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COLLECTOR OF BIJNOR, MANAGER OF THE ESTATE OF CHAUDHRI RANJIT SINGH v. JNUVAR.

if he is appointed a manager, it does not appear to me that he stands in a better or worse position than would a private individual, nor do I think he could be said to be acting in his "official capacity." This difficulty, however, does not arise in the present case. The Collector of Bijnor is not correctly speaking the manager of the estate of Chaudhri Ranjit Singh. No minute or order has been passed by the Court of Wards appointing him to such office, and he seems simply to be acting, *qua* Collector, under s. 204 of the Revenue Act of 1873, as the agent of the Court of Wards. He therefore retains in the fullest sense his character and position of Collector and as such is of course a public officer within ss. 2 and 424 of the Civil Procedure Code.

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

UMR-UN-NISSA (PLAINTIFF) *v.* MUHAMMAD YAR KHAN AND OTHERS (DEFENDANTS).*

Suit for possession of Immoveable Property—Adverse Possession—Act XV of 1877 *(Limitation Act), sch.* ii, *art.* 144.

I died in 1861 leaving a zamindari estate, a moiety of which at the time of his death was in the possession of a mortgagee. On the death of *I* the defendants in this suit, who were among his heirs, caused their names to be recorded, as his heirs, as the proprietors of such estate, to the exclusion of the plaintiff in this suit who was his remaining heir; and they appropriated to their own use continuously for more than twelve years the profits of the unmortgaged moiety of such estate, and the *malikana* paid by the mortgagee of the mortgaged property. In 1877 the defendants redeemed the mortgage of the mortgaged moiety of such estate from their own moneys. In 1878 the plaintiff sued for the possession of her share by inheritance of such estate. *Held* (SPANKIE, J. doubting), with reference to the mortgaged moiety of such estate, that the possession of the defendants in respect of such moiety did not become adverse, within the meaning of art. 144 of sch ii of Act XV of 1877, on the death of *I* in 1861, but on the redemption of such moiety in 1877, "adverse possession" under that article meaning the same sort of possession as is claimed, that is to say, in this case, full proprietary possession, which was not the nature of the possession of the defendants until the redemption of the mortgage, and the suit therefore, in respect of such moiety, was within time.

THE plaintiff in this suit claimed possession of 10 biswansis 8¾ kachwansis of a 2½ biswas share of a village called Charra Rafat-

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* Second Appeal, No. 990 of 1879, from a decree of C. W. Moore, Esq., Judge of Aligarh, dated the 23rd June, 1879, affirming a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 14th February, 1879.

pur, being her share according to the Muhammadan law of inheritance of the landed estate of her father, Izzat Khan. The defendants were the remaining heirs of Izzat Khan, two of them being his son and daughter, respectively, and the third defendant being his widow. Izzat Khan died on the 31st July, 1861, and at the time of his death a moiety of his 2½ biswas share was under mortgage and in the possession of the mortgagee. In 1877 the defendants redeemed the mortgage of this moiety. The present suit was instituted on the 11th September, 1878. The plaintiff alleged in her plaint that "the mortgaged moiety of the 2½ biswas share came into the possession of the defendants on redemption of the mortgage; that on the death of Izzat Khan she with the defendants came into possession and enjoyment of the unmortgaged moiety; but from 1282 fasli (Sept. 1874—Sept. 1875) the defendants discontinued paying her her share of the profits; and hence she sued for possession of her share of the estate." The plaintiff also claimed mesne profits from 1283 to 1285 fasli.

The defendants set up as a defence to the suit, amongst other things, that it was barred by limitation. They stated as follows: "The plaintiff's suit is barred by limitation: Izzat Khan died on the 31st July, 1861, and the defendants took possession of all the property left by him: the plaintiff neither got possession nor did she in any way enjoy the profits of the property left by Izzat Khan".

