The 4th January 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Ex-parte judgment—Cross-examination of plaintiff's witnesses.

Case No. 2466 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 10th June 1868, affirming a decision of the Subordinate Judge of that District, dated the 6th January 1868.

Shahzada Pakaktar (one of the Defendants), *Appellant,*

versus

Jakriram Bhokath (Plaintiff), *Respondent.*

Baboo Mohendronath Mitter for Appellant.

Baboo Debendro Narain Bose for Respondent.

Where a defendant, when duly summoned, fails to appear without lawful excuse, the Court may at once pass judgment *ex parte*. But if the defendant has entered appearance and filed a written statement, it cannot be called an *ex-parte* case, and if the Court proceeds to take the evidence of the plaintiff's witnesses, the defendant is entitled to cross-examine them.

Loch, J.—THE Lower Courts have held that the defendant, when duly summoned to appear, failed to attend without lawful excuse. We think that this Court cannot interfere with this finding. But it is urged in the second place that the procedure followed by the Subordinate Court is not in accordance with the provisions of Section 170 of Act VIII. of 1859, which provides that in such a case "the Court may either pass "judgment against the party so failing or "refusing, or make such other order in re"lation to the suit as the Court may deem "proper under the circumstances of the case." The Subordinate Judge did not pass judgment against the party who failed to appear, as he might have done under the provision of the law quoted above; but he ordered that the case should be heard *ex parte*, and he refused to allow the vakeel of the defendant to cross-examine the witnesses of the plaintiff. The Judge in appeal held that the order of the Lower Court was right.

We think that, on the defendant's failing to appear without lawful excuse, the Judge might at once have passed judgment against him. But if he proceeded to take the evidence of the plaintiff's witnesses, the defendant, who had entered appearance, was entitled to cross-examine them by his vakeel, and the Subordinate Judge was wrong in treating the case as an *ex-parte* one; for, as the defendant had appeared and filed a written statement, it could not be called an *ex-parte* case. If not an *ex-parte* case, the defendant was entitled to cross-examine the plaintiff's witnesses.

We think that the case must go back to the first Court to allow the defendant's vakeel an opportunity to cross-examine the plaintiff's witnesses.

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The case is accordingly remanded to the first Court to allow the defendant's vakeel to cross-examine the plaintiff's witnesses.

The 4th January 1869.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Choses in action—Suit.

Case No. 105 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 5th March 1868.

Munrunjun Singh and another (Defendants), *Appellants,*

versus

Leelanund Singh and others (Plaintiffs), *Respondents.*

Baboos Chunder Madhub Ghose and *Luckhee Churn Bose* for Appellants.

Mr. R. E. Twidale and *Baboo Unnoda Pershad Banerjee* for Respondents.

Choses in action are assignable by Civil Courts in this country, which are not merely Courts of law, but also Courts of equity. The purchaser of a decree-holder's rights and interests in decreed land may sue to recover possession, even if the thing purchased has no actual existence, but rests in mere possibility; if legally saleable, it was equitably an assignable chose of action.

Glover, J.—THE circumstances of this case are as follows:—

Kalee Churn and Mundoor Pershad sued the defendants in this case for possession of certain lands of Mouzah Kochee, and obtain-

ed a decree on the 5th of May 1860 for a 12 annas and 4 annas share of the property respectively.

An Ameen was deputed to the spot, and the decree-holders got possession of the land. They are said to have been almost immediately afterwards dispossessed by the defendants; and whilst in that position, Kalee Churn, the 12-annas sharer, is alleged to have sold to the plaintiff, Rajah Leelanund Singh, all his right, title, and interest in the land that had been decreed to him.

In 1866, the Rajah and the 4-annas shareholder, Mundoor Pershad, brought this suit to recover possession of the decreed land with mesne-profits from the day of ouster.

The defence is that the plaintiffs were never dispossessed, but are still holding all the land decreed to them, and that the suit is an attempt to deprive the defendants of other land not included in the decree.

The Subordinate Judge gave a decree for the plaintiff with wassilat, and against this decision the defendants Thakoor Munrunjun Singh and Bhugut Lokenath Singh appeal.

Baboo Chunder Madhub Ghose on their behalf contends, first, that the plaintiff, Rajah Leelanund Singh, has no right to sue on the kubala of his vendor, who was himself out of possession at the time of sale.

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The first objection appears to us wholly untenable. Civil Courts in this country are not merely Courts of law, but of equity also, and although "choses in action" would not ordinarily be assignable in law, they are, and always have been, held to be so by Courts of equity. Whether or no the vendor was in possession of the land could make no difference. It would be sufficient if the thing sold was legally saleable. It might have no present actual or potential existence; it might rest in mere possibility; still it would be equitably an assignable chose in action. In the present case, the vendor Kalee Churn sold all his rights and interests in the decreed land—interests which had been clearly defined in the decree.

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The 5th January 1869.

Present:

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

Appellate Court—Evidence—Objections.

Case No. 2137 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 16th May 1868, reversing a decision of the Assistant Collector of that District, dated the 20th November 1867.

Lowa Jha and others (Plaintiffs), *Appellants,*

versus

Bisseshur Singh (Defendant), *Respondent.*

Moonshee Mahomed Eusuff for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Where evidence which was rejected by the Court of first instance is admitted at the appeal-stage, the Appellate Court is bound to state its reasons for admitting the evidence.

A defendant is entitled to take in the Appellate Court an objection which he had no opportunity of taking until the case was heard in appeal.

Glover, J.—THIS was a suit for recovery of enhanced rent after notice, the ground of enhancement being that the productive powers of the land had increased in consequence of the landlord's having erected a bund.

The defendant set up a pottah granted to him by the 3 annas 4 gundahs shareholders of the estate, which at the date of suit had still two years to run.

The first Court found for the plaintiff, but the Judge on appeal held that the pottah had been proved, and that the tenant was protected from enhancement during the period of his lease.

The point taken in special appeal is that the Judge has held the pottah to be proved on what is no legal evidence, and that in any case it could only hold good as regards the share of Zoolfekar Ali, a 1 anna 12 gundahs shareholder, and could not bind the owners of the remaining shares.

It appears that, after the first Court had decided the suit adversely to the defendant, an application for review was made on his behalf, on the ground that a deposition of Zoolfekar Ali had been found in another rent-case, in which he had admitted the genuineness of this pottah. The application was rejected; but the Judge on the regular appeal admitted this evidence, and decided on it in favor of the tenant. No other evidence was