The defendant Maddan Thakur, who purhased Tilaknath's interest in Tetanyah, relied in his written statement on the Collector's batwara, and said he knew nothing of the ikrarnama. He affirmed that the Collector's batwara having been assented to by all the parties interested was conclusive, and could not be questioned. The defendant Tilaknath admitted that he had sold his whole interest to the defendant Maddan Thakur.

At the trial Tilaknath refused to produce the ikrarnama of 1257 (1849) though the Moonsiff thought he had it in his possession, but for obvious reasons wished to conceal it. The Moonsiff found that the ikrarnamas of 1257 (1849) and 1257 (1849) had both been executed, but he thought that possession of the land now in dispute had not been given to Hari Prasad. He thought the suit on this view was barred by limitation, but he also dismissed the suit, on the ground that the Collector's batwara was final, and could not be impeached.

The District Judge on appeal agreed with the Moonsiff that the suit ought to be dismissed on the latter ground, but he at the same time expressed an opinion that possession of the land in dispute was given to the plaintiff, who was ousted in 1256 (1848) during the batwara proceedings as above stated.

Baboos *Hem Chandra Banerjee* and *Chandra Madhab Ghose* for the appellant.

A suit like the present can be entertained in the Civil Court, although there was a batwara under Regulation XIX of 1814—*Spencer* v. *Puhul Chowdhry* and *Spencer* v. *Sheikh Kadir Baksh* (1). Under the Regulation XIX of 1814, the Collector cannot decide a question of title. He can only look to the shares. A failure by a party to urge any objections as to title or otherwise before the Collector at the time of the batwara does not preclude such party from resorting to the Civil Court—*Sheikh Ahmedulla* v *Sheikh Ashruff Hossein* (2). When, at the time of batwara, objection.

(1) 6 B. L. R., A. C., 658.

(2) *Before Mr. Justice Bayley and Mr. Justice Markby.*

The 10th May 1870.

SHEIKH AHMEDULLA AND ANOTHER (TWO OF THE DEFENDANTS) v. SHEIKH ASHRUFF HOSSEIN AND OTHERS (PLAINTIFFS).*

Messrs. *R. E. Twidale* and *C. Gregory* for the appellants.

Baboos *Ramee Chandra Mitter* and *Kali Mohan Das* for the respondents.

BAYLEY, J.—I am of opinion that this special appeal must be dismissed with costs. The facts of the case are these. The plaintiff sued for possession of three bigas of mokurrari lands and for declaration of mokurrari title in one biga, on the allegation that a mokurrari potta of those four bigas was granted to him by Bibi Bannu Jan, the proprietor of 8 annas share of the joint estates. It appears that, although the estate was one joint and undivided on the Collector's rent-roll, there was a private partition between the co-parceners, and under it the entire four bigas of the mokurrari were in the portion held by the grantor of the mokurrari. None of those

* Special Appeal, No. 2949 of 1869, from a decree of the Judge of Tirhoot, dated the 24th August 1869, modifying a decree of the Moonsiff of that district dated the 30th March 1869.

1872

BABOO HARI PRASAD JHA v. MADDAN MOHAN THAKUR.

are urged before the Collector, this officer has to stop the proceedings and refer the parties to the Civil Court. If the Civil Court had to decide the four bigas was thenin the portion held by the special appellant. Subsequently, the parties applied for a regular partition of the estate by the Collector under Regulation XIX of 1814.

By the Collector's batwara under this law, two bigas of the mokurrari lands were alloted by the Collector to the share of the special appellants, and the other two bigas were alloted to the other sharers. The plaintiff alleges that he was unable to get from the special appellants a recognition of his mokurrari right for the two bigas, and hence the present suit.

The first Court gave the plaintiff a modified decree. The lower Appellate Court gave the plaintiff a decree in full of his claim.

The defendant appeals, specially urging that under the private partition all the four bigas mokurrari were in the share of the grantor of the mokurrari, and that properly the loss of rent from that time should always be on the grantor, inasmuch as when the estate was held under private partition, then it was that the grant was made out of the grantor's share, and the loss of rent, thus accepted by the grantor himself, was for his own share, and for that only; that therefore the Collector's batwara, under Regulation XIX of 1814, could not alter this basis of the tenure, or transfer two bigas with a mokurrari or smaller rental to the other sharer of the estate.

