

5 B. 208.

ORIGINAL CIVIL.

Before Mr. Justice West.

1880

AUG. 7.

ORIGINAL
CIVIL.

5 B. 208.

VIRJIVANDAS MADHAVDAS AND NAROTAMDAS MADHAVDAS
(Plaintiffs) v. MAHOMED ALI KHAN, IBRAHIM KHAN, FAKRU
MIYA, ANTONIO RODRIGUES AND OTHERS (Defendants).*

[27th, 29th, 30th, and 31st July and 2nd, 3rd, 5th, and 7th August, 1880.]

Ejection—Possession—Suit to recover possession under the Specific Relief Act (I of 1877), s. 9—Proper parties in such suit—Mis-statement in pleading of area of land sued for—Interest in land—Disclaimer—Estoppel.

The plaintiffs sued, under s. 9 of the Specific Relief Act (I of 1877) to recover possession of certain lands which they alleged had been in their possession since 1856. They alleged that while retaining possession of the said land through caretakers appointed by them, they had been in the habit of yearly selling the grass of the land to purchasers who themselves cut the grass so purchased; that in 1878 the grass of the land for the ensuing year was sold to T; that in the month of August, 1879, the defendants forcibly dispossessed the plaintiffs of said land and prevented them and their servants and T from entering the same. Defendant No. 2 denied the dispossession, and disclaimed any interest in the land. Defendants Nos. 1 and 3 denied that the land in question belonged to the plaintiffs, and alleged that it was the property of A, of whom defendant No. 1 was manager, and No. 3 the lessee of the said land. They also alleged that the plaintiffs had tried to take forcible possession of the said land, and that defendant No. 1, acting on A's behalf, prevented them. They submitted that A was a necessary party to the suit.

Held that the three defendants were properly made parties to the suit, and that A was not a necessary party. Defendant No. 1 (the lessee) had the physical [209] occupation of the land sued for; but all three defendants not having made any declaration, in taking possession, that it was taken for one or two of their number, acquired it jointly, and handed on a derivative possession to the actual occupant, which as against third parties ranked as their own. If it was properly assumed, they all had a right to defend it; if not, they might all be called on for restitution. As to A, he was not actually in possession, and had taken no personal part in the dispossession. He was said to be owner, but that did not imply that he committed the alleged acts of defendants, or insisted on his ownership. As he had not the physical possession of the land, it could not be assumed that he had the jural possession merely on the assertion of the defendants. He, therefore, having done no palpable wrong, was not a necessary party.

Held, also, that defendant No. 2 was properly made a defendant, and that, in case the dispossession should be established, he should be retained as a defendant notwithstanding his disclaimer. It was possible that No. 3 held the land on terms beneficial to No. 2, and the disclaimer in the present suit would not estop No. 2 from enforcing these terms in a subsequent suit against No. 3.

Where, under a contract between A and B, an exclusive occupation of immovable property is given to A, he is the proper plaintiff in a suit for possession brought under s. 9 of the Specific Relief Act (I of 1877). If B desires to sue immediately on the possessory right, he should sue in A's name, though for an injury to the reversion he (B) may properly sue in his own name.

The intention of the Specific Relief Act (I of 1877), s. 9, is not to be frustrated by any private arrangement under which the ejector has acted, or by which he may consent to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder he is the dispossessor; possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject, as his, to the result of proceedings taken within the prescribed six months.

A person who has been ejected from his property, in suing to recover it under s. 9 of the Specific Relief Act (I of 1877), may sue the actual ejector or the person under whose orders or by whose authority the actual ejector has acted, or he

* Suit No. 698 of 1879.

1880

AUG. 7.

ORIGINAL

CIVIL.

5 B. 208.

may sue both ; but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant ; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer. The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where that authority is shown.

In a suit for ejection a mere mis-statement of the area of the land sought to be recovered ought not to be regarded as anything more than a "false demonstration." If the space is precisely defined by other description, the statement of its measurement in square yards may be treated as surplusage, and of no consequence.

[R., 15 B. 635 ; 12 C.P.L.R. 52 ; 16 C.P.L.R. 154 ; 7 Ind. Cas. 574 (575) ; 8 Ind. Cas. 941 (942) = 4 S.L.R. 184.]

