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that the judgment against which the applicants desire to appeal affirmed the lower Court's decision on all points on which we had to adjudicate, and dismiss this application with costs.

BHIDE J.—I agree.

A. N. C.

Application dismissed.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Dec. 17.

ZAFFAR HUSSAIN (DEFENDANT) Appellant

versus

MOHAMMAD GHIAS-UD-DIN AND ANOTHER (PLAINTIFFS)
MST. WAZIR BEGUM AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 100 of 1936.

Trespassers — Adverse possession — wrongful possession by some of the Co-heirs of the property allotted on partition to another Co-heir — whether in their own right or as agents of the other Co-heir — Muhammadan Law — Wakf *— Serai — built out of funds coming from the estate of deceased owner — but not dedicated by him — whether* wakf.

Held, that an act of trespass is an individual act of the trespasser and unless there is clear and cogent evidence to show that the trespass was committed by an agent in the interest of his principal, it cannot be said that the principal is in any way benefitted by it, especially when, as in this case, there was a clear disclaimer by the agent at the very time when the trespass was committed.

Held also, that under Muhammadan Law followed by the *Hanafi* sect, a serai built out of funds set apart by *Munsiffs* while distributing a deceased owner's property cannot be considered *wakf*, as there must be a clear declaration by the

owner himself dedicating the property definitely and permanently to God. Even an owner's unexpressed intention to dedicate property cannot have the effect of a formal declaration. And although a *wakf* can be created by user, that user must be preceded by an intention on the part of the owner to create a *wakf*. If no such intention is established, user alone will not be sufficient to divest the property of its private character.

Khwaja Mahmud v. Khwaja Muhammad Hamid (1), *Kishan Kishore v. Din Muhammad* (2) and *Birendra Keshri Prasad v. Bahuria Saraswati Kuer* (3), relied upon.

Regular First appeal from the decree of Lala *Ram Narain, Senior Subordinate Judge, Jullundur, dated 25th November, 1935, granting the plaintiffs a preliminary decree for possession by partition of the properties.*

MOHAMMAD SHARIF and MOHAMMAD AMIN KHAN, for Appellant.

BARKAT ALI, GHULAM MOHY-UD-DIN KHAN and ACHHRU RAM, for Respondents.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—The suit out of which this appeal has arisen was instituted by Mian Mohammad Ghias-ud-Din and Mian Ghulam Moin-ud-Din, I.C.S., sons of Mian Riaz-ud-Din, against Sheikh Zaffar Hussain, *Mst.* Wazir Begam, widow of Jan Muhammad, Sheikh Abdul Majid and Abdul Rashid, sons of Sheikh Abdul Latif, and *R. S. Lala* Kirpa Ram. It was for possession by partition of 16/63 share in the items of property marked (*a*) (*b*) and (*c*) in the plaint and for 1/3rd share in the item marked (*d*). It was

(1) 33 P. R. 1917. (2) 1929 A. I. R. (Lah.) 684.
(3) 1934 A. I. R. (Pat.) 612.

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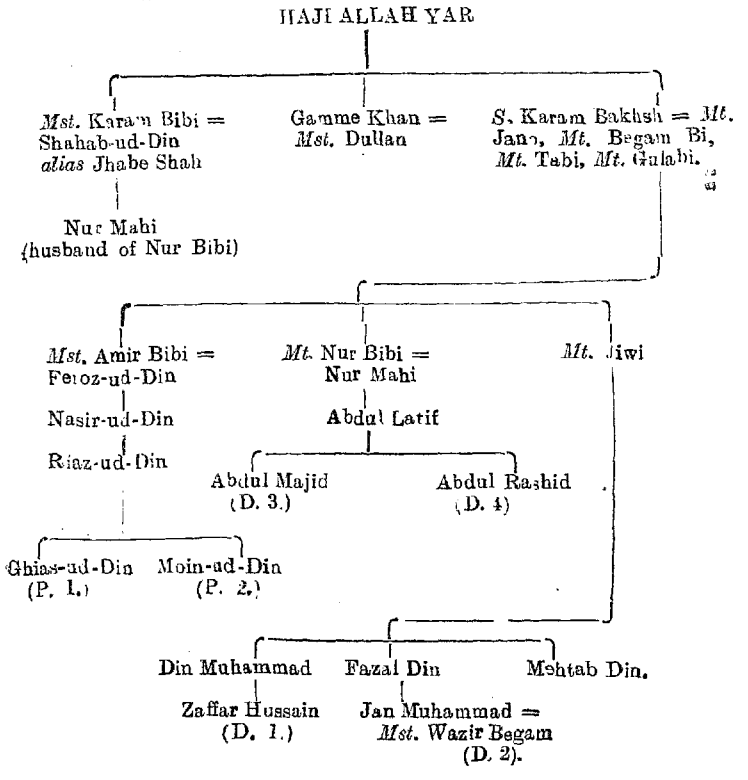
alleged by the plaintiffs that they along with the first four defendants inherited the property in dispute from Sheikh Karam Bakhsh, deceased, that they were in joint possession thereof and that in order to avoid further disputes they claimed separate possession according to their share. Defendant No.5 being a mortgagee of a small portion in the property in suit was also brought on the record.

