younger sons having allowances made to them. Therefore, the second ground utterly fails.

As to the third ground, Doorga Pershad Singh attempted to give evidence that there is a family custom, or *koolachar*, by which in this family females were excluded from inheritance. He did not make any averment to that effect in his written statement, and therefore did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or *koolachar*, the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved.

We think that it would be a great injustice to the plaintiff to raise that issue now, and to allow the defendant to come in upon an allegation as to the truth of which he has never pledged himself and which the plaintiff has had no opportunity of meeting. We therefore decline to go into the question whether upon the evidence as it stands, there is any proof of the existence of any such custom as that now alleged by the vakeel of the defendant Doorga Pershad.

It is said that the plaintiff's witnesses admit the existence of a custom to exclude females. The only statement to which the learned vakeel for the defendant can point as in any degree substantiating that contention is the statement of one Ahun Chand, one of the plaintiff's witnesses, who says, "I know of no case in which women have succeeded to any *guddee* in Chakaye." Very likely, but ignorance is not proof.

The charge that the plaintiff has been living an unchaste life has been abandoned. And, as has been shewn by the Subordinate Judge, has been contradicted by the widow Narain Koonwaree, whose evidence shows that there is no foundation for such a charge.

We think that the suit has been very properly decreed. We think it is evident that the defence set up is a mere fraudulent contrivance and a reckless attempt on the part of Doorga Pershad Singh, a possible future heir, to defeat the rights of the plaintiff whose title as heiress of her son is clear.

We dismiss the appeal with costs.

The 5th January 1870.

*Present :*

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

**Execution—Mesne profits—Section 11, Act XXIII of 1861—Involving process—Extending Court's award.**

Case No. 446 of 1869.

*Miscellaneous Special Appeal from an order passed by the Officiating Judge f Hooghly, dated the 16th July 1869, affirming an order of the First Subordinate Judge of that district, dated the 3rd April 1869.*

Eckowree Singh and others (Judgment-debtors), *Appellants,*

*versus*

Bijoynath Chatterjee (Decree-holder), *Respondent.*

*Baboo Gopeenath Mookerjee* for Appellants.

*Baboo Hem Chunder Banerjee* for Respondent.

A suit for possession of land, in which the plaint contained also a demand for mesne profits, was decreed as to a part of the land, the decree being silent as to mesne profits. The plaintiff appealed in respect to the undecreed portion of land, and the Appellate Court reversing, in this particular, the judgment of the Court below "decreed" the appeal.

HELD, that as mesne profits were not expressly given in the decree, and as they did not in this case come within the terms of Section 11, Act XXIII of 1861, they could not be obtained in execution.

HELD, that the words "appeal decreed" in the Lower Appellate Court's decree could not be interpreted as giving the appellant every thing he asked for, and that there was no decree which could be executed at all.

HELD, that process in execution must always be granted by the direct act of the Court itself. And as parties cannot invoke process *de novo* either by agreement or by their conduct, so neither can they extend the relief which the Court has chosen to award.

*Jackson, J.*—THE plaintiff, who is now before us as decree-holder and special respondent, brought a suit against the special appellant, for a certain quantity of land. In that suit, he got a decree from the Court of first instance for the land which he claimed, except 22 beegahs. The plaint also contained a demand for mesne profits in respect of the land, but the decree was wholly silent as to such mesne profits.

The plaintiff, being dissatisfied with the judgment of the Court of first instance,

preferred an appeal to the Zillah Judge in respect to the 22 beegahs of land for which he had been refused a decree; and that Court, reversing in this particular the judgment of the Court below, "decreed" the appeal.

After this, the plaintiff, considering that the first suit had given him nothing in way of mesne profits, brought a second suit for mesne profits, both of the period comprised in the plaint and also of the subsequent period. This second suit, it appears, was dismissed upon the ground that the plaintiff's proper course was to obtain his mesne profits in execution of his first decree. He has now sought to execute that decree for the purpose of obtaining the mesne profits in question, and the Subordinate Judge, as well as the Judge of Hooghly, have held that the decree-holder is entitled to obtain those mesne profits in execution of his first decree.

Against this decision the judgment-debtors appeal specially to us, and they contend that the execution itself is barred by limitation, and also that there has been error in holding the decree-holder entitled to wassilat in execution.

It has been shown, I think satisfactorily, that no limitation arises inasmuch as the application to execute was within three years from the final decree passed in special appeal in the original suit.

But on the second point, I think the special appellant must succeed. It is contended that Section 11, Act XXIII of 1861 supports the decision of the Courts below and entitles the decree-holder to his wassilat. It appears to me, however, that the Section in question has not that effect. The words of the Section are "all questions regarding the amount of any mesne profits which by the terms of the decree have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest" (which, I apprehend, would be fully written) "or questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree, or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree." . . . . In order to bring the subject-matter of the claim within the terms of Section 11, it appears to me that it must come within one or other of the several Clauses of the first sentence of that Section, that is to say, it must be either a question regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjudication, or it must be a question regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of the suit between the date of the institution of the suit and execution of the decree, or it must be some other question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree.

