to twice the amount of the principal. If that limit had been reached before the institution of the suit no further interest could be allowed between that date and the date fixed for redemption.

A number of other authorities were referred to in the argument, but their Lordships do not think that they throw any doubt on the correctness of the judgments delivered in India, and that a further discussion of them is unnecessary.

For the reasons above stated their Lordships will humbly advise His Majesty that both these appeals should be dismissed. There will be no order as to costs.

Solicitors for the appellant:—*Watkins and Hunter.*

Solicitors for the respondents:—*Clarke, Rawlins and Company.*

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

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v.

HITNARAYAN SINGH.*

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October, 2.

Contribution—joint tort-feasors—liability arising out of joint wrong—right of suit—Equity—pro forma defendant, who did not contest whether liable to contribute—whether appellate court can pass a decree against a defendant who was successful in the trial court and who was not made a party in the memorandum of appeal—Code of Civil Procedure (1908) (*Act V of* 1908), *section* 151, *Order XLI, rules* 20 *and* 33—*Limitation Act*, 1908 (*Act IX of* 1908), *section* 5.

* Appeals from Appellate Decree nos. 887, 1207, 1072 and 1043 of 1932, from a decision of Mr. S. P. Chatterji, District Judge of Shahabad, dated the 19th May, 1932, modifying a decision of Mr. Muhammad Shamsuddin, Additional Subordinate Judge of Shahabad, dated the 22nd August 1930.

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D instituted a suit for declaration that he was entitled to certain Jalkar produce against *P* and others. The trial court decreed the suit in part. *D* and *P* and others filed separate appeals. *D*'s appeal succeeded. *D* executed the decree for costs and realised it from *P*. *P* then brought the present suit for contribution. The defendants asserted that there was no right of contribution between joint tort-feasors.

Held, that the doctrine of contribution was well recognised in this country. The only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover, e.g. where the party sued was a pro forma defendant in the previous suit and not personally interested in the result of it.

Mahabir Prasad v. *Darbhangi Thakur*(1), followed.

Dearsly v. *Middlewick*(2), *Real and Personal Advance Company* v. *McCarthy*(3), *Fakire* v. *Tasadduq Husain*(4), *Nand Lal Singh* v. *Beni Madhab Singh*(5), *Parsotam Das Kolapuri* v. *Lachmi Narain*(6), *Palmer* v. *Wick and Pulteney Town Steam Shipping Company*(7), *Merryweather* v. *Nixan*(8), *Nihal Singh* v. *Collector of Bullandshahr*(9) and *Palepu Narain Murti* v. *Chandrayya*(10), reviewed.

It was inequitable to decree the suit against the defendant who never intended to contest the suit and whose names were by inadvertence included in the list of contesting defendants.

Held, also that order XLI, rules 20 and 33 cannot be applied to the case of a defendant against whom the suit had been dismissed by the trial court and he was not impleaded as a respondent in the memorandum of appeal, without an application under section 5 of the Limitation Act, 1908.

(1) (1919) 4 Pat. L. J. 486.
(2) (1881) L. R. 18 Ch. Div. 230.
(3) (1881) L. R. 18 Ch. Div. 362.
(4) (1897) I. L. R. 19 All. 462.
(5) (1918) I. L. R. 40 All. 672.
(6) (1922) I. L. R. 45 All. 99.
(7) (1894) A. C. 318.
(8) (1799) 8 T. R. 186.
(9) (1916) I. L. R. 38 All. 237.
(10) (1927) 102 Ind. Cas. 835.

Appeal by the defendants.

The facts of the case material to the report are stated in the judgment of Fazl Ali, J.

Anand Prasad and *Brahmdeo Narayan* in S. A. 887, 1207, *K. K. Banerjee* in S. A. 1043, *Yusoof* and *Rai I. B. Saran* in S. A. 1072, for the appellants.

