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in which the right is exercised is not evidence under section 13 of the Evidence Act. I must respectfully differ from this view. The law appears to me to be perfectly clear both from the section itself and from the decisions to which I have already referred, and in my opinion the *ekrarnama*, Ex. 1, is evidence. This being so, the decision of the learned Subordinate Judge is based on legal evidence and is a finding of fact with which we cannot interfere in second appeal. I would accordingly dismiss this appeal with costs.

Ross, J.—I agree. There is direct authority for the admissibility of the counterpart of a lease executed in favour of a third party, in proof of title. in *Earl of Egremont v. Pulman*⁽¹⁾ and *Governor of Magdalen Hospital v. Knotts*⁽²⁾.

Appeal dismissed.

PRIVY COUNCIL.

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MAHARAJA SIR RAMESHWAR PRASAD SINGH.*

(and connected appeal).

Code of Civil Procedure, 1908 (Act V of 1908), section 47—Execution of Decree—Decree for possession of ijmalī share of mahal—Prior partition of ijmalī.

The respondent and other owners of an *ijmalī* share of a mahal obtained in 1904 a decree of a Subordinate Judge setting aside a revenue sale of the *ijmalī* and decreeing to the plaintiffs their respective shares in it. That decree was set aside by the High Court but restored in 1915 on appeal to the Privy Council. Before the decree of 1904 was made the *ijmalī* share had been partitioned under the Estates Partition Act (Ben. Act V of 1897), specific portions of the land being substituted for the shares respectively held in the *ijmalī*.

* PRESENT.—Lord Atkinson, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.

(1) (1877-78) 3 Q. B. 622.

(2) (1878) 3 Ch. D. 709.

Held, that in execution proceedings the court had power under section 47 of the Code of Civil Procedure to put the decree-holders in possession of the substituted shares and that no previous application to the Judicial Committee or separate suit was necessary.

Judgment of the High Court affirmed.

Consolidated Appeals No. 4 of 1921 from a judgment and two decrees of the High Court reversing two decrees of the Subordinate Judge of Monghyr.

The two appeals, consolidated, arose out of proceedings for the execution of a decree of a Subordinate Judge made in 1904 in favour of each of the respondents for possession of their respective shares in an *ijmali mahal*, the said decree having been restored by an order in Council made in 1915 on appeal to the Privy Council [See *Raveneshwar Prashad Singh v. Baijnath Ram Goenka*(1)]. Prior to the decree of 1904 the *ijmali* had been partitioned under the Estates Partition Act (Ben. Act V of 1897).

The facts appear fully from the judgment of the Judicial Committee.

Section 6 of above mentioned Act provides, *inter alia*, as follows :—

(1) Every decree affecting a parent estate made by a Civil Court after the estate has been declared under section 29 to be under partition, but before the date specified in the notice served under section 94,

- (a) shall be made in recognition of the proceedings in progress under this Act for the partition of the estate; and
- (b) shall be framed in such manner that the decree may be applied to, and carried out in reference to, the separate estate which the Collector in his proceeding recorded under section 29 has ordered to be formed out of the parent estate.

The Subordinate Judge dismissed the respondents' petition for execution of the Order in Council and decree of 1904, and to be put in possession thereunder of the land substituted in the partition for their respective shares in the *ijmali*.

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(1) (1915) I. L. R. 42 Cal. 897, P. C.

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Appeals to the High Court were allowed [*Maharaja Sir Rameshwar Prasad Singh v. Rai Baijnath Goenka Bahadur*(1)] and the petitions remanded for disposal. The learned judges (Sir Edward Chamier, C. J. and Roe J.) in delivering judgment said :—

I am of opinion that the irregularity or informality in the decree of the Subordinate Judge in the present case which was restored by the Order in Council does not deprive the plaintiffs of their right to recover what has been substituted for the original shares decreed to them. The question whether the plaintiffs should proceed by separate suit or in the execution department is not a matter of much importance. Section 47, subsection (2), of the present Code of Civil Procedure was intended to put an end to the scandal of persons being deprived of their rights by the difficulty of determining whether they should proceed in the Execution Department or by a regular suit. That subsection provides that the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under that section as a suit or a suit as a proceeding, and may, if necessary, order payment of any additional court-fees. It appears to me that if the decree of the Subordinate Judge is operative to any extent notwithstanding the non-compliance with section 26 of the Estates Partition Act, there is no reason why the plaintiffs should not obtain their rights in the Execution Department.

De Gruyther, K. C. and *Dube*, for the appellant : The Order in Council merely restored the decree of the Subordinate Judge. That decree as it stood could not be executed against the specific land substituted for the shares in the *ijmali*. There should have been either an application to the Privy Council to modify the decree, or a separate suit.

Sir George Lowndes and *Wallach*, for the respondents : There was power in the execution proceeding to give effect to the decree in the circumstances actually ensuing.

The Code of Civil Procedure by section 47, subsection (2), provides for exactly the situation which arose here. That provision was new. It is not really necessary to rely on that provision because the decree refers to the "properties in dispute" which cover the substituted lots.

(1) (1917) 2 Pat. L. J. 496.

De Gruyther K. C. replied: The court had not power under section 47 to allow execution of the decree. The application was not "treated as a suit".

The judgment of the Board was delivered by:—

SIR JOHN EDGE.—These two consolidated appeals are from two decrees, dated 24th April, 1917, of the High Court at Patna, which reversed the decrees, dated 22nd February, 1916, of the Subordinate Judge of Monghyr, by which the Subordinate Judge dismissed applications by the respondents here, or those whom they represent, for the execution of a decree of the Subordinate Judge of Monghyr of 30th June, 1904, which on the advice of the Judicial Committee of the Privy Council had by an order of His Majesty in Council of 3rd February, 1915, been restored, except as to villages Matasi and Mirzagunj.

