

of the non-appearance of the plaintiff. The suit was dismissed under the Code of Civil Procedure of 1859; and, under section 119 of that Code, an appeal was specifically given from an order refusing to set aside the dismissal of the suit. And the order of the Judge rejecting the plaintiff's application was so obviously perverse and improper, that counsel for the defendant did not apparently attempt to support it.

In the present case the District Court considered the reasons given for the delay in presenting the appeal fully on their merits, and, in the exercise of its discretion, determined that the delay was not satisfactorily accounted for. I have given the substance of the reasons of the District Court's order above. I further notice that it appears from the District Court's judgment that the appellant appears to have endeavoured to mislead the Court by falsehood, or, at least, by prevarication. To use the words of James, L.J., in *Sheffield v. Sheffield*, I would "not encourage appeals in cases which, like this, depend entirely upon the discretion of the Judge," especially where, as in this case, the Judge has exercised his discretion carefully and after having the case before him on two separate days.

I would confirm the order of the District Court with costs.

Decree confirmed accordingly with costs.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

MIR AZIMUDIN KHAN (ORIGINAL PLAINTIFF), APPELLANT, v. ZIA-UL-NISA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

March 7.

Sale by a young person not a minor—Grounds for its cancelment—Sale by seamen—Sales by expectant heirs of reversionary interests.

In the case of a sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money, if not

* Regular Appeal, No. 34 of 1880.

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too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense and delay on the other.

The exceptional equitable principles which, in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the onus of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in the above case, or in that of every ignorant and improvident person.

Where a person, by right of inheritance, sued for a declaration of his title to a share in a certain sum of money to which the defendants laid claim, and the defendants met that allegation by setting up a sale, which the plaintiff admitted.

Held that the plaintiff was bound to mention in his plaint the fact that he had parted with his title, and to allege the particular circumstances—misrepresentation, undervalue, or fraud—on which he relies to have the sale set aside: also that the cause of action arose at some time within the period of limitation applicable to the case. If sufficient cause exists, the Court may require the plaintiff to amend the plaint.

THIS was an appeal from the decision of Rao Bahadur Mangeshvar Balvant, Subordinate Judge, First Class, Surat.

The appellant Mir Azimudin Khan and his sister Fatma Begam brought this suit in 1872 to obtain a declaration of the title of the plaintiffs to a share of annas two and pies three in the rupee *plus* anna one and pies six in the event of the marriage of the female plaintiff, in all annas six, in a sum of money in the hands of the Agent to the Governor of Bombay at Surat. The plaintiffs stated that they were entitled to the three-fourths share of their deceased brother Jenudin, one-fourth going to his widow.

The female plaintiff having died in the course of the suit, Mir Azimudin subsequently claimed seven annas and eight and quarter pies share in the rupee in Government promissory notes and cash of the value of Rs. 1,75,415-8-11 held in deposit by the Agent as a share, three annas in the rupee, adjudged to the plaintiff's father in the estate of the late Nawab of Surat by an award of Mr. W. E. Frere, the then Agent, dated 21st December, 1852, and finally upheld by Her Majesty in Council in 1869. The plaintiff rested his claim on an alleged will, dated 11th April, 1863, of his father, and also upon the law of inheritance.

The defendants contended, amongst other things, that the plaintiff's share had been sold to them on the 30th of April, 1855. The plaintiff admitted the sale, but averred that it was effected

under pressure for an inadequate consideration, and should be set aside.

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The Subordinate Judge upheld the sale, and rejected the plaintiff's claim. The plaintiff Mir Azimudin Khan appealed to the High Court.

The Hon. *F. L. Latham* (Acting Advocate General), *Framji R. Vikaji* and *Pandurang Balibhadra* appeared for the appellant.

Jardine and *Shantaram Narayan* appeared for the respondents.

MELVILL, J.—The previous history of this case is so clearly and succinctly stated by the Subordinate Judge in his judgment, that we cannot do better than borrow his description.

“ 1. Nawab Mir Afzuludin Khan died in A.D. 1842, leaving a daughter Bakti-ul-Nisa Begam, who was married to Mir Jaffar Ali, and the present defendants are his daughters.

“ 2. The late Nawab left also two widows and two cousins, all of whom are dead. One of these two cousins was Mir Kamrudin Khan, plaintiff's father.

