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possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellants: Mr. *S. L. Wilson.*

Agents for the respondents: Messrs. *Barrow* and *Barton.*

P. C.*
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June 9 & 12.

PARICHAT (DEFENDANT) *v.* ZALIM SINGH (PLAINTIFF).

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.]

Mitakshara—Alienation of Ancestral Property—Illegitimate Son—Maintenance.

Since by the Hindu law the illegitimate son of a person belonging to one of the "twice-born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate, being in performance of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the Mitakshara.

Quære.—Whether under the Mitakshara law a father who has no child born to him is competent, without legal necessity, to alienate the whole or any part of the ancestral estate; or whether the rights of unborn children are so preserved as to render such an alienation unlawful?

IN the suit in which this appeal was brought, Zalim Singh claimed to recover from Rajah Parichat, possession of a village which he alleged had been granted to him under a sannad by way of maintenance by Bahadoor Singh, the late Rajah of Belhera, whose illegitimate son he was, and from which he had been dispossessed by the defendant, the present Rajah. The defendant denied the *factum* of the sannad. He also denied its validity. The Deputy Commissioner of Saugor, in whose Court the suit was brought, held that the village had been assigned to the plaintiff by his father for his maintenance, and

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

that the assignment was valid. But, on it appearing that the plaintiff had mortgaged the village to a stranger, he was of opinion that he ought not to be restored to possession. He, accordingly, made an order that the defendant should pay the plaintiff a yearly maintenance of Rs. 680, being the estimated value of the village.

This decision was affirmed on appeal by the Commissioner; but on special appeal by the defendant, the Judicial Commissioner of the Central Provinces, on the 24th March, 1874, reversed the decree of the Deputy Commissioner, and gave Zalim Singh a decree for possession of the village. Zalim Singh was not present, and took no part in the proceedings under the special appeal to the Judicial Commissioner. The present appeal was brought by Rajah Parichat against the Judicial Commissioner's order.

Mr. *Cowie*, Q. C., and Mr. *Joseph Graham* for the appellant.—The Deputy Commissioner decreed not what the plaintiff had asked for in his plaint, namely, the possession of land, but an annuity, for which he had not asked. On our special appeal for a reversal of this order the plaintiff did not appear. The Judicial Commissioner set aside the order of the Deputy Commissioner, and in the absence of the plaintiff gave him a decree for the land to which the Deputy Commissioner had held he was not entitled. In the absence of a cross-appeal on the part of the plaintiff, or objections taken by him to the decisions of the lower Courts, the Judicial Commissioner had no jurisdiction to make a decree in favour of the plaintiff at variance with the decree of the Deputy Commissioner. He ought to have dismissed the suit. Section 348, Act VIII of 1859, did not apply to such a case. It might be admitted that the plaintiff, an illegitimate son was, under the Hindu law, entitled to maintenance out of his father's estate—*Chuoturya Run Murdun Syn* v. *Saheb Purhulad Syn* (1). There was evidence, however, that the plaintiff's father had separate self-acquired property, out of which provision for the plaintiff's maintenance might

(1) 7 Moore's I. A., 18.

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have been made. Under such circumstances the grant out of the ancestral estate could not be justified on the ground of necessity, since the separate estate of the father was primarily liable—*Muttusawmy Jagavera Yetappa Naicker* v. *Venkataswara Yetaya* (1). The case was governed by the law of the Mitakshara, under which it was not competent for one of several co-sharers to alienate even his own interest in joint ancestral property without the consent of the co-sharers. Under that law a father could not make a voluntary alienation without the concurrence of his sons, and a son born after an alienation would not be bound by it—*Rajah Ram Tewary* v. *Luchmun Persad* (2), and the passages of the Mitakshara there cited; see also *Modhoo Dyal Singh* v. *Golbur Sing* (3). Assuming the right of Rajah Bahadoor Singh to charge the zemindary to a reasonable amount with the plaintiff's maintenance, it was not necessary, nor competent for him, to alienate for that purpose a specific part of the zemindary in perpetuity.

The respondent did not appear.

Their Lordships' judgment was delivered by

SIR J. W. COLVILE.—This is an appeal from an order made by the Judicial Commissioner of the Central Provinces whereby he has decreed to the respondent, the plaintiff in the suit, who does not appear upon this appeal, the possession of a certain village called Simeeria. The facts, so far as it is necessary to mention them, may be very shortly stated. The father of the appellant, the late Rajah Bahadoor Singh, was the owner of an estate consisting of five villages, one of which was this village of Simeeria. They had been held by his ancestors for a long time, but there seems to have been some doubt to what extent they were rent-free, though enjoyed by him as such. Ultimately, however, the Government of the North-West Provinces determined to recognise the right of the Rajah and his heirs to hold them in perpetuity as rent-free. Before

(1) 12 Moore's I. A., 203.

(2) B. L. R., Sup. Vol., 731; S. C., 8 W. R., 15.

