till confirmed by the zemindar, and reported by him to the Government authorities. It appears to us, therefore, that as the appointment of a person to the vacant office of Ghatwal rests with the zemindar, that he may, if necessary, appoint a suitable person; that, as in this case, no necessity exists, as Government have given up their right to insist on the appointment of persons to that office, and no longer require the services of Ghatwals in Kurukpore; and that as the plaintiff is not entitled to succeed to the property by hereditary right, but only on appointment by the zemindar,—the plaintiff is not entitled to recover possession on the grounds he claims; and we, therefore, reverse the order of the lower Court, and dismiss the plaintiff's suit with costs.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

July 21.

BAIKANTHANATH KAMAR v. CHANDRA MOHAN CHOWDHRY.*

Written Statement—admission.

See also 1 B. L. R. (A. C.)92 6 B. L. R. 303

In a suit by A. against B. for recovery of ancestral jummai lands, of which he alleged that he had been dispossessed by B., B. stated in his written statement that A.'s ancestor having relinquished the land, the zemindar had leased the same to him, B, and he had been in possession since. He also stated how A.'s ancestor relinquished, and that he, B., had thereupon obtained a potta. He denied that he had dispossessed.

Held, that B. having admitted the possession of A.'s ancestor, it lay upon B. to prove his title.

Per Macpherson, J.—The opinion of the Full Bench in *Pulin Behari Sen* v. *Watson*, was that if a party makes a qualified statement, that statement cannot be used against him apart from the qualification; not that if a man makes a series of independent unqualified statements, those statements cannot be used against him. That case goes no further than to lay down that an unfair use is not to be made of a man's written statement, by trying to convert into an admission by him that which he never intended to be an admission.

THIS was a suit for the recovery of possession of jummai lands, which the plaintiff alleged had belonged to his ancestor; and that he had been dispossessed by the defendants.

* Special Appeal, No. 121 of 1868, from a decree of the Principal Sudder Ameen of Burdwan, affirming a decree of the Sudder Ameen of that district.

1868

BAIKANTHANATH KAMAR v. CHANDRA MOHAN CHOWDRY.

Defendant, Baikanthanath Kamar, in his written statement, stated:

1st.—"That on plaintiff's ancestor relinquishing the land in dispute, the zemindar having thereby acquired a right thereto, and having leased the same to me, I have been in possession thereof, hence the suit cannot proceed without the zemindar being made a party defendant.

2nd.—"The zemindar of the village did, in Chait 1267 (March or April 1860), serve a notice of enhancement on the land in dispute. The plaintiff's ancestor, the late Ramkumar Chowdhry, having relinquished the land in dispute, I agreeing to pay rent at Rs. 36-4 annas, obtained a potta on the 5th Chait 1267 (March 1860), and remained in possession. Out of the same, some land is under-let, and some under my own cultivation; after payment of rent, I am in possession. The plaintiffs have no right to the said land. I did not dispossess. The suit is false.

3rd.—"The land in dispute does not appertain to the house of Sardar Karikar. The land in dispute is not the istemrari land of the plaintiff. The plaintiff having confounded the boundary of some of my pottai land, has instituted this suit."

The Sudder Ameen, throwing the onus of proof on the defendant, gave a decree for the plaintiff, on the ground that the alleged relinquishment by the plaintiff's ancestor was not proved; that the plaintiff was in possession of the land in dispute, and had been forcibly dispossessed.

On appeal, the Principal Sudder Ameen held, that the alleged relinquishment was not proved, and that the plaintiff had been dispossessed. He confirmed the judgment of the lower Court.

In special appeal it was contended, that the plaintiff's rights should have been enquired into; that since the plaintiff alleged, that he was dispossessed in 1271 B. S. (1868 A. D.), and the defendant's potta was of 5th Baisak 1268 (16th April 1861), the lower Courts should have enquired into the fact of possession during this period.

