corporation like the G. I. P. Railway Company would be liable under section 3 (*b*), if it were proved that the Company had been negligent and had actually connived at the act of the servant, is a question which does not arise in the present case. But having regard to the circumstances and facts found by the Presidency Magistrate, we think that our opinion on the first point should be in the negative. Such an opinion does not render the Act ineffective for its avowed purposes. The very judgment on which the Presidency Magistrate relied (*Rex.* v. *Marsh*[1]) in a passage quoted by Mr. Mayne but not copied by the Magistrate, shows that the defence in the present case might be good. And as Bayley, J., said in the same case, "under this enactment the party charged must show a degree of ignorance sufficient to excuse him." In short, the judgments clearly import that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute: see per Brett, J., in *Queen* v. *Prince*.[2]

Thus, the case relied on by the Presidency Magistrate is really against the view which he took. We direct the record and proceedings to be returned, with our opinion on the first point in the negative, on the second point in the affirmative.

(1) (1824) 2 B. & C. 717. (2) (1875) L. R. 2 C. C. 154 at p. 162.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

BALKRISHNA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. GOVIND BABAJI AGASHE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1902. *April* 15.

Civil Procedure Code (XIV of 1882), sections 584-585—Second appeal—Finding of fact by lower Court.

One Ragho died prior to 1856, leaving a widow Anpurnabai, and one son Babaji, who was Anpurnabai's step-son. On Ragho's death Anpurnabai took possession of the land in question in this suit and mortgaged it several times. In 1879 she mortgaged it with possession to the father of the defendants. Anpurnabai died in April, 1887, and in 1899, within twelve years after her death, the plaintiffs,

* Second Appeal No. 549 of 1901.

1902.

BALKRISHNA
v.
GOVIND.

who were the sons of Babaji, filed this suit to recover the land. They alleged in the plaint that Anpurnabai had been granted this land by her step-son Babaji by way of maintenance for her life, and they contended that, therefore, their right of suit did not arise until her death. The defendants pleaded adverse possession. They contended that Anpurnabai had held adversely to Babaji and to his sons (the plaintiffs). No evidence was given by the plaintiffs of the alleged grant of the land to Anpurnabai for her life by way of maintenance. The lower Court dismissed the suit. On appeal, the District Judge reversed the decision and passed a decree for the plaintiffs. In his judgment he said: "The plaint states that Anpurnabai had this land for maintenance, and in the complete absence of even the slightest information about Babaji and Ragho I must take this to be the fact."

Held, confirming the decree, that this was a finding of fact with which the High Court could not interfere in second appeal.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, reversing the decree passed by Ráo Bahádur Mahadev Shridhar, First Class Subordinate Judge at Ratnágiri.

Suit to recover possession of land.

The land in question was formerly the property of one Ragho. He died prior to 1856, leaving a widow Anpurnabai, and a son Babaji, who was step-son of Anpurnabai.

On Ragho's death Anpurnabai took possession of his property, and in 1858 she mortgaged it with possession. In the mortgage deed she stated:

My step-son is absent up-country. But it is I and no one else who has recovered (extricated) this property by resorting to litigation, for the expenses whereof this debt was incurred, and for which debt I have mortgaged the *thikan* to you. If he (*i.e.*, the step-son), in accordance with the terms of this mortgage deed, pays off the mortgage debt, after expiry of the period stipulated, you should re-deliver to him this property and this mortgage deed."

In 1879 Anpurnabai paid off the above mortgage, raising the money for doing so by mortgaging the land with possession for forty-five years to the father of the defendants, who took possession. The mortgage deed provided as follows:

The period of the aforesaid mortgage is forty-five years from this day...... My step-son is absent up-country. If he, after the stipulated period, offers to redeem the mortgage, he should be allowed to do so.

Anpurnabai died in March, 1887.

In 1899, and within twelve years from Anpurnabai's death, the plaintiffs, the sons of Babaji, filed this suit to recover possession.

They alleged that Anpurnabai had held the land for her life as maintenance under an arrangement with her step-son Babaji, and they contended that her mortgage of 1873 was, therefore, only operative and valid during her life; that she had no power to mortgage the land beyond that period, and that they, as sons and heirs of Babaji, on her death, became entitled to it.

The defendants pleaded adverse possession. They contended that there was no evidence of the alleged grant to Anpurnabai for maintenance; that her possession was adverse to her son Babaji and to the plaintiffs on his death; and that they (the defendants) had, therefore, a good title against the plaintiffs. The Subordinate Judge dismissed this suit.

On appeal the District Judge reversed this decree and awarded plaintiffs claim for possession with a declaration that the deed of mortgage was in operation after Anpurnabai's death.

Defendants preferred a second appeal.

Narayan M. Samarth for the appellants (defendants):—We contend that we held the land adversely to the plaintiffs in Anpurnabai's lifetime and have got a title by adverse possession. The plaintiffs meet that contention by alleging that by an arrangement between Anpurnabai and their father Babaji, who had inherited the land, Anpurnabai was given it for her life as maintenance and therefore had power to deal with it during her life. This is, no doubt, alleged in the plaint, but there is no evidence whatever of it, oral or documentary, in this case. The lower Court has found that such an arrangement was made and upon that has based its decree. But inasmuch as there is no evidence, we can question the finding in second appeal. Legally it is no finding at all. That being so, then it appears that the plaintiff's father Babaji was the owner of the land, but Anpurnabai took possession of it and dealt with it as her own until her death in 1887. She alleges in the mortgage deed of 1858 that she had recovered the property by litigation. Babaji, the then owner, was then living, and allowed her to deal with the land. On his death he plaintiffs (his sons) became entitled to it. They also stood by and allowed her to deal with it. We submit that under these circumstances Anpurnabai's possession must be taken to have been

1902.

