1887.

ABDUL HOSSEIN ZENAIL ABÁDI v. CHARLES AGNEW TURNER.

For the above reasons their Lordships will humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court of Appeal with the costs in that Court, and to affirm the decree of the first Court. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants :—Messrs. *Hacon and Turner.*

Solicitors for the respondents :—Messrs. *Watkins and Lattey.*

ORIGINAL CIVIL.

1887.
June 20.

Before Mr. Justice Jardine.

EBRA'HIM PIR MAHOMED, (PLAINTIFF), *v.* CURSETJI SORA'BJI DE VITRE, (DEFENDANT).*

Landlord and tenant—Ejectment—Co-owners—Notice to quit by one co-owner—Notice to quit before expiry of term of lease—Suit in ejectment by one co-owner—Parties—Oral agreement inconsistent with written contract—Evidence Act I of 1872, *Sec.* 92.

K. and P. were co-owners of certain property in Bombay, and by a writing dated January, 1883, they granted a lease of the whole of the said property to the defendant for a term of three years from the 1st March, 1883, to the 28th February, 1886, at a monthly rent of Rs. 705. Subsequently to the granting of the said lease, *viz.*, on the 1st September, 1883, P. conveyed her equal and undivided moiety of the said property to the plaintiff. On the 30th January, 1886,—*i. e.*, a month before the expiration of the lease,—the plaintiff gave the defendant notice to determine the tenancy, and required him to quit on the 1st March then next. The defendant refused, and the plaintiff brought this suit for possession and for occupation rent from the 1st March, 1886. The defendant pleaded that the notice to quit being given by one of the co-owners only, was invalid, and, further, that the plaintiff was not entitled to sue alone.

Held, that the notice was a valid notice, and that the suit was maintainable by the plaintiff alone.

The defendant pleaded that it had been verbally agreed between himself and his lessors that he should be entitled to a renewal of the lease for a further period of three years, if he so desired.

Held, that evidence of this oral agreement was inadmissible under section 92 of the Indian Evidence Act I of 1872, being inconsistent with the terms of the second clause of the lease, which was as follows :—"If you mean me to vacate at the completion of the term, you must give one month's notice. In accordance therewith I will vacate and give up possession to you."

Held, also, that the notice to quit was not invalid under the above clause of the lease, although given before, instead of after, the expiry of the term.

* Suit No. 95 of 1887.

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SUIT for ejectment. The plaint stated that by virtue of an indenture dated the 1st September, 1883, made between one Pirozbái of the first part, one Mehrbái of the second part, and the plaintiff of the third part, the plaintiff became owner of one equal and undivided moiety of certain property in Bombay, consisting of a house and two chawls. The other undivided moiety had formerly belonged to one Kessowji Jádowji, since deceased, and at the date of this suit was in the hands of his representatives; that by a Gujaráti writing undated, but delivered by the defendant to the said Kessowji Jádowji and Pirozbái about the month of January, 1883, the defendant agreed to accept, and did in fact accept, from Kessowji Jádowji and Pirozbái a lease of the entirety of the said property for a term of three years from the 1st March, 1883, to the 28th February, 1886, at a monthly rent of Rs. 705. It was provided by the said writing that, if the term of the said tenancy expired, the lessors should give the defendant one month's notice, and the defendant should be bound to give possession.

The plaint further stated that on the 30th January, 1886, the plaintiff gave the defendant notice, under the said clause, to determine the tenancy, and required the defendant to quit the said property on the 1st March then next. The defendant refused to quit and deliver up the said property to the plaintiff. The plaint prayed for possession, and also for payment of occupation rent due from the 1st March, 1886, up to the date of recovering possession.

In his written statement the defendant pleaded that it had been verbally agreed between himself and his lessors, Kessowji Jádowji and Pirozbái, that he should be entitled to a renewal of the said lease for a further period of three years if he so desired; that Pirozbái before selling her interest to the plaintiff had informed the plaintiff of the said verbal agreement, and that the defendant had also given the plaintiff a written notice thereof; that at and before the expiration of his lease he (the defendant) had exercised his option, and desired a renewal of the said lease; that the executors of the said Kessowji Jádowji were ready and willing to renew the lease in pursuance of the said agreement, and the defendant contended that he was entitled to such renewal.