Baboo *Khettra Mohan Mookerjee* for appellant.—The onus is on the plaintiff to prove his title. Written statements are not

1863

BAIKANTHA-NATH KAMAR v. CHANDRA MOHAN CHOWDRY.

father was in quiet possession of the tenure, whatever it might have been; and under the ordinary rules of inheritance, that tenure, as it existed in the father's hands, would have descended to the son, had not the plaintiff's father, as the defendant alleges, relinquished the lands. But it has been found as a fact by the lower appellate Court, that the plaintiff himself was in possession of the lands in dispute, and was dispossessed therefrom by the defendant; and that not only there was no sufficient title shown by the defendant, so as to justify the plaintiff's possession being disturbed by defendant, but that the whole of the title set up by the defendant was fraudulent and unaccompanied by any kind of possession whatever.

Under these circumstances, I hold that the plaintiff's prayer for possession must be decreed, the defendant having shown no title to disturb that possession.

As to the second plea, I think that the contention of the defendant as to the doctrine of law as to admissions, which he wishes us to accept, and considers supported by the various cases cited by him, has no application whatever to the facts of the present case before us.

It is true that an admission which is qualified in its terms, must be ordinarily accepted as a whole, or not taken at all as evidence against a party, but when a party makes separate and distinct allegations without any qualification, the rule of law contended for does not apply. For instance, in the present case, the defendant, in his written statement, makes one clear and distinct allegation that the plaintiff's father had possession, and that he (the defendant) had no possession whatever at the time. Then he makes another distinct and unqualified allegation, that the plaintiff's father having relinquished the lands, he (the defendant) succeeded to the land. There are two such separate statements here that I cannot see why the one statement cannot be taken quite distinct from the other. I think the plea is untenable for these reasons. I, therefore, do not make any further remark on the legal doctrine as to admission. I would dismiss this special appeal, with costs.

MACPHERSON, J.—I wish to add a few words, because it is

1868

BAIKANTHA-NATH KAMAR v. CHANDRA MOHAN CHOWDRY.

pleadings in confession and avoidance, whereby a defendant would be bound by the confession, and compelled to prove the avoidance. The whole statement should be taken together. *Sultan Ali* v. *Chand Bibi* (1). *Pulin Behari Sen* v. *Watson* (2). When a written statement is referred to, the whole of it becomes evidence, and not the portion read or cited. *Radhacharn Chowdry* v. *Chandra Mani Shikdar* (3). The pleading in this case is not an admission of the plaintiff's, nor was it meant to be so. In fact it was a denial of the plaintiff's right.

Baboo *Ambika Charan Banerjee*, for respondent, was not called upon.

BAYLEY, J.—I am of opinion that this appeal ought to be dismissed with costs. The plaintiff sues for possession and mesne profits, on the ground of having been dispossessed from certain ancestral istemrari jummai lands.

The defendant's case is that he has not dispossessed the plaintiff; that the lands in dispute are not the plaintiff's istemrari lands; that the plaintiff's father once held the land, but being unwilling to pay an enchanced rent, he, the plaintiff's father, gave them up by a deed of relinquishment. The first Court decreed the plaintiff's suit. The defendant appealed, and the lower appellate Court has dismissed the defendant's appeal, upon which he (the defendant) has apealed specially, urging before us only two grounds: *firstly*, that the lower appellate Court has erred in law in not requiring the plaintiff to prove an istemrari title, before giving a decree for possession, and that, until the plaintiff had proved such title, no proof should have been required from him (the defendant); and, *secondly*, that the lower appellate Court was wrong in taking a part of the defendant's statement as an admission against him, whereas, as a rule of law, the lower appellate Court should have taken the whole together.

In my opinion, these pleas are untenable, because it is clear from the written statement of the defendant, that the plaintiff's

(1) 9 W. R., 130.

(2) Case No. 76 of 1867, 31st Jan. 1868.

(3) 9 W. R., 290.

