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RICHARDSON J.

was urged by Mr. Hill that the suit was not a suit for rectification but the issues framed in the lower Court are wide enough to enable us to deal with these points, to which indeed the evidence was mainly directed.

In regard to costs, I am inclined to think that as the plaintiff charged fraud and failed and has also substantially failed on the whole case, he should pay the whole of the costs of defendant No. 1. But I am not prepared to go so far as to differ on this point from the order which my learned brother proposes to make.

With these observations, I concur in the conclusions which have been arrived at.

S. C. G.

Appeal allowed in part; cross-appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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March 3.

Receiver—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 503, cl. (b); 588, cl. (24)—Stranger in possession of property in suit—Lien on property—Jurisdiction of Court when ousted—Rights of Stranger against Receiver—Possessory Lien—Possession by Receiver.

Where in a mortgage suit a Receiver appointed by Court was directed to take possession of the property in custody of a person not a party to the suit:—

Held, that such an order was made under s. 503, cl. (*b*) of the Civil Procedure Code (Act XIV of 1882), and was appealable under s. 588, cl. (24).

Where a stranger to a suit claims under a title paramount to that of the parties, the jurisdiction of the Court is not ousted by the mere assertion of the existence of the circumstance, but upon proof of the actual existence of such circumstance and upon judicial investigation.

Budh Singh Dudhuria v. *Niradbaran Roy* (1) and *Mahomed Medhi Galistana* v. *Zoharra Begum* (2) followed.

* Appeal from order, No. 9 of 1909, against the order of Purna Chandra Chowdhuri, Subordinate Judge of Mozufferpore, dated Dec. 11, 1908.

(1) (1905) 2 C. L. J. 431, 437. (2) (1889) I. L. R. 17 Calc. 285.

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Hurree Persad Mahto v. *Koonjo Behary Shaha* (1), *Chunder Koomar Mundul* v. *Bakar Ali Khan* (2), *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (3), *Mahomed Wahiduddin* v. *Hakiman* (4) and *Mayor of London* v. *Cox* (5) referred to.

The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien is confined to the rights of the principal in the goods or chattels at the time when it attaches, and is subject to all the rights and equities of third persons available against the principal at that time.

Attorney General v. *Freeman* (6), *Attorney General* v. *Walmsley* (7), *Manningford* v. *Taleman* (8), *In re Llewellin* (9) and *Peat* v. *Clayton* (10) referred to.

APPEAL by Rowland Hudson, the intervenor.

The respondents, John Pierpont Morgan and others, who were carrying on business in Calcutta under the name and style of the Development Company, appointed the appellant Rowland Hudson, by a power-of-attorney, dated the 29th June 1904, to represent them and to take charge of all property, moveable and immoveable, and to superintend, manage, cultivate, carry on and conduct their establishment and business in India. Subsequently the appellant by an agreement, dated the 4th October 1905, became the Managing Director of The Indian Development Company for a term of five years on a salary of Rs. 1,250 a month and commission upon net profits, so that the total remuneration might not be less than Rs. 1,500 a month, with proviso that either party may determine the contractual relationship by giving 12 calendar months' notice of his intention to do so, and the Company might, in lieu of such notice, determine it upon the payment to the appellant the salary for one year calculated from the date of such determination. The appellant resigned the office of Director under the agreement on the 20th July 1906, but his services were not dispensed with by the Company till the 26th May 1908 after the Com-

(1) (1862) Marshall 99.
(2) (1868) 9 W. R. 598.
(3) (1871) 8 B. L. R. 315; 15 W. R. 9 (F. B.).
(4) (1898) I. L. R. 25 Calc. 757.
(5) (1867) L. R. 2 H. L. 239, 261. 263.
(6) (1843) 11 M. & W. 694.
(7) (1843) 12 M. & W. 179.
(8) (1845) 1 Coll. 670; 66 R. R. 239.
(9) [1891] 3 Ch. 145.
(10) [1906] 1 Ch 659.

pany had gone into liquidation on the 14th May 1908. In the meantime, the Company had appointed Messrs. Octavius Steel & Co. as their attorneys by a power-of-attorney, dated 30th May 1906, which, amongst other things, provided that the power-of-attorney previously granted by the Company to Hudson on the 29th June 1904, and all powers executed by him thereunder were to remain in full force and effect, until they were revoked by the Company or by Messrs. Octavius Steel & Co. under the power in their favour.

