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sufficient reason to feel convinced, that Rango could not, during so long an interval, have acquired sufficient means to purchase a bullock of the value of Rs. 16.

On the ground, therefore, that there is no evidence on which a conviction could legally be based, the Court reverse the conviction and sentence, and order the fine, if paid, to be refunded.

Conviction and sentence reversed.

APPELLATE CIVIL.

FULL BENCH.

Before Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

1882
March 9.

MULCHAND KUBER (ORIGINAL DEFENDANT), APPELLANT, *v.* LALLU TRIKAM (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Purchase of equity of redemption by first mortgagee—Priority—Notice—Merger.

On the 20th of August, 1870, M, the owner of a house in Gujarat, mortgaged it to the defendant's father with possession. On the 2nd of December, 1871, he made a *san*-mortgage of the same house to the plaintiff. On the 20th of April, 1872, M sold the equity of redemption to the defendant's father, who became the purchaser without cancelling his first mortgage. The plaintiff subsequently sued M to enforce his *san*-mortgage, and, obtaining a decree, placed an attachment on the house, which attachment, however, was removed on the application of the defendant's father. The plaintiff now sued to establish his right to levy the amount due on his *san*-mortgage. He claimed priority to the defendant on the authority of *Toulmin* v. *Steere*(1) where it was held that a purchaser of the equity of redemption could not set up a prior mortgage of his own against subsequent incumbrances of which he had notice.

Held that the intention of the defendant's father when purchasing the equity of redemption having been to retain the benefit of all his rights, his son the defendant might properly require the redemption of his first mortgage as the condition of the plaintiff's enforcing the decree upon his mortgage against the property.

A mortgagee purchasing the equity of redemption may indicate his intention to keep his charge upon the property alive otherwise than by express words.

Per WEST, J.—The successive charges created by the owner of an estate may be regarded as fractions of the ownership, which embraces the aggregate of advan-

* Special Appeal, No. 412 of 1876.

(1) 3 Mer. 210. (2) 11 Bom. H. C. Rep. 41.

tages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself then be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground of reason for saying that an incumbrancer who is already owner of one fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after deduction of his prior share.

This was a special appeal against the decision of S. Tagore, Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Dholka.

One Mahadas Dayalji mortgaged his house at Dholka on the 20th of August, 1870, for Rs. 400 to Kuber Shivlal. That mortgage was registered. The same mortgagor mortgaged the same house to the plaintiff, Lallu Trikam, on the 2nd of December, 1871, for Rs. 99. That mortgage was not registered. Subsequently the house was sold on the 20th of April, 1872, by Mahadas Dayalji to Kuber Shivlal for Rs. 400. The deed of sale was registered. The plaintiff (the second mortgagee in point of time) obtained a decree against Mahadas Dayalji for the amount due on the *san*-mortgage of the 2nd December, 1871, and having attached the house under that decree, Kuber Shivlal, the first mortgagee (who was not a party to that suit), by application under section 246 of Act VIII of 1859 caused the attachment to be raised. The plaintiff then brought the present suit against Kuber Shivlal to establish the plaintiff's right to levy the amount due on his *san*-mortgage of the 2nd of December, 1871. Both the Courts below held that the purchase was subject to the *san* mortgage. The defendant, therefore, specially appealed to the High Court.

Nagindas Tulsidas for the appellant.

Gokaldas Kahandas for the respondent.

The case was heard by Westropp, C. J., and Nanabhai Haridas, J., who referred to the Full Bench the question whether a first mortgagee who purchased the equity of redemption could fall back on his first mortgage and retain his priority to subsequent incumbrancers, or whether the doctrine of *Toulmin* v. *Steere*(1) applied in India, viz., "that one purchasing an equity of redemption cannot set up a prior mortgage of his own against subsequent incumbrances of which he had notice."

(1) 3 Mer. 210.

