

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed with costs and the suit should be dismissed with costs.

*Appeal allowed.*

Solicitors for the appellants: *Messrs. Watkins and Hunter.*

Solicitors for the respondents: *Mr. W. W. Bax.*

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 MUSSAMMAT  
 SASIMAN  
 CHOWDHURY  
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### FULL BENCH.

*Before Dawson Miller, C. J., Das and Adami, J.J.*

JUGESHAR MISRA

v.

NATH KOERI.\*

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 January, 16.

*Occupancy Holding, non-transferable—sale of portion in execution of money decree, whether binding on the tenant.*

A sale of a portion of a non-transferable occupancy holding in execution of a money decree is valid against the tenant even in the absence of the landlord's express consent and whether the decree-holder be the landlord or a stranger.

*Sadavi Kunwari v. Palknath Rai*(<sup>1</sup>) and *Macpherson v. Debibhusan Lal*(<sup>2</sup>), overruled.

*Dayamayi v. Ananda Mohan Roy Choudhury*(<sup>3</sup>), *quoad hoc*, dissented from.

*Chandra Binode Kundu v. Ala Bux Dewan*(<sup>4</sup>), followed.

*Agarjan Bibi v. Panauilla*(<sup>5</sup>), *Dwarka Nath Misser v. Hurrish Chunder*(<sup>6</sup>) and *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(<sup>7</sup>), referred to.

\* Miscellaneous Appeal No. 97 of 1921, from an order of W. H. Boyes, Esq., District Judge of Muzaffarpur, dated the 23rd February, 1921, affirming an order of B. Ram Bilas Singh, Munsif of Muzaffarpur, dated the 20th November, 1919, and Miscellaneous Appeal No. 3 of 1921, from a decision of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 26th May, 1920, affirming a decision of B. Nidheswar Chandra, Munsif of Balasore, dated the 21st August, 1920.

(1) (1916) 1 Pat. L. J. 257.

(4) (1921) I. L. R. 48 Cal. 184 (F. R.)

(2) (1917) 2 Pat. L. J. 530.

(5) (1910) I. L. R. 37 Cal. 687.

(3) (1915) I. L. R. 42 Cal. 172 (F. B.) (6) (1879) I. L. R. 4 Cal. 925.

(7) (1897) I. L. R. 24 Cal. 356.

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## Appeal by the decree-holders.

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The facts of the case material to this report are stated in the judgment of Dawson Miller, C.J.

Appeal from Appellate Order No. 97 of 1921, first came before Ross, J., on the 4th November, 1921. His Lordship passed the following order :—

Ross, J.—The question in this case involves a consideration of the decision of this Court in *J. A. J. Macpherson v. Debibhusan Lal*<sup>(1)</sup> I direct that the case be laid before a Division Bench.

Appeal from Appellate Order No. 3 of 1921, came before Das and Adami, J. J., (Circuit Court, Cuttack) on the 1st December, 1921. Their Lordships passed the following order :—

DAS AND ADAMI, J. J.—The question raised in this appeal is a very important one. It has been consistently held in this Court that except under certain circumstances non-transferable occupancy holdings cannot be sold. The decisions of our Court are admittedly based on the decision of the Full Bench of the Calcutta High Court in what is known as *Dayamoni's* case<sup>(2)</sup>. The Special Bench of the Calcutta High Court in the case of *Chandra Benode Kundu v. Sh. Ala Bux*<sup>(3)</sup> has considerably modified the first rule laid down in *Dayamoni's* case<sup>(2)</sup>. It in effect says that the tenant cannot object to a sale if the landlord consents to it. In the case before us it is the landlords who have brought the occupancy holding to sale and the question is whether the tenants can object to the sale of the occupancy holding. On the decisions of the Patna High Court, based as they are on *Dayamoni's* case<sup>(2)</sup>, the tenants can object; but on the decision of the Special Bench of the Calcutta High Court in the case of *Chandra Benode Kundu v. Sh. Ala Bux*<sup>(3)</sup>, the tenants cannot object.

