

decision in *Gill v. Manchester Railway Company* (1) already mentioned, and also with the passages which we have quoted from *Foulkes v. Metropolitan Railway Company* (2). And in a case of *Hooper v. London and North-Western Railway*, decided in the Common Pleas Division on the 2nd December, 1880; and reported in the *Times* of the 3rd December, 1880, Denman, J., is reported as saying: "The case of *Mytton v. Midland Railway* does not appear to have been cited in the subsequent case of *Foulkes v. Metropolitan Railway*, but it was really overruled by it." Lindley, J., seems to have concurred in that view.

Amongst other cases relied upon for the appellants was *Bristol and Exeter Railway v. Collins* (3) which, in its various stages, afforded a strong example as to the possible variety of judicial opinion (4). Neither its facts, however, nor those of any other case cited for the appellants, tally so closely with those in the present case as the facts in *Gill v. Manchester Railway*, which appears to us to have been a just and reasonable decision, and recognized [382] as such in *Foulkes v. Metropolitan Railway* (2) by the Court of Appeal.

For these reasons we concur with Sir Charles Sargent in his finding on the issues.

The defendants have not excused their non-delivery of the bale. The plaintiffs were not bound to prove negligence: *Ishvardas Golabchand v. G.I.P. Railway Company* (5). There must, therefore, having regard to the amendment (made by consent of the parties) of Sir Charles Sargent's decretal order, be a decree for the plaintiffs for Rs. 1,100 damages, and for the costs of the suit, and of this appeal.

Solicitors for the plaintiffs:—Messrs. *Lynch and Tobin*.

Solicitors for the defendants:—Messrs. *Hearn, Cleveland and Little*.

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Before Mr. Justice West and Mr. Justice Pinhey.

SAYAD NASRUDIN (*Original Plaintiff*), Appellant v. VENKATESH PRABHU (*Original Defendant*), Respondent.*
[26th March, 1879.]

Act XXIII of 1861, s. 11—*Procedure—Execution—Possession—New cause of action.*

A plaintiff who has obtained a decree declaring him entitled to the possession of immoveable property must, under s. 11 of Act XXIII of 1861, proceed by execution of the said decree, and not otherwise; if he neglect to do so till he is time-barred, he cannot any the more on that account bring another suit for

* Appeal No. 184 of 1877.

(1) L.R. 8 Q.B. 186.

(2) L.R. 5 C.P.D. 157.

(3) 7 H.L.C. 194.

(4) The Court of Exchequer decided in favour of the defendants, the company (11 Exch. 719). The Exch. Chamber (Coleridge, J.; Wightman, J.; Cresswell, J.; Erle, J.; Williams, J.; Crompton, J.; Crowder, J. and Willes, J.); unanimously reversed that decision, and entered a verdict for the plaintiff (1 H. & N. 517). The House of Lords consulted the Judges; of these four: Byles, J.; Crompton, J.; Williams, J. and Wightman, J.—were in favour of the plaintiff, and two only—Watson, B., and Martin, B.—were in favour of the defendants. The case was decided against the opinion of the majority of the Judges in favour of the defendants by the House of Lords, there being present Chelmsford, C., and Lords Cranworth, Weusleydale, and Kingsdown, which two last Lords gave their judgments with much doubt.

(5) 3 B. 120.

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possession of the same property, whether founded on the old decree in his favour, or on the continued occupation of the said property by the defendant.

[F., 28 M. 338; R., 5 B. 387; 6 B. 7.]

THIS was a second appeal from the decision of A. L. Spens, Judge of the District Court of Kanara, affirming the decree of the Second Class Subordinate Judge of Karwar.

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

Farran (with him *Shantaram Narayan* and *Pandurang Balibhadra*), appeared for the appellants.

[383] *Macpherson* (with him *Shamrao Vithal*), appeared for the respondent.

JUDGMENT.

