money is so paid in, the principle underlying section 379 ought to regulate the discretion of the Court. But we further think that where, although no declaration is prayed for, the defendant raises an issue the finding on which operates as a virtual declaration of the right of the plaintiff, the principle of section 379 ceases to be applicable and the Judge then has full discretion under section 220 of the Code to apportion the costs. We think that is the course the Judge took in this case, and we do not feel at liberty to interfere with that discretion. This appeal must, therefore, be dismissed with costs.

1896.

LUXUMON NANA PATIL v. MOROBA RÁMCRISHNA.

Appeal dismissed.

Attorneys for appellant (defendant).—Messrs. *Khunderao and Sripad.*

Attorneys for respondents (plaintiffs) :— Messrs. *Little, Smith, Nicholson and Bowen.*

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

BUDESAB AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* HANMANTA (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *January* 14.

Adverse possession—Adverse possession of a partial interest (e.g. a tenant's) in land—Title by adverse possession asserted by a plaintiff against the true owner as well as alleged as a defence—Limitation Act (XV of 1877,) Sec. 28 and Art. 144.

Adverse possession for more than twelve years by one claiming to hold land as its full owner not only extinguishes the title of the true owner to the land so held and debars him from suing for its recovery, but creates a title by negation in the occupant which he can actively assert, if he loses possession, even against the true owner.

A partial interest in land may be lost by adverse possession as well as the whole interest, and the right to such partial interest may be asserted by suit.

So where a landlord seeks to recover from his tenant possession of land in his tenant's occupancy and the latter alleging a perpetual tenancy successfully resists on that ground the landlord's attempt to dispossess him, the tenant may, after the statutory period has expired, plead limitation in bar of a subsequent suit in ejectment by the landlord.

A landlord allowing the tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms.

* Second Appeal, No. 300 of 1894.

1896.

BUDESAB v. HANMANTA.

SECOND appeal from the decision of E. H. Moscardi, Acting Judge of Kánara, reversing the decree of Rao Saheb M. M. Nadgir, Subordinate Judge of Sirsi.

Suit for possession by tenants alleging an occupancy right against landlord. The plaintiff's father (Fakirsab) held the land in dispute as a tenant of the defendant's father Ramangavda. In 1862 Ramangavda sought to put an end to Fakirsab's tenancy, alleging it to be *chalgeni*(1). Fakirsab thereupon took proceedings in the revenue Court to protect his possession, alleging that he held the land on *mulgeni* tenure and was not liable to be evicted. The revenue Court referred Ramangavda to a civil Court if he desired to evict his tenant, and accordingly Ramangavda filed a suit in the Munsif's Court at Yellápur to evict Fakirsab, but that suit was afterwards dismissed for want of appearance, Ramangavda having died; and Fakirsab and after him his sons (the plaintiffs) continued to occupy the land as tenants of the defendant (Ramangavda's son), paying rent until 1882, when the Collector acting on behalf of the defendant, who was then a minor, and as his administrator took possession of it from the plaintiffs and in 1884 made it over to the defendant on his attaining majority.

In 1891 the plaintiffs filed this suit to recover possession of the lands with mesne profits, basing their claim (*a*) on a *mulgeni* lease alleged to have been granted in 1827 by the defendant's grandfather to the grandfather of the plaintiffs, and (*b*) on adverse possession as mulgenidárs for a long period.

The defendant pleaded that the plaintiffs were not mulgenidárs; that the lands in dispute were let out to them on a *chalgeni* lease in 1860; that the suit brought by the defendant's father Ramangavda in 1862 was disposed of on the ground of his non-appearance and subsequent to the disposal of the suit he died on the 10th October during the same year; that the defendant having been born three months after the death of his father Ramangavda, no steps could be taken to set aside the decree dismissing the suit, and that the plaintiffs were properly ejected in 1882 by the

(1) *i.e.*, tenancy-at-will or occupation on paying rent for a short or indefinite t rm (see Wilson's Glossary of Judicial and Revenue Terms).

Collector, who was not satisfied with the genuineness of their alleged *mulgeni* lease.

The Subordinate Judge found that the *mulgeni* lease set up by the plaintiffs was not sufficiently proved, but he allowed their claim on the ground that they had acquired a title by adverse possession to the lands which had been in their possession from 1862 to 1882 when they were wrongfully taken possession of by the Collector.

