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29 C. 286.

not be an order made in the trial in the sense of s. 15 of the Charter. That doubt has, however, now been removed.

BRETT, J.—I agree with my Lord the Chief Justice that the Rule must be discharged.

I have only to add that I have had an opportunity before its delivery of reading and carefully considering the judgment of the learned Chief Justice, and that I entirely agree with his conclusions on the points dealt with and the reasons given for them.

*Rule discharged.*

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29 C. 306.

## [306] APPELLATE CIVIL.

*Before Mr. Justice Rampini and Mr. Justice Pratt.*

BAHIR DAS CHAKRAVARTI *v.* NOBIN CHUNDER PAL.*

[27th November, 1901.]

*Agreement—Agreement to refer matter in dispute between the parties to a Commissioner appointed by Court, and to abide by his report—Civil Procedure Code (Act XIV of 1892), ss. 150 and 151—Estoppel—Equitable estoppel.*

**In a suit for possession of land, the plaintiff and defendants, while the case was in the Court of the Munsiff, applied that a pleader might be appointed as Commissioner to ascertain who held the land on either side of the *khal* in dispute, and agreed that if the plaintiffs were found in possession of such land, they should get a decree; while if defendant No. 1 was found in possession, the suit should be dismissed.**

**Accordingly, a Commissioner was appointed, and the plaintiffs' suit was decreed in accordance with the Commissioner's report. From this decision the defendants appealed to the Subordinate Judge, who remanded the case to the first Court.**

***Held*, that the agreement between the parties to abide by the decision of the Commissioner on the fact of possession was a valid agreement, and that, when that agreement was given effect to and carried out, it would be inequitable to allow the defendants to resile from it, they were estopped in equity from so doing, and the order of remand passed by the Subordinate Judge was bad in law.**

***Protap Chunder Dass* v. *Arathoon* (1) referred to.**

THE plaintiffs Bahir Das Chakravarti and others appealed to the High Court.

The appeal arose out of an action brought by the plaintiffs to recover possession of certain land on establishment of their title thereto. The plaintiffs' allegation was that the land in dispute formed a part and parcel of their *jote*; that they were in peaceful possession of the land in dispute till they were dispossessed by the defendant Nobin Chunder Pal and others in Bysack 1304 B. S. (April 1307).

[307] Defendant No. 1, *inter alia*, contended that, neither the plaintiffs nor their predecessors in title having been in possession of the disputed land, the suit was barred by limitation; that the landlord not having been made a party to the suit, it was defective; that the land in dispute was not included in the plaintiffs' *jote*, but that it was included in the defendants' *jote*.

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* Appeal from Appellate Decree No. 430 of 1900, against the decree of Babu Mohini Chunder Ghose, Subordinate Judge of Hooghly, dated the 3rd of January 1900, reversing the decree of Babu Nanda Lal Kundar, Munsiff of Serampur, dated the 26th of May 1899.

(1) (1882) I. L. R. 8 Cal. 455.

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The plaintiffs and the contending defendants, while the case was in the Court of the Munsiff, presented an application to him asking that a pleader might be appointed Commissioner to ascertain who held the land on either side of the *khal*, and agreed that, if the plaintiffs were found in possession of such land, they should get a decree ; while, if the defendant No. 1 was found in possession, the suit should be dismissed. The Munsiff appointed a Commissioner, who reported that the plaintiffs were in possession of the land on both sides of the *khal*, and that the defendants had been in possession in previous years. The defendants objected to this report. The Munsiff, however, holding that, according to the agreement of the parties, they had solemnly bound themselves down to abide by the decision of the Commissioner as to present possession, disallowed the defendants' objection and gave the plaintiffs a decree in accordance with the Commissioner's report. Defendant No. 1 appealed to the Subordinate Judge, who, having held that it was doubtful whether the case was governed by the provisions of ss. 150 and 151 of the Civil Procedure Code, remanded it to the first Court for trial *de novo*. On remand the Munsiff gave a decree in favour of the plaintiffs ; on appeal the Subordinate Judge reversed the decision of the first Court.

