private partition with his co-sharer; that he, plaintiff, held possession of the land until within the last two or three years, when the defendant, without any right or title, forcibly dispossessed him from it. The defendant, on the other hand, stated that he had reclaimed the land from jungle 16 or 17 years ago; that it was contained in his pottah; and that he had all along been in possession and had never dispossessed the plaintiff, whose story was an utter fabrication.

The first Court went minutely into the evidence, and disbelieving that of the plaintiff, and considering that the defendant had always been in possession, dismissed the plaintiff's suit as barred by limitation.

The Deputy Commissioner, on appeal, has held that, as plaintiff obtained a pottah of the land from Government in 1857, the suit is not barred by limitation, and for the same reason that plaintiff is entitled to possession, whether the defendant has or has not been in possession for the last 16 years.

On special appeal it is urged before us that this is no real trial of the case, and we think that, it is not. It will be observed that both parties lay claim to the land as having been in their possession for some 15 years, and, in fact, as having been reclaimed from jungle by them, and both parties claim it as being included in their pottahs from Government.

In a former case, it was held that the date of the pottah which the plaintiff obtained from Government was the date on which the plaintiff's cause of action arose. This may be the case where the plaintiff obtains a pottah of jungle land. But in this case neither party allege that their rights commenced under their respective pottahs. Both state that they have been in possession some 15 years; both state that they reclaimed the land from jungle; and both state that they subsequently obtained a confirmation of their rights by a pottah from Government. In such a case, the pottah of the plaintiff conferred no new rights to the land, and the mere fact that the land is contained in that pottah is not sufficient ground for deciding in favor of the plaintiff. If it was, the Government might give a pottah to the defendant one year, to the plaintiff the next year, and again to the defendant the third year, and no person's rights or interests would be safe. The whole of the facts of the case must first be tried, and the dispute as to which of the two parties has all along been in possession decided. If the plaintiff has held the land for the last 15 years until he was dispossessed by the defendant, he will be entitled to a decree. If, on the other hand, the defendant has held possession during all that time, the plaintiff would not, on the false allegations made by him, be entitled to dispossess him, whether he had obtained a pottah of the land or not. In the case to which the Deputy Commissioner alludes, there was a remand by this Court to try the question of the effect of such settlements as that claimed by the plaintiff; and it was then found by the then Deputy Commissioner, in a long and careful judgment, that where land has been reclaimed from jungle by one person that person is entitled to the settlement-pottah, and that it must be offered to him before it is granted to any one else. The effect of the present Deputy Commissioner's judgment is completely to set aside that of his predecessor.

We reverse the decision of the Deputy Commissioner, and remand the case for trial. The costs will await the final judgment.

Mookerjee, J.—I concur.

The 19th January 1871.

Present:

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

Right of way—Marriage-processions.

Case No. 1561 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 3rd May 1870, modifying a decision of the Moonsiff of Bohur, dated the 21st December 1869.

Raj Manick Singh (Plaintiff), *Appellant,*

versus

Ruttun Manick Bose and others (Defendants), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboos Kalee Mohun Doss and *Huree Mohun Chuckerbutty* for Respondents.

A general right of thoroughfare includes a right of way for marriage or other processions of the like

nature, unless, at the time of the first inception of the right, it was restricted to a right of passage, and such processions were interdicted.

Mookerjee, J.—THIS is a suit to re-open a pathway across which the defendants have thrown a fence, and thus prevented the plaintiff from passing through. The plaintiff, therefore, sues to have this pathway opened, and for a declaration that this pathway is also a way by which his marriage-processions pass. The defendants deny the assertion of the plaintiff that it was ever used as pathway, plead limitation, and allege that no marriage-procession ever passed by it. The Court of first instance held a local inquiry in person, and on the evidence adduced by the plaintiff was satisfied that "the disputed place was occupied by a "pathway leading to the house of the plaint-"iff, which has lately been stopped by the "principal defendant." The first Court also states that this fact is "further corro-"borated by the evidence of Byrub Churn, "Tarinee Churn, and Ram Nidhee Chucker-"butty; as also by the testimony of Ram "Churn Kurmokar and Wooma Kant Chuck-"erbutty, witnesses cited by both parties; "and that, besides being a pathway, it was "used by the plaintiff for marriage and "other processions." That Court, therefore, gave a full decree to the plaintiff.

Against this decision, the defendants appealed to the Subordinate Judge, who, concurring with the Moonsiff in his view that the disputed place was a pathway, held that, "as, with the exception of the two wit-"nesses Kasee Chunder Bose and Chunder "Koomar Chuckerbutty, the remaining 7 "witnesses and the aforesaid 3 priests, as "well as the witnesses named by the defend-"ants, have deposed that they never saw "any marriage-procession pass through that "pathway, that therefore it is not proved "that, except as a public thoroughfare, there "was any pathway over the disputed place "which was used for marriage-processions." The Subordinate Judge gave a modified decree to the plaintiff, dissatisfied with which the plaintiff appeals specially, urging, firstly, that, when the Subordinate Judge has held that a public right of way exists over the lands in dispute, he was wrong in prohibiting marriage-processions to pass along it; secondly, that the Lower Appellate Court has misread and misconstrued the depositions of the witnesses examined by the plaintiff, inasmuch as, besides the two witnesses mentioned by the Court, Juggobundhoo, Rujonee Kant, and Goluck have clearly deposed that marriage-processions do pass by this thoroughfare, and that they actually witnessed the processions, and saw them pass.

With regard to the first objection, we have to observe that, as we understand the Subordinate Judge to mean that he was satisfied that there was a public pathway or thoroughfare over the disputed land for general purposes (সাধারণ চলাচলের রাস্তা), it does not appear why that right should not include a right to pass along with marriage-processions. It may be objected that processions on occasions of marriage generally consist of carriages, horses, or elephants; and it may be that the owner of the land had excluded the right of taking wheeled carriages or beasts of burden, when the original grant was made to the public to pass through this way. But it is difficult to understand how and why the right to take a marriage or other procession, which consists of foot-passengers, is not included in the general right of thoroughfare which the Subordinate Judge finds the plaintiff, along with the public, enjoy over this disputed pathway. The Subordinate Judge has excluded marriage-processions altogether without any finding as to whether, by the custom prevalent in that part of the country, it is usual when making grants to the public of a thoroughfare or pathway over one's field, to make the grant in such restricted and limited a form as to exclude all processions whether on foot or not; and whether in this particular case there is evidence to show that the original grant, when made, was of this nature or not. The mere fact of processions not having passed for a number of years would not, we apprehend, of itself be sufficient or conclusive to prove that the original grant contained a restriction that no processions even on foot should pass over this way. For it may be that for some years past there were no marriages in the houses to which this pathway leads, and consequently there was no occasion to pass through it. We think that, where a right of the nature found in this case by the Subordinate Judge is proved, against the manifestly false contention of the defendant, that there was no right of way at all over this place, and that it was a portion of his field, that in that right is included the right to take marriage and other processions of the like nature; unless the defendants are able to prove that, at the time of the first inception of that right, it is restricted simply to a

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