paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers. The date from which limitation begins to run is three years from the date of the plaintiff's advance in excess of his own share. In the present case nothing was paid by the plaintiff. Therefore it is a question, whether that article or art. 118 applies to this case? Article 118 is to the effect that a suit for which no period of limitation is provided elsewhere in this schedule, may be brought within six years from the time when the right to sue accrues.

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However, without expressing any decided opinion on this point, and assuming that art. 100 applies, we think that the plaintiff was not bound absolutely by the statement made in his plaint that his cause of action arose on the date of the auction-sale. Upon the facts stated in the plaint, it is clear that the cause of action in the present case arose when the sale-proceeds were drawn out of Court by the decree-holder.

We think, therefore, that the lower Courts are not right in holding that the plaintiff's claim is barred without ascertaining the date when the sale-proceeds were paid to the decree-holder. The lower Courts are, therefore, wrong in dismissing the suit as barred by limitation without taking evidence upon that point. The decree of the lower Courts must be set aside, and the case remanded to the Court of first instance for trial. Costs to abide the result.

Case remanded.

ORIGINAL CIVIL.

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

EBRAHIM AND ANOTHER (DEFENDANTS) v. FUCKHRUNNISSA BEGUM (PLAINTIFF).

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July 18 *&* 22
and
August 17.

Appeal—Decision on one of Several Issues—'Judgment'—Letters Patent, 1865, *cl.* 15.

Held, that no appeal lay from a decision upon the settlement of issues that a certain hibbanama relied upon by the appellants was invalid.

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Per GARTH, C. J.—The word 'judgment' in cl. 15 of the Letters Patent, 1865, means a judgment or decree which decides the case one way or the other in its entirety, and does not mean a decision or order of an interlocutory character, which merely decides some isolated point not affecting the merits or result of the entire suit.

Per MARKBY, J.—The matter is one more of convenience and procedure than strict law.

APPEAL from a decision of Pontifex, J.

This was a suit for the construction of a will and hibbanama executed by Omdah Begum, the widow of Shazadah Sultan Hossain. On the case coming on for settlement of issues the learned Judge in the Court below held that the hibbanama was invalid, and raised two issues: *First*—Did the testatrix execute the instrument propounded as her will? *Secondly*—If she did so execute it, have her heirs assented to the provisions thereof, and to what extent and in what manner? Two of the defendants who claimed under the hibbanama appealed, on the grounds, *first*, that the learned Judge was in error in holding that the hibbanama was invalid; and, *secondly*, that he should have raised an issue as to the due execution thereof, and of its legal effect according to Mahomedan law.

Mr. *Evans*, Mr. *Phillips*, and Mr. *Allen* for the appellants.

Mr. *Bonnerjee* for the respondent.

On the case being opened the learned Chief Justice said: "Does any appeal lie in this case? The suit has not been dismissed. The Judge has raised certain issues. Can you appeal because he refuses to raise another issue? If you can appeal in a case of this kind, you can appeal in any case where a Judge refuses an issue which you tender?"

Mr. *Phillips* for the appellants.—This is not a case of refusing an issue. The Judge has decided a question in the suit. He has raised issues of fact, and has declined to raise an issue of law. If there were no appeal at this stage, it would be very inconvenient; for when the case is disposed of, there may be an appeal, and the case may have to go back to try this issue, which might have been tried at the hearing. [GARTH, C. J.—Unless there is an actual

decree there can be no appeal? MARKBY, J., referred to the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (1), where it was held that an order that a mandamus should issue was not a 'judgment,' and that, therefore, no appeal lay.] There is an order in this case deciding a point. There is a judgment. A point in dispute between the parties has been adjudicated upon, and under cl. 15 of the Letters Patent, 1865, there is an appeal. [GARTH, C. J.—Questions of procedure are governed by the Code; the Letters Patent only give jurisdiction?] The Letters Patent provide that an appeal shall lie "from the judgment of one Judge." Those words are not confined to decrees, but include judgments not interlocutory. This is a decree on this particular branch of the case. We could not reagitate this question at the hearing. [GARTH, C. J.—If you had a dozen defences, you might have a dozen appeals, if this appeal is allowed?] In *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (2) an appeal was allowed against an order granting leave to the plaintiff to institute a suit. [GARTH, C. J.—That went to the whole subject-matter of the suit. It decided the question whether the suit was to go on or not.] This case comes within the principle of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (1), where it was decided that the word 'judgment' in cl. 15 of the Letters Patent, 1865, means a decision whether final, or preliminary, or interlocutory, which affects the merits of the questions between the parties by determining some right or liability.

