married Dhaku, the daughter of Kashi. Therefore, we cannot attach such importance to the mortgage of Kashi as might have been attached to it if the families had not been related. Considering the lapse of time since the properties were conveyed to the Ghogle family, and the uncertain nature of the evidence with regard to the dealings in respect of these properties and the finding of the Judge that the Ghogle family had been in possession within twelve years of the suit properties, it is impossible, in my opinion, to come to a conclusion that the decrees of the lower appellate Court are wrong. Therefore, Second Appeal No. 535 of 1916 must be dismissed with costs, and Second Appeal No. 470 of 1916 dismissed.

SHAH, J.:—I agree.

Decrees confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

VALI ASMAL, APPLICANT *v.* RAO BAHADUR A. U. MALJI, OPPONENT*.

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June 6.

Civil Procedure Code (Act V of 1908), Order XVI, Rule 2—Bombay High Court Civil Circulars, 1912, Chapter I, Rule 55†—Pleader summoned as witness—Subsistence allowance.

* Civil Extraordinary Application No. 308 of 1920.

† The Circular runs as follows :—

55....As to travelling and other expenses the following rules having previously been made by the High Court are still in force and should be taken to have the place of rules specifically made under sub-rule (3) of Rule 2 of Order XVI :—

(*a*) European and East Indian witnesses are to be allowed their actual expenses for carriage when the same are not in excess of six annas a mile.

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Where a pleader is summoned as a witness to depose to facts which he came to know when engaged in his professional capacity he is not entitled to more than the subsistence allowance provided for under Rule 55 (*b*) of Chapter I of the Manual of the Bombay High Court Civil Circulars, 1912.

THIS was an application under the extraordinary jurisdiction of the High Court, against an order passed by B. N. Shah, Joint Second Class Subordinate Judge at Broach.

The applicant and another person were defendants in Suit No. 89 of 1913 and represented by their pleader, the opponent. In that suit, their pleader gave a *purshis* as follows: "I, plaintiff's pleader, have no objection to all the papers accompanying 416 being put in."

In 1919, the applicant's co-defendant in the first suit, filed a suit against the applicant. The applicant cited the opponent as his witness to prove that the word "plaintiff's" in the *purshis* in the suit of 1913 was a mistake for "defendants';" and gave him the usual subsistence allowance of one rupee. The opponent was, however, not examined as a witness, for the pleaders on both sides accepted the mistake. The opponent appeared, on the same day, as a pleader in another case in the same Court.

They are also to be allowed a sum not exceeding *Rs.* 2-8-0 a day for subsistence allowance for the time of their attendance at and journey to and from the Court, if they demand the same.

(*b*) Native witnesses of the better class, as Patels, Pandhar-peshas, merchants, Vakils and persons of corresponding rank are to be allowed from eight annas to one rupee a day, and artisans and persons of similar rank eight annas a day, as subsistence allowance.

(*c*) Native witnesses of the class of cultivators and menials who would not under ordinary circumstances voluntarily incur any expense on account of special lodging when away from home, are to be allowed subsistence money at the rate of six annas per day.

(*d*) The persons mentioned in clauses (*b*) and (*c*) are also to receive railway and other travelling expenses actually incurred by them, provided the same be reasonable. When the journey to and from the Court is made by railway

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On the opponent's application, the trial Judge awarded to him a subsistence allowance of Rs. 30 for the following reasons :—

"Rao Bahadur Malji says that he is usually allowed that sum by other Courts. I record, however, that he is not examined in this case, as his examination was not necessary. He did appear as a pleader in other suit today and conducted it. I have no right to take a middle course. I should allow either Re. 1 allowed to a respectable native witness or special fees under clause (*e*) of Circular 55."

The applicant applied to the High Court.