(3) B. L. R., Sup. Vol., 1018; S. C., 9 W. R., 511.

that question (which is not material to the decision of the present appeal) was settled, the Rajah having then no legitimate son, but having an illegitimate son, the Plaintiff, Zalim Singh, executed a sunnud which with the omission of certain names and titles of the parties is in these words:—"This sunnud is granted by Rajah Bahadoor in favour of you Zalim Singh, pledging to you the possession of Mouzah Simeeria, which you will hold and enjoy in perpetuity for your personal expenses, food, clothing, pan, masala. You are to receive as written herein, and to be regular in rendering your service." Delivery of possession of the village seems to have followed upon the grant, and Zalim Singh was in possession of it when his father died, and continued to be in possession during the period while the estate was administered for the appellant, the legitimate son and heir of the Rajah, by the Court of Wards. The appellant, however, on coming of age appears to have ejected Zalim Singh from the possession of the village. The latter then brought this suit, in which he claimed the possession of the village "as granted to him for his maintenance by the sunnud;" and the statement of his pleaders, who were examined in the cause, contains the following passage:—"It is true that the proprietary rights of this village with others belonging to the jaghir were given at the settlement to Parichat (the appellant) as head of the family; this Zalim Singh does not dispute, nor does he claim proprietary rights, but as he belongs to the family, and as his father considered this village sufficient for his support, he claims possession of the same, or a payment in money equal to the profits of the village." And in answer to a direct question by the Court why at the settlement Zalim Singh did not claim proprietary rights, they said, "Zalim Singh only wished for support, and it would have interfered with the position of the head of the family to have broken up the estate by having the proprietary right bestowed on any other than the head of the family." In these circumstances their Lordships do not deem it necessary on this appeal to consider whether upon the true construction of the sunnud it was such a grant in favour of Zalim Singh as would enure for the benefit of his children, if

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he had any, or enable him, upon an alienation of the village, to give a good title to the purchaser. It seems to them that all that is raised on the present record is the right of Zalim Singh to the present possession of the village.

The course the litigation took was as follows:—The right of Rajah Bahadoor Singh to make such a grant was contested. That issue was found in favour of the plaintiff and against the defendant. The *factum* of the grant was also contested. That issue must be taken to have been conclusively found by the judgment of the Deputy Commissioner confirmed by that of the Commissioner in favour of the plaintiff. It came out, however, before the Deputy Commissioner, that after Zalim Singh had been ejected from the possession of the village, he had executed a mortgage of it in favour of some money-lender; and thereupon the Deputy Commissioner came to the conclusion that the plaintiff was no longer entitled to hold the village in khas possession and to receive the collections; but that having a distinct right to maintenance, and having had this village assigned to him by way of maintenance, he was at all events entitled to receive what may be called the net proceeds of it after the expenses of management, collection, and the like were provided for, such proceeds being estimated at the annual sum of 680 rupees. And he made a decree accordingly, which on the appeal of the defendant was confirmed by the Commissioner. Zalim Singh did not appear in the Commissioner's Court, or join in that appeal. It further appears that after the decision of the Commissioner he proceeded to take out execution, and recovered the amount which had been awarded to him by the Deputy Commissioner. In that state of things the defendant, the present appellant, saw fit to carry the case before the Judicial Commissioner by a special appeal, and the two material grounds of that appeal are the first and the fifth. In the first he says:—"The Lower Courts are wrong in law in holding that Rajah Bahadoor Singh had power to alienate ancestral immoveable property in the way he is alleged to have done by the sunnud put forward by the plaintiff." In the fifth he says:—"The lower Courts are wrong in law in decreeing maintenance in plaintiff's favour, notwithstanding that his

plaint was simply for possession of the village of Simeeria, and was never amended so as to enable the Courts to give a decree for maintenance." The Judicial Commissioner in dealing with this special appeal yielded to the last ground of appeal, and held that the lower Courts had gone beyond their proper functions in making a decree for maintenance in money instead of awarding possession of the village; but he assumed that he had a right to make the decree which he thought ought to have been made on the merits of the case, and he accordingly varied the decree of the Courts below by giving a decree for possession. His decree, which is that now appealed from, is: "That the decrees of both the lower Courts be reversed, and a decree granted for possession of Mouzah Simeeria to plaintiff, special respondent," with costs.

It has been argued, that to make this decree upon a special appeal was *ultra vires* of the Judicial Commissioner, the Courts below having decided against the plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships, that the appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitakshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitakshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the

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other. It seems to them that the objection in this case goes only to the particular alienation by the sunnud, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sunnud, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitakshara law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the respondent has not appeared.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins* and *Lattey*.

ORIGINAL CIVIL.

Before Mr. Justice Kennedy.

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June 13 & 18.

EDE v. KANTO NATH SHAW.

Contract, alteration of, after Signature—Contract Act (IX of 1872), *s.* 37.

To a contract between the plaintiffs and the defendant, for the purchase by the defendant of a cargo of salt, the plaintiffs, after the contract had been signed by the defendant, added in the margin: "Ten days' demurrage will be allowed at Rs. 250 per diem." *Held*, that the addition of the words in the margin did not amount to an alteration within the rule of English law: