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Jan. 31.*Special Appeal No. 96 of 1866.*RA'DHA'BA'I, widow of RA'MCHANDRA... *Appellant.*SHA'MA', widow of SUNDAR..... *Respondent.**Act XIV. of 1859, Sec. 1., Cl. 12 and 15—Limitation—Immoveable Property—Bailment—Depositary—Tenancy-at-Will—Adverse Possession—English Law.*

About twenty-five years before suit brought, R. being possessed of a house, allowed K. to occupy it without paying rent, on condition that K. would keep it in repair, and restore it to R. on demand.

Nine years afterwards, and without any demand having been made by R., K. died, and his heirs continued to occupy the house, apparently on the same terms as K. had done.

In a suit brought by R. against the heirs of K. to recover possession of the house, it was held that K. could not be deemed to have been a depositary of the house within the meaning of Sec. 1., Cl. 15, of Act XIV. of 1859, and the case was therefore governed by Sec. 1., Cl. 12, of that Act.

*Held* also that K. occupied the house as tenant-at-will of R.; that such tenancy was not on the death of K., as of course, converted into an adverse occupation, by the heirs of K., in the absence of proof of the intention of the parties to that effect, and in the absence of anything to show that R. did not assent to the heirs of K. continuing to hold on the same terms as K. had done.

**T**HIS was a Special Appeal from the decision of W. M. Coghlan, Acting Judge at Dhulíá, in Appeal Suit No. 39 of 1865, reversing the decree of the Munsif of Nandurbar, in Original Suit No. 585 of 1864.

The facts of the case, and the grounds of the District Judge's decision, appear from the following extract from the judgment recorded by him:—

“This action was instituted by Rádhábái, relict of Rámchandra, against the appellant Shámá, and two other persons, Dagdú and Zagdú, who have not appealed, to recover possession of a house at Prakásha, on the grounds that the house is her property, and that she had lent it to one Karsandás, now deceased, for his residence, on the condition that he kept it in repair, and would restore it on demand.

“Rádhábái stated that she demanded restoration of the house some ten or eleven years ago, from Karsandás, and

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after his death from his son Sundar, who is also dead ; and that they promised to give up the house, but did not do so ; and that she (Rádhábái) had, three years ago, demanded the house from Shámá, Dagdú, and Zagdú ; but that they, although heirs of Karsandás and Sundar, refused to vacate the house.

“Rádhábái stated that the house was given by her to Karsandás as a deposit, and that Sec. 1., Cl. 15, of Act XIV. of 1859 was the provision of the Limitation Act governing the suit.

“Shámá's defence was that the house was not Rádhábái's property, and had not been given by her to Karsandás, deceased, as a deposit, but had been self-acquired by Karsandás fifty years ago, and had been in his family since then. Shámá urged that Rádhábái's statement, that the house was in Karsandás' hands as a deposit, had only been set forth to bring the claim within the Limitation Act.

“Dagdú and Zagdú denied that they had anything to do with the house sued for, partition having taken place between them and their father during their father's lifetime.

“The Munsif gave judgment for Rádhábái, against Shámá only, for the house sued for, with costs, on the grounds that the suit was within the period of legal limitation, which he held to be sixty years, under Act XIV. of 1859, Sec. 1., Cl. 15 ; and that Karsandás, Sundar, and Shámá are shown to have held the house as tenants during Rádhábái's pleasure.

“The Munsif threw out the claim as against Dagdú and Zagdú, on the ground that they were not in possession, and had nothing to do with the house.

“The issues for decision are :—(1) By which section and clause of Act XIV. of 1859 is the suit governed ; (2) did Rádhábái prove that Shámá, and those from whom Shámá holds, held the house as her tenant ; (3) when did Rádhábái's cause of action arise. No other issue is sought by either party.

“My decision on the issues is :—(1) The suit is governed by Act XIV. of 1859, Sec. 1., Cl. 12 ; (2) Rádhábái proved that

Karsandás, the father of Sundar, the husband of Shámá, held the house as her tenant; (3) Rádhábái's cause of action arose at Sundar's death, which occurred more than twelve years ago.