We are at present unable to say that the decision of *Dayamoni's* case<sup>(2)</sup> is erroneous, but we consider the point as of very great importance as cases of this

(1) (1917) 2 Pat. L. J. 530

(2) (1915) I. C. R. 42 Cal 172 (F. B.).

(3) (1921) I. L. R. 48 Cal. 194 (F.B.).

nature are always coming before us. We think that the question ought to be decided by the Full Bench of this Court.

Place the matter before the learned Chief Justice for his orders.

*Kulwant Sahay* and *Bhagwan Prasad*, for the appellants: An occupancy holding is to all intents and purposes in the same position as other immovable property [*Chandra Binode Kundu v. Ala Bux Dewan* (1), referred to]. Hence there is no ground for holding that an occupancy holding is personal property or that occupancy rights are personal rights. It follows that the only person affected by a transfer of an occupancy holding is the landlord and it is only his consent that is necessary and not the consent of the tenant. Further, since a portion of an occupancy holding is transferable it follows that a portion of such holding is also saleable in execution of a money decree, the tenant having no right to object. [*A. J. Macpherson v. Debibhusan Lal* (2) referred to]. That was the law until 1897, when *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (3) was decided. That case has now been overruled in *Chandra Binode Kundu v. Ala Bux Dewan* (4).

Reference was also made to *Dwarka Nath Misser v. Harrish Chunder* (4), *Dayamayi v. Ananda Mohan Roy Chowdhury* (5), *Shakaruddin Choudhry v. Rani Hemangini Das* (6) and *Ananda Das v. Rutnakar Panda* (7).

*Nirsu Narayan Sinha*, for the respondent: The holder of a money decree against an occupancy *raiyat* whose holding is not transferable by custom is not entitled to bring to sale the *raiyat's* holding. It makes no difference that the decree-holder is the 16-annas landlord. (Referred to *Macpherson v. Debibhusan*

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(1) (1921) I. L. R. 48 Cal. 184 (F.B.). (4) (1897) I. L. R. 4 Cal. 925.

(2) (1917) 2 Pat. L. J. 530.

(5) (1915) I. L. R. 42 Cal. 172 (F.B.).

(3) (1897) I. L. R. 24 Cal. 355.

(6) (1911-12) 16 Cal. W. N. 420.

(7) (1902-03) 7 Cal. W. N. 572.

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*Lal* (1) ]. Prior to the passing of Act X of 1859, the Regulations or custom recognized only two kinds of tenants—*khudkast* or *paikast*. The right of transfer was never recognized. [Refers to Fields' *Introduction to the Bengal Code*, pages 31, 32, 33, 50 and 51, Sir John Sheres' *Minute* and S. C. Mitra's *Land Laws of Bengal*, page 297 ].

Even the landlord could not sell the holding in case of non-payment of rent. He could only eject. [Refers to section 15, clause (7), Regulation VII of 1799.]

Undue importance has been attached by the Special Bench of Calcutta on Construction No. 890, dated 1834. The expression used is *jote jamma*. The full facts of the case are not before us. No reason is given for that decision. There might have been special reasons or custom in the district from which the case came before the court. No general inference can be, or ought to be drawn from this solitary case. [Refers to *Mussamat Taramonee Dasse v. Birressur Mozoomdar* (2) ].

The expression "right of occupancy" was for the first time used in Act X of 1859. The occupancy right therefore is created by an Act of the Legislature and the incidents attached must be only those which are conferred upon it by the Legislature.