The Company had executed two mortgages on the 22nd January 1908, the first in favor of the plaintiffs, John Pierpont Morgan and others, and the second in favour of Harman Klienwort and others. The first mortgagees filed a suit to enforce their security in May 1908 and, on an application under section 503 of the Civil Procedure Code, Mr. Clarke was appointed a Receiver by the Subordinate Judge, and his appointment was sanctioned by the District Judge on the 12th May 1908. On the 26th May 1908, on approval of the security offered by Mr. Clarke, he was authorized to commence work as Receiver in accordance with the order of the 12th May 1908, and the Receiver, in pursuance of such order, took possession of all the property, except the portion in possession of Mr. Hudson.

On the 11th December 1908, the Subordinate Judge, on an application by the Receiver for an order directing Mr. Hudson, the appellant, to make over the properties in his possession which he had retained possession of on the ground that he had a lien on them under sections 217 and 221 of the Indian Contract Act (IX of 1872) in respect of money due to him for one year's salary in lieu of notice, and also for commission and allowance due to him, and, on the materials placed before him on the affidavit of both sides, ordered Mr. Hudson to make over the properties to the Receiver.

Against this order Mr. Hudson appealed to the High Court, and pending the appeal obtained a Rule (being Rule No. 102 of 1909) for the stay of proceedings and an *ad interim* stay.

The Rule and the appeal were heard together.

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Mr. Zorab (*Babu Joygopal Ghose* and *Babu Manmatha Nath Mookerjee* with him), for the respondents, raised a preliminary objection that the order of the 11th December 1908 was not appealable. [The objection was overruled.]

Mr. J. E. Godfrey (*Babu Lalit Mohan Banerjee* with him), for the appellant. The Subordinate Judge had no jurisdiction to make the order of the 11th December 1908 on the materials before him; that the appellant claimed a lien on the property and the Receiver in order to obtain possession from him should file a suit so that the various questions relating to the lien claimed, the nature of the possession and the agreement of parties that would arise, might be properly gone into; that all that was necessary for the appellant to establish was a *primâ facie* case of lien and that was obvious on the undisputed facts under sections 217, 221 of the Contract Act, as he was undoubtedly an agent of the Company: see section 182, Indian Contract Act (IX of 1882) and Story on Agency, pp. 2-3.

If the Subordinate Judge had jurisdiction in making the order, the appellant was entitled to retain possession until his claim for money due for remuneration payable and for commission and services in respect of the property was satisfied, and that this lien was available against the Receiver just as much as it was against the mortgagor.

Mr. Zorab, for the respondents. The order of the 12th May 1908 appointing the Receiver not being challenged in time by the appellant, no appeal lies: that the appellant is an officer or servant of the Company and not an agent, and that consequently he has no juridical possession and that his custody of the properties which undoubtedly belonged to the mortgagees is on their behalf and is liable to be terminated at the instance of the Receiver appointed by the Court in the mortgage suit, and even if it be assumed that the appellant has a possessory lien his right to possession cannot prevail against the mortgagees or the Receiver appointed by the Court at their instance; and that the claim did not arise until after the appointment of the Receiver on the 12th May 1908.

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Mr. Godfrey, in reply, pointed out that it was not open to the respondents to argue that the appellant was only a servant of the Company as they had never cancelled the power-of-attorney appointing him agent, as they might have done; and that even on the 12th May 1908 his claim for so much of the current month was in fact in existence.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this appeal to discharge an order made by the Court below under section 503 of the Code of Civil Procedure of 1882, under which one of the respondents, the Receiver appointed in a mortgage suit, is authorized to take possession of properties in the custody of the appellant who is not a party to the mortgage suit. In order to appreciate the grounds upon which the propriety of the order is questioned, it is necessary to narrate the circumstances under which it has been made.

On the 29th June 1904, the appellant, Rowland Hudson, was, under a power-of-attorney executed by one of the respondents known as The Indian Development Company, appointed their attorney, and authorized to take possession of all property, moveable and immoveable, belonging to the latter and to superintend, manage, cultivate, carry on and conduct their estate and business in India. On the 4th October 1905, Hudson entered into an agreement with the Company, under which it was arranged that he would act as Managing Director for a term of five years from the 1st July 1905. The agreement provided that while either party might determine the same by giving twelve calendar months' written notice of his intention to do so, the Company might, in lieu of giving notice, at any time determine it upon payment to Hudson of salary for one year calculated from the date of such determination. The agreement further provided that Hudson as Managing Director was to receive a salary of Rs. 1,250 a month, besides Director's fees and a commission upon the net profits, so that his total remuneration might not be less than Rs. 1,500 a month. On the 30th May 1906, the Company appointed