Out of the defendants Nos.1 to 4, Abdul Majid and Abdul Rashid supported the plaintiffs' allegations and further claimed 31/63 share for themselves. Zaffar Hussain and *Mst.* Wazir Begam put in separate pleas which, however, proceeded on common ground. They contended, *inter alia*, that item No. (*c*), which is a 'haveli' at Hoshiarpur, belonged exclusively to Zaffar Hussain and item No. (*a*), which is a 'serai' at Jullundur, was *wakf* and hence impartible. The Subordinate Judge found in favour of the plaintiffs holding that they were entitled to 16/63 share in items (*a*), (*b*) and (*c*) and to 1/3rd share in item (*d*). At the same time, he observed that the four defendants were equally entitled to the rest of the property in suit. Zaffar Hussain alone has appealed against the whole decree while Abdul Majid and Abdul Rashid have submitted cross-objections claiming that the shares of the parties have not been properly assessed by the Subordinate Judge.

Counsel for the appellant at the outset informed us that he would confine his appeal to the properties (*c*) and (*a*) only and consequently the dispute before us is narrowed down to the two items in question.

In order to understand properly the nature of the present dispute the following pedigree-table, repro-

duced from page 63 of Volume I of the printed record, will be helpful:—



Sheikh Karam Bakhsh, to whom the property in dispute originally belonged, was the Governor of Doaba Jullundur under the Sikh rule. He died in 1857, leaving a considerable amount of movable and immovable property. On his death, a dispute arose between all his relations as to the persons entitled to inherit his property. Under strict Muhammadan Law, *Mussammat* Dullan, who was a widow of Gamme Khan, was not entitled to partake of his inheritance, nor was Nasir-ud-Din, whose mother *Mussammat* Amir Bibi had predeceased *Sheikh* Karam Bakhsh. *Mussammat* Dullan, however, claimed a share as an heir, while Nasir-ud-Din claimed the whole of it on the

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Bakhsh. Litigation ensued which eventually came up for decision in the Court of the Commissioner, Jullundur. The Commissioner by his order, dated the 26th January, 1858, fixed the shares of the various contestants as follows :—

Mussammat Gulabi	... 9 shares.
Mussammat Begam	... 9 shares.
Mussammat Tabi	... 9 shares.
Mussammat Jano	... 9 shares.
Mussammat Nur Bibi	... 64 shares.
Mussammat Jiwi	... 64 shares.
Nasir-ud-Din	... 64 shares.
Mussammat Karam Bibi and *Mussammat* Dullan	... 60 shares.

The matter of the actual partition of the property was made over to three *munsifs* to be appointed by lots. (Ex.P.36, Volume II, pages 2 to 9).

