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second witness was called, who deposed that he would purchase coins of the kind imitated at a particular price. This was itself a denial that they were money. The witness referred them to quite another standard as the measure of their value, and described what he would do as "buying,' which is applied not to money passing as money, but to things taken in exchange for money. The test of common usage or notoriety, which, according to I Russell on Crimes 95, determines whether old coins are the Queen's coins, is still more applicable to the determination of whether they are current coins, or, as the Indian Penal Code says, "used for the time being as money."

It is clear that the tokens imitated in this case were not money, and therefore not coins within the meaning of Section 230 of the Indian Penal Code, and the conviction and sentence must be reversed.

Conviction and sentence reversed.

Sept. 10

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 11 *of* 1874.

RANGO VITHAL and another. *Defendants and Appellants.*
RIKHIVADA'S BIN RA'YACHAND. *Plaintiff and Respondent.*

Limitation—Civil Procedure Code, Sec 269–Summary order–Possession.

The words "suit to establish his right" in Section 269 of the Civil Procedure Code mean a suit to establish his right to *present* possession; but where there is a subsisting right which is contradicted by the summary order under that section, and which is to be properly asserted by such a suit, the suit, by the person dispossessed or refused possession, to establish his right, must be brought within one year from the date of the order, failing which he cannot sue afterwards on any portion of such right. It is otherwise, where his right is consistent with the order and the possession given under it.

THIS was a special appeal from the decision of E. Cordeaux, Assistant Judge of Puná, confirming the decree of the Subordinate Judge, of Talegám.

The plaintiff sued to recover the amount due on a mortgage bond executed by the 1st defendant, Rango Esáji. The plaintiff alleged that the property mortgaged had been sold at a court's sale, in execution of a decree against Rango Esáji, and purchased by the 2nd and 3rd defendants, Rango Vithal and Rámchandra Vishvanáth ; that the plaintiff was dispossessed by the court's order upon a complaint preferred by the said purchasers under Section 269 of the Civil Procedure Code. The plaintiff sought to recover the amount from the defendants personall, or, in default of payment, to have the property sold in satisfaction of his claim.

The 1st defendant admitted the claim. The 2nd and 3rd defendants pleaded limitation,on the ground that the suit was not brought within one year from the date of the court's order made under Section 269 of the Civil Procedure Code.

The Subordinate Judge allowed the plea of limitation, and dismissed the claim as against the defendants Nos. 2 and 3.

On appeal, the Assistant Judge, S. Tagore, held the claim not barred, for the reasons given in the following extract from his judgment :—

'Section 269 provides ' the order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof.' What right? It is clearly a right to the possession of the property sold. But the present suit is not one to recover possession ; it is to enforce the plaintiff's lien against the mortgaged property. It is one thing to claim possession as mortgagee, and another to enforce his lien against the mortgaged property. In the one case the cause of action would arise at the date of the plaintiff's dispossession by the Court's order ; in the other not before the expiration of five years" (fixed for the payment of the mortgage debt) " from the date of the bond , and I cannot see upon what principle it can be contended that the plaintiff should lose his lien altogether, simply because he failed to maintain his possession as mortgagee as against the auction

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purchaser in a proceeding instituted under Section 269. As regards clause 5 of the Limitation Act, it provides limitation of one year for suits to set aside summary orders and decrees of a civil court. This, however is not a suit to set aside the court's orders passed on the execution proceedings; it is simply to enforce the plaintiff's right of lien against some mortgaged property which has passed into the hands of the auction purchasers." He accordingly remanded the suit for re-trial on its merits.

Both the Subordinate Judge and the Assistant Judge, E. Cordeaux, decreed in the favour of the plaintiff on the merits of the case.

The special appeal was heard by WEST and NANÁBHÁI HARIDÁS JJ.

Shantaram Narayan for the appellants.

Dhirajlal Mathuradas (Government Pleader) for the respondent.

Cur. adv. vult.

WEST J.:—The main question in this case is as to the proper scope of the words "his right" in the last sentence of Section 269 of the Code of Civil Procedure. In its first sentence, the section speaks of a "person other than the defendant claiming a right to the possession of the property sold as proprietor, mortgagee, lessee, or under any other title, and then, when the court has dealt by an order with the complaint of the person setting up such a right, it is said that "The order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit *to establish his right* at any time within one year from the date thereof." His right in this last sentence should, on the ordinary principles of interpretation, be identical with the right spoken of in the earlier one, that is, the right to present possession. This is the sole right on which the Court executing the decree has summarily adjudicated, and if its adjudication has been wrong, all that the party, injuriously affected by it, can be reasonably expected to do is to establish "his right" to that of which he has been deprived'

namely, his possession. If the order has been made against the purchaser in execution of the title of the Judgment-debtor, it amounts to a denial that title embraces a right to present possession. If the title does embrace such a right the order ought to have been different, and the purchaser suing "to establish *his right*" must succeed if he establish this right to present possession, no matter what other rights over the same land may be vested in his opponent. But the words, it is plain, are intended to have but a single sense, whether they are applied to the execution-purchaser or his antagonist: if they mean the right to present possession for the former, they must mean it also for the latter.

