The 19th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Mahomedan Law—Partition—Gift of share before.

Case No. 2741 of 1864.

Special Appeal from a decision passed by the Judge of the 24 Pergunnahs, dated the 18th June 1864, affirming a decision passed by the Second Principal Sudder Ameen of that District, dated the 10th September 1863.

Musst. Ameena Bibee (one of the Defendants), *Appellant,*

versus

Musst. Zeifa Bibee (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Moulvie Aftabooddeen Mahomed* for Appellant.

Baboos Anund Chunder Ghosal and *Kedarnauth Chatterjee* for Respondent.

According to the Mahomedan Law, one of two sharers can give over his share to the other even before partition.

THIS was a suit for declaration of title to certain land, which the plaintiff alleged was given by the defendant Ameena Bibee to her brother, Golam Mortoza, and, on his death, devolved upon them, the plaintiffs, as his heirs.

Both the lower Courts found in favour of the plaintiffs. The Lower Appellate Court, in its judgment, said: "The father of "the plaintiffs and of the defendants died, "leaving one son, Golam Mortoza, and three "daughters, Homfa, Khatum, and Ameena. "The son took 6 as. 8 gds., and each of "the daughters 3 as. 4 gds. In these "proportions the lands, houses, &c., were "divided amongst them after valuation by "an arbitrator. The defendant Ameena "made a present to her brother of the whole "share accorded to her." The Lower Appellate Court then goes on to recite the contention of each party, and referring to a plea put forward by the defendant "that "the gift was *hibamusher*, that is to say, a "gift of property which is joint and un-"divided, and therefore invalid," says: "The "latter plea is inserted in the grounds of "appeal, but has not argued orally, and "it is of no value, for it is clear on the "evidence, and indeed it is admitted, that "a partition was made of the lands, &c., "left by her father, and that her gift was "made after the partition was effected." Also, in reference to the plea of Ameena, that she gave her brother only a life-interest in her lands, the Lower Appellate Court finds there is no indication that the brother's right "in the lands was restricted in any way."

On special appeal to this Court the defendant urges:—

1st.—That the Lower Appellate Court is wrong in its construction of the arbitrator's award, inasmuch as that award does not show that any division was come to before the gift was made; at any rate it is clear from it that no division ever was made between the share of the defendant and that of her brother, and consequently the gift by her of her undivided share was void by Mahomedan Law.

2ndly.—That the terms of the gift conveyed a life-interest only, and did not constitute an absolute gift

The gift by Ameena to her brother seems to have been made by parol, but the best evidence of it is afforded by the written decision of the arbitrator, which sets out all the essential facts of the transaction, and was accepted by all the parties to this suit at the time it was made as a correct and binding version of the matters dealt with therein. From this document it appears to us that the division of the shares and the gift by Ameena formed parts of one and the same transaction. Nothing is expressly said as to the order of time in which these two things respectively took place; and, in the absence of any statement on this point, the Court below would have been right in presuming that they took place in such order of succession as would carry out the intentions of the parties, rather than in that which would render the gift void. But we observe that the Lower Appellate Court does not decide upon mere presumption alone, for it says that it was admitted by the defendant "that the partition was made, and that her gift was made after the partition was effected." That this partition did not extend so far as to divide Ameena's share from her brother's is not important, for we hold on the authority of Case XII. of Macnaghten's Precedents of Mahomedan Law, that one of two sharers can give over his share to the other even before division.

We, therefore, see no reason for impeaching the decision of the Lower Appellate Court with regard to the validity of Ameena's gift to her brother.

Neither, on consideration of the terms of the gift, do we think that the Lower Appellate Court was wrong in holding that it was absolute, and the conditions effective to pass all Ameena's interest, which Ameena desired to impose in restraint of alienation, &c., do not indicate to us that she intended to reserve to herself any further or future interest in the land.

The appeal is di smissed with costs.

The 20th May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation— Mesns-profits—Cause of action.

Case No. 269 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 21st April 1864.

Maharaj Koer Ramaput Singh (Plaintiff), *Appellant,*

versus

Mr. J. Furlong, general manager on behalf of the Rajah of Durbhanga (Defendant), *Respondent.*

Moulvie Aftabooddeen Mahomed for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Suit laid at Rupees 14,965.

Under Act XIV. of 1859 mesne-profits can be decreed only for six years before institution of suit. The cause of action for the mesne-profits is the date on which they became annually due.

THE order of the Court below dismissing the suit of the appellant for mesne-profits, due more than twelve years preceding to the filing of his plaint, is correct. The plaint was filed after Act XIV. of 1859 came into operation, and under it the claim for mesne-profits can be decreed only within six years preceding the plaint. Accordingly, mesne-profits due for more than six years cannot be claimed in this case. The cause of action is neither the date of the roobakaree ordering restoration of possession as held by the lower Court; nor does it either shew the date of the plaintiff's obtaining possession, nor the date of the final order of the Civil Courts in the regular case brought by the opposite party to set aside the said order for restoration of possession as argued by the plaintiff. The cause of action for the mesne-profits is the date on which they became annually due. The plaintiff cannot claim any deduction in this case for the period during which the previous litigation commenced by others was pending in different Courts. The appeal is accordingly rejected with costs.

The 22nd May 1865.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Vakeel (absence of).

Case No. 31 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 19th September 1864.

Koroona Moyee Dossee, Pauper (Plaintiff), *Appellant,*

versus

Ali Nukee Merdha (Defendant), *Respondent.*

None for Appellant.

Boboo Bungsheedhur Sein for Respondent.

Suit laid at Rupees 9,150.

A case duly called on cannot be allowed to be postponed by reason of absence of the appellant or his vakeel.

THE pleader, Baboo Mohesh Chunder Bose, is not present. It is stated that he has leave to be absent. He has never received such leave from this Bench. If he had, it was his duty to provide that another vakeel should take his case, or to have seen that the printed Rule, that two vakeels should be appointed in each case, should be attended to. The appellant herself has been duly called, and has not appeared.

We distinctly are of opinion that there is no reason for allowing a case which has been dully called up in its turn to be postponed, because the vakeel and client have neglected to do their duty.

We accordingly dismiss this case with costs.