claim under the term "damage," because the plaintiff might claim the amount for which he brought this suit as damages by reason of the wrong done by the defendant in not acting fully up to his instructions. At any rate the suit might be brought under the terms "claim for money due under a contract." That being so, it seems that we have no power to entertain this appeal, and disturb the judgment of the Lower Appellate Court, however erroneous or unreasonable it might appear. But we think it right to add one word as to the reasons for which we think the plaintiff in this case is not entitled to the sympathy of the Court. The defendant was employed as his law agent. This implies the possession by defendant of certain qualifications—knowledge of law, habits of business, and trustworthiness; and it appears that, within the course of eighteen months, money belonging to the plaintiff to the amount of Rs. 2,300 passed through the hands of the defendant, and for this combined position of trust and competency, the defendant was supposed to be remunerated by the salary of Rs. 2 per mensem. If, in this state of things, the plaintiff with his eyes open voluntarily runs the risk of placing money in the hands of the defendant without taking security from him, or otherwise assuring himself of his honesty, he can hardly expect the Court to feel much for him when the defendant is found to betray his trust. As we have said, the Court has little sympathy for the plaintiff in the present case, and under the circumstances we are less unwilling to dismiss this special appeal, but without costs.

The 24th April 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Execution—Limitation—Act XXIII. of 1861, s. 11.

Case No. 755 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 7th February 1872, reversing a decision of the Moonsiff of Seetakoond, dated the 30th September 1871.

Najabut Ali Chowdhry (Plaintiff), *Appellant,*

versus

Busseeroollah Chowdhry and others (Defendants), *Respondents.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Aukhil Chunder Sen for Respondents.

In a suit for possession and declaration of title in respect of property claimed by plaintiff under a wuseeutnamah from his father, the alleged sole proprietor, which property had been sold in execution of a decree, plaintiff's ground of action was that execution had been fraudulently taken out, during his minority, of a decree barred by limitation:

HELD that the question ought to have been raised in the Court executing the decree, and not in a separate suit, the latter course being contrary to Act XXIII. of 1861, s. 11.

Jackson, J.—IT seems to us that it is impossible that the plaintiff can succeed in this case. He sued to recover possession of one talook, and to have a declaration of his right to possession in certain other talooks, alleging himself to be entitled to all this property in the capacity of *wusee* under a wuseeutnama made by one Nusrut Ali, who was the sole owner of the property in question. It appears that the plaintiff's father (Nusrut) was one of two brothers, Nusrut Ali and Mozuffur Ali, and that the plaintiff himself had one brother named Yar Ali, who married and lived at some distant place, and is not before the Court. The plaintiff suppressed all mention of his uncle Mozuffur's interest in the property, and, in order to account for his doing so, he, as representative of his father, set up the wuseeutnama excluding his own brother Yar Ali, who, as stated above, had married and settled elsewhere. It appears that there had been a decree against Nusrut and Mozuffur obtained by the defendant Busseeroollah, who executed this decree, and procured the sale of the property, and himself purchased at the sale. The plaintiff's story was that the execution of this decree had been barred by limitation, but that the decree-holder fraudulently took out execution during the minority of himself and his brother, and so caused the sale of the property. (It is admitted that the money due under the decree has never been paid otherwise than by the sale of the property.) The Moonsiff who tried the case found on the issues stated in favor of the plaintiff, and gave him a decree for one-half of the property, reserving the brother's share.

On appeal the Subordinate Judge was of opinion that the wuseeutnama was not proved, and, considering that the plaintiff's suit was based entirely on his title under the wuseeutnama, thought it unnecessary to go into the other questions raised, and dismissed the suit. The plaintiff comes up

here in special appeal, and contends that, even supposing that the wuseeutnama is not made out, yet he was, as son of Nusrut, at all events entitled to some share in the property; that the Moonsiff having been of opinion that the execution was barred, and the proceedings consequently fraudulent, he was entitled to the judgment of the Lower Appellate Court on that point; and unless that Court came to a contrary conclusion, he was entitled to a decree for the share coming to him. We are inclined to think that, in so far as the plaintiff sought to recover possession of the property to which he was entitled as the representative of his father, supposing that the facts otherwise entitled him to a decree, he might have recovered notwithstanding the failure of proof of the wuseeutnama, because the effect of that document would only be to entitle him to the whole of his father's share instead of one-half; but we are also of opinion that even making that concession in favor of the plaintiff, he is not much advanced in the object of the suit. We are referred to a case reported in 13 Weekly Reporter, page 273 (Golam Asgur *vs.* Luckhee Monee Debee and others), in which it was held by a Division Bench, I myself being a member of the Court, that the circumstance of the execution of a decree under which a sale had taken place being barred by lapse of time invalidated the sale which took place under that execution. We entirely adhere to the opinion expressed in that case, but there is this important difference between that case and the present, that in that case apparently—and we cannot conceive how judgment could have been given in any other state of things—the fact of the execution being barred was determined by the Court executing the decree or the Court hearing an appeal from the order of that Court, that is to say, the question must have been raised in a Court which was competent to determine such question under section 11, Act XXIII. of 1861, *viz.*, the Court executing the decree, and not in a separate suit; whereas in the present case, the plaintiff brings the suit for the purpose of having it determined that the execution was barred, although the contrary must have been held by the Court which was executing the decree. This, we think, would be directly contrary to the express intention of the Legislature in section 11. It is not necessary in this view of the case to advert to the other circumstances which render the plaintiff's claim liable to dismissal.

The charge of fraud against the decree-holder was merely that he was executing his own decree which was barred by limitation to recover his own money, and no other circumstance has been alleged or proved to support the allegation of fraud. In this view of the case, the special appeal is dismissed with costs.

The 25th April 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Contract—Promissory Note—Cause of Action—Jurisdiction.

Case No. 926 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd March 1872, reversing a decision of the Sudder Moonsiff of that District, dated the 15th June 1871.

F. M. Proby (Plaintiff), *Appellant,*

versus

R. C. Bell, executor of the estate of A. D. Dunne (Defendant), *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Mr. Fergusson for Respondent.

Case.—Where a plaint set forth that the late D gave plaintiff a note written in Calcutta and addressed to C, asking C to pay plaintiff Rs. 650, and plaintiff sued D (resident at the time in Mymensingh) on the allegation that the money had not been paid, the Moonsiff of Dacca considering, upon the allegations made, and having regard to Act VIII. of 1859, s. 139, that the suit was brought, not upon the promissory note, but upon the original cause of action, *viz.*, a contract made in Dacca for the sale of land (in Assam), and finding that the money was due in Dacca, considered himself to have jurisdiction, and tried the suit. In appeal the Judge reversed the decision on the ground that the Moonsiff had no jurisdiction.

HELD that the Moonsiff was warranted in trying the case upon the original cause of action, and that in that view he had jurisdiction.

Markby, J.—WE think that the judgment of the Court below must be reversed. It is quite clear that the Moonsiff had jurisdiction in the view which he took to try this suit. If the suit had remained as it was originally brought, and as the Judge seems still to consider it as a suit upon the promissory note, in all probability the Moonsiff of Dacca had no jurisdiction. But the Moonsiff, I think, very distinctly says that he considers that upon the allegations and statements made by the plaintiff, having