The Court of first instance held that the suit was barred by limitation, the material portion of its decision being as follows:—"On the first issue the Court finds that, when the plaintiff's suit for possession of the property left by her father Izzat Khan has been instituted in Court after twelve years from the date of the death of her father, her suit is clearly barred by limitation; and this bar cannot in any way be removed without proof of one of the two following points:—(i) That after the death of Izzat Khan the plaintiff continued to mess and live jointly with her mother and brother till 1282 fasli, as she did in his lifetime, and enjoyed the profits of the property left by her father jointly with them: (ii) That she continued to receive her legal share of the profits of the paternal estate privately. Now the Court has to observe whether the plaintiff has proved either of the points above set forth by

sufficient and good evidence or not. After a mature and careful consideration of all the facts of the case and the evidence, the Court is decidedly of opinion that she has not done so. No documentary evidence is on the record to prove and corroborate the fact that she continued to live and mess jointly with her brother and mother, or that she continued to receive her legal share of the profits of the paternal estate. The oral evidence adduced on her part is intended to support the first point, and if this evidence be admitted, it must also be accepted that the plaintiff has been messing and living jointly with the defendants within twelve years. But the oral evidence is so worthless and false that the Court can give no credence whatever to it................................ It was argued that, even if the plaintiff failed to substantiate the facts which would have removed the bar of limitation, still her claim for possession of her share of the mortgaged 1¼ *biswas* must be decreed, inasmuch as it had been mortgaged by Izzat Khan, and it was in 1284 *fasli* (1877) that the said share was redeemed from mortgage and came into the possession of the defendants, and that counting from the date of the defendants' possession, this suit was within the period of twelve years. But the Court cannot attach so much weight to this argument as the plaintiff's counsel wishes it to believe it possesses. In the opinion of the Court, the plaintiff's cause of action in respect of this 1¼ *biswas* also arose at the time when the defendants caused their names to be entered in respect thereof in the column of proprietors, enjoyed the *malikana* dues that were paid on account of that share, and began to pay the mortgage-money thereon from the income of their unmortgaged 1¼ *biswa* share, and it is an admitted fact that more than twelve years have passed since." On appeal by the plaintiff the lower appellate Court reversed the decision of the Court of first instance on the question of limitation, and remanded the case for the trial of the issues, amongst others, "Was the mortgage redeemed entirely from the income of the 1¼ *biswas* not mortgaged: if not, how much of the money required to redeem the mortgage was paid from the private resources of the defendants". The material portion of the lower appellate Court's decision was as follows: "The lower Court has found that there is no reliable evidence that plaintiff ever had

any share in the profits since her father's death and throughout the suit. But the lower Court has also found that the mortgage on the 1¼ biswas was redeemed from the income of the other 1¼ bis- was unmortgaged. This being so, it is not clear how there were any profits to share in, until the said mortgage was redeemed, two or three years ago. This Court, therefore, cannot agree with the lower Court that the defendants have shown plaintiff to be out of possession for more than twelve years under circumstances to bar her suit." The Court of first instance, pointing out that the remarks in its decision which led to the remand were erroneous, and that there were no grounds for such remarks, found that the mortgage in question was not redeemed with any portion of the profits of the un- mortgage 1¼ biswas, but was redeemed out of the private income of the defendants. On the return of these findings the lower appellate Court held that the suit was barred by limitation, "in that the plaintiff had not had possession of any part of the pro- perty, mortgaged or unmortgaged, for more than twelve years."

The plaintiff appealed to the High Court, contending that, in respect of the mortgaged 1¼ biswas, her suit was within time, as the possession of the mortgagee was not adverse to her, and the defendants only obtained possession of that share in 1877 on redemption of the mortgage.

The Division Bench (SPANKIE, J., and OLDFIELD, J.,) before which the appeal came for hearing referred to the Full Bench, with reference to this contention, the question as to whether the term "adverse possession" in No. 144, sch. ii of the Limitation Act of 1877, is confined to actual and physical possession only. The order of reference was as follows:

SPANKIE, J.—I am not satisfied that the possession referred to in art. 144 of the Limitation Act necessarily means physical and actual possession. So far as the defendants, the ostensible repre- sentatives of the original mortgagor, are concerned, the possession of the mortgagee was not adverse. The mortgagee recognized them as representatives of the mortgagor and as having the equity of redemption, inasmuch as he paid a proprietary allowance for them. The mortgagee's possession was their possession; but the position of the defendants towards the plaintiff was altogether