“ 3. On the Nawab's death, a dispute arose as to his inheritance among the sharers, and legislation was resorted to in 1848 (Act XVIII of 1848).

“ 4. Mir Jaffar Ali, on behalf of his two daughters (then minors), claimed the whole estate. The then Agent, Mr. W. E. Frere, adjudicated on the claim, and awarded it in the following proportions, viz., to Mir Kamrudin Khan annas 3; to the defendants in right of their mother, who had died in the meantime, annas 8; to Mir Mohinudin Khan, the other cousin, annas 3; and to each of the two widows an anna; making in all sixteen annas.

“ 5. This award was made on the 21st December, 1852.

“ 6. Against this award all the parties appealed to Government, who confirmed the Agent's adjudication on or about the 23rd July, 1853. During the pendency of appeal, Mir Kamrudin Khan made his will (exhibit No. 34), dated 11th April, 1853, and died soon after, viz., on the 5th May, 1853.

“ 7. In appeal, Government confirmed the decision, and Mir Jaffar Ali, as guardian of the defendants, feeling dissatisfied with the decision, appealed to the Privy Council; but the appeal was

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rejected (30th June, 1854,) as not cognizable by that tribunal, who made a suggestion that, if the case in question were referred to them by Her Majesty for their opinion, they would submit their opinion.

“ 8. On the 30th April, 1855, one Mahomed Ali, brother-in-law of Mir Jaffar Ali Khan, obtained three documents, viz., a deed of sale, (exhibit No. 57,) executed by Mir Kamrudin’s heirs ; second, a petition to the Agent to His Excellency the Governor, (exhibit No. 89,) informing him of the sale which they had effected, and stating that they had transferred all their rights and title in the three annas’ share to the vendee, so that he might not be obstructed in recovering it. They also requested by the said petition that a copy of the sale-deed should be made, and kept in the records of the Agency, and the original returned ; third, a *mukhtyarnama* (exhibit No. 90,) appointing one of the plaintiffs, Mir Azimudin Khan, for presenting the sale-deed to the Agent.

“ 9. To the sale-deed and to the petition to the Agent the signature of the plaintiff Azimudin Khan has been made by Mir Jenudin, his brother, and the signature of Fatma Begam has also been made by Mir Jenudin as her Agent.

“ 10. On the presentation of the documents, the Agent, on the 3rd May, 1855, endorsed an answer on exhibit No. 89, to the effect that a copy of the deed would be taken and returned, but that, by doing so, Government is not to be supposed to be bound by the arrangements effected.

“ 11. On the 3rd May, 1855, (exhibit No. 134.) the Agent made a report to the Government on the subject of the sale.

“ 12. Government, in reply, dated 8th June, 1855, (exhibit No. 135,) approved the Agent’s advice to the vendors, and, therefore, the Agent informed the vendors Jenudin, &c., (16th July, 1855, exhibit No. 89,) that Government had no objection to the sale as already effected.

“ 13. In order to prove that a portion of the consideration money had been paid, receipts (exhibits Nos. 58 to 64) have been produced by the defendants to show that about Rs. 16,000 were paid.

“ 14. Exhibits Nos. 65 and 102 are extracts of the day-book containing entries of the debit of Rs. 32,000, the amount for which the sale was effected. These are dated 30th April, 1855.

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“ 15. In 1861, Mir Jaffar Ali, as guardian of his daughters (defendants), petitioned Her Majesty the Queen by way of appeal against the decision of the Agent and the Bombay Government, and the matter was referred to the Privy Council, and their Lordships, on the 17th March, 1869, gave their opinion, confirming the decision of the Bombay Government (exhibit No. 121).

“ 16. Mahomed Ali, the purchaser, made an affidavit, under date the 27th March, 1862, to the effect that he had made the purchase in trust for Mir Jaffar Ali with his money (exhibit No. 113):

“ 17. Mir Jaffar Ali died in 1863.

“ 18. After the receipt of the Privy Council's decision, Mr. Hope, the then Agent, invited all the heirs and claimants to the late Nawab's estate for distribution of the assets of the Nawab in the hands of the Agent.

“ 19. The plaintiffs and the defendants both set up their claims.

“ 20. Plaintiffs asked their share as legatees under the will of their father Mir Kamrudin Khan, and the defendants set up their title as purchasers through Mahomed Ali.