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WESTROPP, C.J., after stating the facts, made the following order:—

In the Courts below, much attention was given to the question whether when Kuber purchased the house he had notice of the plaintiff's mortgage. The District Judge (Mr. Tagore) has found that the onus was on the defendant to prove that he purchased without notice of the plaintiff's mortgage, and that the defendant has failed to prove it. But the recent decision of the Full Bench in *Sobhagchand* v. *Bhaichand*(1) would seem to render that question immaterial. The plaintiff's mortgage being for a sum under Rs. 100 was optionally registrable: the circumstance that it was unregistered, is unimportant, as, until Act III of 1877, section 50 (which is not retrospective), there was not, as has often been decided, any competition between an optionally registrable instrument and a complusorily registrable instrument, which the plaintiff's deed of purchase was, it being for a consideration exceeding Rs. 100. The question which is hereby referred to a Full Bench is, whether the defendant can be permitted to fall back on his mortgage of the 20th August, 1870, or whether the doctrine laid down in *Toulmin* v. *Steere*(2) prevails in India, and Kuber Shivlal must be deemed to have purchased subject to the plaintiff's mortgage? In favour of the opinion that the defendant may fall back on his mortgage of 1870 is the Madras case *Rama* v. *Subbaraya* (3), and against that opinion is the Bombay case *Ichharam* v. *Raiji* (4). *Hirachand* v. *Bhasker Shende*(5) is not in point, inasmuch as Shende's deed of purchase was invalid under Regulation XVIII of 1827, sec. 10, cl. 1, being unstamped, and, therefore, a nullity. In the recent Full Bench case—*Lakshmandas* v. *Dasrat* (6)—the struggle was between mortgagees, and not between a mortgagee and a purchaser. As to *Toulmin* v. *Steere*, it should be mentioned that in *Gregg* v. *Arrot*(7) Sir Edward Sugden, as Lord Chancellor of Ireland, speaking of that case said in 1835: "That case went further than any previous authority, and Sir Samuel Romilly and I thought it at

(1) *Supra*, p. 193.
(2) 3 Mer. 210.
(3) 7 Mad. H. C. Rep., 229.
(4) 11 Bom. H. C. Rep., 41.
(5) 2 Bom. H. C. Rep., 198.
(6) *Supra*, p. 168.
(7) Lloyd and Goold's Rep., *temp.* Sugden, 246—251.

the time wrong, and recommended an appeal, but a relative of the party charged preferred paying the money to encountering any further litigation." It is also unfavourably criticised in *Watts* v. *Symes*(1) by Knight Bruce, L. J.; and in *Walcott* v. *Condon*(2) Lord Chancellor Blackburne said: "Now as to authorities, I should scarcely venture, however high the authority of Sir William Grant, to act on the decision in *Toulmin* v. *Steere*." On a rehearing of *Walcott* v. *Condon* before Lord Chancellor Maziere Brady, he said: "But one of the *dicta* of Sir William Grant in *Toulmin* v. *Steere* has been questioned, namely, that 'there is express authority to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice'; and undoubtedly, if he meant to question the right of the lender to acquire a right to stand in the place of a prior incumbrancer, his observations could not be maintained." But see his subsequent observations at page 18 of the report.

Assuming even that *Toulmin* v. *Steere* and the *dicta* in it must be considered as accepted law in the United Kingdom, which assumption the remarks above quoted show to be at least doubtful, it may be fairly questioned whether the doctrine is such as is suitable to India, or is in conformity with justice. Amongst the cases which bear more or less on *Toulmin* v. *Steere* are *Parry* v. *Wright* (3), *Garnett* v. *Armstrong*(4), *Hayden* v. *Kirkpatrick*(5), and *Unthank* v. *Gabbett*(6). In the last mentioned of these cases the facts were these: A, being owner of premises subject to a charge of £1,000, granted an annuity charged on them to the plaintiff. The premises were afterwards sold to B, who had notice of the annuity. The conveyance purported to be in consideration of £6. By another deed the £1,000 charged and the term securing it were assigned to a trustee for B. B in his answer admitted that he paid £1,006 for the purchase of the premises of which £1,000 was paid to the owner of the charge. B went

(1) 1 De G. M. & G. 240, 244.
(2) 3 Ir. Chan. Rep., 1—13.
(3) 1 Sim. & St., 369, affirmed on appeal 5 Russ., 142; but Sir E. Sugden in his Vendors and Purchasers (11th ed.), p. 1030, note (k) puts a quære to that decision.
(4) 4 Dru. & War., 182.
(5) 34 Beav., 645.
(6) Beatty, 453.