I do not think this contention valid. The whole estate was one and indivisible and as such responsible to the Collector for all the revenue; and although there was a private partition, still that fact would not make the estate, which, as it originally stood by law, was one estate, become two estates, but it would remain one only. Further, the Collector, if he had, after his batwara of such one estate into two, to sell either or both of the then two separated estates for default to pay arrears of Government revenue, could not order at the sale that, as the mokurrari was granted by the proprietor of one 8 annas share under the original private partition, the grantor of the mokurrari must make up the full rent of the two bigas to the purchaser of the other estate created by the batwara under Regulation XIX of 1814, and into which, by the Collector's allotment, under Regulation XIX of 1814, those two bigas for the first time fell.

Again, in making the partition under Regulation XIX of 1814, the Collector had only to assess a proportionate jumma on a proportionate area of the whole estate, and then divide it into two. He cannot, when operating under Regulation XIX of 1814, decide that, as sharer A granted a mokurrari, and so made a diminished rental, a lessor area, or an area burdened with diminished rental, should go to A or his representative. The Collector could not try the validity or otherwise of the mokurrari. He could only take the area of the tenure as part of that of the one mehal to be divided into two, and apportion that whole area and assess upon it the proportionate amount of the whole jumma, and so divide the one estate into two estates.

I think therefore that the lower Appellate Court is right, and would dismiss this special appeal with costs.

MARK BY, J.—I also think that this special appeal must be dismissed. I entirely agree that, for the purpose of assessment of revenue, the private partition between the parties was a matter which the Collector had, if he thought fit, a right to disregard when he came to apportion the revenue, but Mr. Gregory goes further than this, and contends that the private partition might not only be disregarded for the purpose of revenue, but that after the Collector had made the partition, it became absolutely null and void, and that not only as to the shares of the estate, but also as regards the interests of the third party which had been created by the owners of the respective portions of the estate. He has produced no authority for such a proposition, and such a proposition seems to me to be almost monstrous. It is not denied that, prior to the partition by the Revenue authority, there had been a private partition by the shares of the estate, and I am at a loss to conceive by what possible means a title, which is good originally, can be got rid of by any act to which the holder of that title is not himself a party. That seems to me what the special appellant in this case contends for.

I agree in dismissing this special appeal with costs.

questions of title raised then, why cannot the Civil Court do so after completion of batwara? There is no section of Regulation XIX of 1814 which makes the Collector's proceeding final, and prohibits the same from being disputed in a Civil Court. Next, apart from the right generally of any person, who was a party to a batwara by a Collector, on a question of title to dispute that batwara before a Civil Court, the position of the present plaintiff entitles him to be considered to have been nominally, and not really, before the Collector at the time of the batwara.

Mr. *Twidale* for the respondent purchaser, Maddan Mohan Thakur.

The plaintiff was properly represented by his mother before the Collector. He cannot now, after 11 years' acquiescence, equitably succeed in this suit. He has also by his own acts and conduct admitted the batwara. He does not in his plaint charge his mother or Tilaknath Jha with having acted fraudulently. Now, in the last stage, in special appeal, he puts forward a new case. He should not be allowed to go beyond his plaint. The suit, in its present form, not being set aside the guardian's acts, cannot proceed in the face of the batwara.

The judgment of the Court was delivered by

MARKBY, J. (after stating the facts as above)—It has been contended here in special appeal that both the lower Courts were wrong in holding that the Collectors's batwara was final.

Had this been a proceeding between persons of full age and competence, we should have had no hesitation in holding that the Collector's batwara, assented to as it was by all concerned, was final; but we think that a point, which was fairly raised in the plaint, and which, under the circumstances of this case, ought to be considered, has been overlooked. The plaintiff, at the time of the batwara proceedings, was a minor; the only male of the three persons who assented to the petition was Tilaknath; and the effect of these proceedings was, as far as it has been shown to us, to take 28 bigas away from the infant, and to hand them over, without consideration, to Tilaknath. We do not wish it to be supposed that we assert this to be the real character of the transaction. But this is how it now stands before us, and we think that the plaintiff has a right to call for some explanation of a transaction which has this apparent character.

We think, therefore, that the case should be remanded to enquire whether in the batwara proceedings the guardians of the plaintiff Hari Prasad acted *bonâ fide* and with a due regard to his interest? If they did, then their suit ought to be dismissed. If they did not, then the batwara proceedings do not bind the plaintiff, and he ought to be put in the same position as far as possible, as if they had not taken place.

We think the question of costs should be disposed of when the suit has been finally determined, and the conduct of the parties more fully ascertained.

Before Mr. Justice Macpherson.

1872 May 2.

IN THE MATTER OF THE GOODS OF WILLIAM NEWTON, DECEASED.