BALKRISHNA v. GOVIND.

adverse to the plaintiffs. The defendants took the land under her mortgage to them in 1873 and their possession has been adverse to the plaintiffs, and they have now an indefeasible title: *Lachhan Kunwar* v. *Anant Singh* [1]; *Tika Ram* v. *Shama Charan*.[2]

N. V. Gokhale for the respondents (plaintiffs):—Our suit has been filed within twelve years of Anpurnabai's death and is therefore in time. Anpurnabai's possession was not adverse to us, as she held the land for her life as maintenance by arrangement with our father Babaji. That is a finding of fact by the lower Court and cannot be questioned in this second appeal.

[FULTON, J.:—But it is contended that there is no evidence on which that finding is based.]

That is so, no doubt. But it is alleged in the plaint and the allegation is not traversed in the defendants' written statement. The allegation having been made, it was for the defendants to show that it was untrue. In the absence of evidence either way the Court below was justified in presuming that Anpurnabai held the land under the alleged arrangement: *Bai Ani* v. *Gulabbhai*.[3] Her alienation was therefore good for her lifetime, and the plaintiffs could not sue till her death. A grant for maintenance is for life: *Beni Pershad* v. *Dudhnath*.[4] The defendants have not shown that their father, when taking the mortgage of 1873, made any enquiry as to her right to deal with the land.

FULTON, J.:—The facts of this case are simple. Ragho died long ago, leaving a widow named Anpurnabai and a son named Babaji, who was the father of the present plaintiffs. On Ragho's death Anpurnabai took possession of his property and mortgaged it by various deeds, the first of which was dated in 1858 and the last, under which the defendants claim, in 1879. She died on the 15th April, 1887, and the plaintiffs have brought this suit within twelve years of her death to recover possession of the property.

The question for decision was whether the possession of the mortgagees during the lifetime of Anpurnabai was adverse to the plaintiffs or their father Babaji; in other words, could the plaintiffs, if so minded, have ejected the mortgagees during the

(1) (1894) 22 Cal. 445; 22 Ind. Ap. 25.

(2) (1897) 20 All. 42.

(3) (1884) P. J. p. 303.

(4) (1899) 27 Cal. 156.

widow's lifetime? Adverse possession (to repeat the oft-quoted *dictum* of Mr. Justice Markby) means "possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession": *Bejoy Chunder Bannerjee* v. *Kally Prosonno Mookerjee.*[1] It is for the defendants who set up adverse possession under article 144 to prove that the widow had no life interest in the land.

On the facts above stated, which are the only facts known apparently, the son was owner of Ragho's property from the time of his death and was entitled to hold it, unless there was some arrangement between him and his step-mother by which she was to hold the land for life in lieu of maintenance. This, of course, is a question of fact. There may have been such an arrangement or there may not. We do not know what was settled between step-son and step-mother forty-five years ago.

For the appellant the *dictum* of the Privy Council in *Lachhan Kunwar* v. *Manorath Ram*[2] was quoted as follows: "The son having the title, she (the mother) could not take possession excluding him, unless she intended to take an adverse possession, a possession to which she was not in any way entitled." But the facts of one case are never quite the same as those of another, and it is dangerous to rely on the decision on evidence in the one for determining what it ought to be in another. In that case their Lordships found that the widow was not in any way entitled to the property, and therefore the remark above quoted naturally followed.

But in the present case the question is whether the widow was or was not entitled to hold for life. If there is doubt on the subject, the plaintiffs must succeed. The title lies with them and they must recover possession, unless the defendants prove affirmatively that their possession was adverse: *Rao Karan Singh* v. *Raja Bakar Ali Khan.*[3] We may refer to the remark of Stuart, V.C., quoted in *Lallubhai Bapubhai* v. *Mankavarbai*[4] as appropriate: "According to my impression of the law on this subject there ought to be nothing equivocal in a possession which is relied upon as a bar." The learned District Judge in this

(1) (1878) 4 Cal. 327 at p. 329.
(2) (1894) 22 Cal. at p. 449.
(3) (1882) 9 I. A. 99 at p. 102; 5 All. 1.
(4) (1876) 2 Bom. p. 413.

1902.

BALKRISHNA v. GOVIND.

case said: "The plaint states that Anpurnabai had this land for maintenance: and in the complete absence of even the slightest information about Babaji and Ragho I must take this to be the case." Now this is a finding of fact. Certain circumstances were laid before the Judge and he drew the conclusion which he thought most probable. Unless we can say that his inference was wholly unreasonable it is obvious that we cannot interfere. In a somewhat similar case (*Bai Ani* v. *Gulabbhai* [1]) a similar finding seems to have been arrived at, and although of course that decision of fact is no guide to what may have been the real truth in this case, we refer to it as an illustration of an inference which it was thought proper to draw on facts somewhat similar.

Now we think it is clear that we are not in a position to say that Mr. Walker's decision was unreasonable. What really occurred we do not know, but his inference that the step-mother was allowed by agreement with her step-son to remain in possession for life is an inference which may well seem more probable than that she held possession in defiance of her step-son. In dealing with circumstances like those, the Court can only act under section 114 of the Evidence Act by presuming the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. Whether the District Judge's finding is right or wrong, it is one with which we are not at liberty to interfere. We are, as pointed out by the Privy Council in *Pertab Chunder Ghose* v. *Mohendranath Purkait*,[2] bound by the provisions of the Civil Procedure Code relating to second appeals. The passage to which we refer as important to bear in mind is as follows: "Their Lordships must observe that the limitations to the power of Courts by sections 584 and 585, in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact."

We confirm the decree with costs.

Decree confirmed.

(1) (1884) P. J. p. 03.

(2) (1889) 17 Cal. 291; 16 I. A. 239.