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into possession. It was held that B was entitled to hold the charge for the amount of principal and interest due on it, and the plaintiff should only be at liberty to redeem him, he accounting as a mortgagee in possession. Here the assignment of the term and charge in trust was held sufficient to enable the purchaser to fall back upon the £1,000 charge. The justice of the matter most consistent with the equity and good conscience inculcated by Regulation IV of 1827, sec. 26, seems to be that, in so far as the purchaser has beside his purchase an earlier *bona-fide* claim on the estate, he should to that extent be permitted to rank against the estate in priority to the incumbrancer whose charge intervenes in point of time between such earlier claim and the deed of purchase, whether or not the purchaser resorts to the technicality of obtaining an assignment of the earlier charge to a trustee for himself. The fair course here would seem to be to permit Lallu Trikam to redeem Kuber Shivlal's mortgage of the 20th August, 1870(1).

The question on which the opinion of the Full Bench is requested, is whether Kuber Shivlal may, under the circumstances above described, be permitted to fall back on his mortgage of the 20th August, 1870.

The case having been heard by the Full Bench, the following judgments were delivered :—

WEST, J.—The owner of the house in dispute mortgaged it on the 20th August, 1870, to Kuber, the father—now deceased—of the defendant Mulchand. Possession was taken by the mortgagee in accordance with the terms of the mortgage. On the 2nd December, 1871, the owner made a *san*-mortgage of the same house to the plaintiff. On the 20th April, 1872, he sold his remnant of ownership or equity of redemption to Kuber. The consideration for the sale was Rs. 400, the amount of Kuber's mortgage, and the owner was credited with this amount in Kuber's accounts. But the mortgage was not cancelled. Kuber became purchaser of the equity of redemption without giving up his mortgage, or declaring, in so many words, that the debt was

(1) As in *Lakshmandas* v. *Dasrat*, *supra* p. 163; *Naru* v. *Gulabsing*, I. L. R., 4 Bom., 83; *Shaik Abdulla Saiba* v. *Haji Abdulla*, I. L. R., 5 Bom., 8.

satisfied or the security extinguished. What he said was: "The amount of this assurance has been received by me"—*i.e.*, apparently the amount secured by the mortgage.

The plaintiff Lallu subsequently sued the original owner to enforce his *san*-mortgage. He obtained a decree against him, and placed an attachment on the property which was raised on the application of Kuber. The plaintiff then sued to enforce his decree as against Kuber; and the question is, whether Kuber, by becoming purchaser from his mortgagor of the equity of redemption, has so annihilated his own prior mortgage that he has thereby brought Lallu into the position of first mortgagee of property of which Kuber (or now his son Mulchand) is the owner. An objection might, apparently, have been taken to Lallu's enforcing his decree to the detriment of Kuber, on the ground that Kuber was not made a defendant in Lallu's suit, though Lallu had notice of his mortgage and his purchase; but this appears to have been waived, and, at any rate, is not a point referred to us.

In the case of *Icharam Dayaram* v. *Raiji Jaga* (1) it was said that, "generally speaking, a purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same situation as regards such subsequent incumbrances as if he had been himself the mortgagor. He can neither set up against such subsequent incumbrances a prior mortgage of his own, not consequently a mortgage which he or the mortgagor may have got in." This is the doctrine of *Toulmin* v. *Steere*, which, though often doubted and questioned, has never been quite overruled. It rests on the principle that he who becomes owner for a price expended partly or wholly in paying off his own incumbrance on the property he purchases, cannot maintain the continued existence of his incumbrance as against puisne incumbrancers of whose claims he has notice at the time of his purchase. But still the purchaser who pays off a charge and at the same time gets it assigned to a trustee for himself may enforce it as against subsequently created charges, though without this precaution he would, according to *Toulmin* v. *Steere*, be merely relieving an overburdened estate for the benefit of the puisne incumbrancers. It would seem that there must be something

(1) 11 Bom. H. C. Rep., 41.

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doubtful in a principle, the operation or inoperativeness of which rests upon so artificial and fine-drawn a distinction as that of a purchaser having become assignee, or only *cestui que trust* of the assignee, of an incumbrance; and the tendency of the decisions, especially of late years, has been to incumber the leading case with so many qualifications and deductions that it retains little or none of its original properties as a guide in such questions as may arise of a kindred nature.

