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

NARANJI BHIKHABAI AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS, *v.* DIPA UMED AND OTHERS (ORIGINAL DEFENDANT), RESPONDENTS.*

Evidence—Former Decree and Judgment—Indian Evidence Act (I of 1872) ss. 13, 40, 41, 42 & 43—Onus Probandi.

Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent, although they are not conclusive under the Indian Evidence Act (I of 1872) as they were before that Act came into operation, are yet admissible in evidence under s. 13 of the act, even if the parties in the former suit be entire strangers. Where the parties are the same, or representatives of those in the former suit, such judgments and decrees may be evidence so nearly conclusive as, when produced by the party in whose favor they are to shift the burden of proof from him to his opponent.

Semble.— Under s. 13 of the Civil Procedure Code (Act X of 1877) the law is now the same as it was under Act VIII of 1859 prior to the passing of the Indian Evidence Act.

THIS was a special appeal from the decision of H. Birdwood, Judge of Surat, reversing the decree of Khan Bahadur Kharsedji Rustamji, Subordinate Judge of Surat.

The plaintiffs sued to recover *chirda*† allowance for six years. The defendants, among other things, pleaded non-indebtedness The Subordinate Judge held the claims proved, and decreed in favour the plaintiffs. The District Judge reversed that decree. He said :—

It seems that the plaintiffs in this case mainly rely on former Judgements and decree in their favour awarding them arrears of the *hak* in dispute. I do not think they are conclusive as to the plaintiffs right, because in cases of this kind, where the right to a *hak* exists, a fresh cause of action would be given annually on failure to pay the amount due. By s. 40 of the Evidence Act, the existence of a Judgment, which by law prevents a Court from taking cognizance of a suit, is a relevant fact when the question

* Special Appeal, No. 45 of 1877.

† An allowance paid to the agents of *Girásiyás* when they used to recover their *girás* direct. The allowance is continued by the British Government notwithstanding that the *girás* is now paid from the public treasury.

is whether the Court ought to take cognizance of the suit. Under s. 2 of Act VIII of 1859 a civil Court cannot take cognizance of a suit brought on a cause of action which has been hard by a competent Court in a former suit between the same parties, or between parties under whom they claim. When the causes of action, therefore, in two suits are different, a judgment or decree in one suit is no bar to the hearing of the other. The decrees, relied on by the plaintiffs, do not, therefore, prevent the defendant from re-opening the question of title in the present case. * * * * The former decisions in the plaintiffs' favour are not, I think, sufficient to warrant a finding that the plaintiffs are entitled to a continuance of the *hak*, of which arrears have in former years been awarded them. There seems to have been no decree declaratory of their right passed in any former suit. In decreeing now in their favour the Subordinate Judge seem to havo overlooked the judgment of the High Court in *The Collector of Surat* v. *Dáji Jogi*.(1) it is not seriously contended that the *chirda haks*, referred to in that case, are different from the *hak* in the present suit. The Subordinate Judge has found that the *hak* was payble by *Gira siyás* for sevice rendered. That service is admittedly not rendered now. The payments made to the holders of *chirda*, after the cessation of the service, were, therefore, voluntary, and the principle of the High Court's decisions applies to the present case. The decree of the lower Court is reversed, and the claim is rejected."

Nagindás Tulsidás for the appellants.

Gokuldás Khándás for the respondents.

WESTROPP, C.J.—It appears that, on at least three previous occasions, the right of the plaintiffs to the *chirda hak* (for six years' arrears of which they are now suing) has been recognized in a Court of Justice (see exhibit 10, which is a decree dated the 22nd June 1867, and exhibit 22, the judgment in that suit; exhibit 30, the judgment given on the 30th December 1863 in another suit, and the judgment in Appeal No. 27 of 1864, dated the 11th November 1864—all of which proceedings were between the present parties or those whom they represent). Under the

(1) 8 Bom. H. C. Rep. 166 A.C.J.

law as it stood before the Indian Evidence Act (I of 1872) came into force, those decrees were conclusive, inasmuch as the right to the *chirda hak* was established by them as the foundation on which the arrears claimed in the suits in which those decrees were made, were recovered by the plaintiffs in those suits—*Soorjomonee Dayee* v. *Sudanund Mohapatter*,(1) *Krishna Behari Ray* v. *Brojeswari Chowdranee*.(2) If not conclusive since the Indian Evidence Act (I of 1872) came into force, those decisions are, at least, admissible in evidence under s. 13 of that enactment for the purpose of showing that the right has been not only asserted by the claimants, but recognized by the tribunals of the country on several occasions—*Neamut Ali* v. *Gooroo Doss*,(3) *Guttee Koiburto* v. *Bhukut Koiburto*.(4) As pointed out by Sir R. Couch, C.J., in the former of the two Calcutta cases, to which we have now referred, the words contained in s. 43—"unless the existence of the judgment is relevant under some other provision of the Act"—introduce another section of the Act, namely, s. 13, besides those sections (40, 41, 42 and 43) which specially deal with judgments, orders, and decrees. Referring to s. 13 he said: "The word 'transaction' is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not as conclusive, but as of such weight as the Court may think they ought to have. And in this section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used. Of course the value of it will be very different where it was given in a suit to which the person against whom it is used was not a party, and had no opportunity of contesting the matter, and where he was party to the suit, and had the opportunity of producing any evidence he might think fit. Unless the Indian Evidence Act has excluded judgments and decrees which had previously been considered as very good evidence, and which are, indeed, in many cases almost, if not quite, conclusive, it is clear that the decisions referred to were admissible in this case," &c. In the present case the decree and judgments which have been given in evidence are, as we have observed, either between the same parties as those

(1) 12 Beng. L. R. 304 P. C.
(2) L. R. 2 Ind. Ap. 283.
(3) 22 Calc. W. R. 365 Civ. Rul.
(4) *Ibid.* 457.

in the present suit, or between those under whom they respectively claim, and one of them is founded on an admission made by Umed Kasra, father of the present defendants. The District Judge did not absolutely reject them, but he appears to have failed to observe that they are evidence so nearly conclusive as, when produced, to have shifted the burden of proof from the plaintiffs to the defendants. The latter ought, we think, in order to have escaped from the effect of the decree and judgments, to have given proof of some subsequent alteration in the rights of the parties: as, for instance, of an assignment or release by the plaintiffs of their rights, or of some other circumstance which divested them of those rights, or the defendants of their liability—as, for example, an alienation, by the latter, of the property in respect of which the *chirda haks* were payable. Having regard to the decree and judgments in evidence, we do not think that the case mentioned by the District Judge, (*The Collector of Surat* v. *Daji Joji*,(1)) is applicable in the present instance.

We may observe that, in cases falling within the new Civil Procedure Code (X of 1877), the 13th section of that enactment would appear to restore the law to the same state that it was decided by the Privy Council (in cases unaffected by the Indian Evidence Act) to be under the former Civil Procedure Code of 1859.

It being admitted by the defendants' pleader that there is not any evidence showing a variation of the rights of the parties as they stood under the decree and judgments in evidence on behalf of the plaintiffs, we reverse the decree of the District Judge and restore that of the Subordinate Judge, and direct the defendants to pay to the plaintiffs the costs of the suit and of both appeals.

(1) 8 Bom. H. C. Rep. 166, A. C. J.