right of passage, and that marriage or *shadee*-processions were interdicted.

Moreover, the Court of first instance, who had been to the spot, and before whom all the witnesses were examined, finds that "it "has been satisfactorily proved that the "disputed place was occupied by a public "thoroughfare, which was used by the plaint-"iff for marriage and other processions to "pass through it, but which has subse-"quently been stopped by the defendants;" and that "it appears that there is no other "pathway than the one in question for "marriage-processions to pass from the "plaintiff's house." The Subordinate Judge, we regret to find, reverses this finding of the Court below, by holding, as some of the witnesses deposed, "that they never "saw any marriage-procession pass through "that pathway," and that "consequently it "has not been proved that there was any "road over the disputed place which was "used by the plaintiff for the purposes of "marriage-processions." We are not at all satisfied with this finding, and would, therefore, send the case back to him to re-try the case with reference to the remarks made above.

In regard to the next contention of the appellant, we find on reference to the record that, besides the two witnesses named by the Lower Appellate Court as witnesses, who testify to the fact of marriage-processions having, ere this, passed through this pathway, there are no less than three witnesses, Juggobundhoo, Rujonee Kant, and Goluck, who have sworn to the fact of marriage-processions of the plaintiff and others having passed through the disputed place; no less than four or five instances have been recited by these witnesses, one of which is so recent as six or seven years ago, and another so far back as 30 or 35 years, and the rest intervening between this period. These witnesses are not at all disbelieved by the second Court, for we find one of them, Juggobundhoo, is specially named by him in his judgment: "The other two are included in his judg-"ment as the remaining witnesses cited by "the plaintiff," whom he also believes, but whose evidence, according to his view of them, proves a different state of facts. We are of opinion that on this ground likewise the special appeal may be allowed, and the Subordinate Judge should be directed to re-consider the evidence of these witnesses as witnesses for the plaintiff supporting his allegation.

The 19th January 1871

Present:

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

Jurisdiction—Transfer of proceedings—Act XVI. of 1868—Costs—Section 5, Regulation XXVII. of 1793.

Case No. 377 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tipperah, dated the 18th July 1870.

Moonshee Aftabooddeen Ahmed (Decree-holder), *Appellant,*

versus

Mohinee Mohun Doss (Judgment-debtor), *Respondent.*

Baboos Romesh Chunder Mitter and *Doorga Mohun Dass* for Appellant.

Baboos Kalee Mohun Dass and *Chunder Madhub Ghose* for Respondent.

A Judge has no authority under Act XVI. of 1868 to order a Subordinate Judge to try proceedings in execution of a decree which are a portion of the original civil suit tried by himself.

Where a decree-holder carries on such proceedings so referred to a Subordinate Judge, until the result is unfavorable to himself, and then objects in appeal on the score of non-jurisdiction, he should be required to pay all the costs incurred by the judgment-debtor in such proceedings before proceedings are instituted *de novo.*

Section 5, Regulation XXVII. of 1793, has no application to bazaars which did not exist in 1793.

Jackson, J.—MOONSHEE Aftabooddeen Ahmed, the decree-holder, has put forward these proceedings in execution of his decree against Mohinee Mohun Doss, the judgment-debtor. He seeks to recover mesne-profits for a period of six years from July 1857 to April 1862 under his decree of the 19th September 1860.

The application for execution was made to the Judge of the district. He referred the execution to the Subordinate Judge. The Subordinate Judge has taken evidence on the point of mesne-profits, and has awarded to the decree-holder a sum of Rupees 553-12-6. Against this decision this appeal is preferred. The decree-holder is the appellant. At the first hearing of the appeal, he took objection to the jurisdiction of the Subordinate Judge to carry on these execution-proceedings under the order of the Judge. On the other hand, it was contended for the respondent that the Judge had jurisdiction

under Act XVI. of 1868, to refer these proceedings for the decision of the Subordinate Judge; and that the appeal from that Subordinate Judge's decision, under those circumstances, did not lie to this Court, but to the Judge.

We think that the Judge had no authority under that Act to refer this case for the decision of the Subordinate Judge. That Act especially alludes to civil proceedings other than civil suits. These proceedings in this case in execution of the decree are a portion of the original civil suit. There is, therefore, no warrant for the contention that the Judge had authority under that Act to order these execution-proceedings to be tried by the Subordinate Judge.

