The law, section 15, Act VIII. of 1859, says: "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." We think that that must be in suits framed for the purpose of getting a declaratory decree, and not in a suit framed for the purpose of recovering land and mesne-profits. The object of the present suit was simply to recover the possession of land and for mesne-profits, and, in order to do that, to set aside the deed of adoption. We think that the suit was wholly misconceived, if it was intended to bring before the Court the question simply of the validity of the adoption, and to ask to set aside that adoption for the benefit of the plaintiffs as reversioners after the death of the widows.

The plaintiffs did not ask for any declaration of right. The widows of Het Narain and Mode Narain, it is now admitted, are entitled to possession for their lives, and the plaintiffs are not entitled to possession, whether the adoption was valid or invalid. The widows come in to defend their respective rights. If the plaintiffs sought merely to set aside the deed of adoption, and to obtain a declaration of right, the widows of Mode Narain and many of the other defendants were unnecessary parties, and ought not to have been sued.

Under these circumstances, we are clearly of opinion that the appeal must be dismissed with costs.

We would here state that, notwithstanding our decision upon this issue, we should have proceeded to try the remaining issues in the suit if we had entertained any doubt upon the point on which we have decided it. Should an appeal be preferred to Her Majesty in Council, no inconvenience will be caused by our not going into the whole case. Her Majesty in Council will have the necessary materials for determining the other questions disposed of by the Judge, whether we express our opinion upon them or not. The evidence on the question of adoption is upon the record, and the question of the plaintiff's right to succeed in the present suit during the lives of the widows of Het Narain and Mode Narain is one merely of law upon which we cannot render much assistance by expressing our opinion upon it. We do not, therefore, consider it necessary to go into these issues.

The 12th June 1866.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and E. Jackson, *Judges*.

Mookhtearnamah (Proof of genuineness of)—Exhibits (Endorsement of)—Right of suit (by distant heir).

Case No. 60 of 1865.

Regular Appeal from a decision passed by the Judge of Behar, dated the 5th December 1864.

Baboo Bisram Singh *alias* Bishen Singh and others (Plaintiffs), *Appellants*,

versus

Maharanee Indurjeet Koonwar and others (Defendants), *Respondents*.

Messrs. G. C. Paul and *R. E. Twidale*, and *Baboos Ashootosh Dhur* and *Unnoda Pershad Banerjee* for Appellants.

Messrs. R. V. Doyne, *R. T. Allan*, and *C. Gregory*, *Moonshee Ameer Ali*, and *Baboos Dwarkanath Mitter*, *Kalee Prosunno Dutt*, *Nil Madhub Sein*, *Banee Madhub Banerjee*, *Kishen Kishore Ghose*, and *Mohendro Lall Shome* for Respondents.

Suit laid at Rupees 67,98,843-4-8-17-14.

The mookhtearnamah, upon the authority of which this suit was brought, being impugned by the defendant as a forgery, and as not executed by the party alleged to have granted it, the Court held that, notwithstanding its attestation in due form by the Moonsiff of Muttra, the parties charged were bound to prove its genuineness; and, as they failed to do so, the suit was dismissed, and the parties in whose favour it was drawn, and who declined to appear in Court to prove it, were directed to be sent to the Magistrate to be placed on their trial for forgery.

Exhibits produced in Court ought to be endorsed with the name of the person who produced them, as required by section 132, Act VIII. of 1859.

During the existence of a near heir, a more distant heir cannot sue.

THIS was a suit instituted in the Court of the Judge of Behar, under a vakalutnamah signed by one Moorolee Dhur, and this appeal was instituted under a vakalutnamah signed by Rung Bahadoor, his brother, both being sons of Bishen Singh. The one authorized the institution of the suit, the other authorized the institution of the appeal; and they both claim to have so acted under an alleged mookhtearnamah, dated the 20th February 1863, which gave them general power to act on behalf of Bishen Singh. Another person who is a party to the suit is Moonshee Ameer Ali. He claims title to a portion of the property under a conveyance executed by one or both of these two sons, they alleging their