PLAINTIFFS sued, under s. 9 of the Specific Relief Act (I of 1877), to recover possession of a piece of land, comprising ten [210] thousand square yards, situated at Warli, in the island of Bombay, and numbered 3228 in the Revenue Survey map.

The plaint stated that the land had been in the possession of the plaintiffs' family for more than fifty years, and that by an order made in a partition suit instituted between the members of the plaintiffs' family it had been sold and had been purchased by the plaintiffs in the year 1847 ; that the said land was duly conveyed to the plaintiffs by a deed dated 13th March, 1856, and had ever since been in their possession ; that they yearly sold the grass of the land to purchasers, who themselves cut the grass so purchased by them, the land remaining in the plaintiffs' possession through caretakers appointed by them, and that in 1878 the grass of the land for the ensuing year was sold to one Tukaram Rowji ; that in the month of August, 1879, the defendants forcibly dispossessed the plaintiffs of the said land, and prevented them and their servants and Tukaram Rowji from entering the same.

The plaintiffs prayed that the defendants might be ordered, under the provisions of Chapter I of the Specific Relief Act (I of 1877), to deliver up possession of the said land to the plaintiffs.

Defendants Nos. 1 and 3 in their written statement denied that they had forcibly dispossessed the plaintiffs of any land belonging to them or in their possession. They alleged that the piece of land mentioned in the plaint as numbered 3228 in the Revenue Survey map contained 16,371 square yards, of which only 8,900 belonged to the plaintiffs, and the remainder was the property of one Abdulla to whom it had been conveyed by his father Ally Saheb in 1871. Ally Saheb had acquired the said land in 1848, and since that year he and Abdulla had been in possession, and had let the land for grazing. The written statement alleged that defendant No. 3 was lessee of the said land from Abdulla, and defendant No. 1 was Abdulla's manager ; that on the 5th August, 1879, the plaintiffs tried to take forcible possession of the said land, and to cut the grass thereon, and that defendant No. 1, acting on Abdulla's behalf, prevented them. The written statement submitted that Abdulla was a necessary party to the suit.

The second defendant denied the dispossession, and disclaimed all interest in the land.

[211] The following issues were raised :—

1. Whether the defendants Mahomed Ali Khan (defendant No. 1) and Antonio Rodrigues (defendant No. 3) are proper parties to this suit.

2. Whether the said Abdulla, referred to in the written statement, is a necessary party to this suit.

3. Whether Fakru Miya (defendant No. 2) is a proper party to the suit.

4. Whether the defendants, or either of them, at the time specified in the plaint dispossessed the plaintiffs of the land or any portion of the land mentioned in the plaint.

5. Whether defendant, or any of them, were in possession of the said land, or any portion thereof, at the time when the plaint was filed.

The Hon. *J. Marriott* (Advocate-General) and *Farran*, for plaintiffs.
Lang and *Inverarity*, for defendants.

The following authorities were referred to:—*Cole on Ejectment*, p. 67; *Dadabhai Narsidas v. The Sub-Collector of Broach* (1); *Gulliver v. Swift* (2); *Deo v. Stanton* (3); *Mayhew v. Suttle* (4); *Bertie v. Beaumont* (5).

JUDGMENT.

WEST, J.—The first three issues in this case may conveniently be dealt with together. No question has been raised as to the competency of this suit to the plaintiffs. Their contract with Tukaram might, according to the most generally received notions, be deemed to have conferred on him an interest in the land which according to the evidence for the plaintiffs, he proceeded to realize by entering on an exclusive possession. The older cases under the English law would in such circumstances restrict the right of suit resting on possession, to the contractor regarded as a tenant; *Vin. Abr. Trespass (H.) 2, 5*; *Rex v. Inhabitants of Under Barrow* (6); *Burt v. Moore* (7). In *Crosby v. Wadsworth* (8) the purchaser of a growing crop of hay was held to acquire an interest in [212] the land and an exclusive right on which he could have maintained an action of trespass, but for the discharge or rescission of the contract while still executory on the part of the vendor. Other cases are mentioned in *Sugden's Vendors and Purchasers*, ch. 4, s. 2 (9), and the action of ejectment is specially the remedy of a lessee. It might seem more proper, therefore, that in this case Tukaram should have been the plaintiff, and that the owners should if they desired to sue immediately on the possessory right, have made use of his name (*Baxter v. Taylor* (10)), though for an injury to their reversion they might properly sue in their own names. In *Jones v. Flint* (11), however, it was said that the nature of the interest conferred, depends on "the consideration whether to effectuate the intentions of the parties it be necessary to give the vendee an interest in the land." In *Harper v. Charlesworth* (12) Bayley, J., says that "a license to cut and take grass does not vest the possession in the licensee. He takes the grass as representative of the licensor." And in an Irish case it was thought that an interest in land would not be created when the intention was that the contractor should have only the grazing *Mulligan v. Adams* (13).