K. N. Koyajee, for the applicant:—The lower Court has erred in allowing the opponent a special fee of Rs. 30 under clause (*e*) of Circular 55 of the High Court. Clause (*e*) does not apply at all. Clause (*e*) applies to cases where witnesses have to incur extra expenses on account of food or travelling charges. Circular 55 relates only to subsistence and travelling allowances, and does not allow special fees on the ground of a witness being a pleader who has to give evidence of facts coming to his knowledge in his professional capacity or on the ground of his being a respectable witness. The Code of Civil Procedure provides only for travelling and other expenses of a witness and for remuneration for giving expert evidence (Order XVI, Rule 2). But there was no expert evidence to be given in the present case.

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or other means of conveyance, the time for which subsistence allowance is paid should be that actually spent on the journey. Where the journey is made on foot, fifteen miles a day should be reckoned as a day's journey, and subsistence allowance should be paid accordingly.

(*e*) Peculiar cases not provided for in the above rules are to be dealt with according to their own merits, and at the discretion of the Court from which subsistence money or the travelling allowance is demanded.

(*f*) Witnesses produced under warrants of arrest should receive subsistence money at the rate allowed to judgment debtors.

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G. N. Thakor, for the opponent:—It has been an invariable practice of the Broach Courts to award special fees to professional gentlemen appearing as witnesses. On the Original Side of the High Court also special fees are always allowed. If a long-standing practice has been followed, there is no occasion for interfering by way of revision. My client was put to considerable loss as he had to decline a professional engagement at Ankleshwar on the day in question. At any rate my client should not be ordered to pay the costs of his application, especially as my client was not a party to the suit and hence could not be made a party to the application for revision. The opposing parties in the suit should have been made opponents here.

MACLEOD, C. J.:—This is an application under the Civil Extraordinary Jurisdiction of this Court. The petitioner was the defendant No. 1 in Suit No. 210 of 1919 on the file of the Court of the Joint Second Class Subordinate Judge at Broach. He had summoned Rao Bahadur Malji, a pleader, to give evidence with regard to a certain purshis which had been put in in another suit, and had paid the usual subsistence allowance of Re. 1. In the end there was no necessity for the Rao Bahadur to give evidence as the parties to the suit admitted the mistake in the purshis. On the day on which the Rao Bahadur had been summoned to appear, he was actually appearing as a pleader in another suit in the same Court building, and had not, therefore, incurred any extra travelling expenses in going to the Court to give evidence. However, when the case was finished the Rao Bahadur put in a bill for Rs. 30, and this was allowed by the Subordinate Judge as the Rao Bahadur was called to depose on facts which he came to know in his professional capacity as a pleader.

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Now the only jurisdiction, which the Court had, was to allow a certain payment to the Rao Bahadur on account of his being called as a witness for subsistence and travelling allowance under clause 55 of the Civil Circulars. That clause provides for the travelling and other expenses which ought to be paid in the case of various witnesses according to various rates. Sub-clause (*e*) states that peculiar cases are to be dealt with according to their own merits, and at the discretion of the Court from which subsistence money or travelling allowance is demanded. It is, therefore, open to a witness to show to the Court that none of the rates allowed in sub-clauses (*a*), (*b*), (*c*) and (*d*) apply to his case, but that there are peculiar circumstances which entitle him to demand subsistence money or travelling allowance at a higher rate. The learned Judge appeared to think that a special fee under sub-clause (*e*) of clause 55 of the Civil Circulars should be allowed, not because extra expenses had been incurred by the witness, but because he was entitled to something more on account of his status. That was a wrong view to take, because the law does not provide for any special fee being paid to witnesses in the District Courts on account of their status. It is different if a witness is called as an expert to give evidence in matters in which he is held to be an expert. This is not a case in which the Rao Bahadur was called to give evidence on a question of law as an expert. He was merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader. According to the statement made by the Rao Bahadur before the Subordinate Judge, it appears that other Courts had considered that such special fees could be paid to ordinary witnesses, and if that has been the practice in the District Courts, then I can only say that there is no warrant for it in law. If professional gentlemen

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consider that provision should be made by the law to compensate them for the loss of time when they are called to give evidence in Courts, then they should agitate for an amendment of the law. But the Courts have no jurisdiction to set up a practice by which litigants are directed to make payments to witnesses which the law does not authorize. The order allowing Rs. 30 to the Rao Bahadur must, therefore, be set aside.