On appeal by the defendant the Judge reversed the decree. The following is an extract from his judgment:—

"It is argued by the respondent's pleader that under section 28 of the Limitation Act, after the lapse of twelve years from a landlord learning that his tenant has set up a *mulgeni* title, his right to assert such title is extinguished. But that section applies to possessory rights only. No doubt, if plaintiffs were still in possession, they could not be ejected by the defendant if during the period of limitation allowed under Schedule II, article 141 of the Act above quoted, he had failed to take steps to assert his right to eject them. Consequently in 1882, even if defendant's right to sue for a declaration that plaintiffs were his *chalgeni* tenants or for ejectment after due notice to quit had been taken away under the decision quoted (*Sheikh Nazimudin Hossein* v. *Lloyd*, 6 Bengal Law Reports, Appendix, p. 130), yet his right to treat the plaintiffs as his *chalgeni* tenants was not extinguished, and having regained possession he can now rely on such right as against the plaintiffs. Plaintiffs contend that they first set up their *mulgeni* title in 1862, and that defendant, knowing of such claim of plaintiffs, did not until 1882 take any steps to establish their *chalgeni* right. But this will not help the plaintiffs now that they are out of possession and must, therefore, prove the superiority of their title to that of the defendant. It remains now to see whether the plaintiffs have proved the *mulgeni* lease they rely on. I find it is not proved. Only one witness is called to prove the handwriting of the writer, and he denies that the document is in the handwriting of his father who purports to have written it. The document purports to be more than thirty years old, but there is reason to believe that it is a recent forgery, for as the lower Court remarks in its judgment, it never saw the light until 1884, although only two years before, when the Collector asked plaintiffs what documentary evidence they had of their *mulgeni* rights, they gave a long written reply (Exhibit No. 27), in which not a word is said about the lease."

Plaintiffs preferred a second appeal.

Branson, with *Ghanasham N. Nadkarni*, for appellants (plaintiffs):—We contend that our possession was adverse to the defendant from 1862 to 1882, when the Collector dispossessed us. The interest of a tenant is, no doubt, a limited interest; still there can be adverse possession of such limited interest, and acquisition of title by possession during the statutory period can prevail as

1896.

BUDESAB v. HANMANTA.

against the landlord provided the tenancy is not denied. After the acquisition of such a title the tenant can bring a suit to recover possession on that title just as he can allege it as a defence in a suit brought by the landlord—*Bhagu* v. *Byramji*(1); *Radhabai* v. *Anantrav*(2); *Maidin Saiba* v. *Nagapa*(3); *Madhava* v. *Narayana*(4); *Sankaran* v. *Periasami*(5); *Sheikh Nazimudin* v. *Lloyd*(6); *Jugaldas* v. *Ambashankar*(7); *Lachho* v. *Har Sahai*(8).

Macpherson, with *Shamrao Vithal*, for the respondent (defendant):—There is no doubt that if a rightful owner brings a suit after the expiration of twelve years from the time his title is denied by the person in possession, his suit would be time-barred under section 28 of the Limitation Act. But that principle is not applicable to the present case. The Statute of Limitation applies to the institution of suits and can have no application to a case like the present. Further, the Judge has not found whether the possession of the plaintiffs was adverse to us. We rely on *Orr* v. *Sundra Pandia*(9); *Scott* v. *Nixon*(10); *Brassington* v. *Llewellyn*(11).

FARRAN, C. J.:—This is a second appeal from the decree of the District Judge of Kánara dismissing the plaintiffs' claim which had been awarded by the Subordinate Judge.

The facts, as they appear from the judgment of the latter, are briefly these. The plaintiffs' father was a tenant, holding the lands in suit under the father of the defendant. In 1862 the latter sought to put an end to the tenancy which he alleged to be *chalgeni*. The plaintiffs' father took proceedings in the revenue Court to protect his possession, and in the result the defendant's father was referred to a civil Court, if he desired to evict, as the plaintiffs' father asserted that he held the land on *mulgeni* tenure and was not liable to be evicted. The defendant's father accordingly filed a suit in the Munsif's Court at Yellápur to evict the plaintiffs' father. The suit was subsequently dismissed for want of appearance. It would appear that the defendant's father had

(1) P. J., 1892, p. 39.
(2) I. L. R., 9 Bom., 198.
(3) I. L. R., 7 Bom., 96.
(4) I. L. R., 9 Mad., 244.
(5) I. L. R., 13 Mad., 467.
(6) 6 Beng. L. R., Appx., 130.
(7) I. L. R., 12 Bom., 501.
(8) I. L. R., 12 All., 46.
(9) I. L. R., 17 Mad., 255.
(10) 3 Dr. and W., 388.
(11) 27 L. J. (Exch.), 297.

then died, and that the suit was not prosecuted in consequence; but there is no finding upon this part of the case, as the District Judge has not entered upon the question of adverse possession, deeming it, upon the view which he took of the law, to be unnecessary to do so. After the dismissal of the suit the plaintiffs' father, and subsequently the plaintiffs, continued to occupy the land as the tenants of the defendant, paying rent until 1882, when the Collector, acting on behalf of the defendant, who was then a minor, and as his administrator, took possession of it from the plaintiffs, and in 1884 made it over to the defendant on his attaining his majority. The plaintiffs filed the present suit in 1891 to recover possession of the land with mesne profits, basing their claim (*a*) on a *mulgeni* lease alleged to have been granted to their ancestor in 1827, (*b*) on adverse possession as mulgenidárs for a long period.