S. N. Bose and *K. Dayal*, for the respondent.

FAZL ALI, J.—These four appeals arise out of a suit for contribution instituted by the respondent under the following circumstances :—

The defendants first party in the present action being proprietors of Mahal Pipra Jaipal instituted a suit (Title Suit no. 106 of 1914) in the year 1914 for a declaration that they were entitled to raise boro (a kind of paddy) in a jalkar known as Panchdah which according to them appertained to their mahal. Their case was that a small river known as the Gangi branched itself into five streamlets which were known by the name of Panchdah and although these streamlets flowed through different villages, the jalkar right in the Panchdah had been recognised as a separate estate and being assessed with a separate revenue had been attached to the mahal Pipra Jaipal. Title Suit no. 106 of 1914 was resisted by the plaintiff and a number of other persons who had been impleaded as defendants, these being mostly persons through whose estate the river flowed. The Subordinate Judge who tried the suit held that the plaintiffs in that suit (defendant first party of the present action) were entitled to the boro produce of $11\frac{1}{2}$ bighas only. From the decision of the Subordinate Judge two appeals were preferred to this Court, one (Appeal no. 35 of 1917) by the plaintiffs of Title Suit no. 106 (defendants in the present action) and the other (Appeal no. 31 of 1917) by the present plaintiff and certain other defendants of Suit no. 106. Appeal no. 35 was allowed with costs against the contesting respondents excepting one of the respondents who was

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held to be entitled to recover his costs from the plaintiffs (the defendants first party in the present action) and the other appeal (Appeal no. 31 of 1917) was dismissed. Subsequently the defendants first party executed their decree for costs against the present plaintiff alone and realised from him the sum of Rs. 2,732. The plaintiff thereupon brought the present suit for contribution against some of the defendants in Suit no. 106 of 1914 or their heirs whom he described as defendants second party. These appeals are preferred by some of the defendants against whom the suit has been decreed.

I shall first deal with Appeal no. 1207 which has been preferred by defendant no. 5 who was defendant no. 79 in the suit of 1914. Only two points have been urged in this appeal and these are (1) that the present suit is not maintainable because the plaintiff has not joined certain necessary parties in the suit and (2) that a defendant cannot by suit enforce contribution for costs against a co-defendant.

The first point does not require any elaborate examination. The lower appellate court has considered the point fully and has held that all the necessary parties have been joined in the suit as defendants. I find that certain persons were specifically named in the written statement filed by defendants 5, 6 and 7 as persons who ought to have been made defendants and in the grounds of appeal which have been filed in this Court it is reiterated that those persons were necessary parties to the suit. The trial court on the basis of this contention disallowed the plaintiff's claim as to the costs of the original court. In appeal, however, the learned District Judge admitted in evidence the order-sheet of the case and held that all the contesting defendants had been made parties and as no costs had been allowed against the non-appearing defendants, they were not necessary parties. It was not stated in this Court that any of the persons specifically named in the

written statement were among the contesting defendants but at a late stage of the argument it was suggested that one Kalika Prokash, an heir of original defendant no. 77, and defendant no. 115 of the suit of 1914 should have been impleaded in this action. This argument has been fully met by the learned Advocate for the respondent on its merit but the short ground on which it may be disposed of is that these names should have been mentioned in the court below and new facts cannot be investigated in second appeal.

The second point raises a difficult question of law. It is now well recognised principle that ordinarily there is no right of contribution between joint tort-feasors and relying upon this rule it has been held in some cases that a defendant cannot realise from a co-defendant his quota of costs for which both the defendants were held jointly liable. In *Dearsly* v. *Middlewick*(1) Fry J., observed—" I shall follow the dictum which has been cited to me from the Court of Appeal in *Real and Personal Advance Company* v. *McCarthy*(2) and hold that a defendant cannot proceed against a co-defendant for contribution in respect of costs to which both are equally liable." In *Fakire* v. *Tasadduq Hussain*(3) a Division Bench of the Allahabad High Court dismissed a suit for contribution by one defendant against his co-defendants and the learned Judges who delivered the judgment in that case observed—" It appears to us that it lay upon the plaintiff to show that there was either some contract between him and the defendants or some equity which created a duty on these defendants to contribute to the costs in question as between themselves. Apparently the plaintiff and the defendants here were wrong-doers. They were holding on to the property to which the plaintiff in the former suit was entitled and to which they or either any of them were not entitled. Each was acting independently and for his own benefit in

(1) (1881) L. R. 18 Ch. Div. 230.
(2) (1881) L. R. 18 Ch. Div. 362.
(3) (1897) I. L. R. 19 All. 462.