The question has been discussed in numerous case. [Refers to *R. Watson and Co. v. Ranee Shurut Soonduree Debia*(3), *Ajodhya Pershad v. Mussamat Imam Bandi Begum*(4), *Bibee Suhodra v. Maxwell Smith*(5), *Unnopoorna Dossia v. Ooma Churn Doss*(6), *Nurendro Narain Roy v. Ishan Chunder Sen*(7), *Bhiram Ali Shaik Shikdar v. Gopi Kanth Saha*(8), *Durga Charan Mandal v. Kali Prasanna Sarkar*(9),

(1) (1817) 2 Pat. L. J. 530.

(5) (1873) 20 W. R. 39.

(2) (1867) 1 W. R. 86.

(6) (1872) 18 W. R. 55.

(3) (1867) 7 W. R. 395.

(7) (1874) 22 W. R. 22.

(4) (1867) 7 W. R. 528.

(8) (1899) I. L. R. 24 Cal. 355.

(9) (1899) I. L. R. 26 Cal. 727.

*Majed Hossein v. Raghur Choudhry*<sup>(1)</sup>, *Sita Nath Chatterjee v. Atmaram Kar*<sup>(2)</sup>, *Badagar Sircar v. Krishna Chandra Nath*<sup>(3)</sup>, *Sheikh Jarip v. Ram Kumar De*<sup>(4)</sup>, *Peary Mohan Mukerjee v. Jote Kumar Mukerjee*<sup>(5)</sup> and *Agarjan Bibi v. Panauilla*<sup>(6)</sup>]. The decisions are based on the general ground that the right of occupancy is non-transferable.

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In *Ajodhya Pershad v. Mussamut Imam Bandi Begum*<sup>(7)</sup>, Peacock, C. J. said, "Speaking for myself, I am not at all sure that a right of occupancy gained under section 6, Act X of 1859, is necessarily heritable". This was subsequently remedied by the Legislature and the right of occupancy was made heritable. If the Legislature thought fit to make it heritable on account of this expression of opinion there was nothing to prevent it from making it transferable when all the cases cited above decided that it was not transferable. This clearly shows that the Legislature never intended that the right of occupancy should also be made transferable.

[CHIEF JUSTICE: The measure of voluntary transfer ought to be the measure of the involuntary transfer. There should be no difference between the two.]

A voluntary transfer was held valid on the ground of estoppel and on the principle that no one should be allowed to derogate from his own grant, or on the ground of equity justice and good conscience. [Refers to *Bibee Suhodra v. Maxwell Smith*<sup>(8)</sup>, *Ram Pershad Koeri v. Jawahir Roy*<sup>(9)</sup>, *Samiruddin Munshi v. Benga Sheikh*<sup>(10)</sup>, *Ayenuddin Nasya v. Srish Chandra Banerji*<sup>(11)</sup>, *Syama Charan Bhattacharjee v. Mokshoda*

(1) (1900) I. L. R. 27 Cal. 187.

(6) (1910) I. L. R. 37 Cal. 687.

(2) (1900) 4 Cal. W. N. 571.

(7) (1867) 7 W. R. 528.

(3) (1899) I. L. R. 26 Cal. 937.

(8) (1873) 20 W. R. 139.

(4) (1899) 3 Cal. W. N. 747.

(9) (1907) 7 Cal. L. J. 72.

(5) (1906) 11 Cal. W. N. 83.

(10) (1908-09) 15 Cal. W. N. 630.

(11) (1906) 11 Cal. W. N. 76.

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*Sundari Debi*(<sup>1</sup>) and *Raja Kailash Chandra Gojendra Mohapatra v. Akhoy Narain Sow*(<sup>2</sup>).

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[DAS, J : That would be illogical.]

It may be so. The law is not necessarily logical. This illogical position was recognized in *Daya Mayee's* case(<sup>3</sup>). It was held that an involuntary sale is binding when the tenant omits to set aside the sale. [Refers to *Agarjan Bibee v. Pancaulla* (<sup>4</sup>).]

A bequest was held invalid on the ground that estoppel does not apply as there is no consideration. [Refers to *Amulya Ratan Sircar v. Tarini Nath Dey*(<sup>5</sup>) and *Kunja Lal Ray v. Umesh Chandra Roy* (<sup>6</sup>).]