One of the latest of these cases is that of *Adams* v. *Angell*(1) before Hall, V. C., and afterwards before the Court of Appeal. The plaintiff Adams was first mortgagee of a house from Angell of which one Newsom became second mortgagee. Adams sued for foreclosure, and made Newsom a defendant. A decree was obtained for successive foreclosures against Newsom and Angell. Newsom did not redeem, and Angell became bankrupt. Adams then contracted with the trustee in bankruptcy "for the absolute sale to him, subject to the claim of the said J. E. Newsom", of the property for £1, 400, it being further stipulated that "£1,380 due upon the security of the said mortgage (to the purchaser Adams) should be retained by the said F. S. Adams out of the purchase money." The money retained was declared to be "in full satisfaction of the said sum of £1,380 ..... remaining due.....upon the said mortgage security," and the assignment of the lease by the trustee to Adams was made expressly "subject to the aforesaid claim of the said J. E. Newsom." In the arguments all the familiar cases were cited, and the conclusion arrived at by Hall, V. C., was that "the question, after all, is one of intention." He read "the expressions in the deed as to the debt being satisfied as being a satisfaction only as between the parties to the deed." The reference to Newsom's claim the learned Judge read as one meant to be "not in any way improved or varied by the transaction of purchase, but left to be worked out and ascertained in the suit irrespective of the purchase." On the face of the deed there was no reservation whatever of Adams's right as incumbrancer, there was an express submission to the claim of Newsom; yet the intention of Adams as gathered from

(1) L. R. 5 Ch. D. 934.

his correspondence having been to keep his right as incumbrancer in force, he was allowed to do so as against Newsom.

In appeal, Sir G. Jessel, M.R., said : "In a Court of Equity it has always been held that the mere fact of a charge having been paid off, does not decide the question of whether it is extinguished," and of this he gives some instances. The presumption, indeed, is that an owner paying off an incumbrance intends to extinguish it; but the intention, if expressed, governs the case. If no intention is expressed, then his Lordship says : " *Toulmin* v. *Steere*(1) says the incumbrance which is paid off is merged." No intention was *expressed* in the assignment to Adams, but still the learned Judge says: "It is a most extraordinary hypothesis to suppose that Adams could have any other intention (than to keep the charge alive against Newsom) and that he could intend to make Newsom the first mortgagee." James, L.J., rests on the fact of Adam's decree for foreclosure having defined Newsom's right as one to redeem. Newsom's right had been a right to redeem all along, in the sense that he would have to redeem Adam's mortgage before he could give effect to his own against the property. Bagallay, L.J., agreed, adding that the purchase having been made pending litigation, the rights of the parties other than the vendor would not be affected by it. The pending litigation, however, created no new rights; it merely fixed a term within which the recognized rights of Newsom and of Angell must be exercised. The relation of Adams and of Newsom remained what it had been that of first and second mortgagees of the same property, so that, if the purchase by Adams of the equity of redemption would have caused a merger of his mortgage before the suit for foreclosure, it would equally have caused it after the suit and the conditional decree.

The case decides this; that an intention otherwise manifested is equivalent to an intention expressed to keep the charge alive. All the Judges agreed that in such a case the rule in *Toulmin* v. *Steere* would not apply. There can be little or no doubt, except in very extraordinary cases, that an incumbrancer purchasing intends to do so on the terms most beneficial to himself;

(1) 3 Mer. 210, 224.

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and as an express statement of this intention is no longer required, the operation of *Toulmin* v. *Steere* in the English law must, for the future, be very limited, until in due course the rule embodied in it is annulled by the House of Lords or remoulded in accordance with increased experience.

