, borrowed for what purpose is not stated, and the remaining Rs. 815 is said to be for debts due to mahájans and for private expenses. Yet even the witnesses of the bond do not know who these mahájans are or what were their claims, nor is this anywhere stated in the record; and the absence of mention in the registration of the payment of the money makes it doubtful whether it ever passed. On the whole, therefore, there is a presumption that the lawful necessity for the transfer did not exist. On the last point for determination, a recent decision of the High Court in *Chamaili Kuar* v. *Ram Prasad* (2) is so distinct and strong that it leaves no room for further discussion, and is to effect as follows:—On the power of a father to alienate ancestral property,—'There is a current of decisions of this (the Allahabad) High Court invalidating sales by one coparcener without the consent, express or implied, of the other coparceners,'—and the Hon'ble Judge adds: —'I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest.' Under these circumstances, I reverse the whole decision of the Subordinate Judge, and decree for appellants against respondents for possession of the two-anna share claimed, with costs throughout."

The defendants appealed to the High Court, contending that the debts to pay off which the alienation had been made had not been contracted for immoral purposes, and therefore the alienation could not be set aside; and that the plaintiffs had assented to the alienation and could not dispute its validity.

Shaikh *Maula Bakhsh*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Shah *Asad Ali*, for the respondents.

(1) I. L. R., 2 Calc., 438 (2) I. L. R., 2 All., 267.

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The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—It appears that Zauk Lal executed a deed of sale in favor of defendants on the 11th January, 1869, of a two-anna share out of an eight-anna share of property belonging to the family. The defendants obtained a decree on the 17th June, 1869, and were put in possession. Zauk Lal then died, and the plaintiffs, who are his sons and grandsons, have instituted this suit in 1879, ten years after the defendants obtained their decree, to recover the property and cancel the sale. The first Court dismissed the suit: the Judge has decreed the claim, holding that plaintiffs were not parties to the sale, and that the evidence shows a presumption that lawful necessity for the transfer did not exist, and that under such circumstances the sale is invalid even to the extent of the seller's own interest.

This decision is open to some of the objections taken in appeal. The Judge is right in his view that one co-parcener cannot alienate the joint family property without the consent of the others, but he has overlooked the circumstances in this case which render the above rule inapplicable so as to permit the plaintiffs to recover the property from the defendants. The law which applies here to the case of sons claiming to recover property sold by their father has been explicitly laid down in the recent decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), "that, where joint ancestral property has passed out of the joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover the property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted." In this case the deed of sale recites that the money was required to pay off debts and for family necessities, and there is no reason whatever to doubt this was the *bonâ fide* character of the sale, considering the plaintiffs' long acquiescence in the undisturbed possession of the defendants, nor is there even an assertion that the

(1) I. L. R., 5 Calc., 148.

money was required for immoral purposes, or that defendants had notice of the fact. Under such circumstances the plaintiffs are not in a position to succeed in their suit. We decree the appeal and reverse the decree of the lower appellate Court and restore that of the first Court which dismissed the suit with all costs.

Appeal allowed.

CRIMINAL JURISDICTION.

Before Mr. Justice Pearson.

EMPRESS OF INDIA v. GURDU AND ANOTHER.

Omission to prepare charge—Acquittal—Discharge—Revival of Prosecution—Act X of 1872 (Criminal Procedure Code), ss. 216, 220, 298.

A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. Such omission did not occasion any failure of justice. *Held*, with reference to s. 216 of Act X of 1872, Explanation I, that such omission did not invalidate the order of acquittal of such person and render such order equivalent to an order of discharge, and such order was a bar to the revival of the prosecution of such person for the same offence.

THIS was an application to the High Court for the revision, under s. 297 of Act X of 1872, of the order of Mr. J. Kennedy, Magistrate of the Ghazipur District, dated the 3rd June, 1880, convicting the petitioners of theft, an offence punishable under s. 379 of the Indian Penal Code, and sentencing them to rigorous imprisonment for four months. The petitioners were originally accused of the theft before a Magistrate subordinate to Mr. J. Kennedy. The Subordinate Magistrate, after taking the evidence of the witnesses for the prosecution and for the defence, on the 22nd April, 1880, without having prepared in writing a charge against the petitioners, determined the case in their favor. He concluded his judgment in the case in these terms:—"I find the accused, Gurdu and Birju, not guilty, and hereby acquit them." The District Magistrate, being of opinion that the Subordinate Magistrate had misappreciated the evidence against the petitioners, re-instituted proceedings against them, and, on the 3rd June, 1880, convicted them of the theft. In his judgment the District Magistrate