power to convey away that portion of the father's property which they assigned to Moonshee Ameer Ali under the same mookhtearnamah. The defendant Ram Kishen Singh, in his answer, states that Bisram Singh *alias* Bishen Singh, the plaintiff, is untraceable from before the date of the mookhtearnamah under which the suit has been brought (that is, the mookhtearnamah of 20th February 1863 to which the Judge refers) giving a general power to the two sons; that consequently the suit on the part of that individual is false; that the mookhtearnamah in question has been brought into existence by the frauds of the sons of Bishen Singh and of Moonshee Ali Kureem, the Government rebel, and Moonshee Ameer Ali, the maintainer of the suit, and is wholly a fabricated document. There was then a charge in this defendant's answer that the mookhtearnamah was a forgery brought about by the sons of Bishen Singh, who was stated to have been untraceable from before the date of this mookhtearnamah. That being the charge, the Judge laid down the issue—"Is Bisram Singh *alias* Bishen Singh, one of the plaintiffs, untraceable or not; if so, is the suit on his part valid or not?" The question, whether the suit was validly instituted or not, depended upon the question whether the mookhtearnamah was genuine or not, was expressly alleged in the answer which had been already quoted, that it was a forged document, and had been brought about by the fraud of the two sons. The judgment delivered by the lower Court says: "From the record, it appears that, on the 20th of February 1863, a mookhtearnamah was presented in the Court of the Moonsiff of Muttra on the part of Bishen Singh, in favour of his two sons, through one Gunnesh Singh, a mookhtear, and attested by two witnesses, apparently residents of Muttra; and, under the authority of this mookhtearnamah, the present suit has been instituted. As to the legality of this procedure, and that it is in accordance with the custom and usage of our Courts, there can be no question; hence it must be held that the mookhtearnamah, although not attested by Bishen Singh in person, by virtue of which his sons have verified the plaint, is *primâ facie* good and valid. Moreover, apart from suspicion and presumption arising from the facts and circumstances of the case, there is nothing to support any legal presumption that Bishen Singh, the principal plaintiff, is missing or dead; and hence this issue in bar is overruled." We do not quite understand what the Judge means by the words "from suspicion and presumption arising from the facts and circumstances of the case." The Judge himself appears to have thought that there was some suspicion in the case arising from the absence of Bishen Singh. But if a presumption arose from the facts and circumstances of the case, that Bishen Singh was absent at the time when that power of attorney appears to have been executed, surely, when there was a charge, and a distinct issue founded upon that charge, it was necessary to enquire whether the document was genuine or a forgery. It was the more necessary to enquire into the validity of the document, as the title of Moonshee Ameer Ali depended upon it; for, if it was not a valid document executed by Bishen Singh but a forgery, the sons had no power to transfer any portion of their father's property. Therefore, it appears to us that there has been a very insufficient investigation on the part of the Judge in upholding the document without evidence in support of it, especially when it was declared to be a forgery, and when the title of one of the parties depended upon the authority of the persons who were alleged to have derived their authority from that document. The Judge says that there is no question as to the legality of the procedure in admitting the mookhtearnamah, because it was attested by two witnesses in the presence of the Moonsiff, in accordance with the custom and usage of the Courts. But when a charge is made, and one of the parties distinctly, in his answer, states that the document is a forgery—that it has been brought about by fraud—surely it is not sufficient to refer to an attestation in another Court without bringing forward the attesting witnesses and subjecting them to a cross-examination. That proceeding in the Moonsiff's Court was a wholly *ex-parte* proceeding. The parties to this suit had nothing to do with it. Although the document was brought into the Moonsiff's Court, and was there attested by the witnesses in the presence of the Moonsiff, that did not dispense with the necessity of calling for these attesting witnesses for the purpose of proving the document, when the document was stated to be a forgery, and an issue was raised which involved the question whether it was a genuine document or not.

This appeal came on before this Court on the 11th July last. At that time, Mr. Doyne objected that it was not proved sufficiently that Bishen Singh had authorized

