that precisely because it is such, it will mature by length of duration and non-acknowledgment into an absolute and independent legal right, and, no doubt, there is considerable force in this argument; and in *Cholmondely* v. *Clinton*, 2 Jac. and Walk., cited in Story's Equity Jurisprudence, 11th ed., vol. 2, page 229, it is remarked: "The mortgagee, when he takes possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit." If this be the position of the mortgagee, there could be no possession on the part of defendants adverse to the plaintiff before redemption of the mortgage; and it will make no difference in this case if we consider the mortgagees to be dealing with the property for the mortgagors and not adversely to them, for the detention of the property exercised by the mortgagees will enure for the benefit of plaintiff quite as much as defendants, since she is an heir at law of the original mortgagor and might have exercised her right to redeem the mortgage at any time so long as it was capable of redemption; and the mere payment of the annuity by the mortgagees to one of the heirs of the original mortgagor after his death will not affect the relation between plaintiff and the mortgagees.

I am of opinion that the claim in respect of the 1¼ biswa mortgaged share is not barred by art. 144, sch. ii of the Limitation Law.

STRAIGHT, J.—I concur in the view indicated by my honorable colleague Mr. Justice Oldfield, and I hold that the possession in the present case as contemplated by art. 144, sch. ii of the Limitation Act, began in 1284 fasli when the mortgage was redeemed.

APPELLATE CIVIL.

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

SARNAM TEWARI AND ANOTHER (DEFENDANTS) *v.* SAKINA BIBI (PLAINTIFF).*

Jurisdiction of Revenue Court—Wajib-ul-arz—*Act XVIII of* 1873 (*N.-W. P. Rent Act*), *s.* 93 (*a*)—*Landholder and Tenant*—*Second appeal*—*Suit of the nature cognizable in Small Cause Court*—*Act X of* 1877 (*Civil Procedure Code*), *s.* 586.

A suit by a landholder against a tenant for Rs. 130, being the value of a moiety of the produce of a grove of mangoe trees held by such tenant, such

* Second Appeal, No. 152 of 1880, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 10th December, 1879, reversing a decree of C. Rustomjee, Esq., Assistant Collector of the first class, dated the 30th September, 1879.

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BARNAM DEWARI v. MINA BIBI.

amount being claimed in virtue of an agreement recorded in the *wajib-ul-arz*, and not in virtue of any custom or right, is not cognizable in the Revenue Court, but is cognizable in a Court of Small Causes, and consequently no second appeal in the suit will lie.

THE plaintiff in this suit, who was zamindar of mauza Bishenpur, claimed from the defendants her tenants, under s. 93 (*a*) of Act XVIII of 1873, "Rs. 130, value of mangoes on account of 1286 fasli, after deducting the right of the tenants, on a balance sheet signed by the patwari." In the plaint it was stated as follows: "A mangoe grove is situated on the plaintiff's zamindari estate: the defendants have all along given half the fruits yielded by the grove to the zamindar: on account of the present year (1286 fasli) Rs. 130 are due to the plaintiff, the zamindar of the mahál, being the value of 35,000 mangoes out of 70,000 mangoes: notwithstanding that the crop had been appraised, the defendants appropriated all the mangoes including those to which the plaintiff was entitled, and they have not paid the plaintiff, zamindar, a single pice." The *wajib-ul-arz*, or administration-paper, of Bishenpur framed in 1843 contained a declaration by the zamindar regarding the grove in question and other groves to this effect, *viz.*: "Four groves have been planted by the tenants and the planters thereof are in possession of the fruit thereof: I take whatever quantity of fruit they give me of their own accord." The *wajib-ul-arz* of that village framed in 1863 declared that the zamindar was entitled to take one moiety of the produce of the groves The Assistant Collector dismissed the suit on the ground that the zamindar of Bishenpur had not at any time received any share of the produce of the grove in question in virtue of zamindari right, and the plaintiff's suit was therefore not maintainable under s. 93 (*a*) of Act XVIII of 1873. On appeal by the plaintiff the lower appellate Court, having regard to the *wajib-ul-arz* of 1863, held that the plaintiff was entitled to a moiety of the produce of the grove, and gave her a decree.

On second appeal by the defendants to the High Court it was objected on the plaintiff's behalf that the suit was one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie.

