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be paid as an accessory to the principle, and if the note is void as to the principal sum it must, I think, be so as to the interest also. On this ground the present case is, in my opinion, distinguishable from *The Alliance Bank v. Broom*. The claim in the plaint being founded on the note only, the plaintiff is not entitled to recover the interest on the mortgage in this suit, and the judgment of the Division Court for the defendant must be confirmed with costs.

BAYLEY, J., concurred.

Decree confirmed with costs

Attorney for the plaintiff: *Shamrav Pandurang*.
Attorney for the defendant: *Pestamji Dinsha*,

Referred Case.

Jan. 14. YESOBA DAMODHAR.....Plaintiff.
SECRETARY OF STATE FOR INDIA IN COUNCIL.....Defendant.

Land required for public purposes—Compensation to person deemed to be in possession—Real Owner, Suit by—Act VI. of 1857, Secs. 5, 7, 27, and 29.

A Collector who, after making proper inquiry, pays compensation-money for land taken under Act VI. of 1857 to the person "deemed by him to be in possession as owner" (the amount of such compensation having been settled under Sec. 5) is not liable to be sued by the real owner of such land for the amount of such compensation-money

It is in the direction of the Collector whether he will take advantage of the provisions of Sec 29 or not

CASE stated for the opinion of the High Court by N Spencer, third Judge of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850 :—

"This action is brought by the plaintiff to recover compensation for 313 square yards of land, of which he alleges he is the rightful owner, and which have been taken possession of by Government, under the powers given to them by the "Act for the Acquisition of Land for Public Purposes" (No. VI. of 1857).

" The summons was originally issued against the Collector of Bombay, but, at the request of the plaintiff's attorney, I amended it by making the Secretary of state for India the defendant.

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" On the case being called on for hearing, the Government Solicitor, who appeared for the defendant, admitted the plaintiff's title to 202 square yards of land, and his right to compensation for that quantity, which had been awarded and tendered to him. As to the residue of the land, namely 111 square yards, it was stated that conflicting claims were made by the plaintiff and one Tukaram Hiraji; that the Collector, under Sec. 7 of the Act above referred to, decided that Tukaram was the person in possession of the land, made an award in his favour, and paid him the compensation for that portion.

" Under these circumstances it was contended by Mr. Hearn that no action would lie either against the secretary of State, or the Collector of Bombay as his representative, by the person claiming to be the rightful owner of the land to recover compensation for the same. It was argued that the Collector, having decided, under Sec. 7 of Act VI. of 1857, that Tukaram was the person in possession of the land as owner, and having proceeded, under Sec. 5 to make an award in his favour was bound, under Sec. 28, to pay him the compensation awarded; that the defendant thereafter was absolved from all liability to the person claiming to be the rightful owner, and that the remedy of the latter was against Tukaram.

" I was of opinion that the power given to the Collector to decide who was the person in possession was 'for the purpose only of taking such measures as may be necessary for fixing the value of the land and the amount of compensation for the same'; that his subsequent award in favour of Tukaram, and payment of compensation to him, were no bar to the plaintiff instituting an action in this court, which has jurisdiction in respect of the land, against the defendant, by whom he alleges that he has been dispossessed, to establish his title to the land, and right to be compensated for the same.

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" At the request of the Government Solicitor I have presented to state a case for the opinion of the High Court and I now solicit the decision of their Lordship on the following question :—

" Can the plaintiff, under the circumstances above set forth, sue the defendant in the Court of Small Causes to establish his title to the land of which he alleges he has been dispossessed, and his right to compensation ?

" I may add that the amount of compensation claimed by the plaintiff is that which the collector awarded by agreement with Tukaram."

The case was argued before COUCH, C. J., and SARGENT, J., on the 7th of October 1869.

Farran and Bala Mangesh Wagle for the plaintiffs.

The Honourable J. S. White (Advocate General) with him *Green*) for the defendant.

Cur. adv. vult.

14th January 1870. COUCH, C. J. (after briefly stating the facts of the case, and the question for decision, proceeded) :— The decision of that question depends upon the construction to be put on the provisions of the Act (VI. of 1857). That Act, which is an Act " to make better provisions for the acquisition of land needed for public purposes and for the determination of the amount of compensation to be made, for the same," contains a provision in Sec. 4 that the Collector " shall cause the land to be marked out and measured and a plan to be made of it ; after the land has been marked out and measured, he shall give public notice that the land is about to be taken for a public purpose ; and shall also give notice to the same effect to the occupier (if any) of such land, and to all persons known or believed to be interested therein, or to be entitled to act for persons so interested, as shall reside or have agents within the collectorate in which the land is situate. Such notice shall contain a citation calling on all persons interested in the land to appear and state the nature of their interests in the land, and the amount and particulars of their claims to compensation for

me." Then Sec. 5 provides that the Collector "shall proceed to inquire summarily into the value of the land and the amount of compensation to be awarded; and, if the Collector and all the persons interested agree as to the amount of compensation to be allowed, shall make an award for the same; and if the said persons agree also in the apportionment of the compensation such apportionment shall be specified in the award. The award shall be final and conclusive in regard to the value of the land, and the amount of compensation for the same." These provisions are material with reference to subsequent sections. Then the Act, by Sec. 6, provides in the case of there being no claimant, and when the Collector and persons interested are unable to agree as to the amount of compensation, for a reference to arbitration; and then comes Sec. 7, upon the language of which the Judge of the Small Cause Court mainly founded the conclusion to which he came in favour of the plaintiff:—"If upon the said inquiry any question arise respecting the title to the land between two or more persons making conflicting claims in respect thereof, the person deemed by the Collector to be in possession as owner, or in receipt of the rents as being entitled thereto, shall, for the purpose *only* of taking such measures as may be necessary for fixing the value of the land and the amount of compensation to be allowed for the same, be held, as between such persons, to be the person interested in the land." The words of the section are "the person deemed to be in possession shall, for the purpose *only*." The introduction of the word "only" causes some difficulty in the construction of the Act, and the Judge of the Small Cause Court seems to have considered that it operated in such a way as to exclude the payment of the compensation.

