APPELLATE CIVIL.
FULL BENCH.

Before the Acting Chief Justice Bayley, Mr. Justice West, Mr. Justice Pinhey, and Mr. Justice Nanabhai Haridas.

1883
July 6.

SHIVA NATHAJI, APPLICANT, *v.* JOMA KASHINATH AND TWO OTHERS, OPPONENTS.*

Extraordinary civil jurisdiction of the High Court—Regulation II of 1827, *Sec.* 5 *—Letters Patent*, 24 *and* 25 *Vict., C.* 104, *Sec.* 15—*Code of Civil Procedure* (*Act XIV of* 1882), *Sec.* 622—*Certiorari—Mandamus—Prohibition—Specific Relief Act I of* 1877, *Chap. VIII.*

A Division Bench [PINHEY and NANABHAI HARIDAS, JJ.] of the High Court referred the following question for the determination of the Full Bench :—

"Whether the High Court should exercise its extraordinary jurisdiction under section 622 of the Code of Civil Procedure, or otherwise, on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases in which it appears the law has specifically prescribed another remedy by suit or otherwise?"

Held that the question did not admit of a precise categorical reply; that the High Court could not impose on itself limitations without regard to circumstances; but that the general principles governing the exercise, by the High Court, of its visitatorial or superintending powers to be deduced from a general survey of the authorities on the subject might be reduced to the form of the following seven propositions, the fifth of which would ordinarily govern in the class of cases alluded to in the question :—

(1). The visitatorial or superintending power of the High Court is so necessary, and almost indispensable, that it is not to be wholly excluded even by a clause in a Statute withdrawing cases under the Statute from its control. When such a Statute has been made a mere pretext, or has been wholly misapplied, the case will be treated as one not really arising under the Statute, but on an evasion or perversion of the Statute, and, as such, subject to the general control of the Court.

(2). The Court, having called up the record or proceedings of a subordinate Court, will itself investigate the facts on which a jurisdiction has been assumed or declined; on which it depends whether the subordinate Court could or could not legally deal with the matter in question, either at all, or on the principle to which it has referred the case; or according to which its mode of inquiry, or of action, may or may not have been in contradiction, rather than obedience, to the rules of procedure, or the principles implied in them, to such a material extent as to defeat the purpose of the law.

(3). If the Court finds that the external conditions of jurisdiction, of investigation, and of command, have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the deter-

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mination of the inferior Court, in any matter committed by the Legislature to the discretion of such Court.

(4). Where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure.

(5). Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should, in such cases, be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that by the ordinary and prescribed method an adequate remedy, or the intended remedy, cannot be had.

(6). The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for or against the Court's intervention, due weight is to be given to them, regard being always had to the principles already enunciated.

(7). The Court will "sedulously abstain" from making any order or refusing to make it on grounds the appreciation of which is exclusively assigned by law to some other authority, provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range.

THIS was an application for the exercise of the High Court's extraordinary civil jurisdiction.

The applicant Shivá Náthájion March 7th, 1882, obtained a decree against one Kashináth Mádhá Pátil for Rs. 2,195-8-0, to be recovered from the latter personally, and by a sale of the property mortgaged by him to the applicant. On the 7th of October, 1882, the applicant applied for execution of the decree, and the Subordinate Judge attached the property by a prohibitory order under sections 254 and 274 of the Code of Civil Procedure. On the 10th of December, 1882, three minor sons of Káshináth Máhád Pátil by their guardian, their mother Padme, objected to the order of the Subordinate Judge, on the ground that the property was ancestral, that they and their father were undivided, and that they had three shares in it, and prayed that

the attachment, so far as their shares was concerned, might be raised. On the 26th of February, 1883, the Subordinate Judge found the property to be ancestral and the sons undivided from their father, and confirmed the attachment to the extent only of Kashinath Mahad Patil's share. The judgment creditor Shiva Nathaji thereupon made this application to the High Court for the reversal of the order of the Subordinate Judge, on the ground that it was contrary to law.

