why he should not be treated as a representative in interest of the judgment-debtor.

The third case relied upon in the judgment in *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury* (1), namely, that of *Lala Prabhu Lal* v. *Mylne* (2), does not require any detailed examination, as it is based chiefly upon the two Privy Council decisions just referred to.

On the other hand, in the recent case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (3), their Lordships of the Privy Council have held that the equitable principle of estoppel laid down in the case of *Ram Coomar Koondoo* v. *Macqueen* (4), which applies to any person is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree.

For the foregoging reasons I am of opinion that the question stated in the referring order should be answered in the negative, and that the appellant should be held entitled to be heard in support of his objections as a representative of the judgment-debtor within the meaning of section 244 (*c*) of the Code of Civil Procedure.

I would accordingly decree this appeal with costs, set aside the orders of the Court below, and send the case back to the first Court with directions to hear and determine the objections urged by the appellant.

H. W.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

SHEO SHANKAR GIR (PLAINTIFF) *v.* RAM SHEWAK CHOWDHRI AND OTHERS (DEFENDANTS).* 1896 *July* 22.

Hindu law—Endowment—Alienation by de facto Manager of an endowment—Limitation Act (XV of 1877), Schedule II, Art. 91.

The principles of *Hunooman Persaud Pandey's* case (5) apply to the alienation of property by the *de facto* manager of an Hindu endowment.

* Appeal from Original Decree No. 264 of 1894, against the decree of Babu Amrita Lal Chatterjee, Subordinate Judge of Tirhoot, dated the 30th of June 1894.

(1) I. L. R., 16 Calc., 355. (2) I. L. R., 14 Calc., 401.
(3) I. L. R., 22 Calc., 909. (4) 11 B. L. R., 46 ; 18 W. R., 166.
(5) 6 Moo. I. A., 393.

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The possession of such manager cannot be treated as adverse to the endowment.

Semble.—Article 91 of Schedule II of the Limitation Act (XV of 1877) has no application to a suit to set aside such alienation.

Unni v. *Kunchi Amma* (1) and *Sikher Chund* v. *Dulputty Singh* (2) cited.

THIS was a suit by the mohunt of a religious endowment for recovery of an endowed property alienated by one Balraj Gir, a previous mohunt, and for a declaration that the deed of sale under which the alienation was made was invalid, collusive and ineffectual. One of the pleas taken in defence was that the suit was barred by limitation, and the principal point of law discussed in appeal was the question of limitation. The suit was instituted on the 3rd December 1892. The facts and pleadings are sufficiently given in the judgment of the High Court.

The plaintiff appealed to the High Court.

Mr. *W. C. Bonnerjee* and Babu *Umakali Mukerjee* for the appellant.

Mr. *Jackson* and Babu *Lakshmi Narayan Singha* for the respondents.

Mr. *Bonnerjee.*—The suit is not barred by the three years' rule in the Limitation Act. Art. 91 of Schedule II has no application to the present claim, as the cancellation of the deed of sale is not essential. *Unni* v. *Kunchi Amma* (1) following the principle laid down in *Sikher Chund* v. *Dulputty Singh* (2) is in point. See also *Sundaram* v. *Sethammal* (3); *Abdul Rohim* v. *Kirparam Daji* (4). [TREVELYAN, J., referred to a judgment recently delivered—Regular Appeal 103 of 1893, decided 3rd July 1896.] That case lays down that it is to be seen in each case whether cancellation of the deed is an essential element. The plea of adverse possession is also unfounded. *Mulji Bhulabhai* v. *Manohar Ganesh* (5).

Mr. *Jackson* for the respondents.—Balraj after his deposition held the property without any title; he was therefore in adverse possession from 1873. The first *zaripeshgi* was in 1866; that

(1) I. L. R., 14 Mad., 26. (2) I. L. R., 5 Calc., 363 (370).
(3) I. L. R., 16 Mad, 311. (4) I. L. R., 16 Bom., 186.
(5) I. L. R., 12 Bom., 322.

was never paid off, and the possession of the defendants as *zaripeshgidars* also became adverse. The case of *Mulji Bhulabhai* v. *Manohar Ganesh* (1) is not good law, it gives a fresh start to the successor. As to Art. 91, the plaintiff in this case cannot succeed without setting aside the deed of sale. The mohunt, Balraj, was not a stranger, and his acts are valid so long as they are not set aside. The plaint and issues show that cancellation is essential in this case. *Mahabir Pershad Singh* v. *Hurrihur Pershad Narain Singh* (2). The Full Bench case of *Meda Bibi* v. *Imaman Bibi* (3) supports this view. See also *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chowdhri* (4); *Raghubir Dyal Sahu* v. *Bhikya Lal Misser* (5); and *Janki Kunwar* v. *Ajit Singh* (6). The cases of *Unni* v. *Kunchi Amma* (7) and *Sundaram* v. *Sethammal* (8) were of a different nature. *Husan Ali* v. *Nazo* (9) and *Radhabai* v. *Anantrao Bhagvant Deshpande* (10) were also cited.