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“It was pleaded by the plaintiff below that she had placed the house in deposit with Karsandás, in such a manner as to bring it under Cl. 15 of Sec. 1. of Act XIV. of 1859, which fixes sixty years as the period of limitation within which a suit for immoveable property may be brought against ‘a depositary pawnee, or mortgagee.’ The Munsif held that the suit fell within that section, being possibly misled by the very insufficient rendering of the words ‘depositary pawnee,’ in the Maráthi translation of the Act, by the words ‘अमानत घेजारा,’ which words merely signify taker of a deposit, and convey no rendering of the word ‘pawnee.’ I must admit that I have some difficulty in understanding the force of the words ‘depositary pawnee’ in the Act, since it seems that the word ‘pawnee’ only would answer the same purpose. In Lord Holt’s famous judgment in *Coggs v. Bernard* (a), he divided bailments into six classes, the 1st being ‘*depositum*,’ or a naked bailment, and the 4th ‘*valium*,’ or pawn. It seems not unlikely that the framers of Act XIV. of 1859 may have had this classification in view when they framed the Act. I, therefore, take property in the possession of a ‘depositary pawnee’ to be property held as security for a debt, of which the depositary pawnee has the right of sale, but has only the right of appropriating to himself a sum, out of the proceeds of the sale, equal to the sum for which the property was security; and I understand the position of a depositary pawnee to differ from a mortgagee in regard only to the right of appropriating a part only, or the whole, of the proceeds of the property pledged. There is no evidence in this suit to show that there was any element either of pawn or mortgage in the arrangements under which Karsandás came into occupation of the house. I have, therefore, found that Cl. 15 of Sec. 1. does not apply, and that the suit is governed by Sec. 1.,

(a) 2 Ld. Raym. 909.

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Cl. 12, which assigns a limit of twelve years to suits for recovery of immoveable property.

"I concur with the Munsif in finding that the parol evidence of the witnesses Nos. 15, 16, 17, 18, 19, 20, 21, 28, 31, &c., is sufficiently strong to warrant the finding that Karsandás, some twenty-five years or more ago, entered into occupation of the house by permission of Rádhábái. The most difficult question in this case, and one which I feel no assurance of having solved correctly, is, when did Rádhábái's cause of action arise, that is to say, when did the possession of the house by the defendants become an adverse possession.

"The English Statute of Limitation is very much more minute in expression than Act XIV. of 1859; and the 7th section of the English statute (the Limitation Act of 1833, 3 and 4 William IV., c. 27, sec. 7) lays down that in the case of a tenant-at-will, the tenancy, if not determined sooner, determines at the expiration of a year. The Indian Act is silent on the subject. I have been in doubt as to whether I might take the one-year rule of the English statute as being a reasonable time, and apply it here; or whether, in the absence of any period fixed by law, I should consider the occupation permissive during the lifetime of the tenant, and only adverse after his death. I have adopted the latter course, but not without serious doubt. I am aware of no Indian precedent to guide me. It is consolatory to remember that the English statute, precise as it is, gave rise to an immense body of argument in the case of *Nepean v. Doe (b)*, and elicited a great number of contradictory opinions from eminent men on nearly every section.

"My doubt is not, whether I ought to hold the occupancy permissive after Karsandás's death (that is, during Sundar's and Shámá's occupancy), for it is very probable that reasons of a personal nature might cause a proprietor to acquiesce in the occupancy of one tenant, which would not operate in favour of the tenant's heir; nor does the parol agreement, which has been held established, point to a continuance of occupation to heirs. My doubt is whether, on the contrary,

I ought not to consider the occupation adverse from the date of the commencement of Karsandás's tenancy, or from some reasonable time, say a year, afterwards.

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"As it is shown that Karsandás died some sixteen years ago, the effect of my finding that possession since that event has been adverse possession, is to place the suit without the period of twelve years, laid down as the term within which a suit for immoveable property must be brought, by Cl. 12, Sec. 1. of Act XIV. of 1859.