Circumstances are set forth in the plaint which might limit Tukaram's right in this way, and prevent his being really the possessor of the field. A mere sale of the grass of a field, with permission to enter and cut it during the monsoon, has been held, I think, in some of our cases not to convey to the vendee an interest in immovable property under the

(1) 7 B.H.C.R., A.C.J. 82.

(2) 2 Ld. Keny. 511.

(3) 2 B. & A. 371.

(4) 4 E. & B. 347.

(5) 16 East 33.

(6) 8 Burr. 1324.

(7) 5 T.R. 329.

(8) 6 East 602.

(9) 13th ed., p. 100.

(10) 4 B. & Ad. 72.

(11) 10 Ad. & E. 753.

(12) 4 B. & C. 584.

(13) 8 Irish L. R. 132.

1880

AUG. 7.

ORIGINAL

CIVIL.

5 B. 208.

1880
AUG. 7.
ORIGINAL
CIVIL.
§ B. 208.

Registration Act, or a possession of the land whereon the grass is growing, and here the plaintiffs aver that they kept possession by their own caretakers; but where an exclusive occupation is given, it should be borne in mind that the possession is what a suit like the present is intended to guard, and that the possessor is the proper actor. He may sue and, therefore, should sue in order that the defendant may not be exposed to two suits for the same cause.

The plaintiffs, then, as owners of the land in dispute complain that they were forcibly deprived of possession of it by the defendants [213] on the 5th August, 1879. The defendant Fakru Miya denies that he took any part in dispossessing the plaintiffs, and disclaims all rights in the land. Of the other two defendants, Mahomed Ali Khan is, he says, the manager of Abdulla Saheb Khor; the other Rodrigues is the lessee, under Abdulla, of a portion of the field (survey No. 3223) claimed by the plaintiffs. In their joint statement they say that this field contains, not 10,000 square yards as alleged by plaintiffs, but 16,371 square yards, of which 8,973, belonging to the plaintiffs, are in their possession, and have not been trespassed on. The remainder of the field, they urge, belongs to Abdulla, and has long been in his possession. There has been no dispossession of the plaintiffs, though an attempt on their behalf to take possession of Abdulla's portion was defeated.

The plaint, by setting forth survey No. 3228 with its boundaries as the land claimed, makes it perfectly clear what the plaintiffs sought; but as it is described as containing about 10,000 square yards it has been contended that no more can in any case be recovered out of the survey No. 3228, leaving the defendants, if in possession, still in possession of the remainder. From the notes to Savil's Case (1) in Thomas and Fraser's edition of Coke's Reports, it seems that this question was formerly much debated in the English Courts. It was sometimes held that a close, though named, must be demanded by the number of acres (2); but the opinion seems to have prevailed that a description by name, even with a mis-statement of the area, would suffice, as on that the sheriff could give possession (3). Where, as in the present case, all possibility of errors as to the plaintiffs' claim is shut out; a mere mis-statement of the area ought not to be regarded as anything more than a "false demonstration," which cannot reasonably be applied by way of limitation. The space being precisely defined by other description the statement of its measurement in square yards may be treated, as surplusage and of no consequence.

