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appropriation go to discharge in order of date the earlier items on the debit side, is not an arbitrary and inflexible rule, but that it may be modified or departed from, under special circumstances.

In this case the guarantee itself expressly provides the proper mode of appropriation, and the plaintiffs are of course bound by the terms of it.

We consider the case to be perfectly clear; and we dismiss the appeal with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellants: *Orr and Harriss.*

Attorneys for the respondents: *Trotman and Watkins.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Tottenham.

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TILUCK CHAND (DEFENDANT) *v.* SOUDAMINI DASI (PLAINTIFF).*

*Wrongful Possession—Sums paid during Wrongful Possession,
 Right to recover.*

Where a person has wrongfully taken possession of an estate and held it adversely to the true owner, and has, during his possession, paid certain sums for Government revenue on the supposition that he was the lawful owner (being however, in reality, nothing more than a trespasser and wrong-doer), he is not entitled to recover, as against the true owner, any sums so paid even though such payments may have enured to the benefit of the true owner, but must be content to bear the burden of his own wrong.

THE facts of this case are sufficiently set out in the following judgment of the High Court.

Baboo *Taruck Nath Sen* for the appellant.

Baboo *Rash Behari Ghose* for the respondent.

* Regular Appeal, No. 264 of 1877, against the decree of C. D. Field, Esq., Judge of Zilla East Burdwan, dated the 4th of June 1877.

GARTH, C. J.—In this case the judgment of the Court below has proceeded upon an erroneous view of the law.

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The facts are these:—On the 12th of August 1869, one Soudamini Dasi purchased certain property at an execution-sale, and obtained possession of it. But it appeared that one Tiluck Chand had purchased the same property at another execution-sale three days before the purchase by Soudamini Dasi. In 1870, Tiluck Chand brought a suit against Soudamini Dasi to recover possession, and succeeded, the final decree in that case being pronounced in the High Court on the 23rd August 1872. He then, in 1873, brought a suit against Soudamini Dasi for mesne profits during the three years that she had been in possession, viz., from 1869 to 1872, and in that suit Soudamini Dasi set up a counter-claim by way of set-off for sums which she had paid for Government revenue during the time that she was in possession.

Upon the strength of this set-off the Court of first instance not only dismissed Tiluck Chand's suit for mesne profits, but gave Soudamini Dasi a decree for Rs. 1,077-12-8, being the difference between the rents received and the revenue paid for the property during the three years. That decree was reversed by the High Court upon appeal, who held (Markby and Mitter, JJ.) that although Soudamini Dasi had a right, in answer to the claim for mesne profits, to show that the payments for revenue equalled or exceeded the amount of her collections, so that in fact she had made no profits at all, still she could only use those payments by way of deduction or allowance, and could not treat them as a set-off under s. 195 of the Civil Procedure Code. In truth, the suit for mesne profits is a suit for damages, and the High Court held, that although the payments of revenue might be used to reduce those damages, they could not be treated as a substantive set-off.

Soudamini Dasi then brought the present suit against Tiluck Chand to recover the same sum of Rs. 1,077-12-8, which she had failed to obtain by way of set-off in the former suit, and an additional sum of Rs. 457-0-12, by way of interest.

The issues fixed by the District Judge substantially raised two main questions :—1st, whether the plaintiff had a right to

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recover any, and if so, what amount; and *2ndly*, whether the suit was barred by limitation.

The Judge held that as the plaintiff, whilst in possession, was obliged to pay the revenue to protect the property from sale, the sums thus paid by her must be considered as having been expended for the benefit of the defendant as soon as he established his right to the property, and that the plaintiff was, therefore, entitled in equity to recover those sums from him, less the amount of any profits which the plaintiff might have received. He further considered that those payments could not be said to have been made for the defendant's benefit until he had recovered possession of the property, and that, therefore, the plaintiff's cause of action did not arise till then; and he held, that the claim was not one for money paid by the plaintiff for the defendant's use (in which case under art. 59 of the Limitation Act the suit ought to have been brought within three years), but that the suit was founded upon an equitable right which the plaintiff had to be recouped the amount of revenue which she had paid for the defendant's benefit, under the impression that she herself was the true owner of the property; and that, therefore, the case came under art. 118 of the Limitation Act as being one for which no special period was elsewhere provided.

It is unnecessary for us to consider the point of limitation, as we think that upon the first and main question the decision of the District Judge is manifestly erroneous. He seems to have entirely lost sight of the fact that the plaintiff, although she might have supposed that she was the lawful owner of the property, was really in the eye of the law a trespasser and wrong-doer in holding possession of it against the defendant, and that whatever sums she might have paid in respect of it while she was thus in possession, were paid in her own wrong.

She had no right, legally or equitably, to intermeddle with the property at all; and it is not because payments which she made may have enured to the benefit of the rightful owner, that the latter is bound to recoup her for those payments. If *A* pays *B*'s debts, supposing he has authority to do so, but in fact having no such authority, he cannot recover the

amount against *B*; and if *A* innocently obtains possession of *B*'s horse, and wrongfully holds possession of it, believing that he has a right to do so, he cannot claim from *B* the price of food or medicine which he may have supplied to the horse, although the horse would have died without such food or medicine, and *B* alone may have benefited by *A*'s expenditure.

The right which a defendant has, who is sued for mesne profits, to deduct any necessary payments which he may have made from the amount of his receipts, depends upon a different principle, which is explained in the case of *Doe v. Hare* (1) cited in the notes to *Lampleigh v. Braithwaite* (2). In a suit for mesne profits, the plaintiff is only entitled to recover the actual loss which he has sustained by being kept out of possession; and, therefore, in ascertaining the amount of such loss, it is right to take into consideration the receipts on the one hand and the necessary payments on the other. But it does not follow from this that if a man has wrongfully taken possession of property, and held it adversely to the true owner, and has been a loser in consequence, he has right to recoup himself for his losses as against the true owner. He must be content in such case to bear the burthen of his own wrong.

The judgment of the Court below must, therefore, be reversed; the plaintiff's suit dismissed with costs in both Courts; and the defendant must be held free from the terms as to interest and otherwise under which he was placed by the lower Court.

Appeal allowed.

(1) 4 Tyrwh., 29; S. C., 2 G. & M., 145. (2) 1 Smith's L. Cases (6th ed.), 164.

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