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different. From the death of the original mortgagor, Izzat Khan, the father of plaintiff, the defendants at once asserted a position hostile to the plaintiff. They recorded their own names, and not her's, as succeeding to Izzat Khan's estate, and they took and appropriated her share of the proprietary allowance received from the mortgagee. They did this from the time of the death of Izzat Khan in 1861. It is a mistake I think to say that defendants make any admission favourable to the plaintiff in this case. They entirely disputed her claim to possession of any portion of the property in suit. It is true that the omission to record her name as heir of Izzat Khan and as one of the owners of the property mortgaged might not be conclusive by itself against the plaintiff, but it is a circumstance in the case and has to be weighed. The Courts below have both found on the evidence that plaintiff never at any time succeeded to any portion of her father's estate, but that the defendants remained in possession of the property left by him. As the omission to record the name of the plaintiff was followed by the appropriation of the proprietary allowance received from the mortgagee, it would seem that the defendants were actually asserting a title in themselves hostile to the plaintiff; and as they themselves held all the possession in respect of the mortgaged property that the circumstances of the mortgage admitted of, and full and actual possession of all the other unmortgaged property, the plaintiff should have sued to establish her right to be considered one of the original mortgagor's representatives and entitled to a share of the proprietary allowance, and as she did not do so, her right to the property in suit, as provided in s. 28 of the Limitation Act, has possibly been extinguished. But as this view is so entirely opposed to that entertained by my honorable colleague Mr. Justice Oldfield, it might be advisable that we should lay the case before the Court at large for an expression of their opinion, whether or not in art. 144 of the Limitation Act adverse possession is confined to actual and tangible and physical possession only; and I would prefer to reserve my final and complete opinion on the point until the hearing of the case before the Full Bench.

OLDFIELD, J.—The property in suit is a 2½ biswas share of Izzat Khan, the father of the plaintiff and of the defendants Yar

Khan and Kamr-un-nissa, and the husband of Rahim-un-nissa. The plaintiff avers that $1\frac{1}{4}$ biswa was mortgaged and in the possession of the mortgagees at the time of Izzat Khan's death, and was redeemed as lately as 1284 fasli, and came into the possession of the defendants, and that the other $1\frac{1}{4}$ biswa, not mortgaged, came into the joint possession of herself and defendants on Izzat Khan's death, but defendants, in 1282 fasli, refused her the profits, and she sues for her legal share of the whole $2\frac{1}{2}$ biswas and mesne profits. The fact that the $1\frac{1}{4}$ biswa was mortgaged and in the possession of the mortgagees until 1284, when it was redeemed and came into possession of the defendants, is not disputed, and they do not dispute her right, as heir to her father, to the share she claims, but they plead that the suit is barred by limitation, that she cannot recover her share of the mortgaged $1\frac{1}{4}$ biswa without paying a proportionate amount of the mortgage-debt, which they paid, and they object to the amount of mesne profits claimed. The Court of first instance held that there was nothing to show that from the death of her father in 1861 the plaintiff had ever had any possession over the unmortgaged property, which was adversely held by the defendants. With respect to the mortgaged $1\frac{1}{4}$ biswa share, a contention was raised by the plaintiff's counsel that the Limitation Law would not apply to the mortgaged $1\frac{1}{4}$ biswa, inasmuch as it was not redeemed till 1284, when it came into the defendants' possession, and there would be no adverse possession on their part till the time of redemption, since when twelve years have not elapsed. The Subordinate Judge disposed of this contention on the ground that the plaintiff's cause of action arose when the defendants asserted their right to the property by causing their names to be entered in the revenue records, and took for themselves certain *malikana* dues paid on account of that share, and began to pay the mortgage-money thereon from the income of their unmortgaged share, since which date more than twelve years had elapsed; and the Subordinate Judge dismissed the suit on the ground that it was barred by limitation. On a remand being made, the Subordinate Judge held that the mortgaged $1\frac{1}{4}$ biswa had not been redeemed out of the profits of the unmortgaged property, and he pointed out that there was an error in that part of his judgment in which he had stated that defendants had been paying off the mortgage from the profits

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of the unmortgaged share, and he held that, in point of fact, it had been satisfied from other assets. The Judge, on the plaintiff's appeal, has accepted the finding that the unmortgaged share was not redeemed from profits of the mortgaged share, and has held in consequence that the suit is barred by limitation, "in that plaintiff has not had possession of any part of the property or proceeds of the property, mortgaged or unmortgaged, for more than twelve years." The Judge, however, further disposes of the suit on the merits, holding that, if the suit be not barred, plaintiff is entitled to the share claimed and Rs. 103-13-0 mesne profits. The plaintiff has appealed to this Court.