[214] Of this land the plaintiffs say they were forcibly dispossessed by the defendants. The first defendant, Mahomed, says he is manager or steward for Abdulla; but he does not set forth any authority given to him by Abdulla to dispossess the plaintiffs of lands held by them, and asserted by him in doing so. His allegation is that he did not, in fact, dispossess them of anything at all. They say, he did, and if he did, he is primarily liable, albeit some one else may have profited by his act. Rodrigues, too, denies any dispossession. He holds part of the land claimed as lessee from Abdulla. He, then, is in possession and the plaintiffs may on that ground properly sue him supposing, as we must for the present do, that they were actually dispossessed. As to Fakru Miya, who is a

(1) 6 Rep.; page 105 (Part XI, 55 a).

(2) *Owen Joans v. Elizabeth Hoel*, Croke. Eliz. 285; *Jordan v. Cleabourne*, *Ibid* 339.

(3) *Wykes v. Sparrow*, Cro. Jac. 435; *Royston v. Eccleston*, *Ibid*, 654; *Goodtittle v. Alker*, 1 Burr. 133; and comp. 1 Wms., s. 347. (e) 5.

brother of Abdulla, it is said that he took part in the act of dispossession along with Mahomed Ali and Rodrigues. If he did he is primarily answerable for it. When three persons join in ousting a fourth, they all by that act become co-possessors of the property from which they have expelled him (1). He has no means of knowing which of the three is principal and which are assistants, so as to acquire possession not for themselves but for their employer. If we take the case of a single person ejecting another, and a suit brought to recover possession, it is not to be contended that the intention of the Specific Relief Act (I of 1887), s. 9, may be frustrated by any private arrangement under which the ejector has acted, or consents to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder he is the dispossessor; possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject as his to the result of proceedings taken within the prescribed six months. A declaration, even made by the ejector at the time of ouster, may not affect the case (2). He may name some person beyond the reach of the Court's process; or some one who, in fact, has given him no authority. The person ejected is not compelled to take the risk of suing such a defendant, much less of abandoning his suit against the immediate trespasser. If, indeed, he is satisfied that the active agent in ejecting him has been impelled by some one else, he may sue the latter. He may sue both: "*unum propter [215] factum alterum propter auctoritatem*;" but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer (3). The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where that authority is shown. It might, no doubt, fail even in a case of obvious wrong-doing, but for the principle that to the injury of a true-possessor with right, or colour of right (4), the employer could not take the law into his own hands, or give any real authority to his agent. The latter taking possession illegally, does not hold that possession legally for the principal who has impelled him to violence. Such a transaction recognized in that character, generates no legal obligation except that of restitution and recompense to the person ousted, none whatever between the co-trespassers (5). There is, then already a *lis mota* between them and the person dispossessed, and the principal taking possession with notice of what has been done, takes subject to any suit that may be brought in consequence of it. If he is conspicuously in actual possession of the land he should be made a party defendant, as having by that very circumstance ratified the dispossession, and to prevent any repudiation of the agency with a view to defeat a decree against the agent; but the plaintiff is not to be deprived of his remedy by a shuffling about of the apparent possession from one person to another, all deriving their occupation from the same defective source. The doctrine *omnisrati habitio rethabitur* applies

(1) Co. Lit. 160, b.

(2) Comp. Co. Lit. 476 *ad fin.*(3) See (Hilliard on Torts, I, 588, 597); 4 B. & Cr. 485 *per* Bayley, J.(4) See *per* Archibald, J., in *Capa v. Scott*, L. R. 9 Q. B. 269 at p. 277.

(5) Ortolan 1st, III, s. 1187 Ind. Contract Act, ss. 10, 23, 188, 185 Evans's Pothier I, 25: II, 10, 11. Domat C. L., Pt. I, Bk. tit 1, sec. 5 Puff L. N. 3, 7, 10.

1880

AUG. 7.

ORIGINAL
CIVIL.

5 B. 208.

1880
AUG. 7.
ORIGINAL
CIVIL.
S B. 208.

specially to this class of cases, and he who takes the advantage must bear or share the responsibility. Possession being the right in question, all who take it within the prescribed time take it subject to the special suit. If the possession [216] is held against the original dispossessor, the former holder cannot be prejudiced by a possession obtained as against him otherwise than in due course of law. The person in possession must, indeed, be made a defendant in order to prevent collusion between the other parties to his detriment, but the right of action in the original possessor is not thereby affected. If it could operate in this way we should soon see almost every wrongful or questionable dispossession followed by another ostensibly adverse, but really intended to guard it.