Both the lower Courts have found that the alleged *mulgeni* lease set up by the plaintiffs has not been proved, and the District Judge has intimated his opinion that it is a forgery.

The Subordinate Judge, however, relying on the decision in *Maidin Saiba* v. *Nagapa*[1], awarded the plaintiffs' claim on the ground that they and their father had held possession of the land adversely to the defendant and his father for a period of twenty years. The District Judge, without recording any finding as to the nature of the plaintiffs' possession during this period, and considering the case cited by the Subordinate Judge to be inapplicable, dismissed the plaintiffs' claim. Hence this appeal.

The question for decision is, whether the plaintiffs' father and the plaintiffs continuing to hold the land after the unsuccessful attempt of the defendant's father to evict in 1862 constituted such an adverse possession as would create a title to the land in the plaintiffs to the extent which they claimed, *viz.*, a right to hold it on *mulgeni* tenure against the defendant, their admitted landlord and the true owner of the land. In considering that issue, inasmuch as the character of the possession of the plaintiffs since 1862 has not been found by the lower appellate Court, we must (for the purpose of our present decision) assume (as found

(1) I. L. R., 7 Bom., 96.

1896.

BUDESAB v. HANMANTA.

by the Subordinate Judge) that the continued holding of the land by the plaintiffs after 1862 was not under an arrangement with the defendant, but was in assertion of their alleged right to be considered his *mulgeni* tenants. We proceed to consider the case upon that assumption.

It was conceded in argument before us, and as we think rightly conceded, that an adverse possession for more than twelve years by one claiming to hold land as its full owner, not only extinguishes the title of the true owner to the land so held and debars him from suing for its recovery, but creates a title by negation in the occupant which he can actively assert if he loses possession even against the true owner—*Scott* v. *Nixon*(1); *Brassington* v. *Llewellyn*(2); *Sanders* v. *Sanders*(3). This result, we think, flows naturally from the wording of the provisions of section 28 of the Limitation Act (XV of 1877), which enacts that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." There is certainly authority for the proposition that a landlord allowing a tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms—*Bhagu* v. *Byramji*(4). That decision purports to be based upon the ruling in *Radhabai* v. *Anantrav*(5), but the latter was the case of a grant, and the relation of landlord and tenant did not at any time exist between the parties. The decision itself is, however, in point as an authority. In *Sheikh Nazimudin* v. *Lloyd*(6), the Judges (Jackson and Ainslie, JJ.) were of opinion that a landlord who allowed his tenant to pay him rent under a supposed *mokurrari* lease for more than twenty-seven years after an attempt to dispossess him was barred by limitation from maintaining a suit for a declaration that the lease of the defendant was of a different character. The suit was originally framed as a suit to eject the defendant, but that portion of the relief was abandoned. The learned Judges

(1) 3 Dr. and W., 388.
(2) 27 L. J. (Exch.), 297.
(3) 19 Ch. Div., 373.
(4) P. J. for 1892, p. 39.
(5) I. L. R., 9 Bom., 198.
(6) 6 Beng. L. R., Appx., 130.

based their judgments mainly upon the deduction which they drew from the effect of the decision of their Lordships of the Privy Council in *Rajah Sahib Perhlad Sein* v. *Doorgapershad Tewaree*[1] and in *Rajah Sahib Perhlad Sein* v. *Run Bahadoor Singh*[2]. It was not in those cases necessary for their Lordships to consider the question of limitation, as their Lordships took the view that the facts did not raise it, and they cannot, therefore, be treated as authorities. Their Lordships did not, however, intimate an opinion that limitation could not be pleaded in such a case, and it may be contended that they assumed that it could. In *Madhava* v. *Narayana*[3], it was held that where the father of the plaintiffs demised to the defendant's ancestor two items of family land on *kanam* and placed him in possession, the plaintiffs could not, after the defendant had held under the *kanam* for more than twelve years, sue to eject him on the allegation that the *kanam* was illegally granted. The learned Judges were of opinion that "adverse possession for twelve years of a limited interest in immoveable property is a good plea to a suit of ejectment to the extent of that interest." That case was followed in *Sankaran* v. *Periasami*[4], where it was held that payment of *poruppu* by the person in possession did not prevent his possession from being adverse to the person to whom he made such payments. The Court say: "Possession of a limited interest in immoveable property may be just as much adverse, for the purpose of barring a suit for the determination of that limited interest, as is adverse possession of a complete interest in the property to bar a suit for the whole property." On the other hand, in *Watson* v. *Rance Shurut Soonduree Debia*[5] it is laid down that a tenant cannot plead limitation against his landlord; but in *Sheikh Nazimudin* v. *Lloyd*[6], the Court say that the rule was there stated in too general terms.