"For the above reasons, I reverse the decree of the Munsif, and throw out the claim with all costs on the respondent.

"*Postscriptum.*—On thinking over this case, I arrived at the conclusion that there must be a misprint in the Act XIV. of 1859, in omitting a comma between 'depository' and 'pawnee,' and I now find, on reference to another edition of the Act, that such is the case, and that Sec. 1., Cl. 15, properly runs thus: 'To suits against a depository, pawnee, or mortgagee;' this reading is clear and comprehensible, which the other was not. The section is clearly applicable to a naked bailment of goods, to pawn, and to mortgage.

"The section does not apply to the delivery of the house to Karsandás by Rádhábái: since the transaction, as set forth in the plaint, was neither a naked bailment of property to be kept for the use of the bailor, nor pawn, nor mortgage, but a letting of the house, repairs to be made in lieu of rent."

The special appeal came on for hearing this day, before COVER, C.J., and NEWTON, J.

*Nánábhái Haridás*, for the appellant, argued that Cl. 15, Sec. 1. of Act XIV. of 1859 applied to this case; and not Cl. 12, Sec. 1., as held by the Judge; that the respondent's possession, being permissive, never became adverse.

*Bhairavanáth Mangesh*, for the respondent, contended that Cl. 15, Sec. 1. of Act XIV. of 1859 did not apply to this case. The depository in that clause meant the depository of moveable property. The term was not intended to apply to immoveable property. There is a clear finding that Karsandás

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was a tenant-at-will. His agreement to occupy the house in consideration of his making repairs constituted him such. That tenancy expired at his death, if not before. His son (Sundar) then became tenant by sufferance, and the law of limitation commenced to run against the special appellant: Addison on Contracts, p. 429. Cl. 12, Sec. 1. of Act XIV. of 1859 was applicable to this case. The lower court having distinctly held that since Karsandás' death, defendant's and Sundar's possession for sixteen years was adverse, the claim was barred.

*Cur. adv. vult.*

COUCH, C.J.:—This was a suit by the plaintiff to recover possession of a house which came to be her property, and which she alleged she lent to Karsandás sixteen years ago, on condition of his keeping it in proper repairs, and delivering it back to her on demand. The defendant denied the plaintiff's claim; and answered that the land was the self-acquired property of Karsandás, and pleaded the law of limitation.

The District Judge, in his judgment, adopts the statement about the manner in which the house was given over to Karsandás by the plaintiff, and the way in which he was to re-deliver it. It may, therefore, be assumed that that was a true statement of the transaction between the parties. The question then arises as to the law of limitation by which this case should be governed.

The Judge, in an elaborate judgment, fell into a mistake in construing Sec. 1., Cl. 15, of Act XIV. of 1859, regarding the words "depository" and "pawnee," which need not be further alluded to because he corrected it afterwards.

The question to be decided in this case really is, whether Sec. 1., Cl. 15, applies to it or not; that is to say, whether the term *depository* applies to immovable property. The term "depository," in its strictest sense, might apply to both; *i.e.*, there can be a deposit of immovable as well as of moveable property. In Domat's Civil Law there are several passages (c) which show that the term "depository" was so understood in the Civil Law.

(c) Domat, Civil Law, Secs. 684-693.

