APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

BEJOY CHUNDER BANERJEE (PLAINTIFF) *v.* KALLY PROSONNO MOOKERJEE (DEFENDANT).*

1878 *June* 21 *and July* 24.

Grant of Property by Wife during absence of Husband—Possession for twelve years by Grantee under invalid Grant—Adverse Possession—Limitation Act, (IX of 1871).

A wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a *mourasi* grant of a portion of her husband's estate. The grantee entered into and remained in possession for upwards of twelve years. *Held*, that the position of the grantee was not that of a lessee, and that his possession (although in its inception an act of trespass against the husband) having continued for upwards of twelve years, had perfected his title to the lands.

One who holds possession on behalf of another does not by mere denial of that other's title make his possession adverse, so as to give himself the benefit of the Statute of Limitation.

THIS was a suit brought to obtain possession of certain property from which the plaintiff, one Bejoy Chunder Banerjee, had been ousted by one Kali Prosonno Mookerjee. It was stated that Kali Prosonno, in the year 1254 (1847), left his home, leaving behind him his wife Bhobotarinee, then a child of the age of nine or ten years, and certain landed property. When Bhobotarinee reached the age of fifteen or sixteen, she formed an intimacy with one Bejoy Chunder Banerjee; and in the year 1262 (1855), having previously taken possession of her missing husband's property as she could obtain no information as to whether he was alive or dead, she made a grant in perpetuity to Bejoy Chunder of 37 bigas 3 katas of this property, reserving an annual fixed rent of Rs. 22. In the deed of grant, Bhobotarinee described herself as the widow of Kali Prosonno

* Special Appeal, No. 1357 of 1877, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Zilla Nuddea, dated the 4th of April 1877, reversing the decree of Baboo Anund Coomar Surbadhicaree, Munsif of Ranaghat, dated the 29th of February 1876.

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Mookerjee, deceased. Bejoy Chunder entered into possession of the land granted to him, and remained in possession, paying rent for fifteen years,—that is, until 1279 (1872),—at which date Kali Prosonno returned and succeeded in ousting Bejoy Chunder from the lands which had been granted to him. Bejoy Chunder then brought this suit against Prosonno for possession, making Bhobotarinee a *pro formâ* defendant. The latter denied that Kali Prosonno was her husband. The Munsif found that the defendant was the husband of Bhobotarinee, and that although according to the shastar a wife may come forward as heir to her husband if her husband should be missing for twelve years, yet if she became unchaste before the period of twelve years had expired, she would not be in a position to claim her husband's property as his heir, and therefore held, that Bhobotarinee's possession was wrongful because she was unchaste, and that therefore the patta granted by her to the plaintiff was invalid. He considered, however, that inasmuch as the plaintiff and Bhobotarinee had been holding the property adversely to Kali Prosonno for more than twelve years, Kali Prosonno's title was extinguished, and the plaintiff could recover on the strength of the title he had acquired by possession.

The defendant appealed to the Subordinate Judge, who considered that Bhobotarinee, whether unchaste or not, could acquire no interest in her husband's estate during his lifetime by long possession, and that the husband whenever he returned had a right to resume possession; he also held that the plaintiff's possession was not adverse to the wife, and therefore could not be adverse to her husband, and accordingly allowed the appeal.

The plaintiff appealed to the High Court.

Baboo *Gopal Lall Mitter* for the appellant.—Admitting that the interest of the wife in her missing husband's property after the expiration of twelve years is contingent on the husband not returning, still that cannot affect a title *bonâ fide* created by the wife in favor of a third person.

Baboo *Hurry Mohun Chuckerbutty* for the respondent.

The following judgments were delivered :—

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MARKBY, J. (who, after stating the facts of the case as above, continued) :—It is not necessary to consider in this case the effect of the unchastity of Bhobotarinee upon her right to inherit her husband's estate. For even if she had been chaste, we agree with the Subordinate Judge that she could not succeed during her husband's lifetime, and that however long her husband might be absent, he would, upon his return, resume his position both as to his wife and his property. The inference of a man's death from his absence may be rebutted at any time. This we believe to be the universal rule. Nor, under the circumstances, could Bhobotarinee, whom we must take to have originally held possession on her husband's behalf, acquire a title by adverse possession against her husband. One who holds possession on behalf of another does not by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the Statute of Limitation. But the question whether the plaintiff has gained a title by possession is different. He did not derive his possession from the defendant either actually or constructively. He took from Bhobotarinee as widow. We must, therefore, see what is the plaintiff's position under Act IX of 1871, which is the Act applicable to this case. As I understand that Act, as soon as the possession of the holder of land becomes adverse to that of the true owner, the Statute begins to run.

