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in favour of the plaintiff. But that case cannot be said to be an authority for the proposition that a document which is inadmissible in evidence can be indirectly used as a piece of evidence. Mere handing the document to a witness for the purpose of refreshing his memory does not make the document a piece of evidence in the case As against that Mr. Mukharji has drawn our attention to the case of *Fengl* v. *Fengl*(1) where it was laid down that a document which requires stamp but is unstamped cannot be received in evidence except in criminal proceedings for any purpose whatever, including a collateral purpose. I would not have referred to these two cases but for the stress that was laid upon the earlier case by the learned Counsel appearing for the plaintiff because I am of opinion that the case of *Kumar Braja Mohan Singh* v. *Lachmi Narain Agarwala*(2) makes clear the purpose for which unstamped or improperly stamped documents could be used. So there being no document to prove the transaction and the oral evidence having been disbelieved by the courts below, the appellate court has passed the only order that it could pass under the circumstances, i.e. dismiss the plaintiff's suit.

I would, therefore, dismiss the appeal with costs.

SAUNDERS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

1934.

September, 20.

Before Wort and James, JJ.

SHAH ZAHIRUL HAQUE

v.

SYED RASHID AHMAD.*

Appeal—suit under section 92, *Code of Civil Procedure*, 1908 (*Act V of* 1908)—*District Judge directed by High Court*

* In the matter of First Appeal no. 70 of 1934.

(1) (1914) Pr. Div. 274.

(2) (1920) 1 Pat. L. T. 719.

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to frame a scheme and carry it into effect—Mutawalli appointed by District Judge—defeated candidate not being a party to the suit, whether has locus standi *to appeal against the order —Rule 5, Chapter VI, of the Patna High Court Rules—order of the District Judge, whether is a judicial order.*

It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute or by some authority equivalent to a statute.

Minakshi Naidu v. *Subramanya*(1), followed.

Where the order made by a Judge is in continuation of the original action, a party can appeal only if he is a party to the action or if he comes under Rule 5, Chapter VI, of the Patna High Court Rules.

Where the High Court, while disposing of an appeal which arose out of a suit instituted under section 92 of the Code of Civil Procedure, 1908, directed the District Judge to frame a scheme and the Judge, in pursuance of that order, formulated a scheme and proceeded to put it into force by selecting a Mutawalli from amongst the candidates before him, and the defeated candidate, who was not a party to the original suit but alleged himself to be a beneficiary under the trust, preferred an appeal to the High Court against the order of the District Judge.

Held, that the appellant had no *locus standi* to appeal inasmuch as neither he was a party to the suit nor he came within Rule 5, Chapter VI, of the High Court Rules.

Syed Ahmad Nawab v. *Syed Abbas Husain*(2), followed.

Held, further, that merely because the person designated by the High Court to frame a scheme and to carry it into effect was a judicial officer, it did not necessarily follow that his performance of the duties was the performance of judicial duties.

Quaere: Whether the order of the District Judge framing a scheme and carrying it into effect was a judicial order?

The facts of the case material to this report are set out in the judgment of Wort, J.

(1) (1887) I. L. R. 11 Mad. 26, P. C.
(2) (1920) 6 Pat. L. J. 43.

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Khurshaid Husnain and *Ghulam Muhammad*, for the appellant.

Hasan Jan (with him *A. H. Fakhruddin*, *K. K. Banarji*, *H. R. Kazimi* and *S. A. Khan*), for the respondents.

WORT, J.—This matter comes before us on the report of the learned Registrar expressing the view that no appeal lies. The matter arises out of an action in the Court of the District Judge, the subject-matter of the action being a wakf. The matter came on appeal to this Court whereupon, in pursuance of the order passed by this Court, the learned District Judge formulated a scheme for the management of this wakf containing certain rules which regulated the appointment and discharge of a mutawalli. Under clause (*3*) of the scheme prepared by the District Judge a committee were to present candidates from whom a mutawalli was to be appointed: two candidates were to be thus presented. Under the same clause, the learned District Judge had what has been described as extraordinary powers to appoint some person other than the candidates nominated by the committee. In the circumstances of this case it appears that he declined to exercise this extraordinary power.

What happened was that the committee met. Votes were cast for a number of candidates and names of two candidates each of whom had received seven votes were presented to the District Judge. The petitioner or appellant before us is a person who received six votes. The learned District Judge appointed one of the candidates who had received seven votes. It then appears that the petitioner or appellant presented himself before the District Judge, and attacked the character and eligibility of the two candidates who had been presented by the committee, urging upon the learned Judge to exercise his extraordinary powers in favour of the petitioner which the learned Judge declined to do.

Now two questions arise. One is whether an appeal lies from the order of the District Judge; and the other whether the present appellant has any *locus standi*. It seems to me that the matter is determined by considerations which apply to the latter question.