“ 21. The plaintiffs were, therefore, ordered by the Agent to file an action in the Civil Court to establish their title to three annas' share.

“ 22. Government accorded their final sanction to the institution of this suit under Act XVIII of 1848 under date 8th October, 1872, (exhibit No. 3).”

The plaint in the present suit makes no mention whatever of the sale whereby the plaintiffs and other heirs of Mir Kamrudin conveyed all their rights to Mahomed Ali on the 30th April, 1855. It simply states that a sum of Rs. 1,75,415-8-11 is available for distribution among Mir Kamrudin's heirs; that this sum is claimed by the defendants, but on what ground is not stated; and it, therefore, asks that a decree may be made declaring the plaintiffs, as two of Mir Kamrudin's heirs, entitled to a certain specified share of the sum mentioned.

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This plaint was, of course, immediately met by the answer that the plaintiffs had sold their interest in the property seventeen years before the institution of the suit, and that for this, and other reasons, they were not entitled to the declaration sued for.

This being the state of the pleadings, and the sale being admitted, it appears to us clear that we could not, without an amendment of the plaint, make a declaration of title in favour of the plaintiffs, or rather of the surviving plaintiff. The plaintiff Azimudin stands in this position. He asks that he may be declared entitled to certain property as one of the heirs of Mir Kamrudin; but he is obliged to admit that, seventeen years before the institution of the suit, he and the other heirs of Mir Kamrudin sold all their interest in the property to Mahomed Ali. As he brings this suit in his own name, and does not make Mahomed Ali a party, he must be taken to admit, and by his counsel he does in fact admit, that Mahomed Ali was merely an agent of Mir Jaffar Ali, the father of the defendants, and that the purchase was, in fact, made for the benefit of Mir Jaffar Ali. The defendants being Mir Jaffar Ali's heirs, it follows that they are entitled to the property claimed, and that the plaintiff cannot be entitled to the declaration asked for, so long as the conveyance of the 30th April, 1855, remains uncancelled.

The case made for the plaintiff is that he is entitled to be relieved against that conveyance; but this is a case which he has never made for himself in the manner which the law requires. Before he could ask for a declaration of his title, he was bound to mention in his plaint the fact that he had parted with that title, and to allege the particular circumstances—misrepresentation, undervalue, or fraud—on which he relies, as entitling him to have the conveyance set aside. He was also bound to state that the cause of action arose at some date within the period of limitation applicable to the case. As it is, we have nothing but the suggestions of counsel that the plaintiff may have been influenced by a statement in the conveyance which is said to amount to a misrepresentation, and that the plaintiff may not have known, until recently, that he had been imposed upon. These suggestions may or may not have much to support them; but they cannot supply the place of allegations which the law requires the party himself

to make upon oath. If, therefore, we thought that there was any prospect of a sufficient case being made out to entitle the plaintiff to relief, we should still require him to amend his plaint, and to state the circumstances on which he grounds his claim to relief, and to show that his right to relief is not barred by lapse of time. As it is, however, we have no doubt that the best case which could be made for him has been submitted to the Court in argument; and it has not been suggested that any evidence is forthcoming which is not already on the record. That argument, and the evidence before us, have not led us to the conclusion that the plaintiff would be entitled to have the conveyance of the 30th April, 1855, set aside; and it is, therefore, unnecessary for us to direct him to amend his plaint by inserting therein a demand for the cancellation of that instrument.

The grounds, on which it has been contended that the conveyance is voidable, are that there was a distinct misrepresentation by the purchaser, and that advantage was taken of the distressed circumstances of the vendors to induce them to part with a valuable estate for a very inadequate consideration.

Now, on the 30th April, 1855, the date of the conveyance, the state of affairs was this: Mir Jaffar Ali had appealed to the Privy Council against the decision of the Bombay Government, confirming Mr. Frere's award, and the Privy Council had, on the 30th June, 1854, declined to entertain the appeal (1), on the ground that the provisions of Act XVIII of 1848 debarred them from exercising jurisdiction. At the date of the conveyance, therefore, the appeal to the Privy Council was no longer pending, and, consequently, it is contended that the following passage in the conveyance contains a false statement of fact: "The defendants" (Mir Jaffar Ali, on behalf of his daughters,) "were dissatisfied with the decision" (of Mr. Frere), "and made an appeal in England, and there the case has not as yet been decided." It is admitted that Mahomed Ali, the purchaser, was not actually apprized of the result of the appeal, but it is said that, as he was an agent of Mir Jaffar Ali in the transaction, and Mir Jaffar Ali was acquainted with the facts, the ignorance of the agent cannot enable Mir Jaffar Ali's heirs to take the benefit of the misrepresen-

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(1) 5 Moore's Ind. Apps. 499.

