being the principal, interest, and costs which he had paid in excess of the amount decreed by the High Court.

Now, it is contended before us that the Judge should not have awarded interest on the principal sum which was ordered to be refunded to the debtor. But we do not see that this objection is of any weight. The case is a simple one. In liquidation of the decree which was then outstanding against him, the defendant paid down the sum of Rupees 1,967-10-9, and when that decree was modified, he asked that so much of the sum which he had paid in excess of the amount decreed by the High Court might be refunded to him with interest; and we think that the Judge was perfectly right in awarding interest. The decree-holder had taken out the money, and had made use of it; and when he was obliged to refund the money, the debtor was entitled to receive interest upon that money, which properly ought never to have found its way into the hands of the decree-holder.

We think, therefore, that the objection now taken before us must be disallowed, and the appeal dismissed with costs, sixteen rupees being allowed as pleader's fee.

Mookerjee, J.—I concur.

The 23rd January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Transfer of a decree—Sections 2 and 5, Act III. of 1870.

In the Matter of

Sreemutty Jugodumba Dossee, *Petitioner*.

Mr. R. T. Allan for Petitioner.

Where, by the operation of Act VIII. (B. C.) of 1869 and Act III. of 1870, a decree is transferred (*e. g.*, from the Court of a Deputy Collector to that of a Subordinate Judge), any application as to a matter prior to, or which may affect, the decree (*e. g.*, an application for a review), must be made to the Court which passed the decree.

Norman, C. J.—It appears to us that there is no ground for our interference in this case. By the conjoint operation of Act VIII. of 1869 and Act III. of 1870, B. C., the *decree* against the applicant, Sreemutty Jugodumba Dossee, was transferred from the Court of the Deputy Collector to that of the Subordinate Judge of the 24-Pergunnahs. The Subordinate Judge who was executing that decree made a certain order. The applicant then presented a petition to the Subordinate Judge to review the judgment of the Deputy Collector which was passed so long ago as the 16th June 1869. The Judge refused that application, considering that he had no jurisdiction to entertain; and that, if the petitioner desired to have that decree reviewed, her proper course was to apply to the Deputy Collector.

We think that the Judge was perfectly right. Under Section 3, Act III. of 1870, the decree alone was transferred, that is, transferred for the purpose of execution. If there had been any doubt as to the transfer of the suit by the transfer of the decree, that doubt would have been set at rest by the 2nd and 5th Sections of Act III. of 1870, which show clearly that any application in the suit as to a matter prior to, or which might affect, a decree must be made, not to the Court to which the decree was transferred, but to the Court by which the decree was made. The application is refused.

The 23rd January 1871.

Present:

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

Endowments (wuqf)—Execution—Attachment—Leases.

Case No. 152 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 21st September 1869, modifying a decision of the Subordinate Judge of that District, dated the 24th June 1869.

Mr. James Fegredo (Defendant), *Appellant*,

versus

Mahomed Mudessur and others (Plaintiffs), *Respondents*.

Messrs. C. Gregory and *J. S. Rochfort* and *Baboo Taruck Nath Sein* for Appellant.

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Respondent.

Where property is endowed (made wuqf) by the proprietor, and as such devolves to his widow as trustee (Mutwullee), it cannot be sold in satisfaction of a claim against him.

A widow claiming to be such trustee cannot be bound by a decision adverse to a claim set up by her husband's grandfather in respect to the property concerned, if she was not a party to the litigation.

Where landed property is attached in execution of a decree, the party attaching is bound by a lease obtained for it prior to his attachment.

Kemp, J.—THIS suit was remanded on the 19th August 1868 by Justices Bayley and Macpherson.* The decision remanding the case is a very elaborate one, and enters most fully into the case both on questions of law and fact.

Mr. Justice Macpherson, who gave the decision, observed that "the case was really "a very difficult one, involving many very "complicated and intricate questions, and "the consideration of various previous de- "crees, the effect of which it was not very "easy to ascertain accurately." Further, that learned Judge remarked that "it was "impossible to discover and declare the true "relative positions of the parties without "going with the utmost precision and ac- "curacy into all the details of what has "occurred, both as to the results of previous "litigation as to the property in dispute, and "in the course of the dealings between the "appellant and the widows in relation to the "giving the lease to the appellant and sub- "sequent thereto."

The case has occupied much of our time, and we cannot, without entering into some detail, satisfactorily dispose of it.