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Octavius Steel & Co. as their attorneys, but by this deed it was expressly provided that the power-of-attorney previously granted by the Company to Hudson on the 29th June 1905, and all powers executed by him thereunder, were deemed to remain in full force and effect, until they were revoked by the Company or by the new attorneys under the power vested in them. Meanwhile, there had been a correspondence between Secretary of the Company and Hudson as to the status of the latter, and on the 20th July 1906 Hudson resigned his Managing Directorship. On the 22nd January 1908, the Company executed two mortgages, the first in favour of the present plaintiffs, John Pierpont Morgan and others, and the second in favour of Harman Klienwort and others. The first mortgagees, under the terms of the contract with them which we are informed was in the nature of an English mortgage, were entitled to possession upon default of payment and therefore to have a Receiver appointed in respect of the mortgaged premises at any time by an application to Court. On the 9th of May 1908, the first mortgagees commenced an action to enforce their security and made an application under section 503 of the Civil Procedure Code for the appointment of a Receiver for the better management of the mortgaged properties. The Subordinate Judge made an order for the appointment of a Receiver on that very day, and nominated Mr. Clarke, of the firm of Octavius Steel & Co. as a fit and proper person. On the 12th May 1908, the District Judge sanctioned the nomination, and Mr. Clarke was appointed with power of delegation for local management and power to arrange finances. The Receiver was called upon to furnish security to the extent of three lakhs of rupees within seven days. On the 19th May following, the period within which the security was to be furnished was extended to the 26th May, and on the latter date, it was reported that security had been furnished. The security was approved and Mr. Clarke was authorized to commence work as Receiver in accordance with the order of the 12th May. Meanwhile, on the 14th May, the Company went into liquidation, and on the 26th May 1908, the

services of Hudson were dispensed with. The Receiver took possession of all the mortgaged properties, excepting the portions now in dispute which were in the possession of Hudson. The latter on the 22nd June 1908 informed the Receiver that he claimed a lien on the properties in his possession under sections 217 and 221 of the Indian Contract Act, for one year's salary due to him, as his services had been dispensed with without notice, as also for the salary and allowances due to him from the 1st to the 26th of May 1908. The Receiver reported the matter to the Court, and upon the materials placed before the Subordinate Judge in the affidavits of both sides, he directed on the 11th December 1908 that Hudson should make over the properties in his custody to the Receiver. Hudson has now appealed to this Court, and on his behalf, the validity of the order has been attacked substantially on two grounds; namely, *first*, that as he is not a party to the mortgage suit, it is not competent to the Court to deprive him of possession of the properties in dispute; *secondly*, that, if the Court has jurisdiction to deal with the matter, he has a statutory lien upon the properties, which entitles him to retain possession as against the Receiver. In answer to these contentions, it has been argued on behalf of the respondents, *first*, that the appeal is incompetent, inasmuch as the first order of the 12th May 1908, by which the Receiver was appointed, was not challenged in time; *secondly*, that the position of the appellant is not that of an agent of the Company but of an officer or servant, that he has consequently no juridical possession, and that his custody of the properties which undoubtedly belonged to the mortgagors is on their behalf and is liable to be terminated at the instance of the Receiver appointed in the mortgage suit; and *thirdly*, that even if Hudson be assumed to have a possessory lien, his right to possession cannot prevail as against the mortgagees or the Receiver appointed by the Court at their instance.

As regards the preliminary objection taken on behalf of the respondents, we are of opinion that there is no substance in it. The order of the Subordinate Judge of the 11th December 1908, under which the Receiver is authorized to remove Hudson and

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to take possession of the properties now in his custody, was undoubtedly made under section 503, clause (*b*) of the Code of 1882. That order is consequently appealable under section 588, clause (24). It was not necessary for the appellant to challenge the order of the 12th May 1908 by which the Receiver was appointed. He was no party to that order, nor does it appear that he had any notice of it. He was not affected by the proceedings for the appointment of a Receiver, till the latter made an attempt to deprive him of possession of the disputed properties. As soon as there was an adjudication between him and the Receiver as to the title of the latter to remove him from possession, he became entitled to question the validity of the adverse order. We must consequently overrule the preliminary objection and consider the case on the merits.