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He further pleaded that the notice to quit, served upon him by the plaintiff, was not a valid notice.

The following issues were raised at the hearing :—

(1) Whether the plaintiff can maintain this suit.

(2) Whether the notice to quit was a valid notice.

(3) Whether the agreement as to renewal was made between the defendant and his lessors.

Macpherson, (Acting Advocate General) and *Russell*, for the plaintiff, cited Woodfall's Landlord and Tenant, p. 343, (13 ed.); Cole on Ejectment, 44; *Doe, Lessee of Whayman*, v. *Chaplin*(1); *Cutting* v. *Derby*(2); *Doe d. Robertson* v. *Gardiner* (3).

Lang and *Jardine* for the defendant :—Pirozbái and Kessowji were owners of undivided moieties. The latter managed the property. He is now dead, but while he was still alive, Pirozbái granted the lease to the defendant, and subsequently sold her share to the plaintiff, and the defendant gave notice to the plaintiff of the oral agreement as to renewal. The plaintiff alone has given notice to quit. He cannot sue unless the co-owners join—*Bálájí Báikáji Pinge* v. *Gopál*(4); *Jadoo Shat* v. *Kadumbinee Dassee* (5); *Rádhá Proshád Wasti* v. *Esuf* (6); *Reasut Hossein* v. *Chorwar Singh*(7); *Right* v. *Cuthell*(8).

The notice is also bad, as it was given before the expiry of the lease.

Macpherson in reply :—We do not ask for any specific part of the premises; and need not make the co-owners parties. The English cases turn on the terms of the covenant.

JARDINE, J. :—On the 17th January, 1883, the defendant, a Pársi, took a lease of the premises in suit from Kessowji Jádowji, a Hindu, and Pirozbái, a Pársi, jointly for a term of three years from the 1st March, 1883, at a monthly rent of Rs. 705. Defendant has stated that during this term he paid a moiety of the rent to each lessor, a matter on which the lease is

(1) 3 Taunton, 120.
(2) 2 W. Black. Rep., 1075.
(3) 12 C. B., 319.
(4) I. L. R., 3 Bom., 23.
(5) I. L. R.,7 Calc., 150.
(6) I. L. R., 7 Calc., 414.
(7) I. L. R., 7 Calc., 470.
(8) 5 East, 491.

silent. On the 1st September, 1883, the plaintiff, a Musalmán, purchased from Pirozbái an undivided moiety of the property. On the 30th January, 1886, plaintiff gave defendant notice to quit this moiety. Defendant failing to comply, plaintiff without the consent of the executors of the deceased Kessowji, who owned the other moiety, sued for possession of the property, or a moiety thereof, and for the rent since the date of expiry of the lease.

The objections taken in defendant's written statement have been raised in the issues. On the third issue I have already ruled that the alleged oral agreement giving him an option of renewal could not be proved, being inconsistent with the terms of the second clause of the lease, which may be translated as follows :— "If you mean me to vacate at the completion of the term, you must give one month's notice. In accordance therewith, I will vacate and give up possession to you." Section 92 of the Indian Evidence Act I of 1872 bars the reception of evidence of the alleged oral agreement.

It was argued on the second issue that the notice was bad, being given before, instead of after, the expiry of the term. But this contention was based on too literal a construction of the official translation I have quoted.

Then it is argued for defendant that the notice is bad, as being given on behalf of one of the owners only, and similarly that the suit cannot be maintained by him alone, the question raised in the first issue. Cases among Hindus have been cited in support of this argument; and, as remarked by Mr. Justice West in his note C to West and Bühler, Vol. II, (3rd ed.), p. 607, the Indian decisions have usually treated the relation created by contract with several joint landlords as continuing until there exists a new and complete volition to change it. But I think I ought to apply to the present case the rules of the English law. A similar contention received much attention in the thrice-argued case of *Doe, Lessee of Whayman*, v. *Chaplin*[1], on which the Advocate General relies, and again in *Doe dem. Aslin* v. *Summersett*[2], where Lord Tenterden in delivering the judgment of

(1) 3 Taunton, 120. (2) 1 B. & Ad., 135, at p. 140.