In so far as the objections taken in appeal refer to the unmortgaged 1¼ biswa, they must be held to fail, as the finding is one of fact, to which no valid objection can be sustained, to the effect that defendants held possession of that share since the death of Izzat Khan adversely to the plaintiff. But the objection taken in appeal in respect of the mortgaged share appears to me to be valid. Admittedly art. 144, sch. ii, Act XV of 1877, is the law of limitation applicable, and the time from which the period of limitation begins to run is "when the possession of the defendant becomes adverse to the plaintiff." We have to look, not to the fact of plaintiff's possession as the Judge seems to think, but only to whether the possession of defendants became adverse to the plaintiff twelve years before the suit was instituted. The question depends on the meaning of the terms "possession" and "adverse possession" as used in the article. Lord St. Leonards, in his Handy-book on Property Law, 7th ed., p. 214, says:—"The term discontinuance of possession means abandonment of possession by one person, *followed by the actual possession of another person*, otherwise there would be no person in whose favour time would run." It would thus seem that there must be actual possession on the part of the person setting up an adverse title by possession. Turning to the Roman Law to ascertain what was understood by possession, we find in Sandars' Institutes of Justinian, page 51 (Introduction, s. 67): "To the notion of *dominium* was opposed that of *possessio*. A person might be owner of a thing and yet not possess it, or possess it without being the owner. Possession implied actual physical occupation, or *deten-*

tion, to use the technical term, of the thing; but it also implied something more in the sense in which it was used by the Roman lawyers. It implied not only a fact, but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner, and had no claim to be so. The possessor had no rights over the thing; but he was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed"; and at page 174: "A person may not be the owner of a thing, and yet may be in a position to exercise all the rights of an owner over it, and may exercise it, with the intention to do so, as if he were the owner. He is then in Roman law called the *possessor* (see Introd. sec. 67), as opposed to a *dominus* or real owner." And at page 429 of the Institutes, it is stated that the contract of *pignus* gave the possession of the thing pledged to the creditor, but left the property in the thing with the debtor: the *hypotheca* left both the property and the possession with the debtor. A mortgagee would, in the above sense of the term, be in possession, while the mortgagor, or the defendants in this case, would not have possession, prior to redemption of the mortgage, nor am I inclined to consider that it will be otherwise under the Limitation Law.

See also Commentaries of Gaius by Tomkyns and Lemon, p. 257.

See also Story's Equity Jurisprudence, 11th ed., vol. 2, p. 223.

The plaintiff and defendants are all representatives of the original mortgagor, who appears under the terms of the mortgage to have received, as long as he lived, certain sums by way of an annuity from the mortgagees, but the receipt of this annuity did not affect the possession of the mortgagees on the property mortgaged; and if, since the mortgagor's death, defendants have appropriated the annuity to the exclusion of plaintiff, or asserted their right by causing entry of their names as proprietors in the revenue registers, those acts cannot affect the fact of possession of

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the property, or convert the possession of the mortgagees into a possession of the defendants, or constitute a possession of the property in the defendants adverse to the plaintiff, possession in the legal sense being in the mortgagees prior to redemption of the mortgage. I may add that before redemption plaintiff had no present right to possession or to sue for possession. All she might have done was to have sued for a declaration of her right and to recover the annuity, supposing she knew of the acts of the defendants; but because she did not do so, she will not be debarred her remedy by suit for possession, when such a remedy opens out to her on the mortgagees giving up possession, and so long as this remedy has not become barred by the provisions of art. 144, and it is only with the interpretation and application of this article that we have to do. I am aware that a majority of the Judges of this Court, I being one, held that the purchaser of the equity of redemption of immoveable property, which is at the time of sale in the usufructuary possession of the mortgagee, takes actual possession of the subject-matter of the sale within the meaning of that term in art. 10, sch. ii, Act IX of 1871, when the equity of redemption is completely transferred to and vested in him (1). That was a ruling under the former Limitation Law in respect of a suit brought to enforce the plaintiff's right of pre-emption in respect of a sale of property which was at the time of sale in the possession of usufructuary mortgagees. There the subject of sale was the equity of redemption which it was held at the time of sale was completely conveyed to and vested in the purchaser, who might be said to have obtained at time of sale actual possession on the subject of the sale, that is, the equity of redemption. That ruling was, however, opposed to a previous Full Bench ruling of this Court, *Gordhun* v. *Heera Singh* (2), and also to a decision of the Calcutta Court under Act XIV of 1859, and was dissented from by the Chief Justice. The question which was under decision in that case was not, however, the same as the one now before us. We have here to determine what constitutes adverse possession of immoveable property, not merely actual possession under a sale, where the subject of sale was an equity of redemption in immove-