The matter was heard on the 3rd of May, 1883, by a Division Bench [PINHEY and NANABHAI HARIDAS, JJ.,] of the High Court, who referred it to a Full Bench, stating the question for the decision of the Full Bench to be—"whether the High Court should exercise its extraordinary jurisdiction under section 622 of the Code of Civil Procedure otherwise on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases, such as the present, in which it appears the law has specifically prescribed another remedy, by suit or otherwise? For instance, parties considering themselves aggrieved by order passed under sections 280, 281, or 282, may, under section 283, institute a suit. Instead of filing a suit are they entitled to ask the High Court to exercise its extraordinary jurisdiction, and set aside the order? The decisions on the point conflict, and we have, therefore, made the reference."

The matter was heard by the Full Bench on the 18th of June, 1883.

Shantaram Narayan for the applicant.—The question is to be argued irrespective of the merits, and with reference, not merely to section 622 of the Code of Civil Procedure, but section 5 of Regulation II of 1827, as well as section 15 of 24 and 25 Vict., c. 104, the Act constituting the High Court. Section 5 of Regulation II of 1827, with the rest of chapter I of that Regulation, was repealed by Act XII of 1873; but as section 1 of that Act saves "every established jurisdiction", this High Court regards section 5 of the Regulation as still in force. The first clause of that section empowered the Sadar Divani Adalat to hear and determine appeals and revise and rectify the proceedings of Zilla Courts. Its second clause enacted that "it shall also be competent to the said Court to call for the proceedings of any sub-

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ordinate Civil Court, and to issue such orders thereon as the case may require." The plenary powers thus vested in the Sadar Divani Adalat were transferred to the High Court on its creation on the 14th of August, 1862, by section 7 of 24 and 25 Vict., c. 104. The High Court, in the words of that section, "shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts" abolished by the Act. So that the High Court could exercise all the jurisdiction which it was the practice of the Sadar Divani Adalat to exercise. [WEST, J.—But mere exercise of a jurisdiction, by a Court such as the Sadar, established by Statute is not sufficient to prove that it properly possessed it. "No practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted" : *Plamer* v. *Hutchinson*(1).] Section 15 of the High Court Act, 24 and 25 Vict., c. 104, expressly gives to the High Court superintendence over all Courts which may be subject to its appellate jurisdiction. [BAYLEY, C. J. —It is under this section that it has been held that the High Court has superintendence over the Bombay Court of Small Causes.] That is so. In the exercise of the extraordinary jurisdiction derived under section 5 of Regulation II the High Court held, in *Mahadaji Govind* v. *Sonu bin Davlata* (2), that it had the power to set aside an order made by a mamlatdar under Bombay Act V of 1864. A mamlatdar's Court is not governed by the Code of Civil Procedure, but is a remnant of the Revenue Courts. [PINHEY, J. —At page 251 of the judgment in that case Sir Charles Sargent says : "The words of the law impose no limit on the exercise of the power; but the Court has, in its discretion, consistently refused to exercise its extraordinary jurisdiction, except in cases which disclose some grave and patent error, not otherwise to be remedied."] It must be admitted that, unless a grave and patent error exists, the High Court will refuse to exercise jurisdiction, but, as to the existence of another remedy, by the very constitution of the mámlatdár's Court a remedy by suit is always open. The order of a mámlatdar is liable to be superseded by a decree of the Civil Court. Sir Charles Sargent could not, therefore, have meant an error for which there was no remedy by suit. The mám-

(1) L. R., 6 Ap. Ca. at p. 628. (2) 9 Bom. H. C. Rep., 249.