As regards the first question as to whether an appeal lies, it is to be noticed that in pursuance of the order of the High Court the District Judge, as I have already stated, formulated the scheme and then proceeded, in so far as is connected with the matters in dispute before us, to put it into force. No appeal was filed from the order of the Judge formulating the scheme and from that point of view it can be said that his decision with regard to this matter is final. But there is considerable doubt whether in formulating that scheme he was acting in his judicial capacity at all. It was certainly within the competence of this Court to appoint any suitable person to carry out the objects for which the learned District Judge was selected. Merely because the person designated was a judicial officer it does not necessarily follow that his performance of the duties was the performance of judicial duties; and I should have considerable doubt (if I had to decide the question) whether the formation of the scheme and carrying it into effect was a judicial order at all and in the event of the point being decided in the negative, quite clearly no appeal lay. But it seems to me that the decision of that point in the circumstances of the case would be merely academic.

In the course of the argument in the case Mr. Khurshaid Husnain has referred to the decision in *U Ba Pe* v. *U Po Sein*(1) in which the case of *Minakshi Naidu* v. *Subramanya*(2) was quoted by Heald, J.; and Mr. Husnain agrees that there can be no dispute about the proposition which was laid down by their Lordships of the Privy Council in that case which is to the following effect: "Their Lordships cannot

(1) (1927) I. L. R. 6 Rang. 97.
(2) (1887) I. L. R. 11 Mad., 26, P. C.

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assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute or by some authority equivalent to a statute". It seems to me that that proposition applies to some extent to both the points which we have to determine for the reasons which will presently appear.

WORT, J.

I now come to the consideration of the question whether the petitioner or appellant had any *locus standi*. It is admitted that in a sense the order made by the District Judge was in continuation of the original action. Now this is the most that can be said on this point in favour of the appellant; and it is a concession in my judgment to state that the order complained of was in continuation of the original action. Now if that be so, it is clear that the present appellant can appeal only if he were a party to the action or if he came under the rules of this Court (Rule 5, Chapter VI). It is clear that he is not a party to the action; he is, therefore, left with the contention that he comes under one of the clauses of Rule 5 of the Chapter to which I have referred. Mr. Husnain urges that his client is a beneficiary within the meaning of clause (*a*). The claim to be a beneficiary in my judgment is a claim entirely opposed to his present contention. If he was a beneficiary under the wakf, then the answer to his present argument is that he is represented by the person whom he chose to bring the action in which this order which he complains of was made. The other clause which he contends he comes under is clause (*d*) of Rule 5 which provides as follows:

> "A person whose interest arose after the date of such decree or order by reason of any creation or devolution of interest by, through or from any party to such decree or order."

The only part of that rule under which he can possibly come would be

> "whose interest arose after the date of such decree or order."

It is quite clear that any interest which the appellant has was the interest which arose before the order that was made. He claims and in fact is a member of that particular section of the community from which the mutawalli was to be chosen: he, therefore, claims to have an interest; but the most that can be said is that he had a hope to be chosen and nothing more. Even assuming that hope could be described in law as an interest, that interest clearly arose before the decree or order and not afterwards. It is said that the committee which nominated candidates did not act in accordance with their own rules as to voting, and that, if they had acted regularly, the presentation of the appellant would have been inevitable, and that therefore the appellant has an "interest" within the meaning of the rule. But it seems to have been forgotten that had the appellant been chosen as a candidate his election as mutawalli would have been by no means certain. The Judge might have rejected his candidature or elected some person under his extraordinary powers.

The case of *Syed Ahmad Nawab* v. *Syed Abbas Husain*(1) was referred to. The subject-matter of that action was the validity of the plaintiff's election as the mutawalli. The learned Judge who tried the suit came to the conclusion that he was not a proper person, as there were certain disqualifying features regarding his election. Das, J., deciding the case in this Court, arrived at the conclusion that he was not a beneficiary under clause (*a*), Rule 5, Chapter VI of the Patna High Court Rules, stating "he is clearly not a person mentioned either in (*b*) or (*c*). He does not in my view come within (*d*) for his own case is that he was elected mutawalli before (and not after) the date of the decree". That is the position in this case. The interest which the present appellant claims (such as it is) arose before the order complained of and, therefore, for that reason alone, it seems to me

(1) (1920) 6 Pat. L. J. 43.

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that the decision must be that the appellant has no *locus standi*. The mere fact that he appeared before the Judge urging the merits of his own candidature, in my judgment, advances his claim in this Court no further.

WORT, J.

It seems to me that the learned Registrar was right but the matter may be disposed of on the ground that the present appellant petitioner has no *locus standi*. The cross-objection of Shah Abdul Baqua Mohammad (Respondent no. 3 in the appeal) is rejected. The order of the learned Registrar is upheld with costs: hearing fee one gold mohar to respondent no. 1 and one gold mohar to respondent no. 2.

JAMES, J.—I agree.

Appeal dismissed in limine.

APPELLATE CIVIL.

1934.

September, 24, 25.

Before Wort and James, JJ.

JAGGARNATH PRASAD SAHU

v.

GANESH LAL SARAUGI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 135—*person taking up temporary lodging in the place where court is situate, how far is entitled to protection.*

Section 135, Code of Civil Procedure, 1908, provides:

"..... (3) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtears, revenue agents, and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process, other than process issued by such tribunal for contempt of court, while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal....."

* Miscellaneous Appeal no. 235 of 1934, from an order of Babu Bansi Prasad, Deputy Magistrate-Subordinate Judge of Palamau, dated the 6th September, 1934.