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With respect to the only other point in the memorandum of special appeal which has been argued, we are clearly of opinion that the question of the age of the eldest son at the time of the sale was substantially raised by the issue laid down in the lower appellate court at the second trial; and that, therefore, it was not only competent to the District Judge, but was indeed obligatory upon him, to determine this question of fact.

On the above grounds, we affirm the decree of the District Judge, and direct that the special appellant bear all the costs of this special appeal.

Decree affirmed.

Special Appeal No. 645 *of* 1864.

Jan. 25.

DEVA'JI GOYA'JI and others.....*Appellants.*
GODADBHA'I GODEBHA'I and another.....*Respondents.*

Possession—Proof of Deed—Conduct of Suit—Special Appeal.

A sued B, in 1841, to recover possession of certain villages in Gujarát. B produced a deed, purporting to be a conveyance by way of mortgage by A's ancestors of their $\frac{5}{16}$th share in the villages to B's ancestors. A at first denied the genuineness of the deed; but—the suit of 1841 having been withdrawn by consent, with a view to arbitration—took no steps to have the question decided, until the deed was again produced (from the records of the court, where it remained meanwhile) in the present suit, brought, in 1859, by A against B to recover the same villages.

Held, in the absence of evidence to show that the defendants, by their conduct during the interval, had admitted that the deed was not genuine, or that they did not intend to rely upon it, so as to mislead the plaintiffs, that the time which elapsed must be taken into account, and that they ought not to be required to prove the deed in the same way as they might have been when it was first produced and relied upon by them.

Held, also, that the High Court, sitting in special appeal, will not examine the evidence, with a view to determine whether such a document be genuine or not; nor will it consider the question, whether there is any evidence to connect the plaintiffs with the parties to the deed, when the suit appears to have been conducted in the courts below as if this was admitted.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Ahmedábád, in Appeal Suit No. 174 of 1860, affirming the decree of the Munsif of Gogo in Original Suit No. 363 of 1859.

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The special appellants, plaintiffs in the original suit, sought to recover possession of two villages in Gujarát, as to half of which they alleged that they had been wrongfully dispossessed by the defendants; the other half having been mortgaged by their ancestors, and the mortgage satisfied before the expiration of a period of nineteen years, during which the defendants were allowed to remain in possession for the purpose of having the debt paid off. That possession of the defendants was alleged to be the result of a reference to a panchâyat in A.D. 1812; and it was stated that the plaintiffs laid their claim to possession before the Collector in 1836. In 1841 a suit was filed in the Court of the Principal Sadr Amín of Ahmedábád, but was withdrawn by consent, with a view to arbitration. In that suit a document was produced by the defendants, purporting to be a conveyance by way of mortgage, in 1792, by the ancestors of the plaintiffs, of their $\frac{6}{16}$th share in the villages, to the ancestors of the defendants, to become a sale at the expiration of ten years in the event of the debt not being paid off.

The present original suit was decided against the plaintiffs by the Munsif of Gogo in 1860, and that decision was affirmed, in appeal, by the Acting Judge of the District of Ahmedábád. But, on special appeal (No. 296 of 1862), the High Court reversed his decree, and remanded the case for re-trial and a new decision on the merits, awarding costs.

The appeal came on for hearing, on the re-trial, in the District Court, on the 4th of April 1864, before C. H. Cameron, who laid down the issue to be: "whether plaintiff's claim is proved." His decision was as follows:—

"My finding on this issue is that the plaintiffs' claim is not proved.

"There appears to be no good reason for doubting the authenticity of the document No. 178. Its age makes it unnecessary to prove it. But it so happened that the writer was alive during one of the previous stages of the investigation, and his deposition was taken; and a copy of it is now handed to the Court, and recorded No. 11. Against this

bond the plaintiffs' vakíl only pleads that it is a fabrication. They urge that the very late period in the investigation at which it was introduced is *primâ facie* proof that it must have been fabricated, and they also urge that several times the defendants, Godadbhái and Sadabhái, have acknowledged that it was on account of debt only that they claimed possession of the village.

"The Court considers that at first certainly both the parties were equally ignorant of the whereabouts of this bond. Before the Collector, up to the time indeed of the investigagation made by the Principal Ṣadr Amín of Ahmedábád, it was understood by both parties that the possession was the result of debt; and various modes of arrangement were resorted to. From the investigation consequent on these arrangements it, however, became apparent that the defendants had very long possession in their power, and also that, had that possession been merely on account of debts, it is more than probable that some of the plaintiffs' family would have made somo attempt to recover possession before this present claim under investigation.

"It is, therefore, perfectly consistent with ordinary life that the document relating to the mortgage, or any other document relating to the estate, should have been sought for, and when found produced. It is, however, highly improbable that, when the defendants allowed their possession to have resulted from certain debts, they should foolishly introduce suddenly a fabricated document showing that the property was in effect sold. It is difficult to believe that tho defendants would have had the effrontery to produce the document No. 178, if it were a fabrication. It would have been so much easier to have fabricated a document better answering the circumstances of the case; but it is easy to understand the triumph with which this document would be produced by the defendants, when they found not only a mortgage deed, showing their story to have been true from the first, but, besides that, that the property had become their own private property by virtue of a clause in the said document.