The *munsifs* made some interlocutory reports settling certain details that arose for their decision and submitted a final report on the 28th April, 1859, detailing the considerations that had prevailed with them in partitioning the property and specifying the various items of property allotted to each claimant. (Ex.P.37, Volume II, pages 10 to 14). In this report, the *munsif* stated that a sum of Rs.4,064-14-0 had been earmarked " for the construction of a *serai* with a view to the spiritual good of the deceased " and it was proper that this sum should be utilized for the same purpose. They also observed that the *havelis* were not included in the partition of the property, but had been set apart for the residence of the four widows and *Mst.* Dullan and that those *havelis* should on the death of the ladies be divided among the heirs of the

deceased in proportion to their shares. It may be remarked here that the words ' *wursai mazkur* ' (the said heirs) in the original vernacular report have been wrongly translated as " their heirs " in the last line on page 10 of Volume II. It appears that during the course of the partition an agreement was entered into between the various contestants and the *haveli* at Hoshiarpur was allotted to *Mst.* Dullan as a part of her heritage, its money value having been taken into account in apportioning her share. This is evident from a copy of the list prepared at the time of the said partition, the translation of which is printed at pages 65 to 67 of Volume II of the printed record (Ex.P.41).

Mussammat Dullan did not agree to the action taken in connection with this *haveli,* as she claimed it to be her husband's property and thus not liable to be treated as the property of Sheikh Karam Bakhsh. She contested this matter before *Rai Sahib* Bansi Lal who, however, did not accept her contention and issued orders to the *munsifs* to include the said *haveli* in the partition of the property. (Ex.P.40, Vol.II, pages 14-15). Dissatisfied with this order, *Mst.* Dullan preferred an appeal to the Commissioner, Jullundur Division, who dismissed her appeal. (Ex.P.39, Volume II, pages 15-16). *Mussammat* Dullan died about the early eighties of the last century.

The earliest document on the record in relation to this *haveli* after *Mst.* Dullan's death dates back to 1917. It appears that this *haveli* fell into ruins and proved a source of danger to the inhabitants of the locality. Consequently on the 25th August, 1917, a Sanitary Inspector in the service of the Municipal Committee, Hoshiarpur, submitted a report for action under section 114 of the Punjab Municipal Act in

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connection with this *haveli* and described it as the property of *Mussammat* Soni, widow of Sheikh Sandhi. It may be mentioned that Sheikh Sandhi was a brother of *Mst.* Dullan. Notice was consequently issued to *Mussammat* Soni. She, however, represented that the *haveli* did not belong to her but was the property of Sheikh Jan Muhammad and Zaffar Hussain, residents of Jullundur, and that consequently notice should be served on them. Thereupon, the Sanitary Moharrir recommended that notice be issued to the said owners. This was done on the 12th September, 1917. On the 28th November, 1917, the case was consigned to the record room with the remark that the requisite notice had been duly served. (Ex.D.1/6 to D.1/11, Vol. III, pages 31 to 33).

On the 12th March, 1918, one *Mst.* Jiwan, who claimed to be a daughter of *Mst.* Dullan's sister, instituted a suit pertaining to this *haveli* under section 9 of the Specific Relief Act against Jan Muhammad and Zaffar Hussain. She alleged in her plaint that she was the sole heir of *Mussammat* Dullan and that she had been forcibly dispossessed by the defendants on the 1st September, 1917. She stated that she had first filed a complaint under section 145 of the Criminal Procedure Code, against the said defendants, on which the defendants vacated the *haveli* and that she once more stepped into its possession. Her complaint was eventually dismissed on the ground that she was in occupation of the *haveli*, but four or five days after the dismissal of her complaint the defendants again evicted her forcibly and obtained possession of the *haveli*. On the 29th November, 1918, the Subordinate Judge dismissed this suit. A revision against that order was presented to this Court but that also failed.

(Ex.D.1/41, D.1/19 and D.1/18, Vol.III, page 33 to 38).

Mussammat Jiwan then instituted a regular suit on the 25th January, 1921, in *forma pauperis*. Her application to be allowed to sue as a pauper was resisted by Jan Muhammad and Zaffar Hussain who put in a joint written statement on the 21st February, 1921. The same day Abdul Latif made an application asking to be brought on the record on the ground that he too as an heir of Sheikh Karam Bakhsh was in possession of 15/32 share in the *haveli* in dispute. His name was brought on the record in spite of the protest by the other defendants. On the 7th October, 1921, Mian Riaz-ud-Din also made a similar application claiming one-fourth share in the *haveli* in dispute. No orders appear to have been made on this application as negotiations for compromise were then proceeding. On the 28th November, 1921, the Senior Subordinate Judge holding that *Mst.* Jiwan was merely a cat's paw in the hands of other persons, who had stood in the way of a compromise suggested by him, refused to grant *Mst.* Jiwan permission to sue in *forma pauperis*. (Ex.D.1/23, P.1/16, P.1/2, D.1/40, P.1/28, D.1/42, Volume III, pages 38 to 46). Since then, the *haveli* in dispute appears to have been in the possession of Jan Muhammad and Zaffar Hussain.