1868

BAIKANTHA NATH KAMAI v. CHANDRA MOHAN CHOWDRY.

clear to me, from the repeated attempts which have lately been made before us to put a wholly wrong construction upon the judgment of the Full Bench, in the case of *Pulin Behari Sen* v. *Watson and Co.* (1), that, that judgment has been greatly misunderstood. In the judgment of the Chief Justice, Mr. Justice Bayley and myself, there occurs the following sentence : " If you read a man's answer, you must take the whole admission together." This sentence has been repeatedly cited before us recently as laying down that no portion of a defendant's written statement can, by any possibility, be read against him, without every portion of the statement from the beginning to the end being also read. To give such an effect to what we say, is to give it a far wider meaning than was ever intended. The context shows clearly enough what the true meaning is, and it is the only meaning which the passage properly bears. It is simply this : that if a man makes a qualified statement, you cannot use the statement against him apart from the qualification. But it is not laid down by us, and was never intended to be laid down, that if a man makes a series of independent and unqualified statements, these statements may not be used against him. While I still consider the judgment in *Pulin Behari's* case to be perfectly right, I may state distinctly that that case, in my opinion, goes no further than to lay down that an unfair use is not to be made of a man's written statement, by trying to convert into an admission by him that which he never intended to be an admission.

In the present instance, there are two distinct statements of facts made by the defendant. The first is that the plaintiff's ancestor held the tenure, and was in possession of the lands in dispute up to a certaint date. The second is that, on that date, the plaintiff's ancestor relinquished the lands ; and that, therefore a settlement of the same lands was made with the defendant. There is, in what is said as to relinquishment and subsequent settlement with the defendant, no qualification whatever of the statement and admission by the defendant, that the plaintiff's ancestor held the tenure for a certain time. The matter of re-

(1) Case No. 76 of 1867, 31st January 1868.

1868

BAIKANTHA-NATH KAMAR v. CHANDRA MOHAN CHOWDRY.

linquishment, subsequently referred to, is not a qualification of the statement that the plaintiff's ancestor once held the tenure, but is a perfectly fresh and distinct fact. There was, therefore, nothing wrong in law, and nothing contrary to the rule laid down in *Pulin Behari's* case, in reading against the defendant so much of his written statement as stated that the plaintiff's ancestor once held the tenure, and was in possession thereof until he relinquished it.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

1868 *June* 18.

HARAMOHINI CHOWDHRAIN *v.* DHANMANI CHOWDHRAIN.*

Mesne Profits—Act XXIII. of 1861, *s.* 11—*Act VIII. of* 1859, *ss.* 196 *and* 197.

See also 15 B. L. R. 392.

Mesne profits are in themselves simply damages which do not exist as an obligation to be discharged until they have been awarded by a Court competent to do so. Therefore, according to section 11 of Act XXIII. of 1861, "mesne profits payable at the time of execution" must mean mesne profits which have been at that time directed to be paid by a decree of Court. The two portions of section 11 of Act XXIII. of 1861 are in direct connection with sections 196 and 197 of act VIII. of 1859.

A. obtained a decree against B. for recovery of possession of certain property, and for mesne profits up to the date of the suit, but the decree was silent as to mesne profits after that time. *Held*, A. was not barred by the provisions of section 11 of Act XXIII. of 1861, from bringing a suit against B. for mesne profits, during the time that A. was kept out of possession after the decree.

THIS was a special appeal from the decision of the Principal Sudder Ameen of the 24-Pergunnahs, affirming a decision of the Sudder Ameen.

Baboos *Ramesh Chandra Mitter* and *Hem Chandra Banerjee* for appellant.

Baboo *Ananda Chandra Ghosal* for respondent.

The facts of this case are fully stated in the judgment of the High Court, which was delivered by

PHEAR, J.—In the year 1269 B. S. (1862), Dhanmani Chowdhrain sued Haramohini Chowdhrain to recover certain property,

* Special Appeal, No. 3043 of 1867, from a decree of the Principal Sudder Ameen of the 24-Pergunnahs, affirming a decree of the Sudder Ameen of that district.