For the respondent also it was contended that, under the provisions of Act VIII. of 1859, the Judge had authority to refer these proceedings to the Subordinate Judge. It appeared that these proceedings in execution had been carried on in the Court of the Subordinate Judge from the 22nd June 1867, the date of the application for execution to the Judge, and of its reference by him to the Subordinate Judge. There had been long inquiries as to mesne-profits by more than one Court Ameen, and probably large expenditure had been incurred on both sides. We, therefore, intimated to the decree-holder that, as he carried on these proceedings in a Court without jurisdiction without any objection until he reached the Appellate Court, and then raised his present objection apparently only because the result of the inquiry was unfavorable to him, we should require him to pay all the costs of the judgment-debtor incurred by him in such proceedings before ordering them to be instituted *de novo*. The decree-holder, thereupon, through his vakeel stated that he would not press those objections. It is, therefore, unnecessary to go on to decide that point, and we accordingly directed the vakeel to state any other objections which he might desire to urge against the inquiry before the Subordinate Judge. This has opened out the whole case upon the merits.

The contention of the decree-holder is that he is entitled to a much larger sum than has been decreed to him by the Subordinate Judge; that the Subordinate Judge has left out, according to his own showing, from the calculation the collections from a large bazaar which was held on the disputed land. The Subordinate Judge states it to be his opinion that the profits from this bazaar cannot be lawfully countenanced, as they are derived by means of illegal cesses contrary to Section 5, Regulation XXVII. of 1793. He, therefore, refuses to give the plaintiff such collections. We have referred to the Section of the Regulation which the Subordinate Judge has quoted, and we find that that Section applies to certain hauts and bazaars in existence in the year 1793. There seems to have been no allegation before the Subordinate Judge that this bazaar was in existence in that year; and there is no evidence whatever upon the record of any such fact. The Regulation in question is, therefore, inapplicable to the present case.

But it is urged by the vakeel for the respondent that, although there may be no direct law upon the point, still, as his client made all such collections forcibly and by means of extortion, and that he was, therefore, so far a wrong-doer, the decree-holder cannot require him to refund whatever money he may have obtained by such means. This argument might be good if there was any satisfactory evidence that these collections were made by wrong doings. The custom of making such collections from the vendors who attend the bazaar is nothing new in this country. It is recognized as one of the ordinary sources of profit derivable from the lands where such hauts and bazaars are, as is proved by the evidence in the case; and we see no reason why the decree-holder should not be indemnified for the loss which he has suffered by such profits having been kept away from him.

It remains, then, for us to consider what amount of mesne-profits should be awarded to the decree-holder on account of this bazaar. There is evidence upon the record, and it is therefore unnecessary to send the case back to the Subordinate Judge for his opinion or for his decision on the point. We have heard both sides upon that evidence. On the one hand, we have the report of an Ameen who had been twice upon the spot. He has come to the conclusion that the profits from the different mehals into which this bazaar is divided, for the six years for which wassilat is due to the decree-holder, amount to Rupees 4,293-8 annas. On the other hand, we have the statement of the defendant that he derived no profits whatever from this bazaar. He has put in certain jumma-bundee papers, but they omit altogether any profits from this bazaar. From the evidence it seems very certain that this is a very

large bazaar, in which every description of articles of food, such as *turkaree*, rice, fish, as well as salt and cattle, are sold. Evidence has been given as regards the profits arising from the sale of these different articles, and we see no reason whatever to distrust the evidence which has been given on the point, in the absence of any satisfactory evidence on the other side, as to the actual amount of profits derived by him. I need not say that I cannot believe that no profits have been derived. We think we ought to adopt the finding of the Ameen which is supported by evidence, and we accordingly award Rupees 4,190 for mesne-profits, with interest from this date to the date of payment. The respondent will pay the costs of this appeal, pleader's fees being assessed at 50 rupees.

Mookerjee, J.—I am also of opinion that the decision of the Subordinate Judge should be set aside. The objection to the hearing of the appeal having been waived by the pleader for the appellant and the record being complete, the whole case was gone into.

It appears that the question before us is the amount of wassilat which should be adjudged to the decree-holder for the years 1264 to 1269 on account of this bazaar. The Civil Court Ameen was twice deputed to ascertain the amount. In his first inquiry, he found a sum of 3,800 rupees as due to the decree-holder; but when the decree-holder objected to that amount on the ground that the Ameen has refused to examine certain witnesses who had leases of portions of this bazaar, the Ameen was again deputed to complete his inquiry—the result of which was that a sum of Rupees 4,190 was found due to the decree-holder for the six years. The Subordinate Judge, it appears, would have awarded this sum to the appellant; but being of opinion that the income from bazaars was an illegal income under Section 5, Regulation XXVII. of 1793, he refused to award to the decree-holder the sums found by the Ameen to have been collected from the several mehals of this bazaar, *viz.*, *turkaree*, fish, cattle, and salt, &c. On referring to the law quoted above, I find that it refers to bazaars existing at the time of the enactment, for which compensation for collections hitherto made by the owners of the haut, &c., were allowed by Government. The Section in question expressly states: "As the landholders are "to receive a compensation for those collec-"tions, they can have no right whilst such "compensation is continued to them, either "to appropriate the goods for the temporary "use of which such collections were made "to any other purpose, or to levy any other "exactions whatever from the persons who "may, in future, expose their goods thereon "for sale as heretofore, &c." Now, there is no suggestion that this bazaar was a bazaar which existed in 1790, or that the holder of it, by receiving any compensation for his collections from Government, was precluded from making collections from the vendors of the articles exposed for sale on his land. The Section of the law, therefore, appears to me to have no reference to bazaars of the kind for which wassilat is claimed in this suit; consequently, no objection was raised by the judgment-debtor on this head. The Subordinate Judge was wrong in refusing to the decree-holder the amount of collections that the judgment-debtor had made during the period that he was in wrongful possession of the bazaar.