As regards the serai, it appears that in 1859 the Commissioner approved the proposal made by the *munsifs* that a serai should be built for keeping the name of Sheikh Karam Bakhsh alive and for conferring spiritual benefit upon him. (Vol. III, page 15). The work of construction was taken in hand by the Government and the building completed. It is

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not clear, however, what buildings were actually put up in the first instance and what have been added later, but it is admitted that the heirs of Sheikh Karam Bakhsh had constructed a large number of rooms in the serai subsequent to its original construction. During the course of the Settlement operations in 1883 the serai was included in the *abadi*. (Ex.D.1/38, Vol. III, pages 19 to 22). In 1896, the Municipal Committee passed a resolution allowing the use of the serai as a vegetable market and since then the major portion of the building has been used as such (Ex.D.1/4, Volume III, page 27). It has always been managed by a representative of the male members of the family of Sheikh Karam Bakhsh. The shops and stalls in the serai have been let out on rent as private property of the family by the manager for the time being on behalf of all the living male members of the family and in all suits that have arisen in connection with these shops and stalls, the members of the Sheikh's family have consistently taken up the position that the serai was their private property. It is further proved that the serai has been treated by the authorities as a ' public serai ' within the meaning of Act XXII of 1867 which provides for the regulation of ' public serais ' and ' puraos ' and police arrangements have been made by them to keep watch on the wayfarers and travellers who lodge there. There is a mosque also in its compound and on its outer entrance there is an inscription in Persian which runs as follows :—

" Out of generosity and charity, this serai was built by Mian Karam Bakhsh in the way of God. The date of his death coincides with the date of its construction, which is 1274 A.H." This year of Hijri corresponds to 1857 A.D.

Besides the documentary evidence summarised above, the plaintiffs as well as the two sets of defendants led oral evidence also in support of their respective allegations. The evidence for the plaintiff was mainly confined to the proof of various rent deeds executed from time to time in relation to the serai, evidencing its private character and the plaintiffs' joint possession of it along with the other heirs of Sheikh Karam Bakhsh. The defendants Abdul Majid and Abdul Rashid chiefly concerned themselves with proving that their share in the property in suit was 31/63. They produced copies of old plans relating to a previous partition between the parties of some other property left by Sheikh Karam Bakhsh, when their 31/63 share was recognized by the arbitrators appointed for the purpose and acquiesced in by all the other claimants. The defendant Zaffar Hussain examined several witnesses to establish both the *wakf* nature of the serai in suit and his separate ownership and possession of the *haveli* at Hoshiarpur. As regards the serai, the upshot of their statements is that the serai is *wakf*, that it has always been treated both by the authorities and by members of the public as a public serai, that the major portion of it is being used as a vegetable market, that the portion not so used is reserved for wayfarers, that marriage parties are also accommodated there, that since its construction it has been managed by some member or other of Zaffar Hussain's family and that it is at present under the management of Zaffar Hussain himself. With respect to the *haveli* the documents referred to above have been formally proved to show that barring Zaffar Hussain and Jan Muhammad, no other heir of Sheikh Karam Bakhsh had ever possessed it and that their possession now has by prescription been converted into ownership.

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The points requiring determination, therefore, are, whether the plaintiffs have established their claim to the *haveli* and whether the contesting defendants have proved that the serai is *wakf* and hence impartible.