Babu *Saroda Churn Mittra* and Babu *Sanat Kumar Pal* for the appellants.

Babu *Lalmohun Dass* and Babu *Manmatha Nath Mitter* for the respondents.

RAMPINI AND PRATT, JJ.—This is an appeal against a decision of the Subordinate Judge of Hooghly, dated the 3rd January 1900, passed in a suit for possession of certain land after proving title thereto.

The pleader for the appellants contends that the proceedings of the Subordinate Judge are wrong, inasmuch as they are **[308]** subsequent to the order of remand passed by him on the 5th of August 1898 ; and he contends that this order of remand and the subsequent proceedings are invalid and null and void, inasmuch as the case, in the circumstances, should not have been remanded.

The facts are these. The plaintiffs and the contending defendants, while the case was in the Court of the Munsiff, presented an application to him asking that a pleader might be appointed as Commissioner to ascertain who held the land on either side of the *khal* in dispute, and agreed that, if the plaintiffs were found in possession of such land, they should get a decree, while if the defendant No. 1 was found in possession, the suit should be dismissed.

The Munsiff acted upon this agreement between the parties and appointed a Commissioner in the case, and that Commissioner reported that the plaintiffs were in possession of the land on both sides and that the defendants had been in possession in previous years. The defendant No. 1 objected that, although the plaintiffs were found in possession in the current year, the defendants were in possession in previous years, and that therefore the decision should not have been given in favour of the plaintiffs.

The Munsiff, however, recorded that, according to the agreement of the parties, they had solemnly bound themselves down to abide by the decision of the Commissioner as to present possession, and he goes on to say : " All the verbs in the application are in the present tense. I cannot therefore hear the defendant's objection and reject it," and he accord-

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ingly gave the plaintiffs a decree in accordance with the Commissioner's report.

The defendant No. 1 then appealed to the Subordinate Judge who, on the 5th August 1898, set aside the decree of the Munsiff. He held that the disposal of the case on a certain point by agreement of the parties is only provided for in ss. 150 and 151 of the Code of Civil Procedure, and that he could not find any other provision under which the case might come and that, strictly speaking, it was doubtful whether the present case could be governed by the provisions of those two sections. And he thought that the case should go back to the first Court for trial *de novo* and remanded it accordingly.

**[309]** Now, it is this order of the Subordinate Judge, dated the 5th August 1898, which the appellant impugns in final appeal against the final decision of the Subordinate Judge after remand. The Munsiff, after remand, gave a decision in favour of the plaintiffs, and the Subordinate Judge, on the 3rd January 1900, reversed that order on the merits.

We think that the plea of the appellant in this case must prevail. It seems to us that the agreement between the parties to abide by the decision of the Commissioner on the fact of possession is a perfectly legal and valid agreement, and that, when that agreement was given effect to and carried out, it would be inequitable to allow the defendants to resile from it, and that they are estopped in equity from so doing. It may be that the provisions of ss. 150 and 151, Civil Procedure Code, are not, strictly speaking, applicable to this case, inasmuch as s. 150 provides for the question of fact or law being stated in the form of an issue and being referred to the finding of the Court; whereas, in this case the question of fact was stated in the form of an issue and referred, to the finding, not of the Court, but of the Commissioner. But it seems to us that the principles laid down in ss. 150 and 151 are applicable to this case, and that the agreement, having been carried out, the defendants are equitably estopped from resiling from and impugning the decree which was given by the Court of First Instance in accordance with the finding upon that issue which they agreed to refer to the decision of the Commissioner. And we are fortified in this veiw by the case of *Protap Chunder Dass* v. *Arathoon* (1). In this case the judgment-debtor Arathoon had been arrested in execution of a decree. The parties came to a certain agreement among themselves and, in accordance with that agreement, the judgment-debtor was released from jail, and as a condition precedent to his being so released, he agreed not to appeal. As soon as he was released, he proceeded to break his agreement and appealed from the decree in execution of which he had been arrested. The view of the Lower Court in this case was that the parties could not enter into an agreement in respect of legal proceedings and that the judgment-debtor could not waive the right of appeal conferred upon him by law. **[310]** But the judgment of this Court was to the effect that the judgment-debtor, having induced the decree-holder to believe and having undertaken that he would not appeal, and having, by such representation and undertaking, procured his own release from jail, was estopped from acting contrary to his deliberate representation and undertaking.