Mr. *Bonnerjee* was heard in reply.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) so far as it was material for this report, was as follows :—

This suit was brought by the present mohunt of the Kaplessar Asthan in the Nepal Terai for the purpose of obtaining possession of *mouzah* Mahtour, which is situate in the district of Tirhoot. The plaint asks—

1. That it may be declared that Mahtour forms a *deotar* estate belonging to the Kaplessar Asthan.

2. That it may be declared that the deed of sale, dated the 5th of March 1881, was altogether invalid and collusive and ineffectual, and that under it the defendants have acquired no right in that estate.

3. That the Court may be pleased to pass a decree in favour of the plaintiff in respect to the entire *mouzah* Mahtour. This last prayer we read as a prayer for possession.

(1) I. L. R., 12 Bom., 322. (2) I. L. R., 19 Calc., 629.
(3) I. L. R., 6 All., 207. (4) I. L. R., 13 Calc., 308.
(5) I. L. R., 12 Calc., 69.
(6) I. L. R., 15 Calc., 58; L. R., 14 I. A., 148.
(7) 6 Moo. I. A., 393. (8) I. L. R., 16 Mad., 311.
(9) I. L. R., 11 All., 456. (10) I. L. R., 9 Bom., 198 (231).

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The defendants plead that the suit is barred by limitation, and that they have acquired a right by adverse possession. They also plead that *mouzah* Mahtour is not *deotar* property, and deny all the allegations contained in the plaint. Lastly, they plead that the deed of sale under which they claim was executed for legal necessity by the then mohunt of the Asthan.

The Subordinate Judge has held that the property in suit is *deotar* property appertaining to the Asthan, but that the suit is barred by limitation, and that a portion of the money advanced by the defendants was actually applied for payment of the rents of the Asthan property and of debts due by the mohunt. He therefore dismissed the suit.

There can be no doubt that this *mouzah* was *deotar* property. The *sanad* by which it was given many years ago, *viz.*, 1166 Fusli, to a mohunt named Harjih Gir who was a predecessor of the present plaintiff in the mohuntship, distinctly shows that the property was given for the purpose of the Asthan. It was given to the mohunt as such, and the succession was prescribed to be in his disciples. The purposes of the trust were to feed *fakirs* and mendicants. This was a trust for charitable purposes, the successive occupiers of the mohuntship being the trustees.

We also agree with the learned Subordinate Judge in holding that *mouzah* Mahtour belongs to the Asthan Harlaki, which is a dependency of Asthan Kaplessar. It is clear that the mohunt of Kaplessar was *de jure* mohunt of Harlaki.

A predecessor of the plaintiff in this mohuntship was one Balraj Gir. He was deposed from the *guddi* by order of the Maharajah of Nepal, on the 22nd of February 1873. It is the case of both sides that the Maharajah of Nepal had power to appoint and depose mohunts of the Kaplessar Asthan; and as a matter of fact it is clear that in his name such appointments and depositions were from time to time made. It is not for us to consider the propriety of the action of the Maharajah of Nepal.

The *guddi* of this Asthan was held upon a very uncertain tenure, and at the will of the Maharajah or his counsellors a mohunt might at any moment lose his office. On Balraj Gir's deposition one Balwant Gir succeeded him. Balwant Gir was succeeded by Sham

Gir, but in 1886 an order was made for the reinstatement of Balraj. lied before he could be reinstalled, and a *sanad* was grant- he plaintiff. It appears from the evidence in this case that h Balraj between 1873 and 1886 was neither *de jure* nor mohunt of Kaplessar, he did not cease to exercise control r the property belonging to Harlaki. The deed, which is the ject of the present suit, was executed by Balraj in 1881 when was not *de jure* mohunt of Harlaki, although, as far as we can from the evidence, he was *de facto* mohunt and had not ceased exercise his functions as mohunt. On the 5th of March 1881 executed a deed of sale of *mouzah* Mahtour in favour of the lefendants.