We take up the case of the *haveli* first. As pointed out above, the unimpeachable evidence supplied by the old documents on the record is that the *haveli* was allotted to *Mst.* Dullan as a part of her inheritance and that it was not included among those ' *havelis* ' which had been left out of the partition in 1858-59 for the residence of the ladies of the family including *Mst.* Dullan, and made subject to the condition of reversion to the heirs of Sheikh Karam Bakhsh on the demise of those ladies. It is in evidence that on *Mst.* Dullan's death, the two widows of her brother, Sheikh Sandhi, continued to occupy it and in 1917, even when one of the widows was alive, Jan Muhammad and Zaffar Hussain ousted the then occupants and took possession of it on their own account. In the litigation that ensued, they alone were described as possessors and although Abdul Latif, father of Abdul Majid and Abdul Rashid, succeeded in having himself brought on the record in spite of the protest made by Jan Muhammad and Zaffar Hussain and although Mian Riaz-ud-Din, father of the plaintiffs, also made an application to be impleaded as a defendant on the ground of his being an heir of Sheikh Karam Bakhsh, neither of them took any steps to make his claim effective after *Mst.* Jiwan's suit was dismissed. The result was that both Jan Muhammad and Zaffar Hussain continued to occupy the *haveli* to the exclusion of all other claimants. They had unequivocally asserted their hostile title as against all the other heirs of Sheikh Karam

Bakhsh and their exclusive possession could in no circumstances become joint by the mere denial of their sole right of occupation or the assertion of their joint right to occupy it by Abdul Latif or Mian Riaz-ud-Din, unattended by any overt act on the part of either to translate his denial or assertion into practice. The possession of both Jan Muhammad and Zaffar Hussain was adverse at its inception and so it remained throughout the period that elapsed before the present suit was instituted.

Counsel for the plaintiffs has urged that as Mahtab Din, Jan Muhammad and Zaffar Hussain had one after the other been acting as agents of Mian Nasir-ud-Din and after him of Mian Riaz-ud-Din in the management of their joint property, this trespass on their part, should also be considered to be on behalf of all members of the family and thus benefitting every one of them. We do not, however, agree. An act of trespass is an individual act of the trespasser and unless there is clear and cogent evidence to show that the trespass was committed by an agent in the interest of his principal, we are not prepared to hold that the principal is in any way benefitted by it. In the present case, moreover, there was a clear disclaimer by the agent at the very time when the trespass was committed.

Although the case of *Subbaiya Pandaram v. Mohammad Mustapha* (1), was not cited at the Bar, we consider that the principle deducible from that judgment relating to adverse possession completely covers the case before us. We, accordingly, reverse the decision of the Subordinate Judge and dismiss the plaintiffs' suit as regards the *haveli* at Hoshiarpur.

(1) I. L. R. (1923) 46 Mad. 751 (P. C.)

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We now come to the *serai* at Jullundur. From the brief account of the *serai* given above, it will be abundantly clear that there is not a shred of evidence to show that Sheikh Karam Bakhsh made any declaration during his life as to its dedication. All that has been urged by the appellant in this connection is that the *Munsiffs* while distributing the property of the deceased Sheikh among his heirs, set apart a sum of Rs.4,000 odd for the building of a *serai*, that it was built for the spiritual benefit of the deceased, that on its completion, an inscription was put up on its outer gate which stated that Sheikh Karam Bakhsh had built the *serai*, out of generosity and charity, in the path of God and that ever since then it has been open to the public for accommodation of travellers and for housing marriage parties, etc. In other words, though admitting that the *serai* was not completed by *Sheikh* Karam Bakhsh himself and hence not dedicated by him, the appellant has mainly relied on its having been built as a *wakf* property with the funds received out of this *Sheikh's* estate and its having been used as such since its construction. We are, however, disposed to think that the fact that the *serai* was not built or dedicated by *Sheikh* Karam Bakhsh himself would be sufficient to repel the appellant's contention. Under Muhammadan Law followed by the *Hanafi* Sect to which the parties belong, even if no particular formality need be observed to make a *wakf* complete, there must be unmistakable proof available that the owner made a clear declaration dedicating the property definitely and permanently to God. Even an owner's unexpressed intention to dedicate property cannot have the effect of a formal dedication. In the absence of any such intention or declaration, no *wakf* can be said to have been created. It is true that a *wakf* can be

created by user, but that user too must be preceded by an intention on the part of the owner to create a *wakf*. If no such intention is established, user alone will not be sufficient to divest the property of its private character. See *Khwaja Mahmud v. Khwaja Muhammad Hamid* (1), *Kishan Kishore v. Din Muhammad* (2) and *Birendra Keshri Prasad v. Bahuria Saraswati Kuer* (3).