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tation. Assuming this to be so, (and the authority of *Cornfoot v. Fowke* (1) to the contrary is not very strong: see *Story on Agency*, sec. 139, note), we have to consider whether the words in question amounted to a misrepresentation, and, if so, whether the misrepresentation was such as to have been likely to influence the contract by causing Mir Kamrudin's heirs to give a consent which they would otherwise have withheld. Now, although the Judicial Committee declined jurisdiction, yet it appears to us that their decision could hardly have been regarded by any of the parties at the time as a final decision of the case. Their Lordships are reported to have said; "The petitioners, therefore, will take such course as they may be advised with reference to an application to the Crown, through the Board of Control or otherwise. By possibility, in consequence of such application, if made, the matter may come here again; and their Lordships will readily do their duty in hearing it. At present, they consider it not to be within their ordinary functions to do so" (2). Here we have not so much a decision as a suggestion of a mode in which a decision might ultimately be obtained; and as Mir Jaffar Ali was a man who had both the means and the determination to try every mode of getting Mr. Frere's award set aside, and did, in fact, postpone the final decision of the Privy Council for fifteen years longer, it can hardly be said that there was any misrepresentation on the part of Mahomed Ali, when he said that "the case has not as yet been decided". But, assuming that the expression was not strictly accurate, we are still of opinion that, if the plaintiff had been acquainted with the exact terms of the Privy Council judgment, he would not have been any the less eager to enter into the transaction. Two considerations must have been present to his mind, and have acted as an inducement to him and the other heirs to accept the offer.

Rs. 32,000, paid down; in lieu of all claims to a share in the Nawab's estate. The first was that Mir Jaffar Ali might ultimately obtain a judgment in his favour; and there was nothing in the Privy Council judgment, if the plaintiff had known its terms, to allay this fear. The second was that the heirs of Mir Kamrudin were likely, even if they were ultimately successful, to

(1) 6 M. & W., 358.

(2) 5 Moore's Ind. App., 510.

be kept for a long time out of the fruits of the litigation ; and the Privy Council judgment certainly held out no prospect that this period was likely to be abbreviated, Jaffer Ali was a most determined litigant. The proceedings of the Legislative Council of India, of the 31st July, 1858, show that, when the Privy Council refused to entertain his appeal, he was in no way discouraged. He applied to the Court of Directors to order the retention of the Nawab's estate by the Government of Bombay, until he could come to some settlement with the other claimants. When the Court of Directors refused his request, he went to the Board of Control, and obtained the order he wished for, much to the indignation of the Court of Directors. He then applied to the Indian Legislature to amend Act XVIII of 1848, so as to enable the Privy Council to entertain his appeal. Failing in this, we are informed that he got a Bill carried through the House of Commons, but it was thrown out in the House of Lords. Finally, he adopted the suggestion of the Privy Council, and in 1861 obtained from Her Majesty a reference of his petition to the Judicial Committee. It was not until the 22nd February, 1869, that the Judicial Committee finally reported to Her Majesty that they found no reason that the award and adjudication of Mr. Frere, and the decision of the Right Honourable the Governor of Bombay in Council of the 27th July, 1853, thereupon, should be disturbed. Jaffer Ali died in 1863. It was not till 1871 that Mr. Hope, the Agent of the Governor at Surat, was able to proceed to the distribution of the estate. With such a prospect of vexation, and delay, and possible failure, before them, it seems impossible to hold that Kamrudin's heirs were misled in 1855 by the misrepresentation, if such there were, or that they were thereby induced to enter into a transaction, which they would have repudiated, if they had been more accurately informed.