It was then objected by the pleader for the respondent that the Ameen was wrong in finding the amount of wassilat solely from the oral testimony of witnesses, without any documentary evidence showing the exact amount of the collections made by him for the years in question. Now, we find that the decree-holder has done what he could in this case, by examining persons who had taken leases of the several mehals of the bazaar, some of whom have produced their kubooleuts, hokumnamahs, and dakhilas, while the judgment-debtor has done nothing to assist the Court. He has, it is true, produced some papers after the first inquiry made by the Ameen, but these papers are manifestly untrue, and were properly rejected by the Ameen and the Court below. If parties who had the best means in their hands of showing exactly the amount of collections made by them, by production of the genuine records of collections, and examining the parties who either collected the rent or paid them for the years for which they are held accountable, will withhold that evidence or produce false accounts in lieu thereof, they have themselves only to blame when the Court is obliged to go on the evidence adduced by the decree-holder to find what was the amount of the collections made. This evidence may not be very satisfactory; but in the absence of any proof given by the judgment-debtor to assist the Court in coming to a correct conclusion, which was undoubtedly in his power to do, the Court is obliged to rely on the evidence of

he decree-holder and the inquiry made by the Ameen. I am also convinced on the evidence on the record that the mode of inquiry adopted by the Ameen is a correct mode of inquiry, and as such ought to be upheld. I would decree this appeal, and fix the wassilat at the sum stated by the Ameen in his second inquiry, namely, 4,190 rupees.

The 19th January 1871.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Execution—Sale—Limitation.

Case No. 317 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Beerbhoom, dated the 30th March 1870.

Brojungona Dassee (Petitioner), *Appellant,*

versus

Shona Mookhee Dassee (Opposite Party), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Debendro Narain Bose for Respondent.

Until the order is passed confirming a sale in execution, the decree-holder must be considered to be executing his decree, and limitation begins to run against him only from the date of such order.

Jackson, J.—This is an appeal from the decision of the Subordinate Judge of Beerbhoom, holding that further proceedings in execution of a decree of the 21st July 1858 are barred under the law of limitation. It appears execution of this decree was taken out in 1863, and property belonging to the judgment-debtor was sold by auction on the 27th July 1863. The sale was confirmed on the 15th September, and the sale-proceeds taken out by the decree-holder on the 18th September. No further proceedings were taken until the 29th August 1866. A question of limitation was then raised by the judgment-debtor, but it was decided against him on the 18th September 1867, and execution went on. Further proceedings are now being carried on, and the same objection is taken again which was taken previously on the subject of limitation; and the Subordinate Judge has ruled that he was in error in his former decision, and that limitation does bar any further execution, because the judgment-creditor did not apply for execution in 1866 within three years of the date on which the sale took place, the order confirming the sale being merely a *pro-formâ* order, no objection having been urged to the sale. In support of this view, the Subordinate Judge refers to a decision of this Court, Bengal Law Reports,* Volume IV., part 20, page 115.

On appeal, it is said that the former decision is final on the point between the parties, and that the proceedings in 1863 must be held to have been carried on until the sale was confirmed.

Even admitting that the question can be re-tried, I think that the decree-holder is within time. The decision alluded to by the Subordinate Judge supports his view of the law; but the late judgment of the Lords of Her Majesty's Privy Council, page 22, Volume XIV., Weekly Reporter, rules that proceedings in execution shall be considered as being *bonâ fide* carried on every day of the time and every hour of every day, until a final decision is passed upon any pending point. Here the question as to whether the sale would be confirmed or not was in doubt until the order upon it was passed. At any time until the month had elapsed, an objection might have been raised, the result of which might have been to set aside the sale as irregularly held, and this might have required the decree-holder to take fresh steps to have a regular sale. Until the order was passed confirming the sale, we hold, upon the judgment of Her Majesty's Privy Council, that the decree-holder was executing his decree. In this view, we think that the decree-holder is not barred by limitation. We, therefore, reverse the Subordinate Judge's decision, and remand the case to his Court for execution of the decree.

We think that the judgment-debtor should pay the costs of this Court (2 gold mohurs) as well as the costs of the Lower Court.

* 13 Weekly Reporter, page 38.