Now, it appears to me that a question arising between the parties relating to something not comprised in the decree, cannot be a question relating to the execution of the decree. As, therefore, it will not come within the general words at the conclusion of the first sentence of the Section, it ought to come within some one or other of the previous Clauses. Now it is not an amount of mesne profits which has been reserved for adjustment in the execution of the decree, because the decree contains no such reservation. It is not an amount of mesne profits or interest payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, because the decree does not make it so payable: and moreover the question here does not relate to an amount at all. The question which we have to decide is, whether the plaintiff is to receive wassilat, or no. Therefore, in no sense could this question be one of those comprised in the first Clause of Section 11.

A case precisely similar to this has been decided in the same sense by another Bench of this Court. That case is to be found in 1 Bengal Law Reports, 138.*

The Additional Judge observes "I come to the same conclusion as Mr. Bright has come to in regard to the construction to be put on the order passed, which I am of opinion was meant to include a decree for mesne profits for the land decreed." But it will not do to say that a decree was meant to include something; because the Procedure Code, in Section 189, says that the

* 10 W. R., p. 62.

decree, in addition to other matters, shall specify the relief granted, and I apprehend that that which is not clearly specified in the decree, is not given. For these reasons, I think the plaintiff cannot recover wassilat in execution of the decree when it is not expressly given in the decree, and consequently the decision of the Court below must be set aside with costs.

*Markby, J.*—I am of the same opinion. With regard to the first ground upon which we were asked to say that the plaintiff, judgment-creditor, was entitled to recover mesne profits, namely, on the words of Section 11, Act XXIII of 1861, I do not think it necessary to add any thing to the observations made by Mr. Justice Jackson, and by Mr. Justice Phear and Mr. Justice Hobhouse in the case reported in I Bengal Law Reports. I quite concur in thinking that Section 11 does not enable any party to recover in execution any thing except that which has been given by the decree. So that the question comes back to this,—what has been given by this decree? As I understand the argument, it is that inasmuch as the Appellate Court gave a decree in the form "appeal decreed," it must be assumed that that Court gave to the appellant every thing he asked. I think it would be quite impossible to put any such interpretation as that upon those words. I think we are justified in this case in going to the length of saying that there was no decree which could be executed at all. How far, if the decree is ambiguous as to the relief which it awards, evidence may be given to show what the Court intended, is perhaps a question of difficulty, and one which it is not necessary to go into, because so far from there being here any ambiguity, there was no decree at all.

The only point upon which I have felt the smallest doubt, is, as to whether or no, the conduct of the defendant in the subsequent suit in having, as I think it pretty clear he had, contended that mesne profits were given in the first suit, could, in any way, affect the position of the parties. But upon consideration, I think it clear that it could not. I think it a clear principle of law that parties cannot, either by special agreement or by any conduct of their own, invoke the process of the Court in execution. Process in execution must always be granted by the direct act of the Court itself. And it appears to me that precisely upon the same principle that parties are prohibited from invoking the process of the Court *de novo* either by agreement or by their conduct, they are also prohibited from executing in like manner the relief which the Court has chosen to award. Therefore, all questions as to the conduct of the parties where they are seeking to execute a decree of Court, are, in my opinion, immaterial in considering what is the effect of the decree.

---

The 5th January 1870.

*Present:*

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

**Act XVIII of 1850—Responsibility of Magistrates—Damages—Liability of Government—Procedure.**

Case No. 1911 of 1869.

*Special Appeal from a decision passed by the Judge of Hooghly, dated the 15th June 1869, modifying a decision of the Subordinate Judge of that district, dated the 31st December 1868.*

Tarucknath Mookerjee (Plaintiff), *Appellant,*

*versus*

The Collector of Hooghly on behalf of Government and others (Defendants), *Respondents.*

*Mr. J. W. B. Money* for Appellant.

*Mr. Bell (Government Advocate)* and *Baboos Juggadanund Mookerjee* and *Onookool Chunder Mookeriee* for Respondents.

Act XVIII of 1850 does not protect a Magistrate who has not acted with due care and attention. A Magistrate cannot be said to have in *good faith* believed himself to have jurisdiction to do, or order, an act complained of, unless in arriving at that belief, he acted reasonably, circumspectly, and carefully. He is not protected against personal liability for a misconstruction of the law unless his proceedings have been in other respects regular and his view of the law is such as a reasonable and careful man might take.

Government has no right summarily to appropriate or destroy private property merely because it considers that doing so would be for the public convenience. The Government and its officers are just as much bound to proceed in such matters according to law as are private individuals, and are just as much liable in damages for illegally appropriating or destroying property for the purpose of adding to the convenience of the public as is a private individual who appropriates or destroys property for his own convenience.

In the case of an unlawful obstruction or nuisance, a Magistrate proceeding under Chapter 20 of the Criminal Procedure Code, should call upon the person who caused the same *either* to remove it *or* to show cause why it should not be removed within a reasonable time. If