It follows from these considerations that all the three defendants have properly been made parties to this suit, and that the alleged owner of the ground in dispute, Abdulla Saheb, is not a necessary party. Rodrigues, who according to the plaint took part in the ejection, has the physical detention or occupation of part of the land sued for. He may hold it solely for himself or for one or both of those who joined him in taking possession (1). If they were omitted as defendants it might turn out that the possession which they acquired had not been abandoned, as Rodrigues might be only a bailiff or a tenant in common with them. All three not having made any declaration, in taking possession, that it was taken for one or two of their number acquired it jointly (2), and have handed on a derivative possession to the actual occupant, which as against third parties ranks as their own. If it was properly assumed, they all have a right to defend it; if not, they may all be called on for restitution (3). As to Abdulla, on the other hand, he is not ostensibly in possession. He has taken no personal part in the dispossession. He is said to be owner, but this does not necessarily imply that he authorized the acts of the defendants as alleged in the plaint (4); or even that he insists on the ownership thus ascribed to him. As he has not the physical possession of the land, it cannot be assumed that he [217] has the jural possession merely on the assertion of the defendants that this is so. He, therefore, having done no palpable wrong, is not a necessary party. Those who, it is alleged, have done the wrong, cannot escape liability by putting his name forward; nor can he, if he has really employed them, gain by their act without hazard from their liability.

The Roman interdict "de vi" to which the summary suit under Act XIV of 1859, s. 15, and under the Specific Relief Act (I of 1877, s. 9) has sometimes been assimilated (5), had ordinarily to be sought against the person himself who had exercised the violence. If this person had in his turn been dispossessed, the remedy was available against the second equally as against the first dispossessor (6). The person who had prompted the violence was equally subject to the interdict as the active agent (7). In the case of a dispossession without authority by servants or dependents the master was answerable for all that had come to him by their misconduct,—a rule, which, Savigny says, is merely a particular

(1) See Co. Lit. 186 a.

(2) See Co. Lit. 180 b, s. 278.

(3) See Grotius de J. Ber. P. 2, 17; 6, 7, 11.

(4) *Lord Bolingbroke v. Local Board of Swindon*, L. R. 9 C. P. 575. See per Maule, J. in *Mitchell v. Craswellor*, 22 L. T. C. P. 100, *Wilson v. Barker*, Nev. & Man, 409; = 4 B. & Ad. 614. *Allen v. London and S. W. Ry. Co.*, L. R. 6 Q. B. 65 at p. 72.

(5) See *Dadabhan Narsiddas v. The Sub-Collector of Broach*, 7 B.H.C.R. A.C.J. 82.

(6) *Poste's Gaius*, 573; comp. *Puff L. R.* 4, 13, 3.

(7) *Savigny Possession*, s. 33.

case of a general principle of wide application. The possession thus guarded was any possession at all in the case of personal violence having been used; in other cases it must have been evident, peaceable and of right (1). The English Statutes against forcible entry embody, so far as they extend, a similar set of ideas.

In the English law the corresponding remedy by Assise of Novel Disseisin seems to have been instituted by the Assise of Northampton in 1176. Bracton describes it as a relief "*per summariam cognitionem absque magna juris solemnitate*" (2), and his whole discussion of the topic shows very clearly the Roman source of this branch of the law. The right of suit did not depend on title, merely on possession, which, however, must have been a true possession, not a mere detention or occupation on behalf of another (3). The action lay against both the disseisor himself and against the instigator of his act, or him who took the [218] benefit of it (4). It lay also against successive holders of the property, whether by transfer from the disseisor or by dispossessing him (5). A prompt demand was requisite in order to obtain a complete remedy against such persons, as, failing this, they were liable only to make restitution (6) without other amends. Should a disseisin be effected in the name of some person as principal, the immediate disseisors were responsible as principals until the employer adopted or renounced their act (7). If the employer was out of the way, the servants were to be treated as principals, the result binding the absent employer, unless on his return he could get it set aside.