Indian Succession Act (X of 1865), ss. 180, 181, 193, 210, 212 and 237—Practice—Probate of Exemplification of Will—Order to produce Testamentary Paper.

William Newton died in Calcutta on 9th October 1871, having first made his will, dated the 19th October 1868, whereof he appointed J. D. Wilson J. H. Garlent, J. Williams, and Walter Newton of Calcutta executors. The last named executor, who was the testator's brother, had, up to the time of the latter's death, carried on business in partnership with him in Calcutta and elsewhere, under the style of Payne and Co.; and a considerable portion of the testator's estate was in India. Garlent having renounced probate, the will was proved in England by Wilson and Williams, who appointed Messrs J. and C. Mandy their attorneys in India, and sent them an exemplification of the testator's will, for the purpose of obtaining in Calcutta or elsewhere in the East Indies a grant or grants, to be made either to Wilson and Williams alone, or jointly with Walter Newton, of Probate of the testator's will, or of the exemplification thereof, or if that should be found impracticable in consequence of the absence from India of Wilson and Williams, then to obtain letters of administration with the exemplification annexed to the testator's personal estate. The English executors by a letter of 14th November 1871, directed J. and C. Mandy to retain Messrs. Gray and Sen of Calcutta as their legal advisers, and Messrs. J. and C. Mandy thereupon handed the exemplification to Mr. H. C. Gray, a member of the firm of Messrs. Gray and Sen. On the 15th January 1872, Messrs. Wilson and Willams telegraphed to Messrs. Mandy to hold the exemplification from all parties until receipt of a letter from Mr. White, their own Solicitor, dated the 12th January. The letter referred to in this telegram was a copy of one written by White on behalf of Messrs. Wilson and Williams to Walter Newton, directing the attention of the latter to certain clauses in the articles of partnership of Payne and Co., which referred to the purchase of a deceased partner's share by the surviving partners, and requiring, amongst other things, a compliance with the said clauses, or the winding up of the business. After the receipt by Messrs. J. and C. Mandy of the copy of the above mentioned letter, Messrs. Gray and Sen advised them not to part with the exemplification.

Mr. *Ingram*, on the petition of Walter Newton, now moved under s. 237 of the Indian Succession Act, 1865, for an order directing C. Mandy and H. A. Gray to produce and bring the exemplification of the testator's will into Court.

The petition stated the death of the testator after having made his will the appointment of executors, the taking out probate in England by Wilson and Williams, the renunciation of probate by Garlent, the arrival of C. Mandy

1872

IN THE MATTER OF THE GOODS OF WILLIAM NEWTON DECEASED.

in Calcutta with the exemplification and the delivery thereof to H. C. Gray of the firm of Gray and Sen; and it proceeded to state that the petitioner was the only executor then within the Province of Bengal, and that he was willing and desirous to obtain probate, that he had applied to H. C. Gray for the exemplification, but that the latter had refused and neglected to give it up.

Mr. *Ingram*.—The only question is whether this exemplification is a testamentary paper or writing, and the test of that is, would it be entitled to probate. See Dodd and Brook's Probate Practice, p. 795. In Coot's Probate Practice, 4th ed., p. 32, it is laid down that if a "will have been previously proved and deposited in the Court of another jurisdiction, it is competent to the executor to prove an authentic copy, *i. e.*, an exemplification or office copy, *loco originalis*." Walter Newton is the only executor in this country capable of proving the will. No person has a right to keep a testamentary paper in his possession, and the expense necessary to get a will out of the hands of a party must fall upon the person withholding it—*Cunningham* v. *Seymour* (1). Both by the practice of the Court and on the authority of decided cases, the Court may order any person to produce or bring into Court any paper purporting to be testamentary, which may be shown to be in the possesson or under the control of such person. Dodd and Brooks' Probate Practice, page 795; See further the Indian Succession Act, 1865, ss. 180, 181, 193, 210, and 212. The English executors have no right to put any terms upon us.

Mr. *Branson contra*.—This is in the nature of a friendly suit; we have no objection to bring the exemplification into Court, but without an order to that effect we fear that we should not be justified in giving up the document, the conditions mentioned in White's letters not being first fulfilled.

Mr. *Ingram* in reply.

MACPHERSON, J.—I think the exemplification is an instrument falling within section 237, and I order Messrs. Gray and Mandy to bring it into Court.

Proctors for the petitioner: Messrs. *Carruthers* and *Dignam*.

Proctors for the impugnants: Messrs. *Gray* and *Sen*.

(1) 2 Phill., 250.