strued the plaint in the sense in which it has been understood by the Principal Sudder Ameen, that is, as seeking to set aside the order of release made by the Jessore Court, we should concur in the judgment, although not concurring in the reasons assigned in support of it. When the plaint was filed, the property therein mentioned being situated in different districts, the requisite application was made to the High Court, under section 12 of the Code of Civil Procedure, for authority to proceed with the suit in the Pubna Court. The High Court directed the suit to be transferred to the Dacca district, the chief part of the property being within that district. The effect of the order was merely to transfer the suit already instituted in the Pubna Court to the Dacca Court; and thus its legal effect cannot be changed by the improper and erroneous procedure, which was apparently adopted, of returning the plaint in order to its being presented anew in the Dacca Court. For the purpose of computing the period of limitation, this suit was, we think, instituted on the day when the plaint was received and admitted by the Pubna Court, notwithstanding that the requisite authority from the High Court to enable the Pubna Court to proceed with the hearing of the suit was not eventually obtained, and notwithstanding the mode in which its transfer to the Dacca Court was effected. We cannot, therefore, assent to the Principal Sudder Ameen's reason for the dismissal, which seems to be that the plaint, having been returned by the Pubna Court, was not presented to the Dacca Court before the expiration of the year. Had it been presented in the latter Court within that period, it would not, we think, have availed the plaintiff. The true reason, in our judgment, is that the plaintiff was bound to institute a suit for this purpose in the Jessore jurisdiction, within one year from the date of the order; and not having done so, his right of suit is barred. It is argued, however, for the appellant, that the plaint may fairly be read, not as a plaint by a judgment-creditor, who (having proceeded to execute his decree, and having been successfully opposed by a claimant) seeks to set aside the adverse summary order, and establish his right, but as a plaint by a judgment-creditor, who has hitherto taken no proceedings whatsoever in execution against his debtor's property within the jurisdiction of the Court in which he sues by reason of some apprehended obstacle to his so doing; and who now asks the aid of the Court to remove the obstacle in order that he may have the full benefit of his judgment. A person who has obtained a decree, before he proceeds to execute it against his debtor's property, the title to which has perhaps been made doubtful or obstructed by the fraudulent conveyances of the latter, may, in many cases, find it to his advantage to institute in the first instance a regular suit to set aside those conveyances, and the law permits him to bring such a suit. If the suit now before us may fairly be regarded as a suit of this description, it is maintainable. On the other hand, if the plaintiff sues, however indirectly, to obtain the reversal of the summary order, his suit is barred. It has appeared during the hearing of the appeal, and is not, we believe, now denied, that pergunnah Belgachee, though within the Jessore Collectorate, is subject to the jurisdiction of the Furreedpore Civil Court. The proceedings in execution against Belgachee, in the former Court, were, therefore, wholly without jurisdiction and void. They may, with the summary order therein passed, be disregarded, and this suit, although the plaint refers to the proceedings in Jessore, may be considered as a suit by a decree-holder to obtain the assistance of the Court in the removal of an obstruction to the execution of his decree against his debtor's property. Such a suit is, we think, maintainable; and as the present suit has been brought within due time, it should be heard and determined.

We must remand the case to the lower Court for trial.

The 15th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Limitation — Joint Hindoo Family — Allegation of separation — Onus probandi — Witnesses (Enforcing attendance of).

Case No. 411 of 1864.

Regular Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 15th July 1864.

Bissumbhur Sircar and others (Defendants), *Appellants,*

versus

Soorodhuny Dossee (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Hem Chunder Banerjee and *Ashootosh Dhur* for Respondent.

Suit laid at Rupees 5,176 3 annas 18 gds.

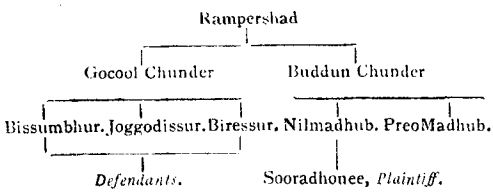
Object of section 11, Act XIV. of 1859 (computation of period of limitation in cases of disability.)

In a suit for a share of ancestral property, the *onus* is on the defendants to prove their allegation of separation at a certain time, they having admitted that the family was joint up to that time, and claiming the property as separately acquired subsequent to that date.

A Court acts illegally in directing a party without cause to re-issue summons for the attendance of his witnesses, instead of enforcing their attendance by attachment and fine when the party requiring their evidence has done everything in his power by issue of summons, and then by depositing *tulubanah*, &c., as required by law, for issue of process of attachment.

THIS suit was to recover a 4-annas share of certain ancestral and family property to which plaintiff alleged that she was entitled on the part of her deceased husband, Nilmadhub Sircar.

The family tree is as follows:—The common ancestor was



Plaintiff alleges that the brothers, Gocool and Buddun Chunder, were joint in estate; and that, after the death of Buddun, the family continued to be joint till 1262, when a separation and division of the property took place; that her husband, Nilmadhub, having died in 1259, she being a minor at the time of the partition of the property, was deprived by the defendants of her husband's share; that, having attained majority in 1268, she brings the present action to recover her husband's 4-annas share from the defendants, making her brother-in-law, Preo Madhub, a formal defendant.

The defendants allege that Gocool and Buddun separated in 1232 B. S.; that after this separation, Gocool, who was a mooktear in Hooghly, made money and purchased property, of which he was in the sole possession and enjoyment, and which descended to the defendants, his sons: and to this property, neither Buddun nor his descendants have any right. The defendants pleaded limitation against the plaintiff's allegation that she came of age in 1266; and that, under the provisions of section 11, Act XIV. of 1859, her suit should have been brought within three years from that time; and in support of their allegation as to her age, they filed a decision of the Principal Sudder Ameen, bearing date the 18th November 1858, in which she was sued for the amount of a debt, and answered to the claim by a vakeel, and was not in those proceedings styled a minor.