Next as to the allegation of inadequacy of consideration. This, if made out, would, according to the ordinary rule, be no ground for relief, unless the bargain were so unconscionable as to point clearly to the conclusion of fraud. The sum actually paid (for we consider it proved that the full amount named in the conveyance was paid), was Rs. 32,000. Now, we have really no sufficient materials to enable us to say what was the actual value of

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the share of Mir Kamrudin's heirs in 1855. It is alleged in the complaint, and the allegation has not been controverted, that the value of the share in 1871 was Rs. 1,75,415. But in the interval of sixteen years the landed portion of the estate must undoubtedly have increased greatly in value, in consequence of the extension of railways to Gujârat, and the funded property had been increasing at compound interest in the hands of the Government. The learned Advocate General, in opening the case, estimated that if a distribution of the Nawâb's estate had taken place in 1855, Mir Kamrudin's heirs would have been entitled to about Rs. 96,000, out of which, however, he admitted that they would have been bound, under the terms of Mir Kamrudin's will, to set aside one anna in the rupee, or Rs. 6,000, for a purpose therein specified; so that the amount actually at their disposal would have been Rs. 90,000. According to this estimate, (for which it cannot be said that there are any sufficient data), Mir Kamrudin's heirs received little more than one-third of the amount which would have come to their hands if the distribution of the Nawâb's estate had taken place immediately. In his reply, the Advocate General submitted to the Court another estimate, to the effect that Rs. 32,000 (of the Broach currency), improved from 1855 to 1871 at 9 per cent. compound interest, (not an unusual rate in this country, and less than Mir Kamrudin's heirs were paying to their creditors), would have amounted in 1871 to Rs. 1,24,000; so that, upon this calculation, the claim of Mir Kamrudin's heirs was discounted for rather more than two-thirds of its actual value, as determined by the event. But, whichever of these two widely divergent estimates be adopted, it seems impossible to say that the bargain is proved to have been an unconscionable one. The interest sold was the subject of very expensive and prolonged litigation. It might turn out to be worth nothing at all; and, at all events, would yield no fruit so long as Mir Jâffar Ali was able to persuade or compel the Bombay Government to withhold distribution. The vendors relieved themselves of the worry and expense of struggling against Mir Jâffar Ali's persistent attacks. They obtained a sum of money sufficient to enable them to pay off all their creditors, who were putting great pressure upon them, and whose claims were accumulating at a high rate of interest.

They were able to keep half the purchase-money for their own wants, and without it it does not appear that they would have had any adequate means of subsistence. Considering all these circumstances, we cannot hold that the transaction was an unfair, or even an improvident one. The best proof that it was not so, is afforded by the opinion expressed at the time by a person who was in the best possible position to form an opinion on the subject. Mr. Hebbert, the Agent of the Governor at Surat, was in charge of the whole of the Nawab's estate in 1855, and, therefore, knew better than any one else what was the value of the share of Mir Kamrudin's heirs. He was a careful and able judge, and competent to form an opinion of the probable results of Mir Jaffar Ali's efforts to upset Mr. Frere's award. It was his duty to advise the Government in the matter of the administration of the Nawab's estate, and to protect the interest of Mir Kamrudin's heirs as much as those of the other claimants. On the 3rd May, 1855, we find Mr. Hebbert writing to the Government the following letter:—

“I have the honour to report, for the information of the Right Honourable the Governor in Council, that Mir Kamrudin's heirs have this day jointly presented a paper to me, apprizing me of their having sold their right to $\frac{3}{16}$ ths of the property of the late Nawab of Surat to Mir Mahomed Ali valad Mir Ahmed Ali, a brother-in-law of Mir Jaffar Ali, for Rs. 32,000. I have, at their request, placed an authenticated copy of the bond on the records of the Agency, but have told them I cannot assent to their transaction in any way without the sanction of Government. I have little doubt the real purchaser is Mir Jaffar Ali, though, as he is absent in England prosecuting his claim to the whole of the late Nawab's estate, as his sole heir, he seeks to conceal the fact by purchasing in another's name. All things considered, I think Mir Kamrudin's heirs have made no bad bargain, and I know of no reason why Government should object to the transaction. After adjusting Mir Kamrudin's debts, I understand about Rs. 15,000 will remain available to his family. I have strongly advised them to invest this, and live on the interest thereof, with what other property they have; but I have no idea they will follow my advice. They are an

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uneducated, thoughtless set, and will, I fear, shortly be worse off than ever." To this letter the Secretary to Government, on the 18th June, 1855, sent the following reply:—"I am directed by the Right Honourable the Governor in Council to acknowledge the receipt of your letter No. 16, dated the 3rd ultimo, and to inform you that Government entertains no objection to the sale, by Mir Kamrudin's heirs, of their share of the property of the late Nawab of Surat, and it approves of the advice given by you to the vendors."