The difficulties that have arisen in England in dealing with cases of this kind seem to have been equalled by the embarrassment which the same class of questions have caused the Continental jurists. These are referred to in the case of *Ramu Naikan* v. *Subbaraya Mudali*(1). Puchta thought that there was something opposed to all legal principles in a man's holding a charge on property of which he was proprietor. Other jurists have been driven to say that an antinomy arises in such cases which has to be got over by common sense or an intuitive equity. Such confessions are discreditable to the law as a science. If its received principles lead to opposite conclusions, the principles themselves need revision, and in this instance a reconciling principle is not hard to find. The successive charges created by the owner of an estate may be regarded as fractions of the ownership which embraces the aggregate of advantages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself thus be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground of reason for saying that an incumbrancer who is already owner of one fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after the deduction of his prior share. A stranger could buy and hold the residual ownership without affecting the sequence of incumbrances. Why not one of the incumbrancers? If, instead of mental fractions of the whole estate, the incumbrances were those of A, B, C, and D on separate fields *a*, *b*, *c*, *d*, the purchase by A of the remaining one field *e* of the estate would not for a moment be supposed to affect his relations with respect to the successive incumbrancers B, C, D, though these incumbrancers by proceeding against the owner to recover

(1) 7 Mad. H. C. Rep. 229.

the sums due to them might have got *e* sold in execution. The principle applies equally to separate interests in the whole as to interests limited to separate physical parts of the whole. The interests are conditional or qualified interests; but when the condition is satisfied, and so far as they extend, they are fractions of the ownership as much as what remains to the so-called proprietor.

But the owner who buys in a first incumbrance cannot set it up against a second; how, then, can the first incumbrancer buying the residual ownership set up his own incumbrance? He becomes owner it is said, and as owner must satisfy out of the property all the charges created by his predecessor in title. To this there are two answers. What the purchaser bought, was not really the "ownership" as an aggregate of all possible rights, but the fragment of it left after a deduction of his own and all the other interests carved out of it. His purchase of this last fraction should leave the other fractions, including his own, in precisely the same position as before. The original owner, again, would have to satisfy the subsequent charges to the whole value of the estate; but that is because of a personal obligation resting on him—a personal relation between him and each incumbrancer binding him to satisfy the charge out of the estate as he may hold it. This relation extends to a stranger purchasing the residual ownership it is said, but it does not extend to the same stranger taking a mortgage of the residue to its full value. Such a mortgagee may take an assignment of any prior mortgage without his own mortgage affecting it: then why not also if, instead of becoming residual owner under the name of mortgagee, he buys the ownership as such? The theory is plainly defective. The personal obligation resting on the original owner to pay each successive incumbrancer or to make him a participator in the ownership, has relation primarily to the ownership as it stands at the time of the transaction; it is extended to an augmented ownership partly because of the difficulty of distinguishing the part newly recovered as by paying off a mortgage, but principally because of the recognition of the debt as an obligation subsisting independently of the property pledged for it, and the justice, as regards the debtor, of enforcing payment of the debt by the means most available. Neither reason applies to a purchaser. He has not contracted

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any personal obligation to an incumbrancer which should make his position worse in paying off the first incumbrance than if he had taken a last mortgage and then an assignment of the first. The enforcement of the discharge of the debts, puisne to the one which he discharges without reference to the capacity of the property to bear both or to the prior right to discharge of the first incumbrance, can only operate to prevent his taking an assignment of it, and so by lessening the demand tend to the perpetuation of separate interests in the property and to making the terms on which money can be raised more onerous by attaching disadvantage to the position of a purchaser who would otherwise in many instances give the best price.

It seems, then, that the position of purchaser of the owner's remaining interest and of a first incumbrance, or the position of a first incumbrancer buying the remnant of ownership where there have been several successive mortgages, is quite distinguishable from that of the owner himself on account of the absence, in the purchaser's case, of any general personal obligation which can be fixed upon the whole property so as to override his own mortgage right in it. This has been felt in the English Courts, and has led to the doctrine that, though the original owner cannot set up a prior incumbrance got in by him against a puisne charge, yet a purchaser, whose money is expended partly or wholly in discharging an incumbrance, may, at his option, set up such incumbrance as still subsisting for his own benefit as against the puisne incumbrancers. It was formerly thought that the desire to keep the security in force must be expressly stated; now, as the case of *Adams* v. *Angell*(1) shows, the intention may be gathered from indications outside the deed itself.

This is the point to which the cases in the Indian Courts also have been gradually tending. The decisions have not been quite consistent in principle, but the conclusion arrived at in the case of *Ramu Naikan* v. *Subbaraya Mudali* (2) on general principles, is substantially the same as that expressed in the case of *Gopee Bandhoo Shantra Mohapattur* v. *Kale Pudo Banerji* (3). When the purchaser of the owner's residual right chooses to take the

(1) L. R. 5 Ch. D. 634. (2) 7 Mad. H. C. Rep., 229.