By article 144 of Act XV of 1877 a suit for possession of immoveable property or *any interest* therein is barred after the lapse of twelve years from the time when the possession of the defendant becomes adverse to the plaintiff. In cases like the

(1) 12 M. I. A., p. 322.
(2) *Ibid.*, p. 332.
(3) I. L. R., 9 Mad., 244 at 247.
(4) I. L. R., 13 Mad., 467.
(5) 7 Cal. W. R., 395.
(6) 6 Ben. L. R., Appx., 130.

1896.

BUDRSAB v. HANMANTA.

present it may, we think, be fairly contended that though the landlord's interest is throughout in the possession of the landlord by his tenant (as it certainly is as regards third persons), the tenant's interest is in possession of the tenant, and that it is the latter which the landlord in a suit in ejectment against his tenant who admits the tenancy seeks to recover. If that be so, it is competent to the tenant, while admitting the landlord's title to the land, and paying him rent in pursuance of such admission, to set up the case that the tenure upon which he holds is such as to disentitle the landlord to eject him so long as he pays the rent and to become entitled to the tenant's interest in the land which he claims by adverse possession. We do not say that a tenant by a false allegation as to the terms of his tenancy though continuously repeated can alter those terms. Such allegations do not necessarily throw upon the landlord the *onus* of refuting them by suit—*Rajah Nilmony Singh* v. *Kally Churn Bhattacharjee*[1]. But where a landlord seeks to recover possession of land in his tenant's occupancy from the tenant, and the latter, on the allegation of a perpetual tenancy, successfully resists the landlord's attempt to dispossess him for the statutory period, the current of authority to which we have referred in our opinion establishes that the law of limitation can be successfully pleaded in bar of a suit in ejectment by the landlord. And as we do not think that there is any principle of law which prevents us from following that current, or that the authorities are based upon a necessarily incorrect interpretation of the provisions of the Limitation Act, we consider that we ought to follow them.

It has, however, been contended before us that even assuming the law to be in accordance with this view, the provisions of section 28 of the Limitation Act are not applicable to the case. We are unable to follow that contention. If the defendant has lost by the operation of article 144 his right to institute a suit to recover the tenant's alleged interest in the land from the latter, it seems logically to follow that the defendant's right to such interest has become extinguished by the operation of section 28, and that by negation it has become vested in the plaintiffs. A different rule cannot, we think, be applied to a partial interest in

(1) L. R., 2 I. A., 83.

1896.

BUDESAB v. HANMANTA.

the land lost by limitation from that which is admittedly applicable to the case of the whole interest. The principle laid down in the cases cited in the beginning of this judgment is, in our opinion, therefore, applicable to the present case. We must send down an issue to have the nature of the possession of the plaintiffs' father and of the plaintiffs between 1862 and 1882 determined. It will be:—

Was the possession of the plaintiffs and of their father between 1862 and 1882 adverse to the defendant within the meaning of this judgment?

Finding to be certified in this Court within two months.

Issue sent down.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IMPERATRIX *v.* APPA'JI BIN YADAVRAO.*

1896. *January* 16.

Penal Code (Act XLV of 1860), Sec. 161—Public servant—Revenue and police pátel—Agreement to restore village Mahárs to office on payment of Rs. 300 towards repair of a village temple—Gratification—Official act.

The Mahárs of a certain village having been suspended from their office for some months a meeting of the villagers was held at the house of the Pátel, at which the Pátel was present, to consider the question of their restoration to office, and an agreement was there come to that they should be restored on their paying a sum of Rs. 300 towards the repair of the village temple.

Held, that the Pátel, being a public servant, had committed an offence under section 161 of the Penal Code (Act XLV of 1860).

THIS was an application under section 435 of the Code of Criminal Procedure (Act X of 1882) for the exercise of the High Court's criminal revisional jurisdiction.

The accused was the revenue and police pátel of Chinchodi in the Ahmednagar District. He was convicted under section 161 of the Penal Code (XLV of 1860) of taking a gratification for an official act under the following circumstances.

In 1892 the Mahárs of the village in question were removed from the services of the village, and Mángs were employed in

* Application for Criminal Revision, No. 364 of 1895.