It would certainly be a strange proceeding on our part if, after the lapse of so many years, and with the very scanty materials on which we are asked to form a judgment, we were to declare that the view taken by Mr. Hebbert and the Bombay Government at the time of the transaction was altogether erroneous, and that instead of the sale by Mir Kamrudin's heirs being, as Mr. Hebbert described it, "no bad bargain", there was in it (to Lord Thurlow's words in *Groynne v. Heaton* (1)) "an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

We may add that there is no evidence whatever of any haste or precipitancy in the transaction which we are considering, nor of any concealment, nor of any inability on the part of Mir Kamrudin's heirs to acquaint themselves with the real value of the property. The estate was in Mr. Hebbert's hands: he was a trustee for all the claimants: and it is not to be supposed that he would have withheld any information which it was important to any of them to obtain. The conveyance was prepared in the house of the Kazi. It is in evidence, (and the evidence has not been contradicted, though the statement was made before Mr. Hope in 1870, and Mr. Hebbert is still alive to contradict it,) that Mr. Hebbert was consulted as to the sale before it took place, and expressed his approval of the transaction. He was the trustee of the vendors, and the fact that everything was done with his consent is the strongest proof of the *bona fides* of the proceeding. The plaintiff, though young, was not a minor at the time; and though his sister Fatma was a Mahomedan lady, she

(1) 1 Bro. C. C. 18.

does not seem to have lived in very strict seclusion; and the evidence shows that she was an active woman, who took an important part in the management of the family affairs, and that in this particular instance she was informed of, and understood, the nature of the transaction into which she was entering. Finally, both the plaintiff and Fatma had the assistance of their elder brother Jenudin, and they had an independent legal adviser in their family-lawyer Dhirajram (witness No. 118). It has, indeed, been suggested by counsel that, as Dhirajram was a creditor of Mir Kamrudin's heirs, and received payment of his debt out of the purchase-money, he was not an honest adviser. But the witness, (who was called by the plaintiff), has himself stated that he discouraged the sale; and the plaintiff has not contradicted him upon this point, nor made any attempt to discredit his honesty.

On the whole, we may say that we are thoroughly satisfied, from all the circumstances of the transaction and from Mr. Hebbert's opinion, that the sale by Mir Kamrudin's heirs was not an unconscionable bargain; and we are not satisfied, from the evidence adduced, that the bargain was even an ill-advised or improvident one, or that the price paid was less than the market value of the property at the time.

In what we have hitherto said, we have dealt with the case as falling under the general rule that a sale is not to be set aside for mere inadequacy of price, unless the party seeking relief show that the price was so inadequate as to indicate fraud. But we must not omit to notice the argument which was much pressed upon us, that the Court ought to deal with this case, not under the general rule, but on the peculiar principles upon which Courts of Equity deal with sales by expectant heirs of reversionary interests, and that it ought to set aside the sale, even without proof of fraud, if the purchaser fail to prove that he gave a fair value for the property. Even if the onus of proof were thus shifted upon the defendants, we are not prepared to say that we should not hold that they had sufficiently discharged themselves of it. But, in fact, this is not a case of the sale of a reversionary interest, but of an interest in possession, although the subject of litigation. The leading case on the subject is *Chesterfield v.*