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Now, I think, in considering what is the meaning of this portion of the section, it is material to consider where the provision occurs. It is part of a series of provisions devoted to the ascertainment of the amount of compensation to be given, and I think full effect is given to it if we consider it was introduced to show that the decision of the Collector as to the

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person in possession was not to have any effect on the rights of persons making conflicting claims, or any other persons; and that the title to the land, or to the compensation which would be substituted for it, should be determined as if he had made no decision. The provision was introduced as if he had in order that the power might not be supposed to extend beyond the ascertaining who was in possession.

Then follow a variety of provisions providing for a reference to arbitration when there is a dispute as to the compensation to be awarded: and then we have Sec. 27, which deals with a new subject-matter.

The amount of compensation having been ascertained by agreement with the Collector, Sec. 27 provides what is to be done:—"When the amount of compensation to be paid for land taken under the provisions of this Act is determined by the award of the Collector, under Sec. 5, he shall pay the amount awarded at the time when possession is taken of the land on account of Government." In the case of an arbitration, possession is taken before the award is made, and in that case "when the compensation is determined by the award of arbitrators under Sec. 20, the Collector shall pay the amount awarded, with interest from the time when possession was taken." It is to be observed that this section requires compensation to be paid when possession is taken, but it is silent as to the person to whom it is to be paid. It must be therefore, considered that compensation is to be paid to the persons interested in the land, and there is no reason for excluding from its operation the person who is deemed by the Collector to be in possession as owner, and as such held to be the person interested in the land.

It is to be presumed that the Collector will do his duty and make proper inquiries as to who is in possession as owner, and, if he has made an inquiry properly and fairly, there is no reason why the person deemed to be in possession as owner should not be dealt with, for the purpose of paying the compensation-money to him, in the same manner as he is dealt with for the purposes of Sec. 7.

This view of the intention of the Legislature is confirmed by a consideration of the somewhat similar provisions of the English Act, which the Legislature here had probably in mind when framing the present Act. Sec 79 of the Land Clauses Act, 8 & 9 Vict., c. xviii., enacts "that if any question arise respecting the title to the lands in respect whereof such money shall have been paid or deposited, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rent of such lands, as being entitled thereto, at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shown to the satisfaction of the Court; and, unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them or consistently with their possession, shall be deemed entitled to the money deposited, and the same shall be paid accordingly." There the Imperial Legislature has given this effect to the fact of possession, that the person in possession is considered as *prima facie* entitled to receive the compensation-money. The money awarded is to be paid to him. That does not conclude the rights of other parties, but it protects the persons who pay the compensation and enables them to take the land. The great object is that the land may be taken possession of upon proper compensation being paid for it, and, as far as it can be done, to the right person, but no other burden is thrown upon the Collector or other officer than that. This construction of the section is consistent with the provisions in subsequent sections, for Sec. 28 proceeds: "Except as provided in the next following section, payment of the compensation shall be made according to the award to the persons named therein." That would apply to a case where compensation has been awarded and where the persons interested are named in the award. The Legislature is always careful "that nothing in this Act contained shall affect the liability of any person who may receive the compensation awarded for any land, or any portion of such compensation, to pay the same to the person lawfully entitled thereto." The rights of other persons are carefully,

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protected, and, although the Collector is discharged by paying the person named in the award, that person on receiving the money is liable to pay it to the person lawfully entitled.

Then Sec. 29 provides that "if there exist any ground which, in the judgment of the Collector, renders it improper to make immediate payment of the compensation to any of the persons having or claiming any interest in the land, or in the compensation awarded in respect thereof, the amount shall be invested in Government securities and held in deposit until an order of court shall be obtained for the payment thereof." Now, that is a provision which leaves it in the discretion of the Collector whether he will pay the compensation-money to the person in possession or named in the award, or leave the question who is entitled to it to be settled by the court; for it may well be that though the Collector would come to the conclusion that a certain person sufficiently represented the owner to settle the compensation, yet that cases would arise of conflicting claims where he would deem it right to refer it to the court to decide the other questions between such parties, and to place the moneys in the mean time under the control of the court. In my opinion the section has no further effect than that.

In this case there is nothing to show that the Collector was not justified in paying the money to Tukaram, and the plaintiff is not entitled to maintain this action. I may add that Sir Charles Sargent has considered this judgment with me, and concurs in it, and what I have said must be regarded as our joint judgment. The reply to the question of the Judge of the Small Cause Court will be that the plaintiff is not entitled to maintain this action. There must be judgment for the defendant with costs of suit together with the costs of reserving this question for the opinion of this court and consequent thereon.

Order accordingly.

Attorney for the plaintiff; *Pestonji Dinsha.*

Attorney for the defendant; *R. V. Hearn*, Government Solicitor.