But in England and America the term "depository" applies to personal or moveable property only, and not to immoveable property. In Story on Bailments, Sec. 51, we find the following :—"In respect to the subject-matter, it (deposit) is in our law limited to personal or moveable property, and is inapplicable to real or immoveable property. The Civil law, and the French law (which follows it), confine the bailment to corporeal property; and do not admit its application to incorporeal property, such as choses in action and debts. But the title-deeds, or evidences of such debts and credits, *ipsa instrumentorum corpora*, may become the subject of such a bailment. The distinction is nice; but as the loss of the instrument will entitle the party to a recompense, adequate to the injury done him, it is unimportant in practice. In the common law, and in the Scotch law, debts, choses in action, and other instruments and evidences of debts, may become the subject of a deposit, properly so called." Also in Sec. 141, on the subject of Mandates :—"The contract of mandate, in our law, is (as the common definition imports) confined to mere personal property; and does not embrace, as it does in the civil law, real property. In general, the civil law makes few distinctions of rights and duties, and remedies between the one species of property and the other. In our law the distinctions are very broad and important in many respects. There is certainly no repugnance to any principle of our law, in considering a gratuitous contract to do an act in respect to real property to be a mandate. It may involve obligations precisely the same as it would in relation to personal property. But the definition of Sir William Jones, above stated, as well as the description of this sort of bailment by Lord Holt in *Coggs v. Bernard*, in which he constantly speaks of goods and chattels, abundantly shows the habit of our law to be, to confine bailments to personal property. In the Civil law a gratuitous engagement to clear out a ditch, or to cultivate or to sell a farm, belonging to the person giving the direction, would be deemed a mandate. In our law it would be treated merely as a special undertaking, without falling under that class of contracts." Then, speaking about gratuitous bailments,

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Sec. 223, he says:—"It follows from the definition above stated that several things are essential to constitute this contract. First, There must be a thing which is lent; and this, according to the civil law, may be either a thing moveable, as a horse, or an immoveable, as a house, or land, or goods, or even a thing incorporeal. But in our law the contract seems confined entirely to goods and chattels, or personal property, and it does not extend to real estate. This is sufficiently apparent from the definition of Lord Holt. It must be a thing lent in contradistinction to a thing deposited, or sold, or intrusted to another for the sole benefit or purposes of the owner."

So that the authorities show that, according to English Law, a depositary is a person charged with the possession of moveable property under certain conditions.

Now Act XIV. of 1859 must be construed with reference to the law of limitation in England, because this Act was intended to apply to cases tried in the Supreme Courts, governed by English law; and was to supersede the law of limitation that prevailed there. Bearing this in mind, we think Sec. 1., Cl. 15, cannot apply to this case.

The contract being of the nature of a tenancy at will, the next question is, when did the cause of action arise, under the circumstances of this case. The District Judge, in considering this point, turned his attention to the present law of limitation in England, and proceeded by analogy to consider that the period of limitation began one year after the tenancy had commenced, or at least from the death of the tenant; and so he held the plaintiff's claim barred. But he overlooked an important distinction between the present English law of limitation and Act XIV. of 1859. It would have been better if the Judge, instead of referring to the present statute of limitation, had referred to the 21 Jac. I., chap. 16.

There is no analogy between the Indian Act and the English law of limitation, under the 3 and 4 Will. IV., chap. 27, the language of which is quite different. The statute 21

Jac. I., chap. 16, is more like Sec. 1., Cl. 12, of Act XIV. of 1859; and the cases decided upon that Act are applicable to this case, such as *Doe v. Hall* (d) and *Doe v. Ferrers* (e). In the last case it was held that the possession of land after the termination of his lease by the lessee, though he paid no rent, was not adverse, so as to let in the operation of the statute of limitation.

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In consequence of the uncertain nature of a tenancy at will, the Legislature subsequently provided that the right of entry should accrue at the end of one year from the date of the lease. But there is no provision to that effect in the Indian law; and we are inclined to think that, looking to the habits of the people, and the usages and customs prevalent in this country, it would be wrong to introduce that provision of the English law here. Then, again, the rule of the English law, that a tenancy at will is determined by the death of either of the parties, may not be applicable to India; and if it is, the agreement in this case may have excluded its operation.

The most important questions in this case are—1st, whether it was the intention of the parties that the tenancy at will should continue after the death of Karsandás; and 2ndly, assuming that the tenancy was not originally intended to continue beyond the lifetime of Karsandás, did the plaintiff, after his death, do any act fairly leading to the presumption that she consented to the son (Sundar), or the defendant, continuing to occupy the house in the same manner as Karsandás had done.

We reverse the decree of the District Judge; and remand the case to have the above questions determined, with a direction to the Judge to pass a new decree accordingly; and we direct the costs to follow the final decision.

*Decree reversed and case remanded.*

(d) 2 D. and R. 38.

(e) 2 B. and P. 542.