the suit, and also that it was not sufficiently proved that he had authorized the institution of the appeal; and the case was postponed to enable the parties to produce satisfactory evidence to this Court that the mookhtearnamah had been executed by Bishen Singh. The appellants were required to prove that Bishen Singh executed it, and it was suggested that the best evidence in the case would be to produce Bishen Singh himself. It was then said that Bishen Singh was afraid to come forward, because he might be arrested for judgment-debts; and in order that he might come forward and give evidence, Bishen Singh was guaranteed against any arrest by either Ranee for whom Mr. Doyne appeared. This Court also recommended that Bishen Singh, and also Gunnesh, the mookhtear, should attend when the appeal should come on again. Gunnesh was the mookhtear who produced the mookhtearnamah for attestation in the Court at Muttra, and therefore he would have been a very important witness to prove that the document was really executed by Bishen Singh, as it purported to be. When the appeal again came on, neither Bishen Singh nor Gunnesh appeared in this Court to say whether the document was valid or not. When the case was before the Court in July last, in order to avoid any difficulty, in the event of the parties not being able to procure the attendance of Bishen Singh or Gunnesh, the Court authorized a commission to be issued to examine the attesting witnesses to the mookhtearnamah in the Court at Muttra. If the lower Court could not examine these witnesses personally, the Court ought certainly to have required their evidence taken under a commission which he might have issued. This Court, however, issued a commission which has been executed. The three attesting witnesses to the mookhtearnamah have been examined under it. The first witness, Mohunt Surgoo Doss, deposes as follows. Answer to first question: "My name is "Surgoo Doss; my age 32 years; by caste "Byragee. I live at Bindabun." (To *2nd* question:) "After examining this mookhtear-"namah, I declare this to be my attestation "on the margin of the mookhtearnamah, "and I attested it on the acknowledgment "of Bishen Singh now in Court." (To *3rd* question:) "Yes; Bishen Singh signed it in "my presence at Bindabun." (To *4th* question:) "I signed my name with my own "hand. I do not know what other witnesses "attested. Kawal desired me to sign for "him, as he could not write, and I did so." Then the witness having identified a person in Court as Bishen Singh, the following question was put on cross-examination: "This person in Court, whom you recognize as Bishen Singh, states that his name is not Bishen Singh: what do you say to this?" The witness answered, "He said his name was Bishen Singh." Now, if it should turn out that Bishen Singh was not present when that document was executed, and that the person who actually signed it was one of the two sons in whose favour it was executed, there can be no doubt that it was a forged document. Then comes the deposition of Kawal Ram. This witness, when called, said (answer to *1st* question): "My name is Kawal Ram; age 40 years; by caste Rahoo. I live at Mouzah Uzeemabad." (To *2nd* question:) "Mohunt Sargoo Doss signed the mookhtearnamah for me, and I attested by desire of Baboo Bishen Singh." (To *3rd* question:) "Yes; Bishen Singh signed it in my presence at Bindabun." But upon cross-examination he said, in answer to the question "Is this Bishen Singh?" "No; this is Baboo Rung Bahadoor Singh, his son;" and again, to the question, "Are you in Bishen Singh's employ?" "Yes; I live in his village, and am in his employ." If this witness's evidence is correct, it seems that Rung Bahadoor Singh, the son, was in Court; but it is not quite certain that he is the same person who was identified by the first witness as the person who executed the document and said his name was Bishen Singh. As the last witness says that he came from Patna, and was in the employ of Bishen Singh, he might surely have been brought forward, and given evidence on the issue raised as to whether Bishen Singh was missing. The third attesting witness says: "My name is Kurun Lall, by caste Chowbey, and resident of Muttra, aged 22 years." (To *2nd* question:) "No; I did not sign this attestation or sign this mookhtearnamah." He says that he never signed or attested the document.

On the last occasion, when the case was before the Court, the Court allowed it to stand over in order that the genuineness of the mookhtearnamah might be proved. From the evidence given, it would seem doubtful whether the document was not really executed by Rung Bahadoor. Now, there is a person besides Bishen Singh who could say whether it was Bishen Singh or Rung Bahadoor who executed the document, and that person is Rung Bahadoor. A sum of

money was deposited for the costs of the day, as a condition upon which this Court allowed the case to stand over. It accordingly stood over till the present day in order that Rung Bahadoor, who authorized the appeal, might prove that it was Bishen Singh, his father, who executed the document. But Rung Bahadoor has not thought fit to appear; he has authorized the appeal to this Court, and executed the vakalutnamah, and yet he does not come forward to prove that he was authorized by his father by that power of attorney. Therefore we have it that he has instituted an appeal in this Court by virtue of a vakalutnamah, signed by him, in which he says that he was authorized by Bishen Singh to sign that vakalutnamah; and when he is charged with having signed that vakalutnamah under a forged mookhtearnamah, he does not venture to come forward and prove that it was a genuine mookhtearnamah signed by his father, or that it was not actually signed by himself, as appears to have been alleged by one of the witnesses examined under the commission. Then what is the inference the Court must draw from these facts? Can they, in the absence of Bishen Singh, of Rung Bahadoor, and of the attesting witness, Kawal Ram, who stated that he was in the employ of Bishen Sing, believe that it was Bishen Singh who signed the document? Or must they not rather infer that this document was not signed by Bishen Singh, but that it was signed by Rung Bahadoor, representing himself at the time to be Bishen Singh? If Rung Bahadoor, representing that he was Bishen Singh, executed this document conferring a power on himself as the son of Bishen Singh, there was a clear forgery. Under these circumstances, the Court have no difficulty in finding that the Judge came to a wrong conclusion on a point of fact in holding that it was satisfactorily proved that the mookhtearnamah was a genuine and valid document. We asked to hear Mr. Paul, who was retained under the authority of Rung Bahadoor, but Mr. Paul very properly declined to occupy the time of the Court unnecessarily by attempting, in the face of the difficulties with which he had to contend, to convince the Court that this document was actually signed by Bishen Singh.