The case is briefly this: The plaintiff, special respondent, is an auction-purchaser in execution of a decree of the rights and interests of Dad Ali and Mahomed Ali, two brothers. It has been found, and the point is no longer open to discussion, that Mahomed Ali had no rights and interests such as could pass to the plaintiff under the purchase. Dad Ali, the remaining judgment-debtor, is represented by his two widows Akburoonissa and Nujoomoonissa. The defendant, special appellant, Mr. Fegredo, is the proprietor of the National Hotel at Burdwan. The plaintiff, after his purchase in February 1864 of the rights and interests of Dad Ali, sued Fegredo for the rent of the said house, alleging that, on the 14th August 1865, he served a notice on the defendant Fegredo to quit, not the whole house, but a 13-anna share of the house; and that, if he did not quit, he would be charged with rent at the rate of 100 rupees per mensem for the 13-annas share of the house in lieu of 40 rupees, the rent hitherto paid by the tenant Fegredo.

The defendant Fegredo's defence was briefly to this effect—that he held a lease from Akburoonissa and Nujoomoonissa, the two co-wives and widows of Dad Ali, executed on the part of Akburoonissa and confirmed on the part of Nujoomoonissa before the date of the attachment taken out by plaintiff in execution of his decree; that this lease gives him a good title as against the plaintiff. Fegredo further alleged that Khyrat Ali, the grandfather of Dad Ali and Mahomed Ali, made a will by which he endowed the property; that Dad Ali, by an exchange with his brother Mahomed Ali, obtained this house in lieu of another house at the same station of Burdwan, and that, by the exchange, the whole house in dispute, known as the "Captain Saheb's Kootee," became wuqf; that Dad Ali, by his will, left the property in dispute as wuqf to his two widows in the proportion of 10 annas to the younger wife Nujoomoonissa, and 6 annas to the elder wife Akburoonissa. Fegredo, therefore, contends that, as the house in dispute was wuqf property, it could not be sold in execution of a decree against Dad Ali or his widows as representing him.

Fegredo obtained, in the first instance, a lease for the whole house from Akburoonissa alone on the 4th Bhadro 1269. This was admittedly before the attachment and sale in satisfaction of the decree under which the plaintiff purchased. He alleges that, on the 12th Aughran 1269, he obtained from the other widow Nujoomoonissa a confirmation of the above lease, which confirmation is also prior in date to plaintiff's attachment; that in Assin 1270, or subsequent to the plaintiff's attachment, Nujoomoonissa executed a formal lease to him of her share in the house. The defendant Fegredo, in addition to denying the plaintiff's title, pleaded further that he had expended a large sum of money in repairing the house, and that his lessors had agreed to allow him 2,000 rupees for the repairs with interest at 5 per cent., the said sum to be recovered by deductions from the rent. He, therefore, claimed the benefit of this arrangement as against the plaintiff, if liable at all to the plaintiff.

In the first instance and before the remand, the Principal Sudder Ameen found that the property was not wuqf, and gave

* 10 W. R., p. 267.

a decree to the plaintiff at 40 rupees per mensem. The Judge held that the lease by Akburoonissa was *bonâ fide*, but that the alleged ratification by Nujoomoonissa by letter prior to attachment had not been proved. He objected to the letter, first, that it was a copy; secondly, because Fegredo had not deposed on oath to the circumstances under which the letter was given to him.

The Judge held that the plaintiff was not bound by the lease of Nujoomoonissa. He, however, was of opinion that Fegredo was entitled to a fair sum for repairs done, as such repairs were requisite. The case was remanded by him for further investigation, as to the extent and amount of repairs done. A decree was given to the plaintiff at the rate of 100 rupees per mensem for the 10-annas share from date of notice to quit, subject to a deduction of what might, on enquiry, be found due on account of repairs.

Both parties appealed, and this Court remanded the case directing the Judge to try the following issues: 1st.—As to the date on which Nujoomoonissa first confirmed the lease to Fegredo.

The Court directed this issue to be properly tried and decided, fresh evidence being gone into for this purpose. It further directed that both Fegredo and Nujoomoonissa should be examined strictly as to the exact date on which, and circumstances under which, the letter of confirmation was given.

2nd Issue.—Whether the house in dispute came to the hands of the widows of Dad Ali as wuqf, and was wuqf at the time the lease was given to Fegredo by Akburoonissa.

