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structing a public footpath connecting two of his fields, caused him loss of time and work, and the Court held that this count was good. And in *Rose v. Miles* (1) Lord Ellenborough said: "If a man's time, or his money, are of any value, it seems to me that the plaintiff has shown a particular damage."

We are clearly of opinion that the injury caused to the plaintiffs by the obstruction of the way leading from the village where they reside to that in which they have their fields and pastures is peculiar to them and to their calling; it causes them substantial loss of time and inconvenience; and it is of a kind different from that which the public generally may suffer by reason of the obstruction; and that, upon reason and authority, it is, therefore, sufficient to entitle them to maintain this action.

The grounds urged before us, therefore, both fail; and this appeal must consequently be dismissed with costs.

S. C. G.

Appeal dismissed.

Before Mr. Justice Marpherson and Mr. Justice Banerjee.

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March 15.

SHAM LAL PAL AND OTHERS (DECREE-HOLDERS) v. MODHU SUDAN
 SIRCAR AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Transfer of Decree for execution—Execution against representative of debtor—Civil Procedure Code (Act XIV of 1882), sections 234, 243, 249 and 578—Application by decree-holder for execution of decree by substitution on death of the judgment-debtor to the Court where the decree has been transferred.

A decree was transferred to another Court for execution. Pending the proceedings, one of the judgment-debtors died. On an application to that Court by the judgment-creditor to execute the decree against the legal representative of the deceased judgment-debtor, a notice was issued under section 248 of the Code of Civil Procedure. The legal representative objected that the Court had no jurisdiction to entertain the application, and that the application should have been made under section 234 of the Code to the Court that passed the decree.

Held, that the power of the Court executing a decree to order execution under section 249 against the legal representative of a deceased judgment-

* Appeal from Order No. 157 of 1894, against the order of A. E. Staley, Esq., District Judge of Backergunge dated the 20th of March 1894, reversing the order of Babu Dwarkanath Mitter, Subordinate Judge of that District, dated the 5th of September 1893.

(1) 4 M. and S., 101.

debtor, after the issue of notice under section 248, is not cut down by the provisions of section 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal representative of a judgment-debtor who is dead, and that the Court where the decree has been transferred has full jurisdiction to allow execution to proceed against the legal representative.

Held also, that even assuming that an application under section 234 to the Court which passed the decree was a necessary preliminary to proceedings under section 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and, under section 578, the order of the Court of first instance should not have been reversed on account of such irregularity.

THIS appeal arose out of an application by the judgment-creditors to execute a decree against the legal representative of a deceased judgment-debtor. The decree was one passed by the High Court in its Original Jurisdiction, which was transferred to the Subordinate Judge's Court of Barisal for execution. Pending the proceedings, one of the judgment-debtors died, and a notice was issued by the Subordinate Judge against the legal representative under section 248 of the Code of Civil Procedure. The legal representative appeared and objected that the Court had no jurisdiction to entertain the application. The Subordinate Judge overruled the objection, and directed execution to proceed against the legal representative. On appeal to the District Judge he reversed the order of the Subordinate Judge, and dismissed the application of the judgment-creditors.

Against this order the judgment-creditors appealed.

Dr. *Rash Behari Ghose* and Dr. *Asutosh Mookerjee* for the appellants.

Babu *Mohini Mohun Roy* and Babu *Upendra Gopal Mitra* for the respondents.

Dr. *Rash Behari Ghose*.—Under sections 234, 248 and 249 of the Code of Civil Procedure, the decree-holder may apply for execution to either of the Courts, *i.e.*, to the Court which passed the decree, or to the Court where the decree is sent for execution. Section 234 does not say that the application must be made to the Court which passed the decree. The word *may*, in that section, does not mean *shall*. Section 239 refers only to applications on the part of the judgment-debtor and section 235 deals with the

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mode of execution. If the judgment-debtor has no property within the jurisdiction of the Court, it has no power to entertain an application for execution. The Subordinate Judge having made an order, the Judge had no power to set it aside, on the ground of mere irregularity, when it did not affect the merits of the case. An objection to jurisdiction cannot be made by way of appeal, but must be made by way of revision : see *Combe v. Edwards* (1). In this country it must be shown that not only there was an irregularity, but that the irregularity was such as to affect the merits of the case. This application is, in fact, a continuance of the previous application for execution : see *Sheo Prasad v. Hira Lal* (2).

