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apart from him (see special appeal No. 307 of 1872, Printed Judgments of 1873, page 1). There is not any finding, by the District Judge, that the plaintiff has proved any such case. On the contrary, the District Judge appears to have believed that she voluntarily tore off her nuptial ornament, and returned it to her husband, and of her own accord left him. We reverse the decree of the District Judge, and restore that of the Subordinate Judge, except as to costs. We direct that the parties, respectively, bear their own costs of the suit and of both appeals.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

1877. November 22.

KA'CHUBHAI BIN GULA'BCHAND AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KRISHNA'BA'I KOM BA'BA'JI (ORIGINAL PLAINTIFF), RESPONDENT.*

Evidence—Act I. of 1872, *Section* 91—*Registration—Practice.*

A deed of partition was executed among three brothers C, N, and B, on the 19th March 1867, but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide these houses among the brothers. In a suit brought by C's widow for the recovery of the house which fell to C's share,

Held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and, therefore, secondary evidence of its contents was inadmissible under section 91 of the Indian Evidence Act.

A Judge is not permitted to make in appeal a different case for the appellant from that which he alleged for himself in the Court of first instance.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of Puna, reversing the decree of Dinanáth Atmárám Dalvi, Second Class Subordinate Judge at Junnar.

The facts of the case appear from the judgment of the High Court.

Special Appeal No. 211 of 1877.

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KA'CHUBHAI BIN GULA'BCHAND AND ANOTHER v. KRISHNA'BA'I KOM BA'BA'JI.

The *Honourable Ráv Sáheb Vishvnaáth Nárávan Mandlik* for the appellant.

Shamráv Vithal for the respondent.

WESTROPP, C. J. :—In this case the plaintiff Krishnábái seeks to eject the defendant Harakchand from a house which he purchased under a decree for sale thereof in a suit brought by the defendant Káchubhai on a mortgage, dated 27th August 1872, executed to him by Chimnáji, a brother of the plaintiff's deceased husband Bábáji. The plaintiff claimed title through Bábáji, to whom she alleged that, on a partition anterior to the mortgage, the house had been allotted. In support of that case she produced a deed of partition, dated the 19th March 1867, which appears to be a genuine instrument, but is unregistered. The Subordinate Judge and the District Judge concur in holding that deed to be inadmissible in evidence, and that secondary evidence of the partition is excluded by section 91 of the Indian Evidence Act (I. of 1872). The deed speaks of the bulk of the family property as having been divided two or three years previously to its date, but recites that there remained undivided three houses, and it then proceeds to state that those three houses were on that day (*i.e.*, the 19th March 1867) divided between the three brothers Chimnáji, Náráyan, and Bábáji, and that the house now in dispute was the one allotted to Bábáji. Although that deed most certainly would not exclude secondary evidence of the partition of the bulk of the family property, which it treated as having been divided two or three years previously, and cannot be regarded as disposing of or at all dealing with that portion of the family property, yet it did affect to dispose of the three houses, by way of partition, made on the day of its execution, and, therefore, under section 91 of the Indian Evidence Act, rendered secondary evidence of its contents inadmissible. So far, and in regarding the deed itself as inadmissible for want of registration, we concur with both the Subordinate Judge and the District Judge. The Subordinate Judge under these circumstances rightly, as we think, held that the plaintiff could not sustain her suit. But the District Judge, notwithstanding his ruling as to the inadmissibility of the deed of partition and of secondary evidence of it, pro-

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ceeded, as he said upon the evidence, to hold that the house was the house of Bábáji and not of Chimnáji, and, therefore, that the plaintiff was entitled to recover it. Having regard to his previous ruling that the partition-deed and secondary evidence of it were inadmissible, we must deem the District Judge as holding that, irrespectively of partition, Bábáji was entitled to the house. That, however, was making a totally different case for the plaintiff from that which she alleged for herself. She asserted a title founded on partition. The Judge conjectured and found a title irrespective of partition. This, we think, he was not at liberty to do. His judgment seems to have been a benevolent attempt on his part to discover a path for the bereaved plaintiff out of the provisions of section 91 of the Indian Evidence Act, and to relieve her from the consequences of the neglect of her husband to register the deed. We must reverse his decree, and restore that of the Subordinate Judge. The plaintiff must pay the costs of the suit and of the regular appeal. The parties, respectively, must bear their own costs of the special appeal.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Pinhey.

1878. June 11.

KALO NILKANTH (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMIBA'I KOM KALO NILKANTH (ORIGINAL PLAINTIFF), RESPONDENT.*

Suit for maintenance—Limitation—Act XIV. of 1859, Section 1, Clauses 14 and 16.

The provision of the Limitation Act of 1859, applicable to suits brought under that Act for maintenance not chargeable upon any estate, is clause 16 of section 1, which gives six years from the accruer of the cause of action. The cause of action in such cases does not arise until there has been a demand and refusal of maintenace.

THIS was a second appeal from the decision of W. Sandwith, District Judge of Dharwar, affirming the decree of A. M. Cantem, Subordinate Judge of the same place.

In appeal, the District Judge, among others, framed two issues, viz., whether plaintiff ever lived with defendant after coming to the age of puberty, and whether the claim for maintenance was

* Second Appeal, No. 253 of 1877.