The Full Bench case of *Daya Mayi v. Ananda Mohan Ray Choudhry*(<sup>3</sup>) held that—

(i) The transfer of the whole or a part is operative against the *raiyat*, (a) where it is made voluntarily, and (b) where it is made involuntarily and the *raiyat*, with knowledge, fails or omits to have the sale set aside.

Thus it is clear that their Lordships did not adhere to the principle that the measure of voluntary sale is the measure of involuntary sale. Their Lordships were driven to this illogical position because of the long line of decisions holding that in case of voluntary sale, the sale would be binding on the *raiyat*. After this Full Bench case there are numerous cases of this High Court as well as of Calcutta holding that an occupancy right cannot be sold in execution of a money decree.

The law, therefore, has long been interpreted in this way and it should not be changed except by the Legislature.

*Kulwari Sahay*, replied.

(1) (1911) 13 Cal. L. J. 481.

(4) (1910) I. L. R. 37 Cal. 687.

(2) (1911) 10 Ind. Cas. 530.

(5) (1915) I. L. R. 42 Cal. 254.

(3) (1915) I. L. R. 42 Cal. 172.

(6) (1913-14) 18 Cal. W. N. 1294.

DAWSON MILLER, C. J.—These two appeals were referred to the Full Bench for final determination and were ordered to be heard together. The questions for determination are similar though not precisely the same in each case.

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Miscellaneous Appeal No. 97 of 1921 arises out of an order of the District Judge of Muzaffarpur affirming an order of the Munsif passed in execution proceedings and allowing the judgment-debtor's objection to the sale of a portion of his non-transferable occupancy holding in execution of a money decree passed in favour of the appellant who is not his landlord.

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The Munsif and the District Judge who considered that the case was governed by the decision of this Court in *Macpherson v. Debibhusan Lal* (1) allowed the objection and dismissed the execution proceeding.

On appeal a Division Bench of this Court referred the case to the Full Bench for determination and ordered it to be heard together with Miscellaneous Appeal No. 3 of 1921 which had previously been referred.

The point which arises for determination in Miscellaneous Appeal No. 97 of 1921 is whether the decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord, of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree, there being no local custom of transferability.

The case of *Macpherson v. Debibhusan Lal* (1) does not directly determine the question arising in this appeal. The question there was between landlord and tenant, the landlord seeking to execute the money decree against his tenant's holding and not against a portion only. The precise point, however, arose and was decided against the decree-holder in the earlier

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(1) (1917) 2 Pat. L. J. 530.

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case of *Sadavi Kunwari v. Palknath Rai*(<sup>1</sup>). So far as I am aware it has never been directly decided that an occupancy holder cannot transfer an interest in a part of his holding to another even without his landlord's consent, provided he does not abandon or relinquish the whole holding. Such a transaction does not create a new tenancy between the purchaser and the landlord without recognition, but it is binding between the tenant and the purchaser, and the latter has a subsisting right notwithstanding the absence of recognition by the landlord. It may be a precarious right dependent largely on the good will of the tenant but the transaction affords no ground for ejection under section 25 of the Bengal Tenancy Act. Moreover the case of *Dayamayi v. Ananda Mohan Roy Choudhury*(<sup>2</sup>) upon which the respondent relies lays down in clear terms that the transfer of the whole or a part of the holding is operative against the tenant where it is made voluntarily, and that where the transfer is of a part only of the holding the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (a) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

The question, therefore, arises whether the tenant can be made to do involuntarily at the instance of his creditor that which he can do voluntarily. In *Agarjan Bibi v. Panaculla*(<sup>3</sup>) which was also relied on by the respondent the power of voluntary transfer was said to be the measure of the power of involuntary alienation. Exactly the same view had been expressed some thirty years earlier in *Dwarka Nath Misser v. Hurrish Chunder*(<sup>4</sup>) where it was laid down that there was no ground for distinguishing a voluntary sale from a sale in execution. In *Agarjan Bibi's case*(<sup>3</sup>) it was, however, held that the purchaser of a portion of

(1) (1916) 1 Pat. L. J. 257.