(1) In *Jageshar Singh* v. *Jawahir Singh*, I. L. R., 1 All., 311.

(2) S. D. A., N.-W. P., January to May, 1866, p. 181.

able property; and possession to be adverse in respect of immoveable property or an interest in such property must be actual possession of the property or interest itself, which, so long as the property is in the usufructuary possession of a mortgagee, cannot be said to be held by any one else but the mortgagee. I am therefore disposed to disallow the finding that the plaintiff's suit in respect of the 1¼ biswa mortgaged share is barred by limitation; but I acquiesce in Mr. Justice Spankie's suggestion that the question as to the meaning of the term possession in art. 144, and whether the suit in respect of the 1¼ biswa mortgaged share is barred under that section, be referred for the opinion of the Full Bench.

Pandit *Ajudhia Nath* and Lala *Harkishen Das*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Oprokash Chandar Mukarji*, for the respondents.

The following judgments were delivered by the Full Bench:

STUART, C. J.—I have felt little difficulty in forming an opinion on the question submitted to us in this reference, and I may say at once that in my judgment the defendants cannot plead possession adverse to the plaintiff within the meaning of art. 144, sch. ii of the present Limitation Act XV of 1877.

The case presents a remarkable and somewhat painful illustration of native family life. The parties, plaintiff and defendants, are all members of the same family and closely connected in that relation, the plaintiff Umr-un-nissa being a daughter and the defendants the son and widow of Izzat Khan, the deceased husband and father, and Kamr-un-nissa another daughter. This Izzat Khan died in 1861, or 1268 fasli, leaving an estate of, or as a portion of his estate, 2½ biswas zamindari rights in the village of Charra Rafatpur, in the district of Aligarh. One half of that property or 1¼ biswas had been mortgaged by him, and the mortgage was subsisting at the period of his death, and it continued in the possession of the mortgagee till 1284 fasli or for about sixteen years after Izzat Khan's death, when, as before stated, it was redeemed.

Now there can be no doubt that up to this period the property mortgaged was in precisely the same position, as respects the law

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of limitation or otherwise, as if Izzat Khan himself had lived till then, but that being dead his heirs (that is, those who are entitled to represent him in respect of the mortgaged property) were similarly situated, neither more nor less, the possession of the mortgagee being up to the time of redemption the possession of all those without distinction who are now in right of the original mortgagor, in other words, the parties on both sides in the present suit. That right and interest so represented absorbed for the time and until redemption the entire estate in the mortgaged property, so that there was nothing left in the way of possession or otherwise for the one party in the family to plead against the other. In other words, Izzat Khan's widow and children had, at the period mentioned, precisely the same rights as Izzat Khan himself could have asserted had he lived till 1284 fasli. How it was that the family came to quarrel among themselves, and to such an extent as the present suit shows, one side after paying up the mortgage-debt eagerly pleading the law of limitation against the other, is not explained. The plaintiff is as I have already stated a daughter of Izzat Khan, and why her mother and other members of her family should have combined to deprive her of her natural rights it is not easy to understand. Be that as it may, something must have occurred to have brought them into collision with each other, and now we have simply to say whether the plaintiff is debarred from asserting and vindicating those rights of her's by the law of limitation pleaded. That she is so debarred in respect of the unmortgaged property is only too clear, the limitation period running against her from the time of her father's death in 1861, or 1268 fasli. But her position with respect to the mortgaged property is altogether different, for that portion of the property remained in precisely the same relation to the whole family as if Izzat Khan had continued to live till 1284 fasli, until when there was not, and could not have been from the nature of the case, any adverse possession on one side or the other, the mortgagee possessing until his mortgage disappeared by discharge of the mortgage-debt.