(3) 23 Calc. W. Rep., p. 338.

owner's accompanying obligation, he may do so; but he is not under any compulsion to do so, no more where he happens to be a prior incumbrancer, than when he is altogether unconnected with the other parties except as purchaser. As, then, *Toulmin* v. *Steere*(1), or the apparent principle of that case, has in England been so qualified and encroached upon as to reduce the prejudice to the incumbrancer purchasing, to a mere matter of intention clearly signified, and the same modification of its principle has been forced on the other High Courts in India, there does not seem to be any sufficient reason why we should continue to make it a rule here, albeit it has been accepted by the highest authorities in the past. If an incumbrancer buying, intends to retain the benefit of his charge, he must be allowed to retain it. Generally he will intend to retain it, and slight evidence will suffice to establish this. In the present instance the purchaser Kuber retained his mortgage deed uncancelled, though he gave his mortgagor an acquittance in the deed of purchase. It cannot be supposed here, any more than in *Adams* v. *Angell* (2), that the purchaser intended to part with his money or his right to money merely in order to make a present to his puisne incumbrancer; and his intention having been to retain the benefit of all his rights, his son Mulchand may properly require redemption of his own first mortgage as the condition of Lallu's enforcing the decree on his mortgage against the property. The decree of the District Court must, consequently, be reversed with costs throughout on Lallu.

MELVILL, J.—I concur. In *Icharam* v. *Raiji* (3) we applied the strict rule of *Toulmin* v. *Steere*, and I do not know that there was anything in the circumstances of Icharam's case which rendered that rule inapplicable. There was, if I remember right, no argument on the subject. There may, however, undoubtedly be cases in which the strict rule would be productive of hardship; and I am quite willing that it should be applied with the modifications introduced by recent decisions, and adopted by the Indian Legislature in the Transfer of Property Act, 1882. Section 101 of that Act is as follows:—"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be

(1) 3 Mer. 210. (2) L. R. 5 Ch. D. 634. (3) 11 Bom. H. C. Rep. 41.

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extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

PINHEY, J.—I am of the same opinion. I also was a party to the decision in *Icharam Dayaram* v. *Raiji Jaga* (1), but at the time I was not aware that the soundness of *Toulmin* v. *Steere* had been questioned. I have known it often questioned since. The rule of law enunciated in that case, though highly technical, was very clear, and had been often acted on as "authoritative". As its application completely disposed of the case before us, I preferred to rest my opinion on it in disposing of *Icharam Dayaram* v. *Raiji Jaga*, rather than discuss the other point which my brother Melvill discussed, as I had at the time been but a short time in the High Court, and my short experience in Gujarat did not qualify me to give an opinion thereon off-hand.

(1) 11 Bom. H. C. Rep. 41.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Bayley.

February 23.

HARRIETTE A. KING, PETITIONER, *v.* JAMES S. KING, RESPONDENNT.
ALLAN F. TURNER, INTERVENOR.*

Divorce—Intervenor—Right of third person to intervene—Procedure in case of intervening after decree nisi—Right to move for new trial—Practice—Procedure—Review—Motion to make absolute a decree nisi—Discretion of Court to refuse motion—Further inquiry ordered by Court—Indian Divorce Act IV of 1869.

A wife sued for dissolution of marriage on the grounds of her husband's adultery and cruelty. The respondent entered an appearance through a solicitor, but did not file any written statement, and did not appear at the hearing, and a decree was made for the petitioner on the 26th July, 1881. On the 3rd October, T, who had acted as solicitor for the respondent, appeared as intervenor, and under section 16 of the Indian Divorce Act (IV of 1869) obtained a rule *nisi* calling on the petitioner to show cause why a new trial should not be had and all further proceedings under the decree *nisi* should not be stayed. The rule was obtained upon an affidavit of T, in which he stated that since the date of the decree *nisi* he had been informed by the respondent that the petitioner had been, prior to that date, guilty of adultery with a person whose name he mentioned; that he was informed by the respondent that the reason why he (the respondent) had not defended the suit was that he wished so avoid making public the

* Suit No. 195 of 1881.