In order that the questions in dispute in these appeals may be understood, it is necessary to refer briefly to some facts and to the history of the litigation in which these appeals have arisen.

Mahal Bisthazari, in the district of Monghyr, which included 360 villages, was jointly owned by a number of persons, including the respondents or those whom they represent. The owners of the specified but undivided shares had applied for and obtained from the Collector a separation of accounts under Act XI of 1859. There was left a large area of the *Mahal* called the *ijmali*, or joint share, the owners of which remained jointly liable for the revenues due, or to become due, in respect of that area. The respondents or those whom they represent owned in the *ijmali* share 14 annas, 1 dam (*pucca*) out of 16 annas (*pucca*) of village Lohara, and shares in village Padmaot and other villages. The revenue due in respect of the *ijmali* share was in arrear in 1901, and the *ijmali* share was sold by the Collector by auction on 9th September, 1901, and was purchased by Baijnath Goenka who was placed in possession as the purchaser. Applications

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to the Collector for the partition of Mahal Bisthazari had been made in 1876, and the proceedings to partition were continued under the Bengal Estates Partition Act, 1897. The partition had not been completed on 9th September, 1901, but it had been completed before the decree of the Subordinate Judge of 30th June, 1904, was made in suit No. 596 of 1902.

In 1902 the respondents or those whom they represent and other share owners brought suit No. 596 of 1902 against Baijnath Goenka to have the sale of 9th September, 1901, set aside, and to obtain possession, and the Subordinate Judge, by his decree of 30th June, 1904, set aside the sale and decreed possession and mesne profits in favour of the respondents, the mesne profits to be ascertained in execution. The Subordinate Judge, when he made that decree, apparently had not been informed that the Collector had completed the partition or indeed that proceedings for partition had been commenced. He made his decree in favour of each plaintiff or set of plaintiffs in the suit for possession of his respective share as if no partition had taken place. The shares specified in his decree are the shares to which the plaintiffs would have been entitled respectively if no partition had taken place, and section 26 of the Estates Partition Act, 1897, was not in the decree complied with. Baijnath Goenka appealed from that decree to the High Court at Calcutta and that High Court, holding that the sale was valid by its decree of 1st May, 1907, set aside the decree of 30th June, 1904, of the Subordinate Judge. From that decree of the High Court at Calcutta, the respondents appealed to His Majesty in Council. That appeal to His Majesty in Council came before the Board in 1915, and the Board taking the same view of the irregularity and invalidity of the sale of 9th September, 1901, upon which the Subordinate Judge had made the decree of 30th June, 1904, advised His Majesty that the decree of the High Court at Calcutta should be set aside and that the decree of the Subordinate Judge should be

restored, except as to the villages Matasi and Mirza-gunj, as mentioned in the Order of His Majesty in Council of 3rd February, 1915. The Board in so advising His Majesty was unaware of the proceedings for partition, and was not informed by the parties or by any one of those proceedings.

After the order of His Majesty in Council of 3rd February, 1915, had been made, the respondents applied to the Subordinate Judge of Monghyr for execution of the decree of 30th June, 1904, and for possession of the lands which had been substituted by the partition for the shares which they had been entitled to before the partition. Baijnath Goenka objected, and the Subordinate Judge, being of opinion that he could not in execution of the decree of 30th June, 1904, grant possession of the substituted shares, as they were not the shares mentioned in the decree of 30th June, 1904, and that the decree-holders could not get possession of the substituted shares without bringing a regular suit to establish their title to them, by his decree of 22nd February, 1916, dismissed the applications for execution. From that decree of dismissal the respondents appealed to the High Court at Patna. The appeals were heard together, and it was contended on behalf of Baijnath Goenka that the decree of 30th June, 1904, could not be executed, and that it would be necessary for the respondents here either to get that decree varied by an application to the Judicial Committee, or to establish their titles by a suit. The learned Judges of the High Court at Patna held that the decree of 30th June, 1904, could be executed by giving possession of the substituted shares, and that an application to the Judicial Committee was not necessary, nor was a separate suit necessary, and by their decree of 24th April, 1917, they allowed the appeals and directed the Subordinate Judge to restore the applications for execution to his pending file and to hold the enquiries necessary for ascertaining which were the shares which by the partition had been substituted for the original shares. From these

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decrees of 24th April, 1917, Baijnath Goenka brought these two consolidated appeals.

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Their Lordships agree with the High Court at Patna that the decree of 30th June, 1904, could be executed by giving these respondents respectively possession of the substituted shares, and that no application to the Judicial Committee was necessary. The questions as to what were such substituted shares were questions which arose within the meaning of section 47 of the Code of Civil Procedure, 1908, between the parties and related to the execution and satisfaction of the decree of 30th June, 1904.

At the conclusion of the arguments in these two consolidated appeals their Lordships were informed by counsel that no stay of execution having been granted, the decree of the 30th June, 1904, has been executed pursuant to the directions given in the decree of the High Court at Patna of 24th April, 1917.

Their Lordships will humbly advise His Majesty that these two consolidated appeals should be dismissed with costs.

Solicitors for appellant : *Watkins and Hunter*.

Solicitors for respondent : *T. I. Wilson, and Co.*

REFERENCE UNDER THE COURT-FEES ACT.

Before Courts, J.

RAGHUBAR SINGH

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Court-Fees Act, 1870 (Act VII of 1870), section 4—Letters Patent of the High Court of Judicature at Patna. Clause (10)—Appeal from decision of single judge, whether court-fee payable on.

No court-fee is payable on a memorandum of appeal from the judgment of a Judge of the High Court sitting singly.