In 1871 application was made by the decree-holder for execution against Gourirsunker's heirs (Gourisunker being dead), and against the property left by him.

Gourisunker's sons presented a petition objecting to the issue of any process of execution, upon the ground, among others, that no steps had been taken to execute the decree against their father for three years preceding the application. The Munsif allowed the execution to proceed, on the ground that the wording of the order of the High Court of 1868 was not clear, and that therefore, the decree-holder was not guilty of any laches. The Judge, on appeal, held that the decree was barred, and was not capable of being executed against Gourisunker's heirs. Wise appealed to the High Court. The case was heared before Couch, C. J., and Bayley, J., who, in consequence of the conflicting decisions in *'Mohesh Chunder Chowdhry* v. *Mohun Lal Sircar* (1) and *Khema Debea* v. *Kumolakant Bukshi* (2), referred

(1) 8 W. R., 80.

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

KHEMA DEBEA AND OTHERS (DECREE-HOLDERS) *v.* KUMOLAKANT BUKSHI AND OTHERS (JUDGMENT-DEBTORS)*

The 3rd June 1868.

Limitation—Execution of Decree against several Defendants with separate Liability.

Baboo *Issur Chunder Chuckerbutty* for the appellants.

The respondents were not represented.

The judgment of the Court was delivered by

MARKBY, J.—The appellants in this case are seeking to execute a decree, dated 21st March 1863, which declares that certain of the defendants in the suit, being six in number, should pay to the plaintiff Rs. 749-0-9; that certain others of the defendants, being five in number, should pay to the plaintiff Rs. 91-8-2; that certain others of the defendants, being three in number, should pay to the plaintiff Rs. 60-8-6; and that the remainder of the defendants, being seven in number, should pay the sum of Rs. 280-0-9; in all Rs. 1,181-5, which, with costs in proportion, the defendants were to pay according to their respective shares.

The suit was brought by one of several persons jointly interested in land against his co-sharers, the ground of his action being that he had been compelled to pay the whole Government revenue due in respect of the land, and he now sought to recover from his co-sharers that which he paid in excess of his own proper share. The result of the suit was that he got a decree in his favor in the form stated above.

The obligation of the co-sharers in some way or other to satisfy this demand is well known, though there has been occasionally some difficulty and some misunderstanding as to the exact nature of the obligation, the mode in which it

* Miscellaneous Appeal, No. 470 of 1867 from a decree of the Judge of Rajshahye, dated the 7th June 1867, affirming an order passed by the Principal Sudder Ameen of that district, dated the 12th January 1867.

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the following question for the opinion of a Full Bench :—"Whether in the case of such a decree as was sought to be arises, and the mode in which it is to be enforced.

The mode in which the obligation arises is no longer of any importance as soon as it is ascertained what the obligation is, and the mode in which it is to be enforced ; and both the points have, we consider, been finally settled by the practice and decisions of this Court in the following manner :—

1 That each co-sharer is bound to refund to the one who has paid the whole revenue, so much as he ought himself to have paid.

2. That this obligation is to be enforced by a suit against all the co-sharers in which the amount of their several liabilities is to be declared by the Court.

It can perhaps hardly yet be said to be fully ascertained how the rights of the parties are to be adjusted, if one of the co-sharers should be unable to fulfil his obligation, but no such question arises in the case before us. The above two propositions were recognized in the Full Bench decision in *Rambux Chittangeo* v. *Modhosoodun Paul Chowdhry* (*a*).

Now, turning to the case before us, we, find that, in the year 1863, the plaintiff attached the property of one of the seven defendants who were ordered to pay Rs. 280-0-9. On the 27th November, the defendant, whose property had been attached, deposited in Court the sum of Rs. 368-0-2, being the above amount, together with the share of costs of this set of defendants and interest; and upon his doing this, the execution case was struck off the file, by which we understand it to be meant that the attachment was taken off, and the execution proceedings entirely put an end to. From that time, no further proceedings were taken by the plaintiff until the 21st November 1866, when he made an application for the purpose of taking out execution against that batch of defendants who were ordered to pay Rs. 749-0-9. It was thereupon objected that execution of the decree was barred under s. 20 of Act XIV of 1859. The plaintiff in answer relied on the proceedings taken against the former batch of defendants, the last step in which was taken on the 27th November 1866. The Principal Sudder Ameen, however, to whom the application was made, gave his opinion in a very clear judgment that the decree was not a joint one against all the defendants, but a separate one against each batch, and that the proceedings against one batch had no effect whatever towards keeping alive the separate decrees against other batches ; and he held the execution to be barred by limitation under the provision referred to. Upon appeal, the Judge of Rajshahye confirmed this decision. It now comes before us as a Miscellaneous Appeal, and we also think the Principal Sudder Ameen was right.

