It is unnecessary therefore to express any opinion upon the other point raised by Mr. Allan, namely, whether the Court below was right in admitting secondary evidence of the mortgage. Upon the ground above stated, the decree in favor of the plaintiff must be set aside, and the suit dismissed. The applicant will be entitled to his costs in this and both the lower Courts.

JACKSON, J.—I concur.

Before Mr. Justice Macpherson and Mr. Justice E. Jackson.

SAYAD UMED ALI (DEFENDANT). *v.* MUSSAMUT SAFFIHAM (PLAINTIFF.)*

1869. *May* 29.

Lien for Dower—Mohammedan Law.

The heir of a deceased Mohammedan, having dispossessed the widow of deceased who was in possession in lien of dower, takes the estate subject to her lien for the amount of her dower.

THE plaintiff, as one of the wives of Jumat Hossein, sued to recover rupees 3,000 out of rupees 41,000 and 2 Gold Mohurs fixed as her 'Den Mohur' or dower payable on the death of her husband. She alleged that she and another wife had been in possession of the property of their deceased husband in lien of dower, and were dispossessed by defendant, the brother of their husband. The lower Courts held that by suing for rupees 3,000 plaintiff must be held to have given up the balance of the rupees 41,000, which it found as a fact had been the dower fixed. Defendant urged that the claim to the residue was barred as more than six years had elapsed from the death of the husband. The Court however found that the wives had been in possession of the estate in lien of dower up to within two years of the institution of this suit, and that the defendant, who had acted as their manager, had, in a verified written statement filed in a suit against third parties, admitted and put forward this fact. He had however ousted them and taken possession as heir two years before. The plaintiff obtained a decree, and the defendant appealed.

* Special Appeal, No. 3320 of 1868, from a decree of the Judge of Bhagulpore, dated the 2nd July 1868, amending a decree of the Subordinate Judge of that Zilla, dated the 11th September 1867.

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SAYAD UMED ALI v. MUSSAMUT SAFFIHAM.

Mr. *R. E. Twidale* for appellant.

Munshi *Mohammed Yusaf* for respondent.

MACPHERSON, J.—In the state of facts found by the Judge, this case falls within the principle acted upon by the Court in the case of *Mussamut Janee Khanum* v. *Mussamut Amatool Fatima Khanum* (1). It is distinguishable from the two other cases of *Mussamut Wafeah* v. *Mussamut Saheeba* (2) and *Mussamut Kalsumnissa* v. *Wahidunnissa*(3) in this, that in those

(1) 8 W. R., 51.

(2) 8 W. R., 307.

(3) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

The 16th April 1868.

MUSST. KALSUMNISSA *alias* BIBI BUDHAN (PLAINTIFF) *v.* MUSST. WAHIDUNNISSA (DEFENDANT.)*

Mr. *C. Gregory* for appellant.

Mr. *R. E. Twidale* for respondent.

JACKSON, J.—We think that the appellant in this case must fail. Her suit was "to recover sicca rupees 7,503 "12 annas—or Co.'s rupees 8,004-4-4, "the balance of the dower-money (out "of sicca rupees 40,000, and one gold "mohur, the amount of dower due from "plaintiff's husband, Mir Sadut Ali) "recoverable on the dissolution of marriage, from one-fourth of sixteen "annas of the estate of the deceased "Mahomed Mehdi, a lunatic, held by "his widow Mussamut Wahidunnissa, "after deduction of the proportionate "amount of dower due by plaintiff as "wife, and of the proportionate amount "due by the said deceased Mahomed "Mehdi's uterine sisters, Mussamut "Hosseni Begum and Fatima Begum, "who have, in lieu of the proportionate "amount due by them, surrende red to "plaintiffs' possession a part which they "apportioned her of the estate of the "deceased Mir Sadut Ali."

It appears that the plaintiff's husband died on the 30th of March 1845. The suit was commenced on the 26th of January 1867, nearly 22 years afterwards. The defendants pleaded, among other things, that the suit was barred by limitation. The Principal Sudder Ameen has held that the suit is so barred. The plaintiff appeals; and the defendant has also urged objections to the decision under section 348. But the first question which it is necessary to consider is, whether the suit is barred by limitation or not.

Mr. Gregory, for the appellant, stated to us, as his contention, that limitation did not apply to the present case because the plaintiff had been in possession of her husband's estate in lieu of dower, and continued down to 1866 in possession of a certain portion of the estate under a compromise with some of the heirs. His contention therefore was, that the cause of action arose in 1866, on his client being removed from possession of the share of the estate which she had held down to that time.

