application of a third person, rightly interfere by virtue of its extraordinary powers with the proceedings in a suit between parties who did not complain. The remedy of the purchaser was by a separate suit.

There is another case in Volume 7 Weekly Reporter (Gobind Koomar Chowdhry *versus* Kristo Koomar Chowdhry), in which a Full Bench held that an application very similar to the present application made by a party to the suit could be entertained by this Court.

In that case, the Deputy Collector had made a decree for arrears of rent. Subsequently, the Lower Appellate Court, and this Court on special appeal, modified that decree, declaring the plaintiff entitled to something less than the amount originally decreed. Meanwhile, the plaintiff had executed his original decree against the defendant for the full amount. After the judgment of this Court on special appeal, the defendant went to the Deputy Collector and asked the Deputy Collector to order the plaintiff to refund to him (defendant) the excess which he had paid beyond the amount finally awarded. The Deputy Collector refused this application, referring the defendant to his remedy by a separate civil suit.

The Full Bench, on this, held that the Deputy Collector was refusing to do his duty on the application of a party to the suit who was entitled to require him to make the order in question.

So here, the petitioner appears to us to be entitled to have the Deputy Collector ordered to do his duty, and to execute the decree which he has wrongly understood not to be a decree.

We think that there really is no collision between the case of DaCosta and the case reported in 7 Weekly Reporter.

There is no doubt a third class of cases with which we are familiar—more than one has come under our notice to-day—in which a subordinate Court having exercised its judicial discretion on the matters and the facts involved in the suit between the parties, and the Legislature having forbidden an appeal, the party aggrieved by the decision seeks a remedy by applying to this Court to exercise its extraordinary powers for the purpose of setting the lower Court right. In such a case as that the argument of the present respondent's pleader is, we think, good.

This Court will not allow the powers which it possesses under Section 15 of the Charter Act to be made use of simply for the purpose of obtaining an appeal in cases where the Legislature has expressly forbidden an appeal. But, as we have endeavoured to explain, the present case lies outside that class of cases altogether. The Deputy Collector has, in our opinion, refused to do that which it was distinctly his duty to do. The matters on which he exercised his judgment—if he did exercise any—were not matters and facts remaining in issue between the parties, but were the circumstances of an act done by his own Court.

It seems to us that no cause has been shewn against the rule, and therefore it must be made absolute with costs, which we assess at 32 rupees.

The 1st June 1870.

Present :

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Possessory suit—Onus probandi—Transfer of title—Section 36 Act XI of 1859—Section 260 Act VIII of 1859—Section 21 Act I of 1845.

Case No. 157 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 29th September 1869, *affirming a decision of the Moonsiff of Kishengunge, dated the 8th July* 1869.

Shaikh Johur Ali (Plaintiff) *Appellant,*

versus

Brindabun Chunder and others (Defendants) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.
Mr. R. E. Twidale for Respondents.

In a suit to recover possession by the ostensible purchaser of an estate sold for arrears of revenue under Act I of 1845, where it was found that plaintiff had stood by ever since his purchase and had for 11 years allowed defendants to remain in possession and enjoy the usufruct as proprietors :

HELD, that the burden of proof was rightly thrown on the plaintiff.

5 W. R., Civil, 56, and 11 W. R., Full Bench, 16, —the former on Section 36 Act XI of 1859 and the latter on Section 260 Act VIII of 1859,—considered, and applied to a case under Section 21 Act I of 1845.

Hobhouse, J.—THE plaintiff in this case was the auction-purchaser, it is admitted, on the 11th February 1858, of the revenue-paying estate in question, and purchased that estate at a sale for arrears of revenue under Act I of 1845. His allegation then was that after the purchase he obtained possession in the usual way; that he enjoyed possession by means of receiving certain rents of the estate up to the 13th April 1858 ; and that he was then ousted by the defendants ;—and he brings his suit to recover possession on the 11th February 1869.

The Courts below have found as facts, about which there can be no contest in this Court of special appeal, that the plaintiff never obtained possession of the property in question, that he never arrived at any enjoyment of that property, and that he was never ousted of the property by the defendants ; but that, on the contrary, the defendants, notwithstanding the ostensible purchase by the plaintiff on the 11th February 1858, retained possession of the estate ever after and up to the present time, that is, for a period of no less than 11 years. Under these circumstances, the Courts below dismissed the plaintiff's suit.

In special appeal it is urged that the plaintiff being a certified purchaser at auction under the provisions of Act I of 1845, the defendants were not in a position to dispute the plaintiff's right to obtain possession of the estate ; and it is also stated that the Courts below have thrown the burden of proof upon the wrong party.

In answer to the second objection, it is sufficient to say that it is founded upon a mistake ; that it is not until the Courts below have found that the plaintiff was never in possession and was never ousted, and that the defendants had been in adverse possession for a period of 11 years, that the Courts below called upon the plaintiff to establish the fact that he was the real purchaser and not the defendants. Therefore, it seems to us that it cannot be said that the burden of proof has in any way been wrongly thrown upon the plaintiff.

