

articles appear to have been taken by the defendant at various times, and not in the way of ordinary and private consumption, but evidently for the objects of a limited trade on his own account.

The cases quoted seem all on one side, and favor the contention of the plaintiff that he is entitled to six years. See Weekly Reporter, Vol. III, page 24, Small Cause Court Rulings; and the ruling of Mr. Justice Macpherson, quoted at page 57 of Mr. N. Thompson's Work on Limitation, and the Appendix of the same work, page 242, at the bottom of the page. No cases on the other side have been brought to our notice, for the case reported at page 68 of Vol. VII, Weekly Reporter, is not in point.

Under these circumstances, we think it right to follow the rulings above quoted, and we remand the case to the Principal Sudder Ameen for a decision on the merits, holding that the plaintiff is entitled to the limitation of six years.

Norman, J.—I entirely concur.

I think we ought to follow the cases which have been decided on this point, which are cited above, as I believe that the construction there put down on the 8th and 9th Sections, has been generally adopted and acted upon. Items beyond six years are of course barred.

The 4th June 1867.

Present :

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

Special Appeal—Issues.

Case No. 2743 of 1866.

Special Appeal from a decision passed by Mr. James Reilly, Principal Sudder Ameen of East Burdwan, dated the 7th July 1866, reversing a decision passed by the Moonsiff of that district, dated the 13th May 1865.

Shaikh Ahmed Mundul (Defendant),
Appellant,

versus

Shaikh Sonaollah (Plaintiff), and others
(Defendants), *Respondents.*

*Moulvie Syud Murhumut Hossein for
Appellant.*

*Baboo Mohesh Chunder Chowdhry for
Respondents.*

A party was not allowed on special appeal to go behind the issues by which he was content to abide in the Lower Courts.

Phear, J.—THIS was a suit to recover possession of a piece of land. The Court of first instance dismissed the plaintiff's claim, but the Lower Appellate Court upheld it. In both Courts the only issues tried were whether the plaintiff had purchased the land, and whether he had been dispossessed by the defendant. The issue in the first Court did not mention the name of any vendor, but in the Lower Appellate Court the question was specially "whether the plaintiff bought the land of Tufuzal Hossein."

The defendant now appeals specially on the ground that the Lower Appellate Court ought to have enquired into the title of the plaintiff's vendor, because it was denied in his, the defendant's, written statement. We are of opinion that this ground cannot now be taken. The defendant had ample opportunity in the Lower Courts of raising all the issues upon which his case depended. And if either of the Lower Courts had refused to entertain any material issue suggested by him, it would have afforded him good ground of complaint against their proceedings. But nothing of this kind is alleged here, no doubt because it could not be alleged with truth; and we cannot now allow him to go behind the issues by which he was content to abide in the Court below, and which were actually tried there with apparent propriety.

The 4th June 1867.

Present :

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

Presumption under Section 4, Act X of 1859.

Case No. 3030 of 1866 under Act X of
1859.

Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensingh, dated the 31st July 1866, affirming a decision passed by Mr. F. F. W. Smith, Deputy Collector of that district, dated the 16th March 1863.

Muneeekurnicka Chowdhraim (Defendant),
Appellant,

versus

Anund Moyee Chowdhraim (Plaintiff),
Respondent.

Baboo Romesh Chunder Mitter for
Appellant.

Baboo Hem Chunder Banerjee for
Respondent.

The presumption under Section 4, Act X of 1859, of holding at a uniform rate from the Permanent Settlement, need not be specifically pleaded, but (unless rebutted) arises as a matter of course on proof of uniform payment for 20 years.

Bayley, J.—AFTER fully hearing Counsel, we are clearly of opinion that there was a substantial pleading by defendant (special appellant) that his tenure was one held at a fixed rent.

In such a case, it was for the Court to see first, whether the presumption contemplated by Section 4, Act X of 1859, existed,—that is, whether it was proved by defendant that he had paid at an uniform rate for 20 years before the suit; because, if so, then the presumption would be that defendant had paid at an uniform rate from the Permanent Settlement, unless something was on the record, or discovered in the evidence adduced by either party, to rebut the presumption.

It is urged on us that the presumption available under Section 4 should be *specifically* pleaded; but we are of opinion that, according to the later and concurrent rulings of this Court, the pleading in this case is quite sufficient to raise the issue, and, indeed, it was orally pressed by the vakeel in the Lower Appellate Court.

But not only did the Lower Appellate Court not fix this important issue, but it also expressly declined to consider the point, which is an error in law on its part.

The case is, accordingly, remanded to the Lower Appellate Court that it may re-try it with reference to the above remarks.

The 4th June 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Section 180, Act VIII of 1859—Local Investigation—Irregularity—Special Appeal.

Case No. 216 of 1867.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Sylhet, dated the 26th November 1866, reversing a decision passed by Moulvie Syud Ahmed Buksh, Principal Sudder Ameen of that district, dated the 30th April 1866.

Ram Doss Koondoo (Plaintiff), *Appellant,*

versus

Nil Kanto Dhur and others (Defendants),
Respondents.

Baboo Otool Chunder Mookerjee for
Appellant.

Baboos Chunder Madhub Ghose and Greesk Chunder Ghose for Respondents.

Section 180, Act VIII of 1859 makes it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local enquiry; but non-compliance with this requirement of law is not *per se* a ground of special appeal.

Glover, J.—THIS suit arises out of a boundary dispute between the Mouzahs of Kamrapattun and Rampassah; a dispute that has been going on between the proprietors for a long time. It was apparently once supposed to be definitively settled by the arbitration of one Nawab Ali who fixed the boundary line; but changes in the course of the river, which formed one of the points of departure, rendered the position of the boundary uncertain, and the dispute between the proprietors at once revived.

The Court of first instance decreed in favor of the Kamrapattun proprietors; but the Judge on appeal reversed that decision. Previous to disposing of the case, he again deputed an Ameen to the spot (selecting for this purpose one Ahmud Ali, a vakeel of his Court, and the person who had once before been employed in the local enquiry before Nawab Ali's arbitration had taken place), and on his report and evidence, in conjunction with the other evidence on the record, decided in favor of Rampassah.

Against this decision, the owner of Mouzah Kamrapattun appeals specially, urging:—

(1). That the Judge had no authority to depute any one but the regular officer of his Court to hold the local enquiry; and