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Janssen, and the other cases bearing upon the subject are collected in White and Tudor's note to that case. We do not find that any of those cases relate to the sale of an expectancy not contingent upon the death of some person other than the parties to the contract. Mr. Story (Equity Jur., sec. 333) grounds the relief in this class of cases upon the circumstance that the contract or other act is substantially a fraud upon the rights of third persons; and in *Chesterfield v. Janssen*, Lord Hardwicke makes observations to the same effect. "In most of these cases", he says, "have concurred deceit and illusion on other persons, not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or his family, but to a set of artful persons who have divided the spoil beforehand." Even if the principle could be applied to a case like the present, the evidence would fail to make out the principal ground of relief in such cases; for there was here no concealment from the person holding the estate, and interested in preserving it, but, on the contrary, as we have said, a reference to Mr. Hebbert for advice, and an approval of the sale by him and by the Government. The only case to which we have been referred, and the only one which we have been able to find, in which the sale of an expectancy other than a reversionary interest has been dealt with on the same principles, is that of *How v. Weldon* (1) in which (contrary to the dictum of Lord Hardwicke in *Chesterfield v. Janssen*, "that the contracts of sailors, selling their shares before they knew what they were, could not be set aside here,") a sale of prize money by a seaman for a quarter of its value, and under circumstances of actual fraud, was set aside by the Master of the Rolls, Sir Thomas Clarke, who observed: "It is reasonable to consider the vendor at least in as favourable a light as a young heir. I am warranted in saying that by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered them as a race of men loose and unthink-

(1) 2 Ves., Sen., 516.

ing, who will almost for nothing part with what they have acquired perhaps with their blood; therefore are they restrained by two Acts of Parliament." In this, and in other cases, seamen have, no doubt, been treated as a peculiar class, who, on grounds of public policy, and because of the special necessity of protecting them, are to be treated with the same indulgence as expectant heirs. But transactions by seamen are an exception to all ordinary rules (see Story's Equity Jur., sec. 322; Fonblanque an Equity, Book I, chap. II, sec. 12, note); and we can find no authority for extending the exception to all ignorant and improvident persons, and for requiring persons who deal with them to make good the bargain, according to the rule stated by Lord Cottenham in *Earl of Oldborough v. Frye* (1), that "where a party deals with an expectant heir, the onus is upon him to show that he gave a fair price." In the case before us, we have nothing more than the sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation. In such a case we think that the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money, may, if not too disproportionate, be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense, and delay on the other.

It only remains to notice an argument to which the learned Advocate General declined to commit himself, but which was put forward by Mr. Framji Vikaji, namely, that the sale was void *ab initio*, as being contrary to the rules of Mahomedan law. This argument, if we understood it aright, proceeded upon the ground that the contract was for future delivery at an indefinite time. We have looked at the authorities to which Mr. Framji referred us; but we do not find that they are of such a character as would oblige us to hold that such a sale as we are considering is forbidden by the Hedaya.

1882

MIR AZIMU-
DIN KHAN
v.
ZIA-UL-NISA.

1882

MIR AZIMU-
DIN KHAN
v.
ZIA-UL-NISA.

For these reasons we confirm the decree of the Subordinate Judge with costs. This decree, however, is without prejudice to any right which Mir Kamrudin's heirs may have, jointly, to receive from the Government one-sixteenth of the property held by the Government as Mir Kamrudin's share; which sixteenth is stated by the plaintiff's counsel to have been devised by Mir Kamrudin in trust for a specific purpose, and to have been, consequently, not liable to alienation by Mir Kamrudin's heirs.

We are constrained to notice with disapprobation the very prolonged period over which the trial of this and the companion cases extended in the lower Courts. There was nothing in the circumstances of these cases which rendered such delay necessary. The suits might have been decided in a very much shorter time, if the different Subordinate Judges, before whom they came, had been less ready to grant adjournments, many of which appear to have been asked for by the pleaders of the parties without any sufficient reason.

APPELLATE CIVIL.

Before Mr. Justice Melvill.

February 13.

BALKRISHNA DHONDO AND OTHERS, APPELLANTS, v. NAGVEKAR
AND ANOTHER, RESPONDENTS.*

Mortgage—Suit against a mortgagee for the recovery of a portion of property mortgaged—Court Fees Act VII of 1870, Section 7, Cl. ix, Item 1, Schedule I.

In cases in which it is competent to the mortgager to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and, as regards the portion of the property sued for, "the principal money expressed to be secured" must be taken to be the proportionate amount of the debt for which such portion of the property is liable.

This was a reference, under section 5 of the Court Fees Act VII of 1870, by the Taxing Officer, High Court, Appellate Side, for the decision of the Chief Justice, who referred the matter to Mr. Justice Melvill.

The circumstances of the reference were thus stated:—

"By a deed of December 7th, 1823, certain property was mortgaged for Rs. 1,201 to three mortgagees who were given possession.

* Reference by Taxing Officer High Court.