Now, the principle in the case of *Protap Chunder Dass* v. *Arathoon* (1) appears to us to apply to the present case. The defendants in the

(1) (1882) I. L. R. 8 Cal. 455.

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present case solemnly agreed to refer a certain issue of fact to the Commissioner and to abide by his decision upon that issue, and impliedly not to appeal against the decree given in accordance with that view. The agreement was fully carried out. The Commissioner gave his decision and a decree was made in accordance with that decision. The defendants are therefore estopped from impugning that decree and from appealing against it or asking the Subordinate Judge to remand the case for trial *de novo*. In this view of the matter it would seem to us that the order of remand passed by the Subordinate Judge is bad and that all subsequent proceedings accordingly fell to the ground.

The learned pleader for the respondents further argues that there was misconduct on the part of the Commissioner, inasmuch as he did not take all the evidence which the defendants intended to adduce before him. But it appears to us that this contention is only the result of an afterthought, because, before the Munsiff on the 18th of February 1898, no such objection to the Commissioner's finding was raised. The sole contention of the defendants then was that they had never agreed to abide by the decision of the Commissioner on the question of present possession. That was the only objection raised to the Commissioner's finding. But the Munsiff distinctly found that the agreement of the parties was that the case should be decided according to present possession.

We therefore cannot now give effect to this further contention of the respondents' pleader, and we accordingly set aside the order of remand passed by the Subordinate Judge and all subsequent proceedings and restore the decision of the Munsiff, dated the 18th of February 1898, deciding the case in favour of the plaintiff.

This order carries costs in all the Courts.

*Appeal allowed.*

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29 C. 311.

## [311] TESTAMENTARY JURISDICTION.

*Before Mr. Justice Ameer Ali.*

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IN THE GOODS OF L. P. D. BROUGHTON. [6th March, 1902].

*Probate—Practice—Application for probate of copy-will with alterations in pencil—Codicil—Will, pencil alterations in, made before execution—Photographic facsimile of will attached to probate—Succession Act (X of 1865), s. 58—Illegible portions of will.*

Where the executors applied for probate of a will consisting of two documents, the first being a copy-will with various alterations and interlineations made in pencil by the testator himself some time before the execution of the second which was in the nature of a codicil confirming the first as altered, the Court granted probate with a copy of the will showing the alterations and interlineations in red ink, and directed a photographic *facsimile* of the copy-will taken in the presence of the Registrar and the executors to be attached, as the pencil alterations were likely to fade in course of time.

*Gann* v. *Gregory* (1) and *Shea* v. *Boschetti* (2), relied upon. *In the goods of Hall* (3) distinguished.

*Held*, the provisions of the Succession Act, s. 58, are inapplicable to this case.

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(1) (1854) 3 De. G. M. & G. 777.
(2) (1854) 18 Beav. 321.
(3) (1871) L. R. 2 P. & D. 256.

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29 C. 311.

APPLICATION for probate of the last will of Lewis Price Delves Broughton, the late Administrator-General of Bengal, consisting of two testamentary documents,—the first being a copy-will altered in pencil by the testator himself some time before the execution of the second.

Mr. Broughton died somewhat unexpectedly on January 3, 1902, at 8, Pretoria Street, Calcutta.

It appears that on April 25, 1894, Mr. Broughton executed a will (while in England), and some time previous to October 1901 he obtained a copy of it from his solicitors in England, and after making various alterations and interlineations in it, in pencil, by his own hand, made over the same to N. S. Watkins, an Attorney of this Court, for safe custody.