With regard to this issue, this Court remarked, "that there can be no doubt that "the house was treated by Dad Ali in his will "as wuqf, and was left in the proportions of "6 annas and 10 annas to his widows; that "the Judge had adopted and acted upon the 'gift to the widows, but had not recognized 'or given effect to so much of the will as "treated the property as wuqf; that if "might be, as the Principal Sudder Ameen "said, that the will of Khyrat Ali had been "declared by a competent Court to be a "forgery, and that this house never came "into the hands of Dad Ali as wuqf; but "it was matter for consideration whether "there was anything which prevented Dad "Ali from himself making the property "wuqf, and leaving it as such to his widows." If, observes the learned Judge, the question as to this house being in the hands of the widows as wuqf has been determined by a judicial decision which is conclusive against *the parties in this suit*, of course there is an end of the matter; but it was not easy to discover whether there was really any binding decision on this point.

The learned Judge, in framing issue No. 2, observes further that it is possible that the property in dispute may be wuqf of the creation of Dad Ali, and directed that this question must be *distinctly* disposed of; that the Judge must consider and state *with precision* what particular decisions, if any, relating to the *matter in issue in this suit* are admissible as evidence and are binding on the parties.

The Judge was also directed to find whether the endowment was *bonâ fide* or merely nominal, for, if the latter, it would not be valid wuqf as against the plaintiff.

3rd Issue.—What is a fair and reasonable rent for the 10-annas share of the house? In deciding this issue, the Judge was directed to consider the state of the house when Fegredo entered upon the occupation, as also the reasonable and necessary repairs executed by him since his entry.

As regards the cross-appeal of the plaintiff, the learned Judge, Macpherson, remarked that it is clear that the liability of the plaintiff to the deduction claimed for repairs depends entirely on the date of the agreement to allow such repairs entered into by the widows; if it was entered into before the attachment, it is binding on the plaintiff exactly in the same degree as the lease; if after the attachment it cannot in any way bind the plaintiff.

After remand, the case was re-tried by the Subordinate Judge, Baboo Russick Lall Bose, who dismissed the plaintiff's suit with costs. The Subordinate Judge held that the property was wuqf, for, observes the Subordinate Judge, it is clear that Dad Ali alone had any title in the property, which would not have been the case if the property was not endowed. He further held that there was nothing in the former decision to show that the act of Dad Ali in making the wuqf was invalid; and with reference to the *bonâ-fide* character of the endowment, he found that, from the evidence of some of the witnesses produced by the plaintiff, it might be gathered that, during the lifetime of both Khyrat Ali and Dad Ali, the property was

used as wuqf in their family, and the purposes for which the endowment was made were carried out.

The Subordinate Judge refers to the deed of exchange dated the 14th Bysack 1265, and to the will of Dad Ali dated 22nd Bysack of the same year. This will, he observes, is registered, and was executed and acted upon long before the attachment and auction-purchase of the plaintiff, and that, at the time this deed was executed, there was no necessity for preparing it fraudulently: hence it cannot be said that the act of making the property wuqf was invalid, or that it was not really made wuqf. Further, that a decree of the late Sudder Court in September 1861 shows that Dad Ali appointed his two wives Mutawullees, and that an objection thereto raised by the co-sharers was rejected and a certificate granted to the widows according to the terms of the will of Dad Ali. The Subordinate Judge ends his judgment by remarking "that, as the plea "of the wuqf character of the property "was established and supported by the "evidence, it was needless to adjudicate "upon the other issues framed by the High "Court."

The plaintiff then appealed, and the Judge, Mr. A. E. Russell, on the main question of wuqf or no wuqf, remarks that "the "previous litigation to be found in decisions "Nos. 7 and 8 had disposed of the question "of endowment in as far as the endowment "by Khyrat Ali is concerned, as the plaintiff "in one of those suits, who is one of the "present defendant's lessor, sued to set "aside an auction-sale on the ground of the "property sold by the same being portion "of an endowment, her claim was dismissed; "and seeing that these lessors at that time "declared that they held under the will of "Dad Ali, and did not prove in these cases "that any endowment was created by that "will, I very much doubt whether their "lessee (Fegredo) is now entitled to raise "that question." The Judge, however, in order, as he says, to carry out the directions of this Court, states that "he has given this matter attention also," and having read the will and deed of exchange, he is of opinion that these documents are not of such a nature as to create any endowment. The Judge proceeds to observe that "the testator, *i. e.*, Dad Ali, holding as a Mutawullee, could not do otherwise than hand down the property to other trustees; but when it is proved that Dad Ali did not hold by a valid deed of endowment, because, though he declared himself to be a Mutawullee, he was "*de-facto* proprietor of the property."