Although it is unnecessary in the view which we take of the facts of this case to determine the question of limitation, we think it desirable that, as it has been argued, we should express our opinion with regard to it. In the first place it is quite clear to us that there is no question of adverse possession. The only way in which it is attempted to set up adverse possession is by adding the tenure of Mahtour by Balraj, after his deposition in 1873, to the possession held by the defendants since 1881, that is to say, by holding that from 1873 the possession of Balraj became adverse. But Balraj continued to hold, not adversely to the endowment, but as *de facto* trustee thereof. He continued as mohunt, and in his dealing with the property in 1881 he acted in that capacity. That being so, it is difficult to see how his action can in any way be treated as being adverse to the endowment. A person who wrongly holds as trustee and pretends to act as trustee cannot be entitled to reprobate the right which he asserts and to contend that he holds adversely to his *cestui que trust*. In our opinion this is perfectly clear, and no question of adverse possession arises up to 1881. Although the defendants had for some time held this land as *zur-i-peshgidars* they did not assert any rights adverse to the endowment. Even if the effect of the sale of 1881 were to start an adverse title, twelve years had not elapsed when the suit was instituted.

We also think that we must hold that Article 91 of the Limitation Act has no application to the present case. A forcible argument was addressed to us on behalf of the respondents in order to induce us to hold that that Article applied, and a large number

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of authorities were cited to us. In no one of them do we find that Article 91 has been applied to an alienation by the manager of an endowment, the manager of an infant heir, a Hindu widow, or any other of the persons whose powers are placed in the same footing by *Hunooman Persaud Pandey's* case (1), and the cases which follows the decision in that case. On the contrary, in two cases we find express authority that twelve years is the period of limitation in a case of that kind. The case of *Unni* v. *Kunchi Amma* (2) is a case in many respects similar to the present, and in a case in this Court, *Sikher Chund* v. *Dulputty Singh* (3), a Division Bench considered that Article 91 was inapplicable. If the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside, but may treat it as of no effect.

The next question raised is as to the position Balraj occupied at the time of the execution of the deed in question. He was not *de jure* mohunt, but he was *de facto* mohunt of the subordinate Asthan Harlaki to which Mahtour belonged. We see no reason why the observations of the Privy Council in *Hunooman Persaud Pandey's* case with reference to the manager for an infant heir should not apply equally to a *de facto* manager of an endowment. The persons with whom the mohunt deals are not bound to look further than the authority which is apparent to them. It is impossible to expect a person dealing with a mohunt who is in possession of land in British territory to know much, or indeed to care much, about what action is from time to time being taken by the Nepal Raj with regard to the status of the mohunt. At page 412 of 6 Moore's Indian Appeals their Lordships of the Privy Council say: "Upon the third point it is to be observed that under the Hindu Law the right of a *bonâ fide* encumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge, had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title."

The same reasons which would induce the Court to support

(1) 6 Moo. I. A., 393. (2) I. L. R., 14 Mad., 26.
(3) I. L. R., 5 Calc., 363 (370).

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the case of a *de facto* manager of an infant heir would, in our opinion, justify it in supporting the case of a *de facto* mohunt, especially where that mohunt had recently been *de jure* mohunt, and the alteration of his rights had been effected by a foreign Government in the main with reference to territory within the jurisdiction of that Government.

The only remaining question is whether this deed can be supported as being based on necessity.

* * * * *

[After considering the evidence on this question, which is not material to this report, their Lordships continued :] We think that this evidence shows that there was a necessity for the sale. There were in existence bonds which had been given for necessary purposes and which could be enforced, and there was a decree. The family of the defendants had for many years been financing this Asthan. They acted not only *bond fide*, but it appears to us they exercised a good deal of care in the different transactions. There is nowhere in the case for the plaintiff anything to suggest that his predecessor on the *guddi* acted improperly in raising money or otherwise than for necessity.

We think therefore that on the merits this appeal fails and must be dismissed with costs.

S. C. C. *Appeal dismissed.*

Before Mr. Justice Macpherson and Mr. Justice Hill.

SARKUM ABU TORAB ABDUL WAHEB AND OTHERS (DEFENDANTS) *v.* RAHAMAN BUKSH AND OTHERS (PLAINTIFFS). *

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Res judicata—Code of Civil Procedure (Act XIV of 1882), section 13, Explanation (2)—Different subject-matters of suits—Limitation Act (XV of 1877), Schedule II, Article 124—Suit for declaration of baradari rights—Subsequent suit for assertion of khadimi rights—Sale of office to which are attached conduct of religious worship, and performance of religious duties—Mahomedan Law—Custom.

Section 13, Explanation (2) of the Code of Civil Procedure applies only to cases in which the plaintiff, having on a former occasion sued for certain

* Appeal from Appellate Decree No. 1401 of 1894, against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 28th of May 1894, affirming the decree of Babu Kailash Chandra Mozumdar, Subordinate Judge of that District, dated the 10th of July 1893.