Mr. *Bonnerjee* for the respondent.—In the case of the estate of *Rajah Pertab Chunder Singh* (3) it was decided that an appeal will not lie from the separate determination of an isolated issue of law or fact before the taking of evidence on the remaining issues. This case is governed by the old Code of Procedure. There has been no decree. But, even if it is governed by the new Code, there is no right of appeal. Even supposing that Mr. Justice Pontifex is wrong, no harm is done by dismissing the appeal. If he decides ultimately against them they can appeal on this

(1) 8 B. L. R., 433. (2) 13 B. L. R., 91.
(3) 7 W. R., 222.

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point, and a reference can be made to take evidence as to the hibbanama, or this Court can take the evidence. The case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (1) related to a mandamus, and as the matter was pending the Chief Justice said that as nothing had been decided there was no appeal. In the case of *Ghasseram Misser* v. *Williamson* (2), where an appeal was allowed although only a part of the case had been dealt with, a decree had been drawn up.

Mr. *Phillips* in reply.

The following judgments were delivered :—

GARTH, C. J.—I consider that in this case the appeal ought not to be heard. The decision of the learned Judge, which is appealed against, is not a judgment or decree which determines or affects the entire claim of the plaintiff. It is a decision which he arrived at on the settlement of issues, upon the validity of a hibbanama which was set up by the defendant as an answer to a portion of the plaintiff's claim.

As regards the rest of the claim, which is not affected by this hibbanama, the Judge has framed certain issues, which will come on to be tried in due course; but the defendant has thought proper in the meantime to appeal from this partial decision. No authority has been adduced by the defendant's Counsel to justify an appeal under such circumstances; and I consider that, looking to the language of the Charter, as well as upon grounds of judicial convenience, the appeal ought not to be allowed.

The fifteenth clause of the Charter, upon which the appellant relies, says, that an appeal shall lie from the judgment of any one Judge of the High Court. I think that word 'judgment,' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit.

I entirely agree with the authorities, which have been cited to

(1) 8 B. L. R., 433. (2) 2 Ind. Jur., 205.

show that an appeal will lie from an order for the rejection of a plaint or the admission of a suit, because those are rulings which determine whether the plaintiff has or has not a right to sue at all in the particular case. But if the appellant is right, we might have three or four appeals, all pending in one cause at the same time, and all proceeding contemporaneously with the trial of the suit in the Court below. Thus, upon the settlement of issues, if the Judge were to refuse the plaintiff an issue upon the ground that a part of his claim was untenable, and he were also to refuse the defendant another issue, upon the ground that a deed, which the defendant wished to set up, was bad in law, and upon the trial of the cause the Judge were to decide one issue in favour of the plaintiff and then adjourn the trial to a future day; each of these decisions, if the appellant is right, might be made separate subjects of appeal to this Court, and might be proceeding on appeal at the same time that the trial in the Court below as to the rest of the case was going on.

I purposely do not enter into the question as to how far such partial appeals would be admissible in the mofussil; but, undoubtedly, if they were so, they would be attended with much more mischief and inconvenience than they would be in the High Court. I think that this appeal should be dismissed upon the ground that the Judge's decision is not a judgment within the meaning of s. 15 of the Charter.

MARKBY, J.—There is some difficulty in reconciling the decisions upon the Letters Patent, but I am inclined to think now that, whereas in this case the decision is of such a nature that it can clearly be questioned in appeal at some time or other, the matter is more one of convenience and procedure than of strict law. I should have been inclined to think that in this particular case the appeal might be conveniently heard now, but as the Chief Justice thinks that it cannot be heard until the other issues are decided in the Court below, I shall not differ.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Trotman* and *Watkins.*

Attorney for the respondent: Baboo *Aushotosh Dhur.*