The following is the judgment of the Court, delivered by

WEST, J.—The plaintiff's uncle, Padsha, sued for restoration of mortgaged property, on the ground that the mortgage-debt had been fully satisfied. His suit was successful, and in appeal he was declared entitled to possession on the 7th December, 1865.

The plaintiff, Padsha, then died, and, after some delay in obtaining a certificate of heirship, the present plaintiff applied for execution to the Principal Sadar Amin who had originally decided the suit.

This application was properly made, but, on the ground apparently that the lands were within the local jurisdiction of the Munsif's Court at Karwar, the applicant was referred by the Principal Sadar Amin to that Court. He went there accordingly, and the Munsif placed him in possession on the 22nd October, 1869.

This execution, however, of a decree of the Principal Sadar Amin by the Munsif was, on the complaint of the defendant, pronounced irregular. The District Judge set it aside, and restored the defendant to possession, which he recovered on the 23rd June, 1871. On special appeal the High Court affirmed the order of the District Court.

The present plaintiff then went a second time to the Court of the Principal Sadar Amin, now become that of First Class Subordinate Judge, and on the 16th July, 1872, his application for execution was granted. The District Court, however, held on appeal that the application was barred by the Limitation Act, and on special appeal this decision was affirmed by the High Court.

The defendant then sued the present plaintiff to recover as damages the mesne profits realized by the plaintiff during his possession from 1869 to 1871. After passing through the lower Courts the case came up to the High Court, which decided that the present plaintiff, having a decree for possession, could not be regarded as a trespasser, and rejected the claim.

This was on the 17th July, 1876; and the plaintiff, on the 2nd December following, filed the present suit for possession of the [384] land which he had thus failed to obtain in execution of the decree awarding it to him. The Courts below have held the suit barred as brought on a cause of action already once heard and determined, and as opposed to the purpose of s. 11 of Act XXIII of 1861, which prescribes that questions

arising in execution between parties to a decree shall be disposed of by the Court executing the decree and not by a separate suit.

The general principle that a judgment recovered bars a further suit on the same cause of action, does not, according to the English, any more than by the later Roman law, serve as a safeguard to a defendant against whom the judgment was pronounced, and who has not satisfied the judgment for a thing certain, such as a particular piece of land or an aggregate of defined lands constituting the object of a suit and decree. It might well be a question whether by itself s. 2 of Act VIII of 1859, which expresses in general terms the doctrine of the English law, ought to be construed literally so as to embrace a class of cases to which the English rule does not extend, and thus enable a defendant to rest his title on a decree not for, but against, him. But s. 11 of Act XXIII of 1861 and the decisions under that section seem to shut out a plaintiff, who has failed to obtain execution of a decree in his favour, from making that decree the basis of a further suit, or from obtaining, by means of a subsequent suit, that which, by adopting the proper means, he might have obtained in execution. It has been properly said that the recognition of such suits would tend to prolonged and possibly endless litigation, and so defeat the purpose of the Limitation Acts; and the general conclusion arrived at appears to have been that, failing to give effect to the means placed at his command by way of execution, a judgment-creditor loses his remedy altogether.

It was urged by Mr. Farran in his able argument that as the title to land sued for does not, as in the case of damages awarded, arise from the decree, the right remains what it was before the decree; and that the continued occupation by the defendant is a continued infringement of the right, enabling a plaintiff, whose claim has been pronounced good, to sue on the cause of action thus from time to time renewed. The declaration in the first decree may, according to this argument, serve as evidence of the [385] right, albeit the relief awarded has become incapable of execution. A piece of land adjudged to be the plaintiff's subsists, and admits of recovery, of delivery, while the mere right to damages, without a definite substance as the object of its incidence, perishes with the lapse of the time allowed for its enforcement. The distinctive character of a judgment in ejectment as compared with one on which a writ of *fi-fa* issues, is recognized in the English law (1); but whether the ownership and right to possession of a house or field, once declared by a Court to subsist, thenceforward adheres to it, notwithstanding the failure of the owner to take possession under his decree within the time limited by law, may itself admit of question. The opposing possession, which would, in a certain time, have ripened into ownership without a suit, may equally, by the operation of the law, ripen into ownership in a different and a shorter time after there has been a suit and a decree against the possessor. From motives of public policy, and on grounds of general probability, the law may raise the presumption on which prescription rests sooner in the latter case than in the former. Section 11 of Act XXIII of 1861 does not distinguish between the cases of suits for land and suits for other property. In the present instance the order of the Court in 1865 for the restoration of the land to the plaintiff was one that he could have forthwith got executed by a delivery to him of exactly the same property that he seeks in the present suit. He dates his cause of action as having arisen when he obtained his