But the first objection taken requires a little more consideration. We think it is quite clear that there is so little difference between the provisions of Section 21 Act I of 1845, and Section 36 Act XI of 1859, and Section 260 Act VIII of 1859, that any decisions of this Court which are founded upon the provisions of any one of those Sections may be said to apply to matters which are governed by any other of those Sections. I will therefore take it that the decision of the Division Bench of this Court to be found at page 56, Volume V of the Weekly Reporter, and the decision of the Full Bench to be found at page 16, Full Bench Rulings, Volume XI of the Weekly Reporter, are in point. But being in point, we think that these decisions themselves show us that upon the findings of fact of the Courts below, the plaintiff was not entitled to succeed in this case.

The facts of the case to be found in Volume V of the Weekly Reporter were these :—that the plaintiff was not only the certified purchaser, but that he had actually obtained possession under his purchase and was ousted. That being so, the learned Judges held that the plaintiff was entitled to the protection of Section 36 Act XI of 1859, which, as we have said before, is equivalent to Section 21 Act I of 1845, which applies to this case, unless, as the learned Judges put it, the plaintiff had by any act of his debarred himself of the right to the benefit of the Section in question. Then the learned Judges go on to say that had the plaintiff in that case, the certified purchaser, in any way waived his right to the purchase or relinquished it in favor of the defendants in the cause, then those defendants would have had a good cause and a good reason for ousting the plaintiff. The Judges further went on, it being a regular appeal, to decide that the plaintiff had not in any way debarred himself of the right to the benefit of the Section in question. and they held, therefore, that he was entitled to succeed in his suit to recover possession.

The ruling, therefore, in that case was that although the certified purchaser was the person who had been in possession and had been ousted, yet that ouster was defensible if it could be shown that the certified purchaser had so acted as to waive his right to the purchase and relinquish it in favor of the defendants.

But the facts here, we need not say, are very different ; for here the finding of the Courts below is that the purchaser has never been in possession and has never been ousted.

Then the purport of the Full Bench Ruling is to be found probably in the first few sentences of the learned Chief Justice's judgment. At page 19 he says :—" I am of " opinion that the defendant is debarred by " Act VIII of 1859," in this case it would be Act I of 1845, " from setting up the de- " fence mentioned in the question, unless " the defendant is in possession under cir- " cumstances which amounted to a transfer " to him of the title which the plaintiff " derived from the purchase." And then the learned Chief Justice goes on to give his reason why he thinks that the defendant could not, unless this defence were proved, set up the defence against the certified purchaser, the plaintiff.

Then, in illustration of what the learned Chief Justice meant when he said that when the defendant set up circumstances which amounted to a transfer to him of the title which the plaintiff derived from the purchase, he goes on to give an illustration, or rather several illustrations. He says—" If " a *benameedar* should acknowledge the pur- " chase to have been made *benamee*, and " waive the right conferred upon him by " Sections 259 and 260, and give up pos- " session to the real purchaser as the right- " ful owner, such act would probably a- " mount to a transfer of the title, as well as " of the possession to the real purchaser."

And again, he says that there was a case in which certain Judges had defended the possession of the defendant exactly under circumstances similar to the present, and in which they had rightly done so. He says that in that case the allegation of the defendants was that they, ever since the purchase in the name of the plaintiff, had been in possession as proprietors. And the learned Chief Justice goes on to say that in that case, which we may remark is exactly the case here, " the defendants' allegation was " sufficient to enable them to prove that, " notwithstanding the estate had been pur- " chased in the name of the plaintiff, he " had waived his right and made over the property to the defendants as proprie- " tors."

Now, that is exactly what the Courts have found in this instance. They have found upon the evidence that notwithstanding that the plaintiff was the ostensible purchaser of the estate, yet that he in reality had stood by ever since the time of the purchase, and for 11 long years had allowed the defendants to remain in possession and enjoy the usufruct of the property as proprietors. That seems to us to amount to a finding that there has been such a transfer of the estate of which the plaintiff was the ostensible proprietor to the defendants, as gave the defendants a good defence against the plaintiff, when, simply on the ground of his purchase, he sued to recover possession.

For these reasons we are of opinion that the judgment of the Court below is good in law, and that we must dismiss this appeal with costs.

The 2nd June 1870.

Present :

The Hon'ble J. P. Norman, F. B. Kemp, and L. S. Jackson, *Judges.*

Jurisdiction—Landlord and tenant—Benamee contracts—Pottah and kubooleut—Sureties.

Case No. 3 of 1869.

Appeal under Section 15 *of the Letters Patent of the High Court against the judgment of the Hon'ble Sir Barnes Peacock, Kt., late Chief Justice, and the Hon'ble Dwarkanath Mitter, one of the Judges of this Court, dated the* 15*th February* 1869, *in Regular Appeal No.* 58 *of* 1868, *from a decree of the Deputy Collector of the* 24-*Pergunnahs, dated the* 21*st December* 1869, *the said Judges being equally divided in opinion.**

Bipeen Beharee Chowdhry (Plaintiff) *Appellant,*

versus

Ram Chunder Roy and others (Defendants) *Respondents.*

The Advocate-General and *Baboo Ashootosh Dhur* for Appellant.

Baboos Ashootosh Chatterjee and *Khetturnath Bose* for Respondents.

Suit in the Deputy Collector's Court for arrears of rent on a gantee jumma, for which four of the defendants were alleged to have taken a lease, receiving a pottah and giving kubcoleut in the name of a third party (*C. P.*), on the security of two others who were sued as sureties. The liability of each defendant had been affirmed in previous decisions between the parties, and the only dispute was between one of the defendants, who claimed for himself and a co-defendant

* 11 W. R., p. 120.