The affidavits filed in this matter show that on January 3, 1902, Mr. Broughton sent for N. S. Watkins desiring him to bring the copy-will of 1894 with him. On the same day Mr. Watkins called at 8, Pretoria Street with the copy-will, and Mr. Broughton, shortly before his death, executed a fresh testamentary document, which was partly written out by **[312]** Dr. Arnold Caddy, his medical attendant, and partly by Mr. Watkins, confirming, amongst other things, the said copy-will of 1894 as previously altered by Mr. Broughton in pencil.

Some of the pencil alterations in the copy-will appeared to have been rubbed out, some of which were partly legible, and some altogether illegible.

N. S. Watkins and Henry Bateson, merchant, who were appointed to be executors in India under the testamentary document of January 3, 1902, applied for probate of both these documents as the last will and testament of the late L. P. D. Broughton, there being assets of the deceased within the jurisdiction of this Court to be administered.

Mr. *J. G. Woodroffe* for the applicants. The provisions of s. 58 of the Succession Act are not applicable to the present case, the alterations having been made before the documents were executed—*Ffinch* v. *Combe* (1); *In the goods of Brasier* (2). In cases such as the present one, where some of the alterations appear to have been rubbed out and where the construction of the will may be affected by the appearance of the original paper, the Court will order a *facsimile* probate to issue; *Williams on* Executors and Administrators (9th edition, pages 273, 324, 482.) The issue of such probate will determine the question as to the nature, condition, and appearance of the documents which form the last will of the testator, leaving it open to a Court of construction to afterwards decide, if necessary, upon the question of the effect of the condition of the documents on the bequest which appear to be given thereby—*Gann* v. *Gregory* (3), *Shea* v. *Boschetti* (4), *Taylor* v. *Richardson* (5).

Though ordinarily the *facsimile* is made by hand, there is nothing in principle or convenience to prevent the use of photography for such purpose. In the present case, owing to the condition of the document, a *facsimile* is only obtainable by means of photography, it not being possible to reproduce in ink the effect of pencil alterations, which appear to have been erased to some eyes, though they may still be legible to others. The uniformity of the ink copy will not show the **[313]** various gradations of the original pencil alterations. [AMEER ALI, J.

(1) (1894) L. R. P. & D. 191.
(2) (1899) P. 3.
(3) (1854) 3 De. G. M. and G. 777.
(4) (1854) 18 Beav. 321.
(5) (1858) 2 Drewr. 16.

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Can you cite any precedent in support of your application for the issue of photographic *facsimile*?] I am unable to find any, but there is nothing against the proposed course. We wish to adopt the most efficient means available.

AMEER ALI, J. This is an application for probate of the will of Mr. L. P. D. Broughton, late Administrator-General of Bengal.

It appears that he had executed a Will in the year 1894, and that some time in 1901 he made over to Mr. N. S. Watkins a copy of that Will with various alterations in pencil, which are sworn to be in his handwriting; that copy remained in the custody of Mr. Watkins until it was produced on the 3rd of January 1902 shortly before Mr. Broughton died. Mr. Watkins has in his affidavit stated that the document which is now produced with the pencil alterations was in his custody all along in the condition in which it was delivered to him by the deceased.

On the 3rd of January this year Mr. Broughton executed a document, which I may treat as a codicil, and which is, with the exception of a few words, in the handwriting of Dr. Arnold Caddy of this city, who was attending the testator medically about the time of his decease. The words not in Dr. Caddy's handwriting were written by Mr. Watkins. By this codicil, which I hold upon the affidavits to have been duly executed by Mr. Broughton, he confirms the copy-will as altered by him in pencil.

These two documents, therefore, upon the affidavits of Miss Rawlings and Mr. Watkins, really represent the last wishes of the deceased. The alterations in pencil in the copy-will, I have no doubt, were made before the execution on the 3rd of January, 1902, of the document I have referred to, and therefore do not come under the provisions of s. 58 of the Succession Act; and as they together represent his last wishes and testamentary dispositions, the applicants, who were appointed by the deceased as his executors, are entitled to probate thereof.