It appears to us that the language of the decree is clear. It directs each batch of defendants to pay a certain sum of money, and there is not a single word in the decree which would lead us to suppose that it was the intention of the Court which passed the decree to impose a joint liability upon all the defendants for the whole amount.

It is said that the decree must be considered as creating a joint liability, because the plaintiff has a right to hold all the defendants jointly liable for the amount which he has paid in excess of his share ; but as appears from what has been already stated, this argument is directly opposed to the established law and practice of this country. In such a suit as this, though all the sharers must be sued together, yet it is the business of the Court by its decree to apportion

(*a*) Reference from the Judge of the Small Cause Court of Krishnagur, dated 15th April 1867.

executed in this case, proceedings in execution against one of the defendants are sufficient to prevent the law of limitation applying to process of execution against the other."

Mr. *C. Gregory*, for the appellant, contended that there was but one decree. The same decree cannot be alive and in force as against certain persons and inoperative as against others. The question now raised was decided in *Mohesh Chunder Chowdhry* v. *Mohun Lal Sircar* (1). There is no difference between that case and this. In *Khema Debea* v. *Kumolakant Bukshi* (2), the Judges proceeded upon the assumption that there were four separate decrees.

Baboo *Boikanthnath Doss* for the respondent.—There are two decrees here; see *Khema Debea* v. *Kumolakant Bukshi* (2), and also the passage from the judgment in *Stephenson* v. *Unnoda Dossee* (3), which is quoted in *Mohesh Chunder Chowdhry* v. *Mohun Lal Sircar* (1). Execution against one of the judg-

the liability amongst the shareholders according to their respective shares, and not to give a joint decree against all. This was done as far as it was necessary to do so in the present case.

We have been much pressed with a case of *Mahesh Chander Chowdhry* v. *Mohun Lal Sircar* (*a*), decided by L. S. Jackson and Hobhouse, JJ. There is no doubt, great similarity betw een that case and the present, and had we differed from those two Judges or any principles of law, we might have thought it right to send the case before a Full Bench. But we do not consider that upon any principles of law involved in this case there is any difference of opinion whatever. The Judges in that case thought that the decree before them was joint and several, and considered that the joint liability of all the defendants was kept alive by proceedings against any single one. We do not question this, but in our opinion the decree before us is not a joint decree as against all the defendants. It, in fact, comprises four decrees against four separate batches of defendants, and though, as between defendants comprised in the same batch there is a joint liability for the amount which that batch has to pay, yet, as between the members of different batches, there is no common liability. Consequently, we consider that the proceedings in execution against one batch of defendants would not have any effect in keeping the rights of the decree-holder alive as against defendants who belonged to other batches, and no proceedings having been taken within three years to execute the decree against the batch of defendants to which the respondents belong, the rights of the decree-holder under this decree is, as against these defendants, barred by limitation.

The appeal is dismissed with costs.

(1) 8 W. R., 80.

(2) *Ante*, p. 259.

(3) 6 W. R., Mis., 18; see p. 21.

(*a*) 8 W. R., 80.

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ment-debtors is not enough to keep the decree alive against the others.

Mr *C. Gregory* in reply.

The judgment of the Fulll Bench was delivered by

COUCH, C.J. (after reading the question).—The suit appears to have been brought to recover arrears of rent for 28 years, and it appears that one of the defendants Gourisunker had been in possession up to a certain time, and that then the possession had been transferred by sale and purchase from him to Mr. Gasper, and there was no joint liability. Each person was liable for the rent for the period during which he or she had occupied, and the decree was, in the first instance, made by the Munsif, apparently, in that form. The Principal Sudder Ameen appears to have modified that on an appeal, and to have declared that the rent was to be allowed for the whole time against the persons in possession. That was in reality the same thing, but leaving the period for which each would be liable to be determined in the execution of the decree. Subsequently, the High Court appears from the proceedings to have declared that that was so, and Mr. Bagram, who represented Mr. Gasper, was declared to be separately liable for the rent of 1259 (1853). Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law, a decree against one persons for the rent of one period, and a decree against the other person for the rent of another; and I think such a decree as this, although it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of s. 20 of the law of limitation, there is really no difficulty; the decree is to be kept in force against each, and to be treated as a separate decree against each, in such a case as this, as it would in the case of persons sued for contribution because it is a separate liability, and each is liable only for his own share. I think that, although the decree is made in one suit, it is in reality and substance a separate decree against each for the portion for which each is declared to be liable.

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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