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to repeal the words in the local Act, which are on the above hypothesis opposed to the section quoted of the Criminal Procedure Code. The uncertainty of procedure resulting from the Government resolution referred to render it desirable to submit the reference to the High Court with a hope that the point may be decided."

There was no appearance on behalf of the accused or the Crown.

WEST, J.—The special local law has been preserved by the Code of Criminal Procedure (Act X of 1882) whether intentionally or through oversight. The view taken by the Legal Remembrancer is correct, and the District Magistrate of Kaládgi should be so informed.

Report of the Legal Remembrancer referred to :—"I am of opinion that the last nine words of section 23 of the Bombay District Police Act, VII of 1867, are still in force, notwithstanding the provisions of section 495 of the Criminal Procedure Code (Act X of 1882).

"2. Section 2 of the Code directs that, in the absence of any specific provision to the contrary, no local laws shall be affected by anything in that Code. As, therefore, it is not expressly stated that section 495 is to be in force in this Presidency notwithstanding section 23 of the above local Act (the last nine words of which are not, like the corresponding words in section 24 of Act V of 1861, repealed by the Code), section 495 must, I think, be read so as not to affect the provision of the Bombay District Police Act, VII of 1867.

"3. The omission to repeal the last nine words of the last-named Act was probably not intentional, and it might be brought to the notice of the Government of India, or a Bill might be introduced into the Legislative Council of this Presidency for repealing those words."

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

DATTU (ORIGINAL DEFENDANT), APPELLANT, *v.* KASA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

June 24.

Limitation—Practice—Point of limitation taken for the first time in second appeal—Omission of Court of first instance to reject a plaint for limitation, effect of.

The plaintiff's suit to recover certain lands was dismissed by the Court of first instance and by the lower Appellate Court, but on second appeal was remanded for

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determination of plaintiff's alleged right of perpetual cultivation of the land. On remand the District Judge gave a decision in favour of the plaintiff. The defendant appealed to the High Court, and then for the first time raised the point of limitation.

Held that the objection was taken too late. The defendant had the opportunity of raising his objection under the Limitation Act and, if necessary, of getting any question, on which it depended, tried by the Courts below; and as he took no steps to this end he should be taken to have waived his right to raise the objection. The omission of the Court of first instance to reject the claim, if erroneous, gave the defendant a right of appeal which he might renounce, and virtually did renounce. The obligation resting on the Court of first instance to reject a plaint, which on the face of it is barred by limitation, is not expressly laid on each successive Court whenever the objection comes to view, and ought not to be assumed by inference.

THIS was a second appeal from the decision of R. F. Mactier, District Judge of Sátára.

The plaintiff sued to recover certain lands which had been sold in execution of a decree against Sydu and Ganesh claiming to have a right of perpetual cultivation therein. Her suit was dismissed by the Court of first instance and the lower Appellate Court, but on second appeal was remanded for a determination as to the plaintiff's alleged right of perpetual cultivation. The District Judge on remand gave a decision in the plaintiff's favour.

The defendant now appealed to the High Court, and for the first time contended *(inter alia)* that the claim of the plaintiff was barred by limitation.

Ghanashám Nilkanth Nádkarni for the appellant.

Pándurang Balibhadra for the respondent.

WEST, J.—There was, apparently, an objection of limitation to the institution of the suit in this case which might have been urged by the defendant or raised by the Court of first instance under the Limitation Act, IX of 1871, sec. 4. This objection, however, if it could really have prevailed, was not taken either in the Court of first instance or in regular or special appeal. The cause was remanded by this Court expressly for adjudication on the issue of whether the plaintiff had proved his right of perpetual tenancy, and this having been found in his favour, it is now sought in second appeal by the defendant to raise the objection of limitation. We think that at this stage the

objection comes too late. The District Court could not on remand dispose of the case on any issue except the one prescribed to it. The defendant had the opportunity of urging his objection under the Limitation Act, and, if necessary, of getting any question on which it depended tried by the Courts below; and as he took no steps to this end, he must be considered to have waived his right to raise the objection.

This is substantially admitted; but it is urged that as the bar of limitation arises from what appears in the plaint, the Court of first instance was bound to reject it, and that the same obligation rests on each Court in succession whenever the objection comes to view. We do not think that this suggestion agrees with the former decisions in analogous cases, and the defendant's pleader does not cite one directly in point. In the case of *Koylash Chunder Ghose* v. *Shaik Ashruf Ali* (1) it was held that failure to make a special appeal against a possibly wrong decision in favour of a Munsif's jurisdiction barred the defendant from afterwards raising that question when the cause after being tried by the Munsif was brought up in special appeal. According to *Temulji Rustomji* v. *Fardunji Kávasji*(2) the lower Court would have no competence on the remand made to it to entertain the objection now raised. The omission of the Subordinate Judge here to reject the claim, if it was erroneous, gave to the defendant a right of appeal which he might renounce, and did virtually renounce. The duty of rejecting the suit under such circumstances as the present is not expressly laid on the High Court, and ought not, we think, to be assumed by inference.

On the merits the District Judge's finding of facts is conclusive. We, therefore, confirm the decree of the District Court with costs.

(1) 22 W. R., 101, C. R. (2) 5 Bom. H. C. Rep., 137, A. C. J.