I have ascertained from the Registrar the practice of this Court regarding Wills containing alterations made by the deceased, and I am informed that the practice has been **[314]** to attach to the document of which probate is sought, a copy in writing with the alterations incorporated in the text, and I think I ought not to depart in this case from that practice; but having regard to the fact that the alterations here have been made in pencil by the testator himself and that the pencil writings are likely to fade in course of time, I direct, in the exercise of my discretion, that a photographic *facsimile*, taken in the presence of the Registrar and of the executors, be attached to the probate.

I may add that the case *In the goods of Hall* (1) does not apply to this case. In my opinion the alterations shown in the document of which probate is sought are not of a merely deliberative character, and that therefore the applicants are entitled to probate of the Will with the alterations. The directions I have given are amply supported by the authorities to which I was referred by *Mr. Woodroffe*, viz., *Gann* v. *Gregory* (2) and *Shea* v. *Boschetti* (3). In the copy in writing, which I have directed to be attached, the pencil alterations and interlineations should be shown in red ink.

[*Mr. Woodroffe.* There may be some question as to what is legible or illegible, and the red ink portions may not contain all that may be said

(1) (1871) L. R. 2 P. & D. 256.
(2) (1854) 3 De G. M. & G. 777.
(3) (1854) 18 Beav. 321.

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to be legible. This difficulty may be obviated by a photographic *facsimile* probate.]

Under the ruling of Lord Penzance in *In re Hall* (1) I can only allow to be copied the portions that are legible, and regarding which I can say they represent the testator's disposing mind. Under that ruling portions rubbed out must be treated as revoked.

[*Mr. Woodroffe.* Will your Lordship decide what is legible ?]

No. I will leave that to the Registrar. He can have a copy made and submitted to you, and, if any question arises, it can be referred to me.

*Probate granted.*

Attorney for the applicants : *Frank Williamson.*

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29 C. 315.

## [316] ORIGINAL CIVIL.

*Before Mr. Justice Harington.*

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HARA LALL BANERJEE *v.* NITAMBINI DEBI.*

[18th, 19th, 20th, 21st and 24th June, 1901].

***Jurisdiction—Letters Patent, 1865, cl. 12—"Suits for land or other immoveable property"—Cause of action—Suits for title to land situate outside the original jurisdiction of the High Court—Jurisdiction of the High Court as limited by the Charter—Suit for administration.***

**The plaintiff brought this suit in the High Court for a declaration that he is entitled to immediate and absolute possession of properties, both moveable and immoveable, the latter being wholly situated outside the local limits of the ordinary original civil jurisdiction of the Court, for the construction of his grandfather's Will under which he claimed, for an account by the executrix of the Will, for the administration of the testator's estate and other reliefs, alleging, *inter alia*, that the principal defendant was residing in Calcutta, and that there was personal property if the testator's within the jurisdiction of this Court at the time of the institution of the suit :**

***Held*, that this was a 'suit for land' within the terms of cl. 12 of Letters Patent, 1865, and the High Court had no jurisdiction to entertain it.**

**The meaning of the words "suits for land or other immoveable property" in clause 12 of Letters Patent, discussed.**

***Delhi and London Bank* v. *Wordie* (2) *Kellie* v. *Fraser* (3), *Seshagiri Rau* v. *Rama Rau* (4) referred to.**

ONE Kunja Lall Banerjee died on April 9, 1894, leaving considerable immoveable property in the District of Hooghly. He left a Will appointing his wife, Nitambini Debi (the principal defendant in the present suit), his executrix.

On July 24, 1894, the said Nitambini Debi obtained from the High Court probate of the Will of her deceased husband on the allegation that there was at that time moveable property belonging to the estate of Kunja Lall within the jurisdiction of this Court ; and took possession of the whole estate in due time.

**[316]** On March 31, 1898, the plaintiff Hara Lall Banerjee (the grandson of Kunja Lall) instituted this suit for the construction of his grandfather's Will, for declaration of the rights of the respective parties

* Original Civil Suit No. 247 of 1898.

(1) (1871) L. R. 2 P. & D. 256.
(2) (1876) I. L. R. 1 Cal. 249, 263.
(3) (1877) I. L. R. 2 Cal. 445, 463.
(4) (1896) I. L. R. 19 Mad. 448.