The Full Bench case referred to at the hearing, *Jageshar Singh* v. *Jawahir Singh* (1), is not in all respects in point. The limita-

(1) I. L. R. 1 All., 311.

tion question there arose in a pre-emption suit and related to the time under art. 10, sch. ii of the former Limitation Act IX of 1871, "when the purchaser takes actual possession under the sale sought to be impeached." But I fully adhere to the definition I gave in my judgment in that case of the meaning of the term "actual possession," as being "personal and immediate enjoyment of the profits." Now the only party having such possession in the present case was the mortgagee, and as he continued to represent, until the time of redemption, the interest of the mortgagor, there was nothing left in the way of possession for the one party to assert against the other. He possessed for them both up to and inclusive of the period of payment of his mortgage-debt, and when his incumbrance was removed the members of the family were left to their natural and equal rights, and there therefore could not possibly be adverse possession of any kind among them.

There must of course be an accounting among the parties respecting the redemption money and the mesne profits since redemption, but subject to such accounting the plaintiff is not precluded by art. 144, sch. ii of the present Limitation Act XV of 1877, from claiming her share of the 1¼ biswa which had been mortgaged by her father.

PEARSON, J.—In my opinion, in order to bar the suit under art. 144, sch. ii, Act XV of 1877, the adverse possession of the defendants must be of the same nature as that sought by the plaintiff. Now the possession sought by the plaintiff in this suit in respect of that portion of the property in suit which was mortgaged by Izzat Khan is full proprietary possession, and the defendants have only had full proprietary possession of that portion since its redemption from mortgage in 1284 fasli or 1877 A.D. Before that year it was in the possession of a mortgagee whose possession was not adverse to either party, and the circumstance that, during the period between Izzat Khan's death in 1861 and the redemption of the mortgage in 1877, the *malikana* or proprietary allowance due to both parties from the mortgagee was exclusively appropriated by the defendants is not equivalent to adverse possession of the mortgaged property by them during that period.

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SPANKIE, J.—I am willing to accept the opinion of my honorable colleagues on the point referred and to hold that art. 144 of the new Limitation Law does *not bar the suit*. At the same time I confess that the facts of the case are such that I still remain doubtful. It is not a question between a person having the equity of redemption suing the mortgagee. The latter is not concerned with the case. The plaintiff asserted that on her father's death she did obtain possession of the unmortgaged property and all the possession she could get of the mortgaged property left by him, and the Courts below have both found on the evidence that the plaintiff never at any time obtained possession of any portion of her father's estate, but that defendants remained in possession of all the property. They would not allow her name to be recorded as a proprietor, and appropriated her share of the proprietary allowance paid by the mortgagee to the mortgagor. They asserted a title hostile to her share and had all the possession that the circumstances admitted of. It is admitted now that she loses half the property, to that extent her suit being barred. I find it difficult to hold that her cause of action did not arise after her father's death when the defendants refused to admit her title.

OLDFIELD, J.—I have but little to add to what I have stated in the referring order. A person setting up adverse possession within the meaning of the Limitation Act must I apprehend show that he has exercised what is technically termed *detention* of the property for himself as owner to the exclusion of the person claiming against him, or that such *detention* if exercised by another was exercised for him, and the term *detention* has been defined to be "the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded."—Savigny on Possession, translated by Sir Erskine Perry, 6th ed., page 2. Any successful assertion of adverse possession in the immoveable property mortgaged on the part of the defendants *against plaintiff* in the case before us appears to me incompatible with the position of the mortgagees, so long as they remained in possession of the property. I find it stated in Brown's Law Dictionary, page 16: "The possession of a mortgagee is adverse to the title of the mortgagor," and the author observes

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.

1880
June 1

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 Ghâzipur, dated the 10th December, 1879, reversing a decree of C. Rustomjee, Esq., Assistant Collector of the first class, dated the 30th September, 1879.