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the Court said that, without any adoption by the other joint tenants, "a notice to quit by one of the joint tenants put an end to the tenancy as to both," and gave, among others, the following reasons:—

"When joint tenants join in a lease, each demises his own share (Co. Litt., 186 *a*), and each may put an end to that demise as far as it operates upon his own share, whether his companions will join him in putting an end to the whole lease or not; *Doe, Lessee of Whayman* v. *Chaplin* [1]; so that upon the notice to quit in this case, no doubt a third might have been recovered, had there been a separate demise. But, though upon a joint lease by joint tenants each demises his own share, this is not the only operation of such a lease. Joint tenants are seized not only of their respective shares, *per my*, but also of the entirety, *per tout*; Litt., s. 288. The rent reserved will enure jointly to all the lessors; Co. Litt., 47*a*., 192*a*., 214*a*; and if any of them die, the lessee shall hold *the whole* as tenant to the survivors. Upon a joint demise by joint-tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the *whole of all* so long as he *and all* shall please; and as soon as any of the joint tenants gives a notice to quit, he effectually puts an end to *that* tenancy; the tenant has a right upon such notice to give up *the whole*, and unless he comes to a new arrangement with the other joint-tenants as to their shares, he is compellable so to do. The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious; for, however willing a man might be to be sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it; and if upon such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint-tenants must have the same right. It cannot be optional on one side, and on one side only." *See* also *Cutting* v. *Derby* [2] and *Doe d. Robertson* v. *Gardiner* [3].

(1) 3 Taunt., 120.

(2) 2 W. Black. Rep., 1075.

(3) 12 C. B., 319.

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The right of the plaintiff, who is a tenant-in-common, appears to me stronger than that of a joint-tenant, as the former has a several estate: see the authorities in note K to Thomas' Systematic Arrangement of Coke, Vol. I, p. 779.

For these reasons I find on all the issues for the plaintiff, and decree for the plaintiff, with costs to be paid by the defendant. The rent to be Rs. 352-8-0 *per* month, the decree to relate to the undivided moiety only.

Attorneys for the plaintiff:—Messrs. *Tobin and Roughton.*

Attorney for the defendant:—Mr. *Khanderáv Moroji.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

DHUNJISHA NUSSERWA'NJI, (PLAINTIFF), *v.* A. B. FFORDE, (DEFENDANT).*

1887. *June* 14.

Jurisdiction—Cause of action—Whole cause of action—Contract—Place of performance of contract where no stipulation in contract—Breach of contract—Leave to sue under Clause 12 *of Letters Patent.*

By a contract executed in Bombay on the 19th December, 1885, the defendant promised to pay the plaintiff Rs. 9,152, of which amount the sum of Rs. 4,752 was to be paid by monthly instalments of Rs. 132 extending over a period of three years, and the remainder, *viz.*, Rs. 4,400, in a lump sum at the end of the three years. It was provided, that in case of default being made in payment of any of the instalments, the whole of the amount then due should be paid forthwith. The plaintiff, alleging that the defendant had only paid eight of the instalments, brought this suit for the balance. The defendant, who did not dwell or carry on business in Bombay, pleaded *(inter alia)* that the High Court of Bombay had no jurisdiction, as the whole cause of action had not arisen in Bombay, and no leave to sue had been obtained by the plaintiff under clause 12 of the Letters Patent The written contract, which was admittedly executed in Bombay, contained no stipulation as to where the instalments or the final balance was to be paid.

Held, that, in the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance. From the facts and acts of the parties it appeared that their intention was that payments under the contract should be made at Surat. The breach of contract consequently took place at Surat, and not in Bombay, and the High Court of Bombay had no jurisdiction to try the suit, the plaintiff having omitted to obtain leave to sue under clause 12 of the Letters Patent.

* Suit No. 163 of 1887.