The first point taken on behalf of the appellant raises the question, whether the Court has jurisdiction to remove from possession a person who claims under a title paramount to that of the parties to the litigation in which the Receiver is appointed. On behalf of the appellant, it is argued broadly that the Court has no jurisdiction to do so, and that as soon as a Receiver finds that the subject-matter of the litigation is in the possession of persons who claim under a paramount title, he, as well as the Court from which he derives authority, must withhold their hands. In our opinion, this contention is not supported either by principle or by authorities. Section 503 of the Code of Civil Procedure clearly contemplates the removal from possession of persons who are not parties to the suit, and the last paragraph of the section formulates the test to be applied in cases of this description. In determining whether the Court should remove from possession or custody of property under attachment, any person who is not a party to the litigation, the test to be applied is, whether the parties to the suit or some or one of them have or has a present right so to remove him. If the intention of the Legislature had been that a person who was not a party to the suit should not, under any circumstances, be deprived of possession of the disputed properties, the Code

would have made an appropriate provision to that effect. On the other hand, the Code expressly provides for the test to be applied in cases of controversy between the Receiver and a stranger to the suit. It is argued, however, by the learned counsel for the appellant that as soon as the stranger asserts a paramount title, the Court must stay its hands. In our opinion, this argument is opposed to reason and principle. If this were the true rule of law, the action of the Court might be paralysed by the groundless assertion of an entirely unfounded claim. But as was pointed out by this Court in the case of *Budh Singh Dudhuria* v. *Niradbaran Roy* (1), it is an elementary principle that when the jurisdiction of a Court to take cognisance of a matter brought before it is disputed, the Court must adjudicate upon the question. The jurisdiction of the Court is ousted, not by the mere assertion of the existence of the circumstances under which the Court loses its jurisdiction, but upon proof of their actual existence. As illustrations of the application of this doctrine, it is sufficient to refer to the cases of *Hurree Persad Malee* v. *Koonjo Behary Shaha* (2), *Chunder Koomar Mundul* v. *Bakur Ali Khan* (3), *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (4), *Mahomed Wahiduddin* v. *Hakiman* (5), and to the observations of Mr. Justice Willes in *Mayor of London* v. *Cox* (6). If the jurisdiction of the Court is disputed, the matter must be judicially investigated. The view we take is supported by the observations of Mr. Justice Pigot in *Mahomed Medhi* v. *Zoharra Begum* (7), where that learned Judge pointed out that when a person who is a stranger to the suit seeks to retain possession as against the Receiver appointed at the instance of the parties to the litigation, it is proper for, and perhaps absolutely incumbent on the Court to make an order for an enquiry, because whatever may be the least expensive course, consistent with satisfactory enquiry, ought to be adopted in order that the Court shall not

(1) (1905) 2 C. L. J. 431, 437.
(2) (1862) Marshall 99.
(3) (1868) 9 W. R. 598.
(4) (1871) 8 B. L. R. 315.
(5) (1898) I. L. R. 25 Calc. 757.
(6) (1867) L. R. 2 H. L. 239, 261, 263.
(7) (1889) I. L. R. 17 Calc. 285.

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by its dominant power hold the property on which the parties to the suit have no claim and hold it in despite of the real owners; if the Court can find out who the real owners are, it should do so and in the least expensive manner. No doubt, when the question arises whether the Court should remove from possession a person who is a stranger to the suit, the Court has a discretion which must be exercised judicially and not arbitrarily. But the view that the mere assertion of a paramount title compels the Court to withhold its hands cannot be supported. Substantially the same principle has been adopted in the English and American Courts. Thus, it has been ruled in England that although the effect of the appointment of a Receiver is to remove the parties to the action from the possession of the property, if at the time when a Receiver is appointed, a party claiming a right in the subject-matter under a title paramount to that under which the Receiver is appointed is in possession of the right which he claims, the appointment of the Receiver leaves him in possession : *Evelyn* v. *Lewis* (1), *Bryant* v. *Bull* (2), *Wells* v. *Kilpin* (3), *Underhay* v. *Read* (4). In the American Courts, also, when a Receiver comes into conflict with third persons, such third persons are, it appears, permitted to come in and be heard in relation to their interests or they are given leave to bring a suit against the Receiver to test the question of their rights. In other words, as observed in Alderson on Receivers, section 193, "the Court will, in general, entertain such an application on affidavits only where it clearly appears that the adverse possession began subsequent to the commencement of the action and is therefore subject to the decree or order which has been made, or where the person holding the property has no legal right; but, as a rule, wherever the testimony is conflicting, and there is a reasonable ground for difference of opinion as to which is entitled to possession of the property, the Court will *not* assume to try the title by hearing a motion for a "writ of

(1) (1844) 3 Hare 472.