(3) (1910) I. L. R. 37 Cal. 687.

(2) (1915) I. L. R. 42 Cal. 172 (F.B.). (4) (1879) I. L. R. 4 Cal. 925.



a non-transferable *raiya* *jote* could not obtain joint possession without the landlord's consent and that the tenants, other than the vendor in possession of a portion of the *jote*, could question the validity of the transfer. The interests of the co-sharers of the *jote* were involved in that case which should not be lost sight of. Assuming, however, that *Dayamayi's* case<sup>(1)</sup> is good law in so far as it denies the landlord's right to question a voluntary transfer of a portion of the holding, except under special circumstances not arising here, it is difficult to see why that which the tenant can alienate at his will cannot be the subject of a sale in execution of a decree against him. But *Dayamayi's* case<sup>(1)</sup> further laid down with regard to involuntary transfers of the whole or a part of the holding that they are valid, as against the *raiya*, only where the *raiya* with knowledge fails or omits to have the sale set aside. In so deciding the Full Bench was merely applying to sales of a whole or a part of the holding the principle embodied in *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* <sup>(2)</sup> which was to the effect that an occupancy holding was not saleable at the instance of the occupancy *raiya* or of any creditor of his other than his landlord, seeking to obtain satisfaction of his decree for arrears of rent. *Bhiram Ali's* case<sup>(2)</sup> was decided in 1897 and for the first time laid down the proposition there broadly stated. It excluded the case of a landlord seeking to sell in execution of a money decree, but up to that time there had been no decision to the effect that the holding could not be transferred in execution where the landlord was a consenting party. Indeed from 1834, when the *Sudder Dewanny Adawlat* in the case of *Neel Kanth Roy v. Casheenath Ghose* issued construction No. 890, up to 1897 the power of transfer with the landlord's consent appears not to have been questioned. *Bhiram Ali's* case<sup>(2)</sup> was generally, though not consistently, followed by the Calcutta High Court until 1920 when the whole question

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(1) (1915) I. L. R. 42 Cal 172 (F.B). (2) (1899) I. L. R. 24 Cal. 355.

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of the transferability of occupancy holdings was elaborately discussed and the authorities from the earliest times as well as the statutes relating to the subject were considered by the Special Bench of the Calcutta High Court in *Chandra Benode Kundu v. Ala Bux*(<sup>1</sup>). The view presented on behalf of the tenant in that case was that the right of occupancy was a personal right or privilege and not an interest in land capable of transfer, and that the only incidents attaching to the right were those conferred by the Rent Acts of 1859 and 1869 and the Bengal Tenancy Act of 1885 as subsequently amended. It was sought to explain the cases where a voluntary transfer of the whole or a part of the holding had been upheld as against the tenant, of which many instances might be cited, as founded on the doctrine of estoppel or the rule that the transferor cannot derogate from the grant, and it was argued that involuntary transfers might be explained on the ground of waiver. It is difficult, however, to see how these doctrines could apply so as to validate a transfer in a case where, *ex-hypothesi*, there was nothing that could be transferred. The Special Bench consisting of the Acting Chief Justice and six other Judges unanimously decided that the case of *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(<sup>2</sup>) was wrongly decided and overruled that and subsequent decisions based upon it. It further decided that the proposition laid down in *Dayamayi v. Ananda Mohan Choudhury*(<sup>3</sup>), which related to the transfer of occupancy holdings apart from local usage, required modification, and that the first proposition there laid down should be stated thus: "The transfer of the whole or a part is operative as against the *raiyat* whether it is made voluntarily or involuntarily". This decision, by establishing the validity as against the *raiyat* of all cases of transfer of a whole or a part of the holding, recognized the test formulated by Jackson J., in *Dwarka Nath v.*

(1) (1921) I. L. R. 48 Cal. 184 (F. B.). (2) (1899) I. L. R. 24 Cal. 355.