With reference to the issue as to the date of the letter of confirmation by Nujoomoonissa of the lease to defendant, the Judge observes that "he considers that the lady "has most glaringly shirked from answering "any direct question regarding it, while she "is able to speak to any other of the numer-"ous points on which she was examined; "further that, beyond the admission by the "lady that the letter bore her seal, she had "not attested it."

With reference to the evidence of Fegredo, the Judge observes that Fegredo failed to fix in any intelligible way the period at which the letter was given. For these reasons, the Judge was of opinion that Nujoomoonissa "has purposely shirked the question as to the time at which the letter was written."

In the matter of the notice to the defendant Fegredo to quit the house unless he agreed to pay the enhanced rate of rent demanded, the Judge was of opinion "that "he was not justified in awarding the rent "demanded in the notice from date of the "notice or even from the date of suit;" the defendant will be liable, says the Judge, "to pay rent according to the rate which "the Court deems to be equitable from the "date of the Judge's decree."

In the matter of the claim made by the defendant for repairs and re-constructions, the Judge was of opinion that "they cannot "be binding upon the plaintiff, for the con-"sent of the defendant's lessor, namely, "Nujoomoonissa, to the bill for repair, &c., "amounting to Rupees 2,000, was given after "the date of attachment;" further, as the defendant has been in possession of the house for a number of years at a low rent, the Judge did not think "that it is now neces-"sary to allow the defendant to claim a "lower rent in future on the plea of the "expense he has been put to in the con-"struction of rooms and the repairs of "house, especially as the amount exp "is excessively badly established." Judge found that a fair and equ was Rupees 100 per mensem. "suit was one for arrears "and not for a settle "which it can be held wou not "wl "her

"share of the property." The Judge decrees the rent at the existing rate, *i. e.*, 40 rupees per mensem up to the date of suit. Each party to pay his own costs of the appeal. Against this decision both parties came up in appeal to this Court.

We take the question o wuqf first, for if this property is wuqf, it will be unnecessary to consider the other questions raised by the remand-order, inasmuch as, if the property in dispute was endowed by Dad Ali, and as such devolved to his widows as trustees, it could not be sold in satisfaction of a claim against Dad Ali, and consequently no title has passed to the plaintiff as against Fegredo, the lessee of the widows, by the purchase of the plaintiff in execution.

In disposing of this issue, we have to consider, as the Judge was directed to consider by the order of remand, the effect of the previous litigation with reference to this property, for, as observed by the learned Judges remanding the case, "it is matter "for consideration whether there was any-"thing which prevented Dad Ali from him-"self making the property wuqf, and "leaving it as such to his widows." Of course, if the question as to the property in dispute had been determined by any judicial decisions which are conclusive and binding upon the parties to this suit, there is, as observed by the remanding Judges, "an end of the matter."

The previous litigation referred to has been submitted to our consideration. It consists of two decisions, Nos. 7 and 8. Now, in the first place, the parties to the present suit were not parties to the suits Nos. 7 and 8. The suit No. 7 was a claim made by Akburoonissa, one of the widows of Dad Ali, against Sutto Buttee Dossee and others in the summary department. Akburoonissa's lease has been found to be valid as against the plaintiff in the present suit.

In No. 7, the then Principal Sudder Ameen, Mr. J. Reily, held that, although Akburoonissa was not a party to the previous litigation with respect to the endowment by Khyrat Ali which had been found to be not proved, yet, as she was the wife of Dad Ali, she was bound by the decision holding that the endowment by Khyrat Ali was not proved.

No. 8.—In this case the other widow Nujoomoonissa was the claimant; Sutto Buttee and others were the opposite parties. To this proceeding neither the plaintiff in this suit nor the defendant Fegredo was a party. Nujoomoonissa stated in that case that her husband Dad Ali had endowed the property now in dispute after an exchange with another property. The same Principal Sudder Ameen, Mr. J. Reily, relied upon his decision in No. 7, and rejected the claim of Nujoomoonissa. In neither of these proceedings can we find that the question of whether Dad Ali himself endowed the property in dispute and left it as such to his widows was decided. How the widow of Dad Ali was bound by any decision adverse to a claim set up by Khyrat Ali, simply because she is the widow of his grandson Dad Ali, it is not easy to understand. We can, therefore, have no hesitation in saying that there have been no decisions by any competent Courts which, on the question of whether the property was endowed by Dad Ali or not, are binding upon the parties to the present suit; and we concur with the first Court in holding that the former decisions did not dispose of the above question. There is evidence which was believed by the first Court, and which is not rejected or even touched upon by the Judge—that the profits of the endowed property were devoted to the purposes for which the endowment was created, and there is the very important fact noticed by the first Court, but wholly lost sight of by the Judge, that if this property had not been endowed, the two widows of Dad Ali would, under the Mahomedan Law, have inherited equally, and not have succeeded as trustees to the property in the proportion of 10 annas and 6 annas respectively.