(2) (1878) 10 Ch. D. 155.

(3) (1874) L. R. 18 Eq. 298.

(4) (1887) 20 Q. B. D. 209.

assistance" : *Musgrave* v. *Gray* (1), *Gelpeke* v. *Milwaukee* (2), *Vincent* v. *Parker* (3). It is obvious, therefore, that we must determine whether the Receiver is entitled to possession as against the appellant, by the application of the test, whether or not the parties to the suit or some or one of them have or has a present right so to remove him.

The second ground taken on behalf of the appellant raises the question, whether he has a possessory lien entitled to precedence over the right to possession of the Receiver. As we have already stated, the appellant founds his claim on the lien of an agent, while the respondent strenuously contends that he was merely a servant and not an agent. It is unnecessary for our present purposes to determine this question, and in view of the possible litigation between the parties in which the true character of the status of the appellant may be in controversy, we ought not to prejudge it. We shall assume, therefore, that the appellant was an agent of the Company within the meaning of sections 217 and 221 of the Indian Contract Act. But the question still remains, whether he has a preferential title to possession as against the Receiver. This brings us to the consideration of the third point taken on behalf of the respondents.

It is well settled that the possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien ; such lien is confined to the rights of the principal in the goods or chattels at the time when it attaches and is subject to all the rights and equities of third persons available against the principal at that time. We need not consider the case of money or negotiable securities deposited with the agent, because no question as to how far they may be affected by the rights or equities of third persons arises in the case before us. It is sufficient to say that the lien of the agent on property and goods is only given against third parties so far as the principal

(1) (1898) 123 Alabama 376 ; 82 Am. State Rep. 124.
(2) (1860) 11 Wis. 454.
(3) (1838) 7 Paige N. Y. 65.

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himself has rights and interests in the property: *Attorney General* v. *Freeman* (1), *Attorney General* v. *Walmsley* (2), *Manningford* v. *Taleman* (3), *In re Llewellin* (4), *Peat* v. *Clayton* (5). Upon the assumption, therefore, that the appellant has a lien, he can enforce it subject to the rights of the parties as they existed at the moment when his lien accrued. His services were dispensed with on the 26th May 1908 and any possible lien, therefore, which he can claim accrued on that date. The Receiver, however, had been appointed on the 12th May previously, and it admits of no doubt that his title to possession accrued on that date; for as regards the rights of third persons, the appointment of a Receiver does not take effect or date back by relation to a period prior to his appointment. It seems to us also that the appointment of the Receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. The Receiver, therefore, took the property as it was on the 12th May 1906, for where property, on which there are valid liens existing at the time of his appointment, has come into possession of the Receiver, the Receiver must clearly hold the same subject to such liens, and his appointment cannot divest the lien previously acquired in good faith,—a view which we find has been taken by the Supreme Court of the United States: *Quincey* v. *Humphreys* (6); High on Receivers, section 138; Beach on Receivers, section 202. Now what was the condition of the property on the 12th May 1908? On that date there was a valid English mortgage created in favour of the plaintiffs, on the the 22nd January 1908, under which the mortgagees were entitled to possession upon default of payment and to have a Receiver appointed by the Court. On what principle, then, can it be contended that the lien of the appellant, assuming that he has a statutory lien as an agent under sections 217 and 221 of the Indian Contract Act, prevail against the rights of

(1) (1843) 11 M. & W. 694.
(2) (1843) 12 M. & W. 179.
(3) (1845) 1 Coll. 670; 66 R. R. 239.
(4) [1891] 3 Ch. 145.
(5) [1906] 1 Ch. 659.
(6) (1891) 145 U. S. 82.

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the mortgagees ? It was suggested that the lien under which the plaintiff claims, came into existence on the 14th May 1908 when the Company went into liquidation, because from that moment the Company must be taken to have, by implication, dispensed with his services. Even if we assume this contention to be correct, it does not in any way affect the question at issue, because in the view we take, the lien set up by the appellant cannot prevail either over the rights of the mortgagees or of the title to possession of the Receiver appointed at their instance. We must hold, therefore, that although the appellant is a stranger to the mortgage suit, he is liable under section 503 of the Code to be removed from possession, because at the time when the Receiver was appointed, his lien had not accrued, and the mortgagees plaintiffs had a present right to remove him.

The result is that the appeal fails and must be dismissed with costs.

The Rule which was obtained for an *ad interim* stay of proceedings must also be discharged. We make no order as to costs in the Rule.

S. A. A. A. *Appeal dismissed.*