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setting up a title against the plaintiff to the former suit which was independent of and separate from and inconsistent with the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other and there was no equity between these persons whose cases were antagonistic to each other." This decision was followed by another Bench of the same Court in *Nanda Lal Singh* v. *Beni Madhab Singh*(1) and the same view appears to have been taken in some cases of the Madras High Court also. There are, however, a series of cases in which it has been pointed out that it cannot be laid down as a general rule that a defendant can in no case recover costs from a co-defendant and though the case-law on the subject is highly conflicting it is now well established that a distinction should be drawn between the cases where the tort-feasors were aware of the fact that they were acting without a semblance of right in themselves and those cases where the tort is committed more or less innocently and in good faith with a semblance of one's rights although these rights did not actually exist. In some cases a distinction has also been drawn between the position *inter se* of two co-plaintiffs who are " all in the same boat pulling together. Their objects, aims and interests are *ex necessitate* identical and mutual " and the defendants " who have been pushed into the same boat whether they like it or not and if their interests are adverse inter se, they cannot pull together ", see *Parsotam Das Kolapuri* v. *Lachmi Narain*(2). It is said that where two or more persons join in an attack it may be presumed that there was an implied contract between them that they will share in the gain or the loss but no such presumption can be raised where the interests of the various co-defendants are not identical but conflicting. These distinctions are useful, but I think that there is a more vital distinction which should not be overlooked and that is the distinction

(1) (1918) I. L. R. 40 All. 672.
(2) (1922) I. L. R. 45 All. 99.

between cases of contribution for damages as between two joint tort-feasors and cases where contribution is claimed for costs or damages as between two co-defendants after a decree has been passed holding them both jointly and severally liable. This distinction was drawn in very forceful language by Lord Herschell in *Palmer* v. *Wick and Pulteney-Town Steam Shipping Company*(1) in which one of the defendants was held entitled to claim contribution of half the damages and half the costs against a co-defendant on the ground that his claim rested on a decree which created a civil debt. In that case Lord Herschell pointed out that although it is too late to question the decision in the case of *Merryweather* v. *Nixan*(2) [upon which the general rule of non-contribution as between joint tort-feasors is founded] it did not appear to be based on any principle of justice or equity which would justify its extension to the jurisprudence of other countries. This remark has been quoted as authority for not extending the principle of *Merryweather* v. *Nixan*(2) beyond certain limits in this country in various cases [see *Nihal Singh* v. *Collector of Bulandshahr*(3) *Palepu Narain Murti* v. *Chandrayya*(4) and *Mahabir Prasad* v. *Darbhangi Thakur*(5)]. It appears to me that the decision of Sir Dawson Miller in the last mentioned case fully meets the points which have been raised before us in the present appeal and having regard to the clear and well-reasoned decision of his Lordship we have no hesitation in adopting his view for the purpose of deciding the present case. In that case the learned Chief Justice expressed his views in these terms:—"It seems clear, therefore, that the doctrine of contribution is well recognised in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand

(1) (1894) A. C. 318.
(2) (1799) 8 T. R. 186.
(3) (1916) I. L. R. 38 All. 237.
(4) (1927) 102 I. C. 835.
(5) (1919) 4 Pat. L. J. 486.

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that the plaintiff should not recover as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it." These remarks merely emphasise the fact that the claim of the plaintiff being based not upon any contract but uopn the principle of equity cannot be enforced against a person against whom it will be inequitable to enforce it. Keeping this principle in view we have to decide whether there is any equity in favour of defendant no. 5 who is the appellant in Appeal no. 1207. As the argument advanced on behalf of this defendant is only the general argument that no suit for contribution can lie against a co-defendant and we can find no special circumstances in his favour, I think his appeal must be dismissed with costs.

Different considerations, however, apply so far as the remaining three appeals are concerned and in my opinion these appeals should be allowed.

