Talook, they were opposed by the defendants, and the conduct of the defendants was such that the plaintiffs very wisely abstained from attempting to take possession by force and sought redress in the Civil Courts. The defendants are very numerous, some 134 in number. Many of them did not defend the suit at all, others put in appearance in the first Court, but their defence was not a common defence. Some of them pleaded that they had no *elaka* or connection with the talook in dispute, others that they had relinquished the lands held by them in that talook, and others again that they held *mirass* rights. In short, their defence was a varying one and not in any way a common one.

The Subordinate Judge, after going into the defences of the different groups of defendants, found that their allegations had not been proved, and that they all had wrongfully combined together to resist the plaintiffs obtaining possession of their auction-purchased talook. A decree was therefore passed against the defendants in favor of the plaintiffs. With this decision all the defendants were content with the exception of one, namely, Ooma Churn Dey, and he appealed to the Judge not against the whole of the decision but against that part of it only which affected him. His allegation was that no witnesses had identified him as having taken part in the common object of the defendants to resist the plaintiffs in their attempt to take possession of their purchased talook. The Judge without going into the question whether Ooma Churn was a *mirassdar* or not, which would have materially affected the case, in asmuch as, if he had been a *mirassdar*, it would have been a fact corroborating the evidence as to his having joined in the common object, found that there was not sufficient evidence to identify Ooma Churn Dey as having taken part in the combination. As stated by the learned Counsel, Mr. Woodroffe, it would have been well if his clients had let well alone and had not appealed against the decision in favor of Ooma Churn Dey. However, being dissatisfied with the decision of the Judge, they appealed to this Court, and unfortunately for them the result was that the decision of the first Court with which all the other defendants had rested content was reversed not only in favor of those defendants who appeared and defended the suit in the first Court, but also as regards those defendants who had not appeared at all, and the plaintiff's suit was dismissed *in toto*. To add to their misfortunes, an order was also made that they were to pay separate sets of costs to all these numerous defendants.

We think that the decision of the Division Bench of which review is now sought was wrong in law. The appeal of Ooma Churn Dey, although he was one of the defendants, was not an appeal against the whole of the decision of the Court of first instance. Section 337 enacts that if there be two or more plaintiffs, or two or more defendants, in a suit and the decision of the Lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favor of all the plaintiffs or defendants. Ooma Churn Dey did not appeal against the whole decree; he only appealed against that portion of it which affected him, and his defence in the first Court was not a defence common to the other defendants. We, therefore, think that the learned Judges were wrong in law in reversing the decree of the first Court in favor of those defendants who had not appealed.

We, therefore reverse the former decision of this Court and restore that of the first Court with costs payable by the defendants. With reference to Ooma Churn Dey, the learned Counsel admits that he has no case as against him, and that he did not wish to take out notice against that party. It appears, however, that he has been made a party to this application, and he is therefore entitled to his costs which he will obtain from the plaintiffs including one gold mohur as pleader's fees.

The 29th April 1872.

Present:

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

Jurisdiction—Act VIII. of 1859, s. 81—Attached Property made away with—Criminal Prosecution.

Reference of the High Court by the Judge of the Small Cause Court at Goalando, dated the 17th February 1872.

Choitunno Paramanick and another,
Plaintiffs,

versus

Zumeerooddee Shaikh and others,
Defendants.

A suit will lie for the recovery or the value of property attached under s. 81, Act VIII. of 1859 and afterwards made away with by the defendants in collusion with the attaching officer, without a criminal prosecution being previously instituted against them.

Case.—THE suit is for the recovery of Rs. 30, value of 10 maunds of sugar cane molasses taken away on the 9th Chyet 1277, B. S. before judgment, but never produced before the Court or deducted from the amount subsequently decreed.

The particulars of the case, as stated by plaintiffs in their plaint, are that defendant No. 1 instituted in this Court case No. 239 of 1871 against plaintiff No. 1 for recovery of money due on a *khut*, and caused, in collusion with other defendants, 10 maunds of molasses belonging to both the plaintiffs to be attached under section 81 of Act VIII. of 1859 alleging them as the 1st plaintiff's property.

On looking into the records of case No. 239 of 1871, I find, while my predecessor presided over the Court, the 1st plaintiff made an application on the 30th June 1871, stating "that he paid to 1st defendant three "jars of molasses, valuing Rs. 38, in liquidation of a debt of Rs. 39, which 1st "plaintiff owed to 1st defendant under a *khut*, "and asked him to return it to him. The "1st defendant evaded his request under various pretences and afterwards sued him for "the money due on the *khut* without deducting the amount paid him in kind. The "1st defendant who instituted this suit, attached 10 maunds of molasses, five head of "cattle, and a brass lota belonging to plaintiffs "under section 81 of Act VIII. of 1859, and "obtained an *ex-parte* decree against him. The "property thus attached was made away by "the 1st defendant with other defendants. "The 1st defendant afterwards executed the "decree for the whole amount decreed and "attached two head of cattle and one brass "lota. All the circumstances took place "when 1st plaintiff was absent from home "from 22nd Falgoon 1277 to 16th Assar "1278. He learnt these facts on his return "home and ascertained from the Court "that the 2nd defendant, a peon attached to "the Court, was entrusted with the execution "of the process of attachment issued under "section 81 of Act VIII. of 1859. He attached the property before judgment but "made a return that no property was attached. "The persons in whose charge the attached "property was kept, can testify to the fact of "attachment under section 81. He, therefore, "prayed that the Court would enter satisfaction of the decree which 1st defendant obtained against him, to the extent of the "money paid by him before; that the payment "to 1st defendant of Rs. 39-12 which he "deposited in the Court for satisfying the "decree may be withheld; that the property "now under attachment be made over to him, "and that he may be released from further "liability."

My predecessor, Baboo Kalee Kinkur Roy, by an order, dated 12th July 1871, recorded on the back of the aforesaid application, summoned the persons in whose charge the property attached under section 81 was kept and rejected the prayer for withholding payment to 1st defendant; and by another order, dated 12th August 1871, called for evidence regarding the charge brought against the peon. When I took charge of the Court in September last, I found the application pending and disposed it of by ordering the petitioner to prosecute the peon in the Criminal Court.

The case now instituted by plaintiffs is for recovery of value of the 10 maunds of molasses made away by defendants. The facts disclosed by the plaint and the 1st plaintiff's application filed on the 30th June 1871 are that the 2nd defendant as peon of the Court went to execute the process under section 81 of Act VIII. of 1859, attached certain property belonging to the plaintiffs during their absence from home and that the 1st defendant in collusion with him and other defendants made away with it. This taking away of the property without accounting for it, I hold, is nothing less than felony. Therefore, I am of opinion that a case for recovery of it or its value cannot be entertained in a Civil Court without the defendants being criminally prosecuted before—*vide* Coonamull *vs.* Sarno Raur, H. Indian Jurist, New Series page 187.

Under these circumstances, I beg respectfully to solicit the opinion of the Hon'ble Judges of the High Court of Judicature on the point as to whether the case as stated above can be entertained by this Court without any criminal prosecution being held against the defendants previously.

The Judgment of the High Court was delivered as follows by—

Kemp, J.—We are of opinion that the suit of the plaintiff can be entertained.

The Small Cause Court Judge will be informed accordingly.