Lala *Lalta Prasad*, for the appellants.

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Mr. *Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The Court (STUART, C. J. and STRAIGHT, J.) delivered the following

JUDGMENT.—This suit was originally brought in the Court of the Assistant Collector of Ghâzipur by the plaintiff-respondent, who is a zamindar, against defendants-appellants, who are tenants, to recover the value of half the produce of a grove of mangoe trees, estimated at Rs. 130, upon the basis of a contract contained in the *wajib-ul-arz* of 1863. The Assistant Collector dismissed the claim, but on appeal it was decreed and the defendants now appeal to this Court. At the hearing a preliminary objection was taken by the counsel and pleader for the plaintiff-respondent to our entertaining the case on the ground that the suit did not fall within the terms of clause (*a*), s. 93 of the Rent Act, but was in reality based upon a contract, and as such, being cognizable by a Small Cause Court, a second appeal was prohibited by s. 586 of the Civil Procedure Code.

We are of opinion that this objection is fatal. The plaintiff claims the amount in suit by virtue of an agreement to which the defendants were parties as recorded in the *wajib-ul-arz*. She does not sue for dues payable to her in respect of any custom or right, as contemplated by cl. (*a*), s. 93 of the Rent Act, and she therefore ought to have taken her case to the Small Cause Court, if there be one in the district, whose decision would have been final. The incident therefore arises that the plaintiff, in order to prevent our hearing this appeal, seeks to take advantage of her own error in bringing her suit in the Revenue Court. For if her contention be right, the Judge might, assuming there is a Small Cause Court in her district, have dismissed her appeal on the ground that her claim had been laid in a Court that had no jurisdiction to entertain it, and s. 206 of the Rent Act would have been unavailable. It is true that the objection now urged was not taken by the defendants when respondents before the Judge, and the appeal appears to have been disposed of as an ordinary revenue case under s. 189 of the Rent Act; but we do not think we can avoid now taking notice

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of it going as it does directly to our jurisdiction to hear this appeal. In our opinion, the plaintiff's suit being of a nature cognizable by a Small Cause Court, a second appeal is precluded by s. 586 of the Civil Procedure Code. The preliminary objection must therefore prevail and the appeal will accordingly be dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Pearson and Mr. Justice Oldfield.

DEBI PRASAD AND OTHERS (DEFENDANTS) *v.* JAFAR ALI (PLAINTIFF).*

Determination of Title by Revenue Court—Res judicata—Estoppel—Act IX of 1871 *(Limitation Act), s.* 29 *and sch.* ii, *arts.* 14, 15, 118, 145—*Limitation—Suit for possession of immoveable property—Suit for a declaration of proprietary right.*

In 1864 the defendants served a notice upon the plaintiff demanding rent for land in his possession for which the plaintiff had not paid them rent previously. The plaintiff thereupon instituted a suit in the Revenue Court contesting his liability to pay rent for such land on the ground that he was the proprietor thereof. A decree was made in that suit on the 16th August, 1865, directing the plaintiff to execute a *kabuliyat* to pay the defendants rent for such land at a certain rate. The plaintiff did not appeal from that decree, but from its date until August, 1877, paid the defendants rent for such land. On the 8th August, 1877, the plaintiff instituted the present suit against the defendants in the Civil Court in which he claimed a declaration of his proprietary right to such land, and to be maintained in possession thereof as proprietor, free from the liability to pay rent, and to have the decree of the Revenue Court dated the 16th August, 1865, declared null and inoperative. *Held* that, the plaintiff's suit in the Revenue Court not being one which that Court was competent to entertain, the decision in that suit could not be held final on the question of title raised in the present suit; that there was nothing in the conduct of the plaintiff which estopped him from instituting the present suit; that the limitation applicable to the present suit was not that provided by art. 118 of sch. ii of Act IX of 1871, but that provided by art. 145 of that schedule, a suit by a person in the possession of land for a declaration of proprietary right being substantially a suit for possession of immoveable property, and the present suit was therefore within time; and that arts. 14 and 15 of that schedule were not applicable, there being no decree or order which the plaintiff was bound to have set aside within one year.

THE plaintiff in this suit, who was in the possession of twelve bighas twelve biswas of land situate in a village called Sudiapur,

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* Second Appeal, No. 132 of 1880, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 8th December, 1879, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 30th March, 1878.