Appeal no. 1043 has been preferred on behalf of defendants nos. 14 and 15 who were defendants 116 and 117 in Suit no. 106 of 1914. It appears that they were minors when they were substituted as defendants in place of their deceased father and a written statement was filed on their behalf through a pleader guardian. The written statement has been placed before us and although certain formal objections appear to have been taken in the earlier paragraphs of their written statement to the claim of the plaintiff, paragraph 5 was to this effect—

"That these defendants have unnecessarily been made party-defendants in the suit. These defendants beg to submit that they have no concern whatsoever with the Gangi rivulet or its streamlet and branches nor have they any concern with the mahal in suit. These defendants are malik in Chandwa which has separate tauzi and khewat except that these defendants are tenants residents of village Pakri."

It appears to me that these defendants never intended to contest the suit and even though their names may have been by inadvertence included in the list of contesting defendants, it will be inequitable to decree the

plaintiff's claim as against them. The appeal of these defendants must therefore be allowed.

Appeal no. 887 has been preferred on behalf of defendant no. 7 whose father was defendant no. 81 in Suit no. 106 of 1914 but he died during the pendency of the appeal in the High Court. Defendant no. 7 thereupon brought a title suit before the Subordinate Judge for a declaration that the decree passed by the High Court was not binding upon him as it had been passed against a dead person. He ultimately succeeded in getting this declaration from the High Court and he also got a declaration as to his title as owner in the stream in dispute. Another point in favour of defendant no. 7 is that the present suit was dismissed against him by the trial court and his name did not appear in the memorandum of appeal which was filed by the plaintiff before the District Judge. The learned District Judge, however, has granted a decree against him applying the provision of Order 41, rules 20 and 33 and section 151 as against him. In my opinion, however, none of these provisions were properly speaking applicable and the appeal would have been competent against defendant no. 7 only if the court below had extended the period of limitation as against him under section 5 of the Limitation Act. In the circumstances of the case I think that the plaintiff's claim should be disallowed so far as defendant no. 7 is concerned and his appeal should also be allowed.

Appeal no. 1072 has been preferred on behalf of defendant no. 10 who was impleaded as defendant no. 121 in Suit no. 106 of 1914. It appears that one Musammat Walihan, the mother of this defendant, was defendant no. 107 in the suit and after her death this defendant was impleaded as defendant no. 107 also. Defendant no. 107 has been treated throughout as a contesting defendant, but it appears that only one written statement was filed by defendant no. 10 and on the basis of that written statement the suit was dismissed against him and he was awarded costs

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against the plaintiffs of Suit no. 106 of 1914. He also did not join the plaintiffs of the present action and the other contesting defendants in appealing to the High Court from the decision of the Subordinate Judge in Suit no. 106 of 1914. The courts below have allowed the plaintiff's claim against defendant no. 10 on the ground that he had a dual capacity. Technically this may be so, but we find that he filed only one written statement and he evidently succeeded upon that written statement and remained satisfied with the decision of the Subordinate Judge. In my opinion it will not be equitable to grant contribution against him and his appeal must also be allowed.

A point was taken on behalf of the respondent that if any of the present appeals is allowed the amount of contribution decreed against the other defendants should be proportionately increased. In my opinion in the special circumstances of the case the plaintiff's prayer cannot be granted. The prayer can be granted only upon hearing many of the defendants in the suit who have not appealed against the decision of the court below and have not entered appearance in this Court and besides the amount which has been decreed as against defendant no. 5 and the other defendants who have not appealed is very much in excess of the amount which was claimed by the plaintiff in the schedule attached by him to the plaint. Besides, as was pointed out in *Mahabir Prasad* v. *Darbhangi Thakur*(1) in appropriate cases the liability may be apportioned in unequal shares and it appears to me that the plaintiff should not be allowed to throw an additional burden upon any of the defendants at this stage of the litigation.

I would thus dismiss S. A. 1207 with costs and allow the other appeals and dismiss the plaintiff's suit as against defendants 7, 10, 14 and 15 but direct that in appeals other than Appeal no. 1207 each party should bear his own costs throughout.

LUBY, J.—I agree.

Appeal no. 1207 *dismissed.*
Appeals nos. 887, 1043 *and* 1072 *allowed.*

(1) (1919) 4 Pat. L. J. 486.