We have here not only analogies but rules, the reasonableness of which is immediately recognized and capable of direct application to the cases arising under the Specific Relief Act (I of 1877). [219] The distinctions between disseisin and dispossession (8) are not, for the present purpose, of importance. The action of ejectment was of later growth, and was

(1) Savigny Poss. Loc. Cit.

(2) Bract. de Leg. Lib. III, fol. 164.

(3) Co. Lit. 206.

(4) *Competit enim assisa..... tam contra ipsum qui auctoritatem præbet de jectibus præcepto concilio et auxilio inductivo quam contra ipsum qui disseysinam ratam habet ex post facto..... Item incidunt in assisam non solum unus sed plures, quidam principaliter et quidam secundario. Item... non solum ille qui facit nomine alieno verum etiam ille, cujus nomine fit, dum tamen factum suorum et injuriam advocaverit et illam facit esse suam.*

(5) *Item non solum ille qui facit et præcipit (vi prædictum est) verum ille qui statim et recenter ingreditur seysinam post disseysinam factam..... et hoc sive ingreditur de voluntate disseysitoris per donationem, vel per aliam translationem sive contra voluntatem per disseysinam et hoc ante impetrationem quando cunque.— Bract. Lib. III., fol. 171.*

(6) *Quia ad quemcunque res pervenerit post impetrationem omnes per diligentem impetrationem et prosecutionem effecta sit litigiosa, ille qui eam sic receperit (quamvis in brevi non nominetur) illam restituere cogetur..... Et si quidam ante impetrationem per longum intervallum feoffatus fuerit, vel disseysinam fecerit de re spoliata post intervallum et si in brevi non nominetur respondere non tenetur nisi velit.— Bracton, Lib. III. fol. 171.*

(7) *Item facit quis disseysinam non nomine proprio (vi prædictum est) sed nomine alieno, ut si procurator, servus, vel familia nomine dominorum focerit disseysinam ipsi semper erunt primi et principales, quousque domini eorum factum eorum advocaverint et disseysinam vel deadvocaverint..... Si autem..... deadvocaverint... adhuc tenentur dum tamen si presentes sicut et se gratis posuerint in assisam..... Si autem in remotis agant domini..... propter hoc... remanebit assisa in odium disseysitorum et remanebunt disseysitores primi et principales ita quod si assisa faciat pro eis remaneant domi sui in seysina de facto suorum. Si autem contra eos, recuperabit querens et domino cum redierit si factum eorum advocaverit incidit in paenam disseysinae cum suis et si viderit sibi expedire agat de convictione.— Bract. de Leg. 204.*

(8) Bract de Leg f 160; Co Lit 153 B; 1 Burr. R. 109

1880
AUG. 7.
ORIGINAL
CIVIL
5 B. 208.

1880
AUG. 7.
—
ORIGINAL
CIVIL.
—
S. B. 208.

developed in a very artificial form. Being of the nature of trespass, it was once held that it would not lie by A, ejected by B, against C, who had in turn ejected B (1); but now the question is merely of the right to possess as against the actual possession (2). A mere servant, such as Mahomed Ali asserts himself in this case to be, cannot, it is said, be made a defendant, because he is not really the "person in possession" but if, like Mahomed Ali, "he appears to the writ and defends the action, it will be no defence that he occupied merely as servant of another person" *Doe v. Stradling* (3), *Doe v. Stanton* (4). In *Doe v. Stanton*, Bayley, J., says: "It is sufficient to subject a party to this action that he has the visible occupation of the premises" (5) though in fact, a servant, and the necessity for this is stated in the old case of *Wilson v. Weddell* (6). There it was adjudged that a servant residing with his mistress in the tenements was a sufficient trespasser and ejector to be a proper defendant. He was, it was said, (as against the plaintiff) a co-occupant. The real owner might, it was held, bring his action against either master or servant, (both being wrong-doers), and unless this were so, the master might avoid process (while retaining possession) by keeping out of the way. No owner has in this case come forward to relieve Mahomed Ali from his responsibility.

The principles, then, of both the Roman and the English law, apart from the specific provisions of particular enactments, justify, in a case like the present, a suit against each of the persons concerned in the ouster and in maintaining the alleged wrongful possession thus acquired, whether immediately or mediately, from the plaintiff. Fakru Miya now disclaims any interest in the land in dispute; but, according to the plaintiff, he took part in the dispossession, and he has not effected a re-instatement. Supposing [220] Rodrigues holds on terms beneficial to him he would not be bound as by an estoppel, in a subsequent suit against Rodrigues resting on an averment contrary to his present admission (7). It is essential, therefore, to the protection of the plaintiff, and not unjust to Fakru Miya, should the dispossession be established that Fakru Miya should be made a defendant and retained as a defendant, notwithstanding his disclaimer. A derivative possession conferred privately on some third party could not be affected by such a disclaimer. The suit calls on any such party to come forward and maintain his right, if right he has.

On the first three issues I find for the plaintiff.

As to the possession of the land in dispute, there is an irreconcilable contradiction between the evidence for the plaintiff and that given for the defendants. The oral testimony is on each side supplemented by documentary indications of title, and by entries in the account books of the plaintiff and of Abdulla Saheb Khan, which, if they really relate to one and the same area, necessarily imply a gross fabrication of evidence on one side or the other. [His Lordship then discussed the evidence and continued:—]

The last contractor under Mr. Virjivandas is Tukaram, who took the field last year, and whose exclusion is the ground of complaint. Tukaram's statement taken literally would deprive the present plaintiff of his right to sue by showing that Tukaram himself had possession, and was alone, therefore, in a position to be dispossessed. This may be the reason why Tukaram's sepoy or caretaker was not called; but, as the evidence stands,

(1) 9 Vin. Abr. 337.

(2) Cole on Ejectment, p. 82; Stat. 15 & 16 Vic., cap 76, ss. 168, 170.

(3) 2 Starkie 187.

(4) 2 R & A. 371=1 Chit. Rep. 113. (5) 2 B & A. at p. 372.]

(6) Yelv. 144.

(7) *Ram. Surin Singh v. Mt. Fran Peary*, 13 M. I. A. 551.

1880

Aug. 7.

ORIGINAL
CIVIL.

5 B. 208.

Tukaram's taking of possession in the month of Jesht seems to have gone so far only as to set his sepy to watch the grass. He may thus have acquired possession as against his lessor, with whose assent he made a kind of entry, but there was in what he ascribes no open assumption of an exclusive occupation such as to deprive of his possession a stranger who previously had it. If Virjivandas was in possession of the whole field in Jesht, Tukaram may have then taken possession of it for him, or assumed it for himself, but he did nothing apparently to expel any one else. On one day in Shravan he says his father and his servant brought home two [221] bundles of grass cut in the field. The place where they cut the grass, ought to have been proved by those persons themselves. Tukaram could not prove it on their mere report. Nor would the mere cutting of a couple of bundles of grass constitute a taking of possession where there was no possession before: *Ex parte Fletcher* (1), *Lord Townsend v. Ash* (2). The real possessor may have known nothing about it, and no right is gained by a bare trespass. As to what occurred the next day and afterwards, the accounts of Narayan and Tukaram do not seem reconcilable. Tukaram reported to Narayan on receiving certain information from his sepy who has not been produced. Tukaram says he went then with Narayan to the field by which the defendants were, and the dispute at once began. Narayan says Tukaram's complaint was made on the 5th August; that on the 6th he went with Tukaram to the field, and set him to cut the grass, which he did without interruption,—a fact of which Tukaram says nothing; and that on the third day, the 7th August, he went to the field when called by Tukaram's sepy. The account given of the occurrences at the field by Virjivandas' witnesses is plainly exaggerated. The police sepy Lakshman Daji seems to have spoken with perfect truthfulness on this point and what appears from his testimony is that Abdulla's men were in the field, that the defendants were beside it, and that Narayan was vehemently asserting his master's ownership of the land which the Musalmans as vehemently denied. The physical detention or occupation of the land really in dispute was at this time plainly held by Abdulla's party; but, if suddenly taken, and not acquiesced in till it had acquired a colour of right, it could not be deemed a possession on which a suit could be brought if it were displaced (3). It counted for such a purpose, no higher than the cutting of a couple of bundles of grass by Tukaram's father and servant. The possessor before the dispute was the possessor still, until quite ousted, if he was ousted at its close, when his effort at reinstatement had plainly proved ineffectual, though at that moment the dispossession was to be deemed to have begun at the first known and continuous intrusion.