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"When to this is added the fact of long undisturbed possession, and that [the deposition of] a witness to the document still exists to certify its truth, the Court feels satisfied that the Munsif has come to the right conclusion, and that the bond No. 178 is a true deed, which proves that the plaintiffs have now no claim whatever on the villages.

"No further issue was sought by either party.

"On the fact above proved, the Court, considering the plaintiffs' claim is not proved, affirms the decree of the Munsif of Gogo, and saddles the plaintiffs with all costs of both Original and Appeal Courts."

Against this decision the present special appeal was brought, which came on for hearing on the 18th of January 1865, before COUCH, NEWTON, and WARDEN, JJ.

Anstey, *White*, *Dhirajlál Mathurádás*, and *Nánábhái Haridás* for the appellants.

Reid, *Vishvanáth Náráyan Mandlik*, and *Kivámuddin Miyanji* for the respondents.

Cur. adv. vult.

COUCH, J.:—Upon the hearing of this appeal, it was at first contended by the counsel for the appellants that the exhibit No. 178 was a fabrication; and he wished us to examine into the evidence recorded in the suit, with the view of determining that question. But we were of opinion that this was a matter which it was not competent for us, sitting as a court of special appeal, to try; and that the appellants must show that there had been some substantial error or defect in law in the procedure or investigation of the case in the court below.

The appellants' counsel then relied upon the objection taken in the second ground of appeal, "that the District Judge was wrong in holding exhibit No. 178 to be good only because it is old." Now, the Judge says: "There appears to be no good reason for doubting the authenticity of the document No. 178; its age makes it unnecessary to prove it;" but he does not stop there; and we think it cannot be inferred from his judgment that he held the

document to be good only because it was old. The statement at the end of his judgment, that "the Court feels satisfied that the Munsif has come to the right conclusion, and that the bond No. 178 is a true deed," must, in our opinion, be considered as a finding upon all the evidence in the case, and not a conclusion founded merely upon the age of the document; nor do we consider ourselves justified in inferring, from his not having in his judgment remarked upon every portion of the evidence, that he has excluded it from his consideration.

The document was produced in 1841, and was then relied upon by the respondents, in answer to a suit to recover possession of the villages now in dispute. After being recorded in that suit, it appears, and is now admitted, to have remained amongst the records of the court at Ahmedábád until it was produced in the present suit. The appellants, although they at first disputed its genuineness, have allowed it to remain amongst the records of that court, without taking any step to bring the question of its genuineness to a decision.

We think the time which has elapsed since it was first produced and recorded must be taken into account; and that the respondents ought not now to be required to prove the document, in the same way that they might have been required to do when it was first produced and relied upon by them. The lapse of time may have rendered it impossible for them now to produce evidence which they then had it in their power to produce. If the respondents had, by their conduct during the interval, admitted that the deed was not a genuine one, or had shown that they did not intend to rely upon it, so as to mislead the appellants and induce them not to take any further proceedings, the case might have been different; but we are of opinion that this has not been shown, and that there has not been any error in law on the part of the Judge.

It was objected that there was no evidence to connect the plaintiffs with the parties to the deed. This objection was not taken in the grounds of appeal to the Judge, and ap-

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pears not to have been taken before the Munsif. The suit appears to have been conducted as if this was admitted, and when that is the case, we think an objection of want of evidence of the fact cannot be taken on a special appeal. *Stracy* v. *Blake* (*a*) and *Doe d. Child* v. *Roe* (*b*) are instances of the application of this principle.

We are asked by the appellants' counsel to make a decree for redemption of the six annas share; but, even supposing it would be right to do so after the lapse of upwards of sixty years, the appellants cannot have such a decree upon the present plaint.

Decree affirmed.

(*a*) 1 M. & W., 168. (*b*) 1 E. & B., 279.

Special Appeal No. 734 *of* 1864.

Jan. 25.

MOTI' BHAGVA'N .....*Appellant.*
HARJI'VAN GIRDHARDA'S .....*Respondent.*

Issues, Framing of—Finding on—Question of Fact—Remand.

The High Court will not, in a special appeal, remand the case, where there has been a distinct finding by the District Judge on the only issue framed by him, although he may have omitted to find on another issue raised before the Munsif, but not called for by either party in appeal.

THIS was an appeal from the decision of C. H. Cameron, Judge of the District of Súrat, in Appeal Suit No. 169 of 1863, reversing the decree of the Munsif of Balsád, in Original Suit No. 860 of 1862.

Harjívandás Girdhardás sued Motí Bhagván and Rámdás Jayachand to remove an attachment from, and to establish his ownership to, a house attached under a decree held by the defendants. The suit was brought on a deed of sale passed by Amthá Rasikdás to the plaintiff, dated the 26th of November 1861, by which the house in dispute was sold for Rs. 751, being the principal and interest due on a *sán* mortgage of the same house dated the 10th of August 1860.

The defendants contended that the sale by Amthá to the plaintiff was collusive and without consideration, and that