By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession. If by this adverse possession the Statute is set running, and it continues to run for twelve years, then the title of the true owner is extinguished and the person in possession becomes the owner.

This being so, it seems to be clear that if Bhobotarinee had conveyed this land absolutely to the plaintiff, and the plaintiff had entered into possession on the strength of this conveyance, his possession would have been adverse as against the husband, and the Statute would have begun to run. Consequently, after

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twelve years' possession, the plaintiff would have gained a good title as against the husband whose title would have been extinguished.

On the other hand, if the plaintiff had only been let into possession by Bhobotarinee as tenant for a term, I greatly doubt whether he could have successfully pleaded the Statute of Limitations as a protection to his possession even during the term. I doubt whether under the decisions of this Court his possession, which was clearly not adverse to Bhobotarinee, would be treated as adverse to her husband.

But, however this latter point may be (and I do not now wish to express any opinion upon it), the present case is not one of lessor and lessee for a term. The plaintiff holds as owner and not as lessee on the terms of paying a fixed sum annually to the former owner. It is true that what he pays is called a "rent," and under Reg. VIII of 1819, the person entitled to receive such a rent would have remedies for the recovery of it in some respects similar to the remedies of a landlord for rent proper. But there is no reversion—no rights are reserved, the ownership of the land was intended to pass entirely to the plaintiff; the interest which Bhobotarinee intended to grant to the plaintiff in this land was heritable, transferable, and perpetual. The estate granted to the plaintiff is what English lawyers would call an estate-in-fee. I do not think, therefore, that the possession of the plaintiff can be considered as the possession either of the actual grantor of the lease or of the true owner of the land: it was, I think, clearly possession on his own behalf.

I do not rest my decision in this case upon any assertion of title by Bhobotarinee. I assume for the present purpose that when she granted this lease she must be taken to have been the wife of Kali Prosonno in possession of her husband's estate on his behalf, and with only the powers which a wife would have under such circumstances; that she could not therefore make a valid *mourasi* grant. But she did in fact make one; and under that grant the plaintiff entered. In doing so, he was, as against Kali Prosonno, a wrong-doer and a trespasser, but nonethe-less by his entry on the land he put Kali Prosonno out of

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possession. The Statute, therefore, commenced to run, and in twelve years Kali Prosonno lost, and the plaintiff gained, a title.

Considering the discreditable circumstances under which the plaintiff came into possession, I feel considerable reluctance in giving him the benefit of the Statute of Limitations; but the Legislature in this country has not thought fit in laying down its rules of prescription and limitation to make any distinction between cases where the possession begins by wrong, and cases where the possession commences, in a "just cause," although it may be under a defective title. And though I consider that distinction to be a sound one, and though it is recognized by the Hindu law (Mitakshara, Chap. III, Sec. iii, "On the effect of possession"), I do not think it is within the province of Courts of Justice to qualify the express and deliberate enactments of the Legislature.

I think, therefore, that we are bound to reverse the decisions of the Court below, and to give the plaintiff a decree for possession. The conduct of Kali Prosonno in dispossessing the plaintiff was clearly wrongful. But I do not think that we are called upon to award any costs up to decree.

PRINSEP, J.—I agree in setting aside the order of the Lower Court and decreeing the suit in favor of the plaintiff on the ground that Kali Prosonno on his return was not entitled to eject the plaintiff.

Appeal allowed.

PRIVY COUNCIL.

RAMANUND KOONDOO AND ANOTHER (PLAINTIFFS) *v.* CHOWDHRY SOONDER NARAIN SARUNGY AND OTHERS (DEFENDANTS).

P. C.*
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Nov. 15.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Principal and Surety—Execution against Surety—Interest—Giving Time.

R sued *M*, *B*, *C*, and *P* for money due for goods supplied. Separate solehnamas were filed by each of the four defendants, in which they admitted the debt, and each undertook to pay one-fourth thereof, with interest, by instal-

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.