pay the costs of all other parties out of the estate of Nicholas Isaac Malchus.

The residuary estate of Nicholas Isaac Malchus is not before the Court, and the order cannot be construed as one dealing with that estate generally. If it were, effect could not be given to it.

We think on the whole the order should be construed as the learned Judge construed it, as an agreement between parties with reference to the residue, so far as they could properly dispose of it by agreement, that is to say, the plaintiff's interest in the residue.

We dismiss the appeal with costs; the costs to be charged as those in the first Court have been.

Appeal dismissed.

Attorney for appellant: Mr. *H. H. Remfry.*

Attorneys for respondent: Baboo *O. C. Gangooly* and Mr. *Carruthers.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ASHANULLAH KHAN BAHADUR (PLAINTIFF) *v.* TRILOCHAN BAGCHI AND ANOTHER (DEFENDANTS).*

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Road Cess Act (Beng. Act IX of 1880), *ss.* 52, 53—*Evidence Act, s.* 114—*Presumption.*

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done.

Held, that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*) of the Evidence Act, and must be proved.

THIS was a suit for the recovery of cesses against four defendants in respect of a lakheraj tenure.

* Appeal from Appellate Decree No. 979 of 1885, against the decree of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 16th of February 1885, modifying the decree of Baboo Khettra Prosad Mukherji, Munsiff of Atiah, dated the 26th of June 1884.

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The defendants Nos. 2 and 3, in their written statement, denied holding any portion of the said tenure. The defendant No. 4 admitted that he held a portion of it, but stated that he was not in possession of the rest: he also alleged that the Collector had not assessed any cesses in respect of his lakheraj holding.

The defendant No. 1 did not enter appearance in the Court of first instance.

It appears from the Munsiff's judgment that a single witness was examined on behalf of the plaintiff in support of his claim, and the Munsiff was of opinion that the evidence of that witness was not satisfactory. He says, this witness is a dependant of the plaintiff, and is a man of no position or character. His evidence does not clearly prove that the defendants Nos. 2 and 3 are in possession. He therefore dismissed the suit as against the defendants Nos. 2 and 3, but decreed it as against the defendants Nos. 1 and 4.

Against this decree the defendant No. 4 appealed, and on that appeal the decree against the defendant No. 1 was reversed, and the decree against the defendant No. 4 was modified.

Against the defendant No. 4 a decree was made only at the rate admitted by him. The Subordinate Judge was of opinion that the plaintiff was not entitled to recover road cess from him at the rate stated in the valuation-roll, produced by the plaintiff, of the lakheraj tenure, because it was not shown that any notice under s. 52 of the Road Cess Act had been issued.

The plaintiff appealed to the High Court.

Baboo *Rashbehari Ghose* for the appellant.

Baboo *Shama Churn Chuckerbutty* for the respondents.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J. (who, after stating the facts as aboye, continued).—It has been contended before us that the lower Appellate Court ought to have presumed under cl. (*e*), s. 114 of the Evidence Act, that the Collector did issue a notice in accordance with the provisions of s. 52.

We are of opinion that cl. (*e*) of s. 114 is not applicable to the present case, and that the lower Appellate Court was right in not making any presumption in favour of the publication of the notice prescribed in s. 52.

Reading ss. 52 and 53 together, it appears to us that the object of the notice prescribed by s. 52 is to inform the tenure-holder, who would be affected by the valuation-roll, of the amount assessed, so that he might come in and object, and have it altered if there be reasonable grounds for such alteration. This appears to be quite clear from s. 53. That being so, it seems to us that the publication of the notice was a condition precedent to the tenure-holder being bound by the valuation-roll prepared by the Collector.

That being so, we are of opinion that no presumption ought to be made under clause (*e*) of s. 114 in favor of the condition precedent having been observed. Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favor of the things prescribed by the Act having been done.

That being so, we are of opinion that the lower Appellate Court was right in holding that the defendant No. 4 is not bound by the valuation-roll prepared by the Collector, because it was not shown that any notice under s. 52 of the Road Cess Act had been duly issued. The appeal as against him must therefore be dismissed with costs.

As regards the defendant No. 1, unless the judgment of the Munsiff proceeded upon a ground common to him and to the defendant No. 4, the Appellate Court would have no power to reverse the decree against him (the defendant No. 1).

In this case, as I have said before, the defendant No. 1 did not enter appearance, and the Munsiff's judgment against the defendant No. 4 proceeded upon his admission that he was in possession of a portion of the tenure mentioned in the plaint. Whatever therefore may have been the ground upon which the decree against the defendant No. 1 was based, it could not have

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been the ground upon which the decree against the defendant No. 4 proceeded, because that was based on his admission, and that was a ground which could not apply to the defendant No. 1, who did not appear before the Munsiff. It is, therefore, clear that the judgment of the Munsiff did not proceed upon a ground common to the defendants Nos. 1 and 4.

That being so, the lower Appellate Court had no power to set aside the decree against the defendant No. 1, on the appeal of defendant No. 4.

We, therefore, set aside the decree of the lower Appellate Court so far as the defendant No. 1 is concerned, and restore the decree of the Munsiff against him with costs.

K. M. C. *Decree modified.*

Before Mr. Justice Mitter and Mr. Justice Grant.

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ARJAN BIBI (PLAINTIFF) *v.* ASGAR ALI CHOWDHURI (DEFENDANT).*

Interest—Bond—Agreement—Penalty—Contract Act, s. 74—Act XXVIII of 1855, *s.* 2.

The stipulation in a bond was in these terms :—"I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days ; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month" : *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855, and did not fall under s. 74 of the Contract Act.

Mackintosh v. *Crow* (1) approved.

Balkishen Das v. *Run Bahadur Sing* (2) considered.

THIS was a suit for the recovery of a sum of Rs. 2,600 as principal and interest due upon a bond. The bond stipulated that, unless the amount of the debt (Rs. 1,000) was paid within two months and 15 days of the date thereof, interest at the rate of 2 annas per rupee per month should run from the date of the bond. The defendant admitted execution ; but pleaded (1) that prior to the institution of the suit he had tendered the money which was refused by the plaintiff's husband and

* Appeal from Appellate Decree No. 2038 of 1885, against the decree of R. H. Greaves, Esq., Judge of Chittagong, dated the 17th of June 1885, modifying the decree of Baboo Jiban Krishna Chatterji, Subordinate Judge of that District, dated the 28th of July 1884.

(1) I. L. R., 9 Calc., 689. (2) I. L. R., 10 Calc., 305.