The purchaser of the land of a judgment-debtor, sold in execution of a money-decree, stands in a position quite analogous to that of the successful claimant in a suit for the land. If the the claimant in the latter case dispossesses a third person, that person may present an application, which is disposed of by the Court as an ordinary suit. What has to be tried in that suit is, as said by Melvill, J., in Special Appeal 406 of 1872, "the right of the decree-holder to dispossess him under the decree," and though, according to some earlier decisions of the High Court at Calcutta, the procedure seems to have been regarded as of the same nature as that under a writ of right, yet the later and general current of authority has reduced the inquiry to one into the right to possession. The applicant must have been in possession to have the advantage of an inquiry under Section 230 but if he was in possession, that possession is a sufficient *prima facie* proof of his right to be restored to it. Under Section 269, the case between the ousted claimant and the execution purchaser is not tried as a regular suit, and the unsuccessful party has no remedy by way of appeal. The Court disposes of the contention by a summary order, relief against which must be sought by a regular suit. But this regular suit, in its purpose and effect, ought, it would seem, to occupy towards the summary order the same place as the inquiry conducted like a suit under Section 230. If the suitor establishes

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a right to possession, he ought to be re-instated, no matter what other rights may be vested in his adversary. It is only the right to possession, which is immediately in issue; no other right can be conclusively determined by the inquiry except so far as it is essential to the decision of the right to possession.

The same words, as those now under consideration, occur in Section 246. There it is said of a party unsuccessful in raising or maintaining an attachment that he "shall be at liberty to bring a suit to establish his right." "His right" in this section means his right to have certain property or part of it subjected to or exempted from sale. All that is the judgment-debtor's may properly be sold, so that as to the applicant to raise the attachment, if he was out of actual possession, "his right" includes all that he can establish against the full proprietorship of the judgment-debtor and no more; if he was in possession, all that cannot be established against him as the judgment-debtor's and no less. Whatever interest the judgment-debtor has is to be made available, and the object of the inquiry and the suit is to determine what that interest is as against the intervenor. Thus the alleged rights of the opposed proprietors are brought into conflict in their fullest possible extent. The suitor's proprietorship or partial proprietorship from the greatest to the smallest conceivable interest in the property may properly be tried and ought to be brought forward. In determining "his right" in such a suit, the Court disposes finally of all rights which have combined to make it up. All the claimant's rights, and, therefore, every individual right, being thus the proper subject of inquiry, the limitation clause shuts out the assertion of my right at all after the lapse of one year. This is the principle involved in the decision of Special Appeal No. 49 of 1874, where a plaintiff alleging that property of *A* and *B*, to the possession of which he was entitled, had been attached and sold, notwithstanding his opposition, in execution of a decree against *A* alone, was not allowed after the lapse of a year to sue even for the restoration to him of the land, which he averred was *B*'s. The

whole right had been in question in the summary inquire as to what might be sold in execution, and the assertion of the whole right and therefore of every part of it was barred except in so far as it was brought forward within a year.

The right under Section 246, therefore, may be much more extensive than that under Section 269. It may include any thing proposed to be sold as *A's* which *Z* says is wholly or partly his, and the suit that follows the order may be for the establishment of full proprietorship or of the minutest fragment of interests. Under Section 269, as *C* ought not to be dispossessed in execution of *A's* decree against *B*, he should succeed on proving his possession until some better title is shown against him. And as this should be so in the summary inquiry, so also in the regular suit, by which any defect of that inquiry is to be remedied. Otherwise *A*, by suing *B* and on the sale of *B's* alleged interest, may get *C* turned out and put on proof of his title. All, therefore, that comes necessarily in question as a terminal issue in the suit under Section 269 is the right to possession.

This may rest on complete proprietorship, on a mortgage with possession, on a lease, or on mere possession unexplained. In any of these cases, the right, if established is sufficient to ground a decision against the purchaser in execution. But suppose the purchaser, in a summary inquiry, seeks to expel an alleged lessee, whose lease, he says, is a merely colourable one, the result of the inquiry is to satisfy him as well as the Court that the lease is valid, and that it has still two years to run. Is he bound in such a case to sue within one year to establish his reversionary right, or else to lose it altogether? It may never have been denied; it cannot have been concluded by a summary inquiry into the right to immediate possession. Suppose, again, that *A*, in possession of fields L, M, and N as mortgagee, is ousted by the purchaser of his mortgagor's interest in execution. He seeks re-instatement, but, in the summary inquiry, it turns out that field N has not been enumerated in the mortg[illegible] amongst those the possession of which he is to hold [illegible] payment. The sum advanced has been made a charge [illegible] field N as well as the others, but the money is not t[illegible]

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paid for three years. Must he sue within one year to establish "his right" which at first, he said, had been invaded by the purchaser? There is nothing to establish, that is nothing, which has necessarily been invaded, or which can be in that predicament for 3 years to come. The order has been quite correct, yet in granting possession to his adversary, it has left his rights consistent with that present possession intact. It would seem to be almost absurd to require an unsuccessful applicant in such cases to bring a suit within one year to establish a right, which is not to operate for some time longer, and which is not necessarily contradicted by the summary order for possession.

