[APPELLATE CIVIL JURISDICTION.] 1873. April 1.

Referred Case.

GULABHÁI MONDA'S.....*Plaintiff.*

DAYÁBHÁI GOVARDHANDA'S.....*Defendant.*

Parties bound by their deed till rectified—Mistake in deed—Rectification by court—Small Cause Court—Jurisdiction.

The plaintiff sold to the defendant a field containing a well, Tax was payable to Government on the field as well as a tax on the well. The deed of sale expressly provided for the payment of the tax on the field by the defendant, but was silent as to the tax on the well. Government recovered the amount of the tax on the well from the plaintiff for 1871, as the well stood entered in the Government Books in the plaintiff's name. The plaintiff sued to recover the amount from the defendant.

Held that under the deed of sale the defendant was not liable to reimburse the plaintiff the amount paid by him to Government.

Held also that if the omission in the deed of sale, to provide for the payment of the tax on the well by the defendant, should have arisen from a mistake, his only remedy was a suit for reforming the deed so as to make it in accord with the actual agreement between the parties at the time of the sale.

The amount and nature of proof required of plaintiff in such a case, pointed out.

A Small Cause Court has no power to entertain a suit for the reformation of a deed.

THE following question was referred by Gopálráv Hari Deshmukh, Judge of the small cause Court at Ahmedabad, for the consideration of the High Court:—

"Whether or not a man who uses a well is bound to pay the tax on it, though the deed of the purchase by which he has obtained his right to the well, is silent as to his liability to pay it.

"The facts of the case are as follows:—

"The field No. 963 is assessed at Rs. 11, and is held by the plaintiff. No. 956 was also held by him, but has been sold by him to the defendant.

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"The field No. 957 is held by two persons, a 'Gosávi' and an 'Ora.'

"The well was sunk by the Gosávi, the Ora, and the plaintiff. The Gosávi has ½ share in it, the Ora ¼, and the plaintiff ¼.

"There is a tax called 'Kus' on the well, of Rs. 30 per annum, payable to Government. Of this sum, the Gosávi pays Rs. 15, the Ora Rs. 7, and the plaintiff Rs. 8.

"The tax on the field No. 963, Rs. 11, and the portion of the tax on the well, Rs. 8, are entered together in the accounts of the plaintiff with the Collector, probably because the plaintiff used to water his field No. 963 from the well. The consequence is that the Collector recognizes the plaintiff as the tax-payer and recovers Rs. 19 from him.

"The plaintiff sold his field No. 956 with his share in the well to the defendants in 1870. The deed of sale (a copy of which is appended) states that he is to pay the tax on the field but is silent as to his liability to pay the portion of tax on the well, though it gives him permission to use it to the extent to which the plaintiff used it.

"The Collector recovered the portion of the tax of Rs. 8 from the plaintiff in 1871.

"The plaintiff, therefore, claims to recover the same with Rs. 1-3-0 as damages from the defendants who used the well.

"The defendants state that their understanding was that they should use the well, but not pay the tax of Rs. 8 which was entered in the accounts of the plaintiff and not in the account of the field No. 956. There was, therefore, no stipulation made in the deed of sale, though the payment by them of the tax on field No. 956 was specially provided for in it.

"My opinion is that the tax should be paid by the defendants who use the well. It is true that there is no stipulation in the deed, but it was the duty of the purchaser to have made the matter clear."

The question was considered by WESTROPP, C. J., and MELVILL, J., on the 1st April 1873.

PER CURIAM:—If this case is to be regarded as resting solely upon the deed of the 25th December 1870 executed by the plaintiff to the defendants, the defendants are not liable to reimburse the plaintiff the amount of the tax paid by him to Government in respect of the well, inasmuch as the deed expressly provides for the payment by the defendants of the tax on the field and is silent as to the payment by them of the tax on the well. This view as to the non-liability of the defendants for the tax on the well is founded on the familiar rule of construction of deeds *expressio unius est exclusio alterius*—see Broom's Maxims of the law. If there be good reason for supposing that there has been a mistake in the deed of sale of the 25th December 1870, in omitting to provide for the payment of the tax upon the well by the defendants, the only remedy open to the plaintiff is to bring a suit, praying that the deed should be reformed so as to accord with the actual agreement between the parties at the time of the sale to the defendants. In such a suit, the plaintiff is required to prove, beyond all doubt, that there was a mistake in the deed, and it is a suit in which it is extremely difficult to succeed. (As to the necessary proof, and as to the effect of delay in seeking relief; see I Story's Equity Jurisprudence, pl. 153 to 169 inclusive; and *Bunbury* v. *Lloyd* (*a*), *Mortimer* v. *Shortall* (*b*), *White* v. *Anderson* (*c*), *Harris* v. *Pepperell* (*d*), *Sells* v. *Sells* (*e*), *Druitt* v. *Lord Parker* (*f*), *De La Touche's Settlement* (*g*), *Bloomer* v. *Spittle* (*h*), *White* v. *White* (*i*). The Small Cause Court would not have jurisdiction to entertain such a suit.

(*a*) 1. Jo. and Lat. & 638. (*b*) 2. Dru. & War. 363. (*c*) 1. Ir. Ch. Rep. 419. (*d*) L. R. 5 Eq. 1. (*e*) 1. Dr. & Sm. 42. S. C. 29 L. J. Ch. 550. (*f*) L. R. 5 Eq. 131. (*g*) I. R. 10 Eq. 539. (*h*) L. R. 13 Eq. 427. (*i*) L. R. 15 Eq. 247.