In this case, even the user is not proved; rather, the manner in which the *serai* has been held and enjoyed leaves no doubt that it has never been treated as *wakf*. As to how it was used prior to 1896, the evidence is vague and inconclusive. Since 1896, it has practically been used as a vegetable market, and only an insignificant part of it has afforded shelter to the wayfarers. It is clear that the mere fact that it has been treated as a public *serai* under Act XXII of 1867 or that it has admitted lodgers without any charge for three days is not enough to show that it is *wakf*. There is evidence that several other privately owned buildings in that very town are being used as public *serais* and controlled under the Act.

Besides, there are a number of documents on the record which show that the heirs of *Sheikh* Karam Bakhsh have always considered it to be their private property. In fact, the contesting defendants themselves and their predecessors in title have, in various suits relating to shops and stalls in the *serai*, made a categorical denial of the *serai* being *wakf*, and every manager, whosoever he was, in all rent deeds secured from the stall keepers has described it as the joint property of all the living male descendants of *Sheikh* Karam Bakhsh. The inscription on the outer gate of

(1) 33 P. R. 1917. (2) 1929 A. I. R. (Lah.) 684.
(3) 1934 A. I. R. (Pat.) 612.

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the *serai* does not advance the case of the defendants any further. In the first place, it was not written at the instance, or in the lifetime of *Sheikh* Karam Bakhsh and secondly, the unknown poet merely followed his line in indulging in hyperbolic expressions.

On these grounds, we have no hesitation in holding that the *serai* is not *wakf* and is consequently heritable and partible. The mosque in the *serai*, however, will remain *wakf* as before.

Adverting now to the cross-objections put in by the sons of Abdul Latif, the decree does not incorporate that part of the judgment which deals with the respective shares of the various defendants, but we treat these cross-objections in the way of a prayer to remove that defect in the decree and save the parties the expense and worry of a separate suit. On examining the evidence relied on by the objectors, we consider that there is enough material on the record to support their contention. The statement of Khan Ghulam Mohy-ud-Din, Advocate, corroborated as it is by the plans prepared at the time of the previous partition, is conclusive on the point and there are no grounds for not acting upon it.

The result is that we allow the appeal to the extent of dismissing the plaintiffs' suit in respect of the *haveli* at Hoshiarpur, but dismiss the appeal as regards the *serai* at Jullundur.

We allow the cross-objections too and raise the share of Abdul Majid and Abdul Rashid in the *serai* which we have held to be partible as well as in the property (*b*) in the plaint from 47/126 allowed to them by the Subordinate Judge to 31/63. The remaining 16/63 share will belong to the defendants Zaffar Hussain and *Mussamat* Wazir Begam. We are aware

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that *Mussammat* Wazir Begam had in her pleas disclaimed any share in the property in suit, but as the Subordinate Judge declared her to be equally entitled with the other defendants and there was no appeal taken from this part of the decision, we do not propose to interfere with this part of the judgment.

We leave the parties to bear their own costs throughout.

P. S.

Appeal accepted in part.

APPELLATE CIVIL.

Before Bhide J.

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Nov. 2.

BISHEN CHAND (DECREE-HOLDER) Appellant

versus

BAKHSHISH SINGH AND ANOTHER (JUDGMENT-DEBTORS) Respondents.

Civil Appeal No. 659 of 1936

Punjab Debtors' Protection Act, II of 1936, sections 4, 5 — whether have retrospective effect.

The point for decision was whether an executing Court has power to reserve a certain portion of the land of a judgment debtor for maintenance, and refuse execution against it, when his land is not sufficient for the purpose. The annual net income of the land in this case was only Rs. 72.

Held, that sections 4 and 5 of the Punjab Debtors' Protection Act relate to procedure and will, therefore, govern pending cases also, although there is no specific provision in the Act giving them retrospective effect.

Maxwell, on the Interpretation of Statutes, pages 195-6, 7th Edition, referred to.

Second appeal from the order of Mr. A. R. Cornelius, District Judge, Jullundur, dated 3rd March, 1936, affirming that of Lala *Pars Ram, Subordinate Judge, 1st Class, Jullundur, dated 22nd*