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(1) See Com. Dig. Execution (A. 5): *Doe dem. Taggart v. Butcher*, 3 M & S 557.

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decree in 1865, and it has been contended that down to that time the relation of the parties was contractual, which then became strictly antagonistic. But if the decree of 1865 did change the relation of the parties, that decree is itself the foundation of the suit, as the old relation and the right involved in it could not then any longer subsist. It is evident that the plaintiff seeks, by means of a new suit, to gain what the law, equally in the case of land as of money, binds him down to obtain by execution; and in no other way.

Then it is said that the decree, by which this Court in 1876 refused to pronounce the plaintiff a trespasser, during the two years of his possession irregularly obtained under his decree, [386] necessarily implies, that, not being wrongfully, he was rightfully in possession from 1869 to 1871; and if so, it is contended, then his dispossession in 1871 constituted a cause of action on which he can maintain the present suit. The implication may perhaps be logically necessary; but still, while the order of this Court stands, by which the plaintiff was turned out, his ouster cannot possibly constitute a cause of action. The order under which he had been put into possession was set aside, and he was thus thrown back on the decree, and, seeing this, sought execution anew on the decree, though after a lapse of time by which his remedy had become barred. His fresh application for execution in 1872 implied a decree still in force and unexecuted (1), which was inconsistent with his having obtained the fruit of that decree in a possession of which, by a new wrong, he had afterwards been deprived; and the argument now raised was seen at that time in all probability to be unsustainable.

The position of the plaintiff is a most unfortunate one, since, while adopting the ordinary means and obeying the directions of the Courts, he has by that very obedience shut himself out from the enjoyment of a right to which he was adjudged to be fully entitled. His proper remedy, however, as he did not appeal against the first erroneous order of the Principal Sadar Amin, would seem to have been an application based on the judgment of this Court in 1876 for a review of its prior judgment of 1871. On such an application anything that could have been done would have been done to give the applicant substantial justice (2). It might possibly have been held in such a case that the Munsif, in giving possession to the plaintiff, had acted ministerially, or quasi-ministerially, under a judicial or authoritative direction of the Principal Sadar Amin; or that the plaintiff, having entered without any wilful abuse of process, was entitled to retain the possession which he had thus united to his right under the decree. Or again, on the principle *actus curie neminem gravabit* (3), the plaintiff might possibly have succeeded in getting the order of 1875 revised, and the [387] application for execution of the 9th May, 1872, treated as made at the date of his earlier application of 1868, since the intermediate delay had arisen from a misdirection on the part of the Principal Sadar Amin. Whether such an application would or could succeed now, after so great a lapse of time, and the creation perhaps of new interests, we cannot undertake to say.

The decree of the District Court must be confirmed with costs.

(1) Com. Dig. Execution (A 3).

(2) 8 B.H.C.R.A.C.J. 245.

(3) See *Shelly's Case*, 1 Rep. at p. 106. *Taylor v. Cole*, 1 Sm.L.C. (6th ed.) 115. *Brinsmead v. Harrison*, L.R. 7 C.P. 547, *Ex parte Drake*, W.N. 1877, 119. Printed Judgments for 1874, p. 279.