We, therefore, think that the decision of the lower Court upon that issue must be reversed. But although the decision on that issue, as to whether the suit was brought by Bishen Singh or not, is decided against Bishen Singh, it does not decide the suit, inasmuch as there are other parties—Lall Narain Singh and Deoputtee Narain Singh—who are co-plaintiffs in the suit. It is sufficient for us to say that these two gentlemen cannot maintain this suit so long as Bishen Singh is *alive;* because, if he is alive, he is admittedly a nearer heir than either of those parties can be, and there is no sufficient proof of his death.

The other plaintiff is Moonshee Ameer Ali, and he claims a portion of the property under a conveyance executed by virtue of that mookhtearnamah. If the mookhtearnamah is not a genuine document, then the title of Moonshee Ameer Ali, under the conveyance which was executed under an authority alleged to have been derived through that document, must fall to the ground.

Having reversed the decision of the Judge as to the issue whether the mookhtearnamah was a genuine document or not, and holding that Bishen Singh did not execute it, we think that, in such case, we must relieve Bishen Singh from all costs. We therefore reverse so much of the judgment of the lower Court as awards costs against him, and we order that the plaintiffs, with the exception of Bishen Singh, pay the costs of this appeal and the costs in the lower Court—that is, the costs of the Ranees who are the principal defendants, and of Ram Kishen Sing, but not the costs of those defendants who were plaintiffs in the other suit.* And we further order that Rung Bahadoor, who filed this appeal, do pay all costs of this appeal in case they are not paid by plaintiffs.

* No. 1 of 1864; appeal to this Court, No. 58 of 1865.

The mookhtearnamah was produced in the Judge's Court, but it does not appear to have been filed originally. But, as it was produced in the lower Court, and the Judge received it, there ought to have been an endorsement on the document as to the name of the person who produced it. Section 132 of the Procedure Act says: "When an exhibit is received by the Court and admitted in evidence, it shall be endorsed with the number and title of the suit, the name of the party producing it, and the date on which it was produced, and shall be filed as part of the record." We think that, whether the exhibit was filed originally or was produced at the trial, the rule is one which ought to be acted upon, and that all documents produced as evidence on the trial, though they may not have been filed as

exhibits in the first instance, ought to be endorsed as directed by section 132. The Procedure Code requires all documents which are intended to be given in evidence to be filed in the first instance, and it appears that, without the leave of the Judge, no document which has not been filed is admissible as evidence. Then when a Judge on a trial thinks it proper to admit a document which has not been filed as an exhibit, surely he ought to take care that it is produced by a proper person, and that the endorsement pursuant to section 132 is made upon it, in order that hereafter it may be known who the person is who produced it. If that had been done, we should have seen upon the face of this document whether it was produced by a vakeel in the lower Court, or whether it was produced by Rung Bahadoor. But in consequence of that not having been done, we are unable to say at the present moment whether Rung Bahadoor did produce it or not. We think that an investigation ought to be made by the Magistrate of Behar into this case, as to whether Rung Bahadoor or any other persons did use, or attempt to use as true, evidence which he or they knew to be fabricated; and further, as regards this particular mookhtearnamah, under section 471 of the Penal Code, to see whether Rung Bahadoor or any other person did fraudulently or dishonestly use as genuine a document which he knew, or had reason to believe, to be a forged document. Under section 171 of the Code of Criminal Procedure, we think that the case should be sent to the Magistrate of Behar for investigation, and direct him to proceed according to law against Rung Bahadoor or any other person or persons for any offence or offences which he or they may appear to have committed against the above-mentioned section or any other section or sections of the Indian Penal Code.

The 12th June 1866.

Present:

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

Mortgage (Zur-i-peshgee lease)—Recovery of land before expiry of lease—Account.

Case No. 399 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 12th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 18th April 1865.

Punjum Singh (Defendant), *Appellant,*

versus

Musst. Ameena Khatoon (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Moonshee Ameer Ali for Respondent.

A mortgagor—one who has granted a *zur-i-peshgee* lease—can sue to recover possession of his lands before the expiry of the term fixed by the lease, on the ground that the mortgage-debt has been satisfied by the mortgagee's receipts while in possession.

In the case of a mortgage by a *zur-i-peshgee* lease, the mortgagor is entitled to an account from the mortgagee, notwithstanding an express stipulation in the lease that the latter shall not be liable to account.

THE special appellant contends that the lower Court is wrong—*firstly*, in holding that the mortgagor (this being a case of a *zur-i-peshgee* lease) can sue to recover possession of his lands before the expiry of the term fixed by the lease, on the ground that the mortgage-debt has been more than paid off by the mortgagee's receipts while in possession; and, *secondly*, in holding that the mortgagor is entitled to an account from the mortgagee, when it is expressly stipulated in the lease that the latter shall not be liable to account.

As regards the first point, we are of opinion—and our opinion accords with that expressed by the late Sudder Court on various occasions—that the lower Court was right.