[222] It is necessary, therefore, to go behind this transaction in order to determine who was the real possessor of the land. The plaintiff's evidence on this point has already been discussed. That of the defendants, if it is to be believed, is equally inconclusive. I do not believe in the story of the Musalman companions of defendant No. 1 having gone to Warli quite by accident on the day of the dispute. It is clear that the field is called "Darad" if it is also called "Korti Cha-Tongar" contrary to the statements of the defendant's witnesses. The venerable Muzavar has yielded to sympathies which have affected his memory. The other witnesses, except Mr. Morris and the police sepy already mentioned, betrayed a partisan spirit hardly less warm than that shown by those of the plaintiff.

(1) L. R. 5 Ch. D. 809.

(2) 3 Atk. at p 339; 9 Vin. Abr. 323.

(3) Comp. Co. Lit. 368 A.

1880

AUG. 7.

ORIGINAL

CIVIL.

S.B. 208.

The defendant's books, though there is a gap of several years in his documentary evidence, go to show from 1867, at least, pretty constant exercise of possession over the land in dispute, and so far as they extend there is no more obvious reason to distrust them than those of the plaintiff.

Rodrigues as a defendant may be thought necessarily prejudiced. He is corroborated by his partner L. Quini; and if these men speak truly, they have held the land in dispute under Abdulla for four or five years. Domas Quini held the land as one of several partners from twelve or fourteen years ago for four years from Abdulla Khor. These transactions are supported by agreements, either separate or entered in the books of the defendant's employer. There are other agreements of persons who are now dead. The recent occupation by Rodrigues, Quini and Bastian Misquita (now dead) is deposed to by a labourer who worked under them. If the pretty consistent story of these witnesses is true, there can be no doubt that Abdulla has had possession for several years; but there are some obvious mis-statements in their depositions which cast a certain doubt on all they say.

Some external test of the truth of these contradictory bodies of testimony is obviously desirable if one can be found. It seems to be sound in the evidence of Mr. Morris and of the sepoy Lakshman. Bastian Misquita, claimed as a tenant by both parties, erected a shed on the land held by him. Narayan, in order to make out that he was certainly Virjivandas' tenant, places [223] this shed south of the line of stones which divides the field. Mr. Morris proves that the still existing platform is north of the line of stones. The fact would not be inconsistent with Bastian Misquita's tenancy of the whole field, but it is inconsistent with Narayan's honesty as a witness. Misquita was apparently a partner of Rodrigues and Quini, and the sepoy Lakshman says that he has seen Rodrigues in growing vegetables on the land said to be Abdulla's during the two years of his service in that neighbourhood. These indications are confirmed by the confused account given of the alleged dispossession by Mr. Virjivandas' witnesses. Amid the mass of dubious and of absolutely false testimony with which I have had to deal, only a very few statements can be taken as absolutely trustworthy; only a few facts are unquestionably established. Comparing the whole case on each side with the facts thus ascertained, I arrive finally at the conclusion that the dispossession alleged by the plaintiffs cannot be deemed proved, and, without discussing the fifth issue, I reject their claim with costs.

Decree for defendants.

Attorneys for the plaintiffs.—Messrs. *Prescot and Winter.*

Attorney for the defendants Nos. 1 and 3.—*Mr. H. W. Payne.*

5 B. 223.

ORIGINAL CIVIL.

Before Mr. Justice West.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, (*Plaintiffs*)
v. GOVIND RAMCHANDRA, (*Defendant*). * [11th, 12th and 19th
February, 1881.]

Company—Winding up—Suit against contributory—Service of notices and orders—Contributory in India to English company—Last known address or place of abode—Rule 63 of the Rules of 1862—Jurisdiction.

The London, Bombay and Mediterranean Bank, a Joint Stock Company, registered under the English Companies' Act, 1862, was ordered to be wound

* Suit No. 420 of 1880.