Even admitting that the plaintiff attained majority in 1266, we think that she is not out of Court by limitation. Her cause of action arose on her husband's death in 1259, and she brought the present suit in 1269; so that, under the provisions of clause 13, section 1 of Act XIV. of 1859, she is within time, and her allegation of minority need not be taken into consideration. The same question was heard and determined by Mr. Justice Trevor and Mr. Justice Campbell on the 4th May last in the special appeal of Kalidas Chatterjea and others, No. 3165 of 1864, and we quote that part of their judgment which disposes of this objection: "We "think that the Judge has wrongly con- "strued the Law of Limitation. Act XIV. "of 1859, section 11, was never intended to "place minors under a special disability as "compared to majors; but to make a special "concession in their favour. A man who "comes into Court after attaining his major- "ity, if he is within the ordinary time of limi- "tation provided by section 1, is not "bound to invoke section 11. Section 1 "is complete in itself, and applies to "all suits. Section 11 is an additional "or supplementary provision, giving minors "liberty to take a fresh start for compu- "tation from the time of attaining major- "ity, provided that the privilege so ac- "corded is limited to three years. If the "plaintiff's time, computing from the origi- "nal cause of action (accruing in his major- "ity), had expired during his minority, or "had less than three years to run, he would "have had full three years; but that not "being so, he has the ordinary twelve years "from the original cause of action." Concurring entirely in this view of the law taken by our colleagues, we reject the plea of limitation.

On the merits, we find that the lower Court has given a decree for the plaintiff, holding that the defendants, upon whom was the *onus* of proving that the property was self-acquired by Gocool after separation, had failed to substantiate this allegation. It is urged before us that it was for plaintiff, who admitted that a separation took place in 1262, to prove the continuance of the joint estate up to that period; but we hold with the lower Court that defendants were

bound to prove their allegation of separation in 1232, having admitted that the family was joint to that time, and claiming the property as separately acquired subsequent to that date. The defendants have brought forward several members of their family, neighbours, and others, who prove that the families separated many years ago, and that the property in dispute had always been in the sole possession of Gocool and his descendants We find also all the documents, such as conveyances and receipts connected with these properties, drawn up in the name of Gocool, and in the custody of Gocool's representatives; and though such facts are not conclusive as to the sole possession of the defendants, they make out a sufficiently strong case to require the Court to call upon the plaintiff to prove that this family continued joint after the period asserted by the defendants. She has filed a quantity of correspondence between Buddun and Gocool, and also letters from the zemindar, which, it is alleged, clearly shew the *status* of the family to a very recent period; and she has examined one or two witnesses to prove that the family continued undivided till 1262. Unfortunately this correspondence has not been attested, and in its present state cannot be admitted as evidence; but, on reference to the record, the pleader for the plaintiff (respondent) points out how hardly his client has been dealt with by the lower Court, which virtually refused to enforce the attendance of her witnesses, who could have proved the genuineness of this correspondence, and otherwise substantiated her case. We find that plaintiff did everything that she was required to do by law to procure the attendance of her witnesses, and put in the *tulubanah* to take out process of attachment of their property; but, instead of this, her reasonable request being complied with, she was directed by the former Principal Sudder Ameen again to issue summons for their attendance, so commencing the whole business *de novo*. We think this order quite illegal, and that it cast additional and most unnecessary expense and trouble on the plaintiff—an order with which, from her circumstances, she was unable to comply. She stated the whole circumstances of the case in a petition to the present Principal Sudder Ameen on 4th July last; but that officer considered himself bound by the acts of his predecessor. We think that justice cannot be done in this case unless that evidence be taken, and we, therefore, remand the case under the provisions of sections 355 and 356 of Act VIII. of 1859, in order that the Principal Sudder Ameen, after enforcing the attendance of the witnesses, as provided by law, may record their evidence, and re-submit it to this Court. The defendants will also be allowed to adduce any further evidence already offered by him should he wish to do so.

The 15th May 1865.

Present:

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

Costs—Goverment made a defendant.

Case No. 22 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 29th September 1864.

The Government (Defendant), *Appellant,*

versus

Musst. Sanoola, Pauper (Plaintiff), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. C. Gregory for Respondent.

Suit laid at Rupees 252-13-6.

Suit for a certificate of administration under Act XXVII. of 1860. Government did not apply for any such certificate or oppose the plaintiff's suit. But having been made a defendant by the plaintiff, and obliged to make an answer—HELD that it was not liable to be cast in costs.

IN this case Government has been cast in costs, and appeals on the ground that it did not oppose plaintiff's suit; but, having been made a defendant by plaintiff, merely truly stated such facts as were within its knowledge, and then asked for the Court's adjudication of the case. We think that this appeal must be decreed. The Judge, acting under section 7, Regulation V. of 1799, directed that the Collector should take charge of the real property, and took charge himself of the moveable property, because the plaintiff, and second and third defendants, who were parties to the proceeding under Act XXVII. of 1860, *i. e.*, seeking to obtain a certificate of administration, could not prove their right to it. Government did not apply for any such certificate. The answer of Government was necessary, as plaintiff had made Government a defendant. We do not think plaintiff had, under the above facts, a right to do this, and we think plaintiff should accordingly pay all the costs of Government.

This appeal is decreed with costs accordingly.