Under section 244, if any question arises as to who is the legal representative, that question may be decided either by the Court executing the decree, or that Court may send it to the Court which passed the decree for determination.

Babu *Mohini Mohun Roy* for the respondents.—Under section 223 of the Civil Procedure Code, before a decree can be transferred to another Court for execution, it must be shown that there exists some ground personally affecting the debtor. The conditions mentioned in clauses *a, b, c, d*, are the only ones under which a decree can be transferred to another Court for execution. In order to construe section 234, we must not overlook the conditions under which a decree can be transferred. That being the case, the Court which passed the decree is the proper Court for entertaining an application to execute the decree against the legal representatives. It may be that in this case the judgment-debtor has property within the jurisdiction of the Court to which the decree has been transferred for execution ; but that does not matter. If, in the Court where the decree has been transferred for execution, an objection is taken to the application, the proper order to pass is that the decree-holder should apply to the Court which passed the decree for an order under sections 248 and 249 of the Code. To get an order under section 248, the decree-holder must apply first to the Court which passed the decree under section 234. Section 244 has no application to the present case.

(1) L. R., 3 P. D., 103 (128).

(2) I. L. R., 12 All., 440.

Dr. *Rash Behari Ghose* in reply.

The judgment of the Court (MACPHERSON and BANERJEE, J.J.) was as follows:—

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In this case a decree of this Court on its Original Side was sent to the Backergunge Court for execution. While the proceedings were pending there, one of the judgment-debtors died, and an application was made to the Backergunge Court to execute the decree against the legal representative of the deceased judgment-debtor. Upon that, notice was issued under section 248, calling upon the legal representatives to appear and shew cause why the decree should not be executed. They did appear, and the only objection they took was that the Court had no jurisdiction in the matter, as the application to execute the decree against them should, under section 234 of the Procedure Code, have been made to the Court which passed the decree. This objection was overruled, and they then appealed to the District Judge, who held that the objection was good and allowed the appeal. Whatever the precise meaning and effect of section 234 may be, it is quite clear that when the enforcement of a decree is applied for against the legal representative of a party to the suit, the Court executing the decree must, under section 248, issue the notice proscribed in that section to such representative, and can, under section 249, make an order for execution, after hearing the objections, if any, preferred by the person to whom notice was given. The contention for the respondent is, that, under section 234, the Court which passed the decree is the only Court which can order execution against the legal representative of a deceased judgment-debtor, or at least that the application under section 234 is a necessary preliminary to a notice under section 248, or an order under section 249. We find in the Code no warrant for this contention. The power of the Court executing a decree to order execution under section 249 against the legal representative of a deceased judgment-debtor, after the issue of notice under section 248, is not cut down by the provisions of section 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal representative of a judgment-debtor who is dead. Before we can hold that the Court executing the decree could not make the order for execution, which, in this instance, it has made,

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we must find in the Code some limitation of its power in this respect, or some provision by which the power to order execution in the first instance against a legal representative of a deceased judgment-debtor is confirmed exclusively upon some other Court.

We think, therefore, that the view taken by the District Judge is wrong. Even assuming that an application under section 234 to the Court which passed the decree was a necessary preliminary to proceedings under section 248 by the Court executing the decree, the omission to make it was only an irregularity; and, under section 578, the order should not have been reversed on account of an irregularity which did not affect the merits of the case. It seems clear that in this case there are no merits, because the objection which was taken to the execution of the decree was a technical one. The legal representatives of the judgment-debtor were not in any way prejudiced by the application being made in the Backergunge Court, as admittedly they then resided within the jurisdiction of that Court.

The order of the District Judge must be set aside, and that of the Subordinate Judge restored. The appellants are entitled to their costs both in this Court and in the lower Appellate Court.

S. C. G.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Hill.

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 April 4.

NRITTO LALL MITTER v. RAJENDRO NARAIN DEB AND OTHERS.*
*Specific Relief Act, section 9—Nature of possession giving right of suit—
 Juridical possession.*

Where the plaintiff alleged that he was in possession of a certain room, as representing his father and uncle, who were alive but who were not parties to the suit, and that he had been dispossessed from such room within six months of the institution of the present suit: *Held*, that his possession not being juridical possession, did not entitle him to maintain a suit under section 9 of the Specific Relief Act.

Permission to be allowed to amend the plaint by alleging that the possession of the plaintiff was exclusive possession on his own account was not allowed, such allegation being inconsistent with the case on which he came into Court.

* Original Civil Suit No. 9 of 1894.