It seems to us that this view of the case is untenable. Without going at

* Regular Appeal, No. 260 of 1867, from a decree of the Officiating Principal Sudder Ameen of Patna, dated the 31st of July 1867.

cases the widow's possession had been expressly declared by decree of the Court to be wrongful, which is not the case in the

unnecessary length into the facts of the case, it may be stated that the present plaintiff was, from one cause or another, in possession of the property left by her deceased husband. That husband, at his death, left a widow the present plaintiff, and one sister, who appears to have died shortly after him, and a nephew, Mahomed Mehdi who at some time or other, it does not appear when, became a lunatic. The defendant before us is the widow of that nephew.

After the present plaintiff had remained for some time in possession of her husband's estate, his nephew's wife, the now defendant, sued her to recover that nephew's share of the estate, he being then as above stated a lunatic, and obtained a decree on the 27th of May 1859; that decree was confirmed on the 28th of January 1861. Pending the appeal, the nephew Mahomed Mehdi had died, and he was represented, it seems after his death, not by his widow, the now defendant, but by his two sisters as heirs, and the final decision, on appeal, was therefore passed in the presence of them and of the plaintiff. But it appears clear that the nephew's widow, Wahidunissa, would be bound by that decree, and consequently it may be properly used as evidence in the present suit. We must therefore take it that in the previous suit, in which the present plaintiff was defendant, and a party whom the present defendant now represents was plaintiff, it was decided that the now plaintiff was not entitled to, and was wrongfully in possession of, her deceased husband's estate, and was adjudged to restore the same, together with mesne profits; and there was in that case no reservation of her right to sue for dower. We mention this circumstance because it seems to constitute a distinction between the present case, and a case of *Musst. Janee Khanum* v. *Musst. Amatool Fatima Khanum* (1) in the same manner as it constituted a distinction between that case and a later case (the ruling in which has our concurrence) *Musst. Wafeah* v *Musst Saheeba* (2). It seems to us that the effect of the judgment in the previous suit was to throw the present plaintiff back on her original right of dower, and her cause of action, by reason of the non-payment of dower, which accrued on the death of her husband. It seems to us also that the plaint in this case discloses that very cause of action, and no other.

It cannot be said, we think, nor was it said in the case of *Musst. Janee Khanum* v. *Musst. Amatool Fatima Khanum* (1) that this is a suit to give effect to the lien of the plaintiff on the share of the defendant, because the question of her right to a lien, and to hold possession of the share of the defendant has been expressly decided against her in the previous suit. Neither is it a suit arising out of any right of the plaintiff to hold possession of the property by virtue of any contract or agreement, or compromise between her and the heir of the husband; because no such contract or agreement exists; and the alleged compromise between the plaintiff and the nephew's sisters was not binding on the other heirs and has also been set aside. It seems to us therefore that the Cause of action arose in 1845, and that there

(1) 8 W. R., 51. (2) 8 W. R., 207.

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present suit, where the final dispossession of plaintiff was not till 1273, and was not brought about or confirmed by any decree of Court. The Judge finds as a fact that the plaintiff was in possession by virtue of her right of dower, and that she was not dispossessed till 1867 (1273). The statement made by the defendant in 1867 in his written statement, to the effect that the plaintiff was in possession in lien of dower, is legally and properly used now as evidence against him. The respondent's vakeel has contended by way of cross appeal that the lower Appellate Court has erred in not giving interest from the date of institution of the amount of dower decreed. We think this objection is well founded, and that the respondent is entitled to interest from the date of institution of the suit. The decree must be amended accordingly and subject to this amendment the appeal will be dismissed with costs.

Before Mr. Justice Macpherson and Mr. Justice E. Jackson.

1869. *May 29.*

DAMANULLA SIRKAR AND OTHERS (PLAINTIFFS) *v.* MAMUDI NASHIO AND OTHERS (DEFENDANTS.)*

Act X. of 1859, ss. 6 and 7—Right of Occupancy—Leases for fixed Terms.

There is nothing in the mere fact of a tenant having been in possession for over 12 years under a series of pattas, each for a fixed term, which gives him a right of occupancy.

8 B. L. R. 167.

Mr. *M. L. Sandyal* for appellants.

Baboo *Girish Chandra Ghose* for respondents.

THE facts are set out in the judgment.

MACPHERSON, J.—In this case the plaintiffs sue to be restored to possession, on the ground that they have a right of occupancy. The case, made by the plaint, is that one Hanif Mohammed Sirkar had two consecutive leases of the property (at different

* Special Appeal, No. 2805 of 1868, from a decree of the Officiating Judge of Dinagepore, dated the 16th June 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 25th April 1868.

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is nothing to take this case out of the operation of Act XIV. of 1859; and therefore the Principal Sudder Ameen has rightly held that the suit is barred. We dismiss the appeal with costs and interest.