In contrast to cases of the kind just considered stand those, in which the rights of the claimant come to a single point, are capable of immediate exercise, and, if they exist at all, may properly be disposed of by a single adjudication. If *A*, an alleged proprietor, is dispossessed by *Z*, an execution-purchaser, under Section 269, and fails in his application for re-instatement, the decision against him may rest either on a denial of his proprietorship or on an affirmation of an existing right to present possession consistent with his proprietorship. In the latter case, if he is satisfied with the reasons given by the Judge for deciding against him, it would be vain for him to sue within a year either to obtain a possession, to which, he is satisfied, he will not be entitled for some years to come, or to establish an ultimate proprietorship, which has been already recognized as his right. In the former case, however, his right as a whole is pronounced against. He is said to have no right. The possession acquired under the adjudication is wholly adverse and a standing contradiction to his title. His natural and proper remedy under our system of procedure is a suit for restitution of the possession of which he has been deprived, but as his title has been wholly denied he may also seek such a declaration of it as the evidence will enable the Court to make. If he was in truth a proprietor in possession, all his rights will have coalesced to constitute "his right," which has to be tried in the regular suit to be brought within 12

months. All ought to be advanced, and the omission to bring any of them forward will properly exclude him from doing so afterwards.

Similarly in the case of a mortgagee in possession, the order under Section 269 may be based on a denial of the mortgage altogether, or on a denial of its alleged effect in giving to the mortgagee a present right to possession. If the latter be the ground taken, and the reasons satisfy the mortgagee, it cannot have been intended that he should be forced to sue within a year, or at any time to establish a right, which he recognizes as not existing. If, however, the order is based on the spuriousness or invalidity of the mortgage, it necessarily contradicts his title and every right which he could set up under the deed. The possession obtained under it is an assertion that he has no right at all, and challenges him directly to establish such a right as he has. He, too, then, like a proprietor, is, in such circumstances, called on to sue to establish "his right" denied in its whole extent, without delay, and may properly do so in a suit to recover that possession of which he has been deprived. It was not intended, we think, that where the whole question between the parties might thus be brought to issue and decision without delay by a suit for possession, the person dispossessed should be at liberty to lie by for more than one year. His right, if it exists, being capable of immediate enforcement, ought to be asserted and established within that time.

The result, to which we are led by these considerations, is that where there is a subsisting right, which is contradicted by the summary order, and the possession obtained or confirmed under it, and such right continues to subsist during 12 months so as to ground a suit for possession, and to be properly assersed by such a suit, the suit, by the person dispossessed or refused possession, to establish his right must be brought within one year, failing which he cannot sue afterwards on any portion of such right, but that, in other cases, as his right is consistent with the order and the possession, he is not forced to any action until some present

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relief becomes legally claimable. In the present case, the right of Rikhivadás was wholly denied and his mortgage pronounced invalid by the order of the Subordinate Judge. His proper remedy was a suit, on the mortgage thus refused recognition, to recover the possession, of which he had been deprived. In seeking this, it was incumbent on him, to prove his mortgage and establish its validity to bring forward his whole right under it, as the right had been altogether contradicted. He failed to do this within a year, and his suit merely to enforce his charge on the property brought after that perid was, we think, barred by the last sentence of Section 269.

We, therefore, reverse the decree of the Assistant Judge with costs, and restore the first decree of the Subordinate Judge.

[APPELLATE CIVIL JURISDICTION.]

Civil Referred Case No. 10 *of* 1874.

September 15

BÁBÁJI BIN KUSAJI......................*Plaintiff and appellant.*

MÁRUTI, minor, by his mother, and guardian GAJÁI..........*Defendant and Respondent.*

Certificate of Administration—Act XX of 1864—Mother of minor.

An order for the issue of a certificate of administration to a particular individual ought not to be made until it is ascertained whether the individual is willing to take it.

A certificate of administration ought not to be forced upon the mother of a minor unwilling to take it.

Where an order for the issue of such a certificate to the mother of an infant was made, on the default of the mother to appear and show cause why it should not be issued to her:

Held that such default in appearance ought not to have been accepted as her assent to the issuing of the certificate to her.

Course pointed out where no relative or friend of a minor can be found willing to take such a certificate.

THIS reference was made by R. F. Mactier, District Judge of Satara, for the opinion of the High Court. The facts of the case will fully appear from the following observations submitted by the District Judge :—