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We must answer to the question which is put to us that, in such a case as this, the proceedings are not sufficient to prevent the law of limitation applying to the other defendant.

The case will go back to the Division Bench with that answer.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

HURRONATH MULLICK AND OTHERS *v.* NITTANUND MULLICK

1873

Jan. 27 *&* *Feb.* 5.

Evidence Act (I of 1872), *ss.* 13, 21, *cl.* 1, *and* 32, *cl.* 7—*Relevant Fact*—*Evidence of Family Custom*—*Statement in writing by a Party to the Suit who is dead*—*Admission.*

In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as lleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit and, as the plaint alleged, by "a considerably majority" of the family, but the defendant was not a party to it. *Held*, that the deed was admissible as evidence on behalf of the plaintiffs, though they could themselve be called as witnesses: but that, though admissible, the custom as against the defendant must be proved *aliunde*.

THE plaintiffs and the defendant in this case were descendants of two brothers who, some two hundred years ago, had established certain idols. These idols had, for many years been kept up, and their worship maintained by the various families descended from the original founders, each of these families in rotation being entitled to the custody of the idols and to a *pallah* or turn of worship. It was alleged in the plaint that the majority of the descendants of the founders had always lived in Calcutta, and that, by the custom prevailing in the family, the idols could not be removed from Calcutta, but must be kept in the house in Calcutta of the person who for the time had the *pallah*. The defendant, on his *pallah* commencing last October, proposed to remove the idols to his house at Bhagmuree, out of Calcutta, whereupon the present suit was brought for the purpose of having it declared that the custom alleged in the plaint prevailed in the family, and of obtaining an injunction to

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restrain him from doing so. An *interim* injunction had been granted by Pontifex, J and the suit now came on for final disposal,

It was proposed, on behalf of the plaintiffs, to put in as evidence of the alleged custom a certain deed of agreement under seal, executed in June 1871 by the plaintiffs and "a considerable mojority" of those entitled to *pallahs*, in which after reciting that the custom of the family was as alleged in the plaint, they covenanted with one another not to remove the idols from Calcutta during their respective *pallahs*. The defendant was not a party to this deed, and one of the plaintiffs, Shama Churn Mullick, who had joined in the execution of the deed, had died since the suit was instituted.

Mr. *Kennedy* and Mr. *Lowe* for the plaintiffs.

Mr. *Woodroffe* and Mr. *W. Jackson* for the defendant.

Mr. *Kennedy* for the plaintiffs, contended that the deed was admissible under the Evidence Act, I of 1872, ss. 13 and 32, cl. 7. Shama Churn was a party to the suit, and he is now dead. This must be taken to be a statement by him relating to a transaction by which a custom was recognized. It is clearly *ante litem motam*. [MACPHERSON, J.—You may perhaps put in the recitals as being a statement by one of the plaintiffs who is now dead, but the only effect of that will be that what he states in the plaint will then appear as evidence given in the box.] It will be for the Court to give what weight it pleases to it, but I submit that the whole deed is clearly evidence

Mr. *W. Jackson*, for the defendant, objected to the reception of the deed in evidence.

Cur. adv. vult.

The following was the judgment on this point:

MACPHERSON, J.—Besides calling some of the plaintiffs and one of their priests to prove that the right to remove the idols has never before been either exercised or claimed, Mr. Kennedy proposed to put in a deed of agreement under seal, executed in June 1871, by (as the plaint says) "a considerable majority" of those

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entitled to *pallahs*, including the plaintiffs. That deed recites the custom of the family to be as now alleged in the plaint; and those who signed it covenanted with one another not to remove the idols from Calcutta. The defendant was not a party to this deed, and its reception to evidence was objected to on his behalf by Mr. Jackson. I said, at the trial, that I would receive the recitals, as being a statement in writing made by one of the plaintiffs, Shama Churn Mullick, who might have been examined as a witness had he not died since the suit was instituted. I thought that the recitals were, under s. 13 of the Evidence Act, read together with s. 32, cl. 7, receivable as statements made by Shama Churn, he being now dead, Mr. Kennedy, however, pressed for the admission of the whole deed, together with evidence of the circumstances under which it was executed. He relied on s. 13 of the Evidence Act, and contended that as the question is as to the existence of a right or custom, the execution of this deed is a "relevant fact," as being either a "transaction by which the right or custom in question was * * * * recognized and asserted" under cl. (*a*) of s. 13, or as being "a particular instance in which the right or custom was * * * * recognized" under cl. (*b*). At first, I thought the deed inadmissible, except as a statement made by Shama Churn, the defendant not being a party to it, and being in no way bound by it. And it certainly is rather startling to find that when a set of plaintiffs come into Court claiming a right by custom as against a defendant, a declaration by them among themselves (but behind the back of the defendant) that they have the right, and a covenant to do nothing contrary to it, are admissible as evidence on their behalf. Such an assertion of right, it at first sight appeared to me, could be placed no higher than an "admission," which (s. 17) is defined to be "a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact," made by a party to the proceeding, and which is ordinarily (s. 21) not admissible on behalf of the person who made it. But by cl. 1 of s. 21, "an admission may be proved, by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be revelant as between third persons under s. 32." And further considera-

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tion of the matter has made me come to the conclusion that I must admit this deed, as being in strictness admissible on behalf of the plaintiffs generally: for in admitting the recitals as a statement made by Shama Churn Mullick, I held them to be relevant under s. 32: and it almost necessarily follows that I must admit the deed on behalf of the plaintiffs, though they can themselves be called, as witnesses, and though the deed amounts merely to a statement by them of their own view of their case.

Practically, however, it makes little difference whether the deed, or any portion of it, is admitted or rejected. Whether it is or is not evidence under the new Act, it is manifest that a mere statement by the plaintiffs and others, forming "a considerable majority" of those interested, a few months before action brought, that they have this right and will uphold it, is worthless, as against a third party, as evidence that they do in fact have the right which they assert they have. It is none the less worthless because made, as in the present instance, on the occasion of a settlement among themselves of questions and difficulties which had arisen. In my opinion this deed, when admitted, leaves the plaintiff's case exactly where it was: for it shows no more than that, whereas the plaintiffs, in October 1872, filed the plaint now before me, asserting that a certain right exists and praying that the defendant may be restrained from infringing it, they in June 1871, signed a deed in which they (as amongst themselves) asserted this same right and bound themselves to respect it. Whether, as against the defendant, they have or have not the right claimed remains unaffected by the deed, and must be proved *aliunde*.

Attorneys for the plaintiffs: Messrs. *Beeby* and *Rutter*.

Attorney for the defendant: Mr. *Oliver*.