It has been argued on his behalf that although the applicant has succeeded, no order as to costs should be made on the ground, first, that the respondent was not a party to the proceeding ; secondly, that the demand made was only according to what he considered to be the recognised practice. But I could have understood the argument better if a preliminary point had been taken by the respondent that he was not a proper party to the Rule, and that the Rule should have been taken out against the opposite party in the suit. Then the question of procedure would have been considered, and if the respondent is not a proper party, of course the Rule would have been discharged. But that is a preliminary point, and it was practically waived by the respondent when he entered upon his arguments of the Rule on the merits.

As a matter of fact, according to the record, the bill of costs was sent in to the Court by the Rao Bahadur, and the decision of the Court, so far as I can see, was made between the Rao Bahadur, who was demanding the payment of the bill, and the present applicant. It is not the case of certain expenses of a witness being entered in a bill of costs to which an objection could be taken on a point of taxation. It is a demand made by a witness against the party who has issued the summons. I think, therefore, that the Rule was properly taken

out against the respondent, and there was no reason why the ordinary law that costs follow the event should not be observed. If, as a matter of fact, the applicant has been wrongly ordered to pay this Rs. 30, then he is entitled to come to this Court for redress, and it would certainly be very unjust if in getting that order set aside it should cost him the same amount as the amount at stake on the application. In directing that the respondent should pay the costs of the Rule, we do not consider that any slur is involved on the Rao Bahadur since he seems to have considered himself entitled to make the demand quite *bona fide* according to a wrong practice which was in vogue in the District Court. But equally was the applicant entitled to come to this Court and to get a final decision on this question. The Rule, therefore, must be made absolute with costs.

SHAH, J.:—I concur. The only question on this application is one of jurisdiction. That question is whether the Court had power to direct payment of Rs. 30 to the witness, who is the present opponent, and who was summoned in his professional capacity as a witness. It is clear that the case of a professional gentleman being summoned as a witness is not covered by sub-rule (2) of Rule 2 of Order XVI of the Civil Procedure Code. The only basis for this order that is suggested by the lower Court is clause 55, sub-clause (*e*) of the Civil Circulars of this Court. It is clear, however, that clause (*e*) has no application to the present case. Clause (*b*) specifically provides for the case of Vakils attending as witnesses; and in the absence of any indication of special circumstances justifying a higher payment for travelling expenses or subsistence money, clause (*e*) cannot afford any basis for the order which has been made in the present case.

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There may be some ground for the argument that the time of the professional gentlemen would be taken up without a sufficient check upon the litigants if they could be summoned as witnesses without the summoning parties having to pay adequately for their attendance. But that is a matter for the Legislature or the Rule Committee under the Civil Procedure Code to consider. At present all that we are concerned with is whether there is any provision which can justify the order made by the lower Court; and I am unable to find any such provision either in the Code or in the Civil Circulars.

Any argument based on the practice on the Original Side of this Court cannot avail the present opponent, as that practice is based upon an express rule of the High Court on the Original Side. There is no such rule either in the Civil Procedure Code or in the Civil Circulars applicable to this case; and in the absence of any such rule, the order of the lower Court, which is based apparently upon the practice of that Court, cannot be supported. The order of the lower Court must, therefore, be set aside on the ground that that Court had no jurisdiction to make it.

As regards costs, it has been urged on behalf of the opponent that it would not be right to make him pay the costs of this application. But there is no sufficient reason for departing from the ordinary rule that the successful party must get the costs which he had necessarily to incur in order to get the order set aside. I do not see how such an order as to costs could be interpreted as involving any reflection on the opponent, who appears to me to have acted with propriety and in good faith in these proceedings.

Rule made absolute.

R. R.