(3) (1915) I. L. R. 42 Cal. 172 (F. B.)

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*Hurrish Chunder*(<sup>1</sup>) in 1879, that the measure of the liability to involuntary alienation is the power of voluntary alienation, and removed all difficulty which might arise in the application of section 60 of the Civil Procedure Code which renders saleable in execution all property of the judgment-debtor over which he has a disposing power. It further decided that the rights of an occupancy holder is an interest in land and not merely a personal right.

We have been asked by the learned Vakil for the respondent to dissent from the views expressed by the Special Bench in *Chandra Benode Kundu's* case(<sup>2</sup>) and the arguments addressed to us have been along the same lines as those there advanced. In my opinion that case correctly expressed the law and the contrary view expressed by this Court in *Sadari Kunwari v. Palknath Rai*(<sup>3</sup>) which followed that part of *Dayamayi's* case(<sup>4</sup>) which was dissented from by the Special Bench should no longer be followed. I would answer the point of law above formulated in the affirmative. The appeal is accordingly decreed and the application for execution allowed with costs in all courts including the costs of this reference.

*Miscellaneous Appeal No. 3 of 1921.*—This appeal raises nearly the same question but the facts are somewhat different. In this case the landlord is the decree-holder and his tenant is the judgment-debtor. The decree is a money decree. The landlord sought to execute his decree by attachment and sale of his tenant's occupancy holding. It must be conceded in such a case that the landlord consents to the transfer. The Munsif and the District Judge dismissed the application for execution being bound by the decision of this Court in *Macpherson v. Debi-bhusan Lal*(<sup>5</sup>). In view of the recent decision of the

(1) (1879) I. L. R. 4 Cal. 925.

(3) (1916) 1 Pat. L. J. 257.

(2) (1921) I. L. R. 48 Cal. 184 (F.B.). (4) (1915) I. L. R. 42 Cal 172 (F.B.)

(5) (1917) 2 Pat. L. J. 530.

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Special Bench of the Calcutta High Court in *Chandra Benode Kundu v. Ala Bux*<sup>(1)</sup>, the case was referred on appeal to this Court for decision by a Full Bench. The question for determination is whether a landlord who has sued his tenant and obtained against him a money decree can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent.

This question is precisely that which arose for determination in *Chandra Benode Kundu's* case<sup>(1)</sup> and with which I have already expressed my concurrence in the above judgment. I would therefore answer the question in the affirmative and hold that *Macpherson v. Debibhusan Lal*<sup>(2)</sup> was wrongly decided. The appeal should be decreed and the application for execution allowed with costs in all the lower courts including the costs of the appeal to the High Court but not of this reference in which the parties did not appear.

DAS, J.—I agree.

ADAMI, J.—I agree.

*Appeal decreed.*

## LETTERS PATENT.

*Before Dawson Miller, C. J., and Jwala Prasad, J.*

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Jan. 17.

RAMCHANDRA MARWARI

v.

KRISHNA LAL MARWARI.\*

*Execution of Decree—Step-in-aid of, application for the issue of notice to judgment-debtor is—Code of Civil Procedure, 1908 (Act V of 1908), sections 39 and 42 Order XXI, rule 22—Limitation Act, 1908 (Act IX of 1908), Schedule 1, Article 132—Application for transfer of decree to another court for execution granted—copy of decree not transmitted—further application for execution, whether lies to first court.*

\* Letters Patent Appeal No. 42 of 1921.

(1) (1921) I. L. R. 48 Cal. 184 (F.B.). (2) (1917) 2 Pat. L. J. 530.