SHEWAK RAM ROY *alias* DURGA PRASAD *v.* SYAD MOHAMMED SHAMSUL HODA AND OTHERS.

In the case of *Mussamut Pranputty Koer* v. *Lalla Futteh Bahadoor Singh* (1), cited by the Judge, there had been no alienation by the widow, but a simple declaration made by her in a Warasatnama, which of course was no evidence against the reversioner and could not bind him. We are therefore of opinion that under the ruling of the Full Bench quoted above, this suit will lie.

The plaintiff may not be entitled to ask to have the deed cancelled, but he is competent to ask for a declaration that it is not binding upon him beyond the life of the alienor.

Before Mr. Justice Kemp and Mr. Justice Glover.

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June 10

GOPAL DAS (PLANTIFF) *v.* SHEIKH SYAD ALI AND OTHERS (DEFENDANTS.)*

Bill of Exchange—Notice of Dishonor.

In an action brought in the district of Patna against the indorser and acceptors of bills of exchange, after a part payment by the acceptors no objection having been taken as to the misjoinder of defendants, and the Judge having omitted to find whether the indorser had received notice of dishonor or not, *Held*, the case must be remanded to ascertain, first, whether notice had been given within reasonable time, and if not, whether thereby the indorser had been injured or exposed to material risk of injury; and, secondly, whether (English law not being applicable to the case) by the usage of merchants at Patna, a part payment by the acceptors and receipt by the plaintiff discharged the indorser from liability.

Mr. *G. C. Paul* and Baboos *Mahes Chandra Chowdhry* and *Ramesh Chandra Mitter* for appellant.

Messrs. *R. E. Twidale* and *C. Gregory*, and Munshi *Mahomed Yusaff* for respondents.

* Special Appeal, No. 666 of 1869, from a decree of the Judge of Patna, dated the 21st December 1868, reversing a decree of the Subordinate Judge of that district, dated the 16th July 1868.

(1) 2 Hay, 608.

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THE facts are fully stated in the judgment which was delivered by

KEMP, J.—The plaintiff in this case is the special appellant before us. It appears, taking the facts from the judgment of the lower Court, that the firm of Gupi Sahu and Dabi Sahu drew bills on the firm of Kandhi Sahu and Ram Sahu for rupees 5,000, in favor of the special respondent Syad Ali at 51 days' date. Syad Ali sold these bills to the plaintiff, who presented them for acceptance to the drawees by whom they were accepted The bills fell due, one on the 26th of August 1867, and the other on the 5th September of the same year.

It is asserted that the acceptors subsequently became bankrupt, but that before bankruptcy the plaintiff recovered rupees 500 from them, and that not being able to recover the balance, he has brought this suit against the indorser Syad Ali and the acceptors. The first Court gave the plaintiff a decree against the acceptors and the indorser, from which decision we are told the acceptors did not appeal. On appeal by the indorser Syad Ali, the Judge has reversed the decision of the first Court. The Judge does not come to any very distinct finding whether notice was given to the indorser Syad Ali or not, and in the pleadings in the first Court, the parties were at issue not as to the question whether the notice given was within reasonable time, but whether any notice had been given at all, on which issue the first Court found that notice had been given. The Judge observes that even supposing that notice reached the indorser on the 1st of Aswin, it would be very nearly a month from due date of payment of one hundi and 18 days from the date of the other. "The Judge proceeds to say "that what may be a reasonable notice, he is not prepared "to say, but he thinks that in this case the delay in giving "notice till after the acceptors had been allowed time to "pay, and had failed to pay more than rupees 500 was not "a reasonable delay; that therefore the failure of the plaintiff "to give notice of non-payment on the due dates and his "acceptance of part-payment without the knowledge of "the indorser sometime after the bills were due." appeared to him to be sufficient to support the case of Syad

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Ali the defendant; he therefore reversed the decision of the first Court and decreed the appeal with costs. The first contention before us in special appeal has been that as the parties in the first Court did not raise any issue as to whether the notice was given within a reasonable period, but simply went to trial on the question of notice or no notice, the Judge was wrong in entering into the question of whether the notice was given within a reasonable period, without giving the plaintiff, special appellant, an opportunity of giving evidence as to the usage amongst the merchants of the district of Patna as to what is considered notice within a reasonable period. It is also urged, and correctly so, that the Judge was wrong in his facts in respect of the date on which the hundis fell due. There is no doubt that such is the case, and that some days must be allowed on that account. It has also been urged with refrence to a decision T. W. *Pique* v. *Solab Ram* (1), that on general grounds of equity and good conscience it is not sufficient to show that notice was not given within a reasonable time, but that it must also be shown that the indorser for want of notice within such reasonable time has been subjected either to injury or to material risk of injury. In the case from which we are quoting, the learned Judges remanded the case to try whether notice of non-payment was given to the maker of the bill within reasonable time, and whether by reason of want of notice he sustained injury or risk of injury. As observed above, the Judge has not attemtped to decide in this case what may be a reasonable notice, nor has he gone into the question of whether the indorser the defendant has been injured in any way by the non-receipt of notice within what may be considered reasonable time.

Looking to the fact that the Judge has committed a mistake in the dates on which these hundis fell due, and that although this was brought to his notice in the shape of an application for rehview, the Judge still adhered to his former judgment, we think that, as it has been ruled by several decisions of this Court that the strict rules of mercantile law of England are not applicable to transactions in bills and hundis as amongst native

(1) 1 W. R., 75.

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of this country, equity and good conscience require that there should be a finding upon the question whether the indorser, the special respondent, has been injured or exposed to material risk of injury from the want of a notice within reasonable time. The Judge in disposing of this question must also find, either upon the evidence on the record, or on such fresh evidence as may be adduced by giving the parties an opportunity of showing by evidence what is the local custom amongst the mahajans, whether the notice in this case, if any notice was given at all, has been given within a reasonable time, and then proceed to try if necessary, whether, finding that it has not been given within reasonable time, the indorser, the special respondent, has been subjected to injury or to material risk of injury.

There are other points in the case which require notice; and which are taken in cross appeal. It is contended that the plaintiff is not entitled to sue the acceptor and the indorser together, that he must first look to the acceptor and then to the indorser, and that having joined them together in the same suit his case ought to have been dismissed. With reference to this we may observe that this plea was not taken below, and we do not think it proper to allow it to be taken at this late stage of the case. The second ground is that as the plaintiff recovered rupees 500 from the acceptors of the bill, he may be said to have given them time, and that by such conduct he discharges the indorser from liability. If this case was governed by English law, no doubt such would be the case, but on this question as upon the question of notice the Judge must decide the case according to the usages amongst merchants of the city of Patna. The Judge therefore will try this point also, namely, whether owing to the fact of the plaintiff having recovered rupees 500 from the acceptors of the bill, he has by such conduct discharged the indorser from all liability. The decision of this question will depend upon the evidence which may be adduced, giving the parties an opportunity to do so, on the local mercantile custom.

We therefore remand the case with reference to the above remarks. Costs to follow the result.