We, therefore, concur with the first Court in holding that this property was endowed by Dad Ali, and as wuqf came into the hands of his widows as Mutawullees. Here we might well stop, but with reference to the letter of confirmation by Nujoomoonissa, we think that the Judge is clearly wrong. Nujoomoonissa was examined by commission, and she was not cross-examined as to the precise date on which the letter was written. The letter bears date prior to the attachment. Nujoomoonissa deposes as to the circumstances under which the letter was written; and being unable to read and write, she attested the letter by saying that the seal affixed to it was her seal, and that the letter was written with her consent.

The Judge is also wrong in saying that the defendant Fegredo does not in any "intelligible way fix the period at which the letter was written," for we find that Fegredo

does distinctly state the date of the letter, and when and under what circumstances it was written. The letter being in confirmation of the previous lease by Akburoonissa for the whole house, which has been found to be valid, and that lease and the letter confirming it by Nujoomoonissa being of date prior to plaintiff's attachment, plaintiff would be bound by both leases.

Having found, however, that the property was wuqf created by Dad Ali, and that his widows took the same as trustees of the endowment, and there being evidence not discredited or commented upon by the Judge, that the endowment was *bonâ fide* and the profits appropriated according to the terms of the trust, we dismiss the plaintiff's suit, and decree this appeal with costs of both Courts payable by the plaintiff, special respondent.

The cross-appeal of the plaintiff in the matter of the rate of rent is dismissed with costs.

The 23rd January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Section 347, Act VIII., 1859—Default—Re-admission.

Shomaed Ali Sowdagur, *Petitioner,*

versus

Eusoof Khan Chowdhry, *Opposite Party.*

Baboo Bhugobutty Churn Ghose for Petitioner.

Baboo Debendro Narain Bose for Opposite Party.

An appeal having been struck off for default, application was made for re-admission under Section 347, Act VIII. of 1859; but the Judge refused the application, because the appellant had not conformed to a rule which he had passed that two pleaders should be engaged in every appeal.

HELD that the Judge was bound to see whether the reasons set forth for re-admission of the appeal were satisfactory or not.

Mookerjee, J.—IN this case it appears that the petitioner was the appellant in a certain appeal before the Judge of Chittagong. The appeal was called for hearing. But neither the appellant nor his vakeel being present, the appeal was struck off. Subsequently the applicant applied to the Court under Section 347, Act VIII. of 1859, for re-admission of the appeal, setting forth the reasons which prevented him from appearing when the appeal was called on for hearing.

The Judge disposes of this application by saying that, inasmuch as he had passed a rule that two pleaders should be engaged in every appeal, the rule of his Court is the same as that existing in the High Court, he would not re-admit the appeal.

We think that the Judge was bound to see whether the reasons set forth in the application for the re-admission of the appeal were satisfactory or not. This he has not done. We send the case back to the Judge to act under the provisions of Section 347, and to consider whether a good ground has been shown for the re-admission of the appeal.

The 24th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Wrong-doer—Fraud—Civil Courts—Jurisdiction—Possession—Title.

Case No. 1193 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 22nd March 1870, affirming a decision of the Moonsiff of Teghra, dated the 23rd July 1869.

Ram Sahoy Singh (one of the Defendants), *Appellant,*

versus

Kooldeep Singh (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Nil Madhub Sein* for Appellant.

No one for Respondent.

A wrong-doer who has forcibly taken possession of another man's property is not entitled to withhold it from its lawful owner on the ground of a fraud which has in no way affected his own status or position.

Civil Courts have no power to interfere with the vested rights of parties merely by way of penalty, unless they are authorized to do so by positive legislative enactment.

Adverse possession for more than 12 years is of itself sufficient to create a title.

Mitter, J.—I AM of opinion that there is no ground for this special appeal.

The plea of *bonâ-fide* purchaser without notice is not available to the appellant, who is merely the purchaser of the right, title,