latdárs' Courts were re-constructed by Act III of 1876, section 18 of which is express on this point. It provides that "in any subsequent suit or other proceeding in the ordinary Civil Court between the same parties, or other persons claiming under them, the mamlatdár's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive." Even after this Act the Full Bench of this High Court held, in *Bai Jamna* v. *Bái Jadav* (1), that it was not deprived thereby of the powers of superintendence and revision which it had previously exercised over the mámlatdárs' Courts. A reference to these cases is important, because the mámlatdárs' Courts are not governed by the Code of Civil Procedure, and the High Court could not have exercised superintendence over them except under section 5 of Regulation II of 1827. Section 350 of Act VIII of 1859 enabled the High Court merely to deal with material irregularities in *suits*; section 38 of Act XXIII of 1861 indirectly gave a similar jurisdiction in miscellaneous proceedings; and section 35 of that Act referred only to cases where no appeal lay. Section 622 of Act X of 1877, when it came into force on the 18th of October, 1877, ran thus: "The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit." As altered by Act XII of 1879, and re-enacted in Act XIV of 1882, a third contingency has been added, in the following words: "or to have acted in the exercise of its jurisdiction illegally or with material irregularity." Now, as regards the first of the three contingencies so expressed, *viz.*, the exercise by the lower Court of jurisdiction not vested in it by law, the non-existence of another remedy has never been held to be a condition precedent. The same is the case with regard to the second contingency; and there is no reason why it should be so held in the case of the third. In the Full-Bench case of *Maulvi Muhammad* v. *Syed Husain* (2) decided by the High Court of Allahabad, Pearson, J., Oldfield, J., and Straight, J., held that, under section 622, the

(1) I. L. R., 4 Bom., 168. (2) I. L. R., 3 All., 203.

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High Court might pass any order which it might have passed if it had been dealing with the case as a second appeal Stuart, C. J., however, went further, and held that the Court might pass any order, whether in regard to law or fact, as it thought proper for the purposes of the justice of the case. In the case of *Mt. Jameela* v *Luchmun Panday* (1) the High Court of Calcutta under section 622 affirmed their jurisdiction to interfere in a remediable case, the subordinate Court having refused to exercise jurisdiction vested in it by law. [WEST, J.—In the case of *J. G. Bagram*(2) Chief Justice Couch takes a distinction between the non-exercise of jurisdiction and the wrong exercise of it. The subordinate Court in that case possessed jurisdiction, and exercised it, but in an erroneous manner, and he held that the decision of the subordinate Court ought not to be set aside under the 15th section of the High Court Act.] The High Court of Madras has also, under section 622, exercised jurisdiction in order to rescind an order of the lower Court confirming a judicial sale, although there was no material irregularity in publishing or conducting the sale. The ground alleged for setting aside the sale was fraud, which could always be made the ground of a suit: *Subbáji Rau* v. *Srinivasa Rau* (3). In the case of *Mana Vikrama, Zamorin of Calicut*, v. *Mallichery K. Nambudri* (4) the Madras High Court held that it could interfere under section 622 where the subordinate Court had refused to file an award upon an application under section 525. The Bombay High Court exercised this jurisdiction soon after its establishment: see *In re Sambhájiráv*, referred to in *Bai Baiba* v. *Bai Daguba*(5). There Sausse, C. J., and Hebbert and Newton, JJ., exercised extraordinary jurisdiction, even though a suit was open to the aggrieved party by section 7 of Regulation VIII of 1827. This was in February, 1863. In 1877, before Act X of 1877 became law, Westropp, C. J., and Melvill, J., interposed and set aside the order of a Subordinate Judge who had refused to make an inquiry under section 269 of Act VIII of 1859. In *Ganesh Govind Bhole* v. *Rámchandrá Bhâskar* (6) Justices Kemball and Pinhey having differed in opinion, the question, whether the High Court should exercise jurisdiction or not, was

(1) 4 Calc. L. R., 74.
(2) 20 Calc. W. R., 10.
(3) I. L. R., 2 Mad., 264.
(4) I. L. R., 3 Mad., 68.
(5) I. L. R., 6 Bom., 722.
(6) Printed Judgments for 1881, p. 133.

referred to Justice Melvill, and he said : "The High Court's powers of revision, derived from clause 2, section 5 of Regulation II of 1827, are as wide as possible ; but, no doubt, our general rule has been not to exercise our extraordinary jurisdiction (except on grounds relating to jurisdiction) whenever the applicant has an ordinary remedy. I think, however, that, in practice, we have made an exception to the rule whenever an order or decree complained of has been, on the face of it, manifestly illegal and unjust. In such instances we have considered it more equitable to interfere summarily for the correction of a patent error than to force the aggrieved party to have recourse to the tedious and expensive process of a regular law-suit." The Court accordingly issued a rule, even though a suit was open to the injured party under section 335 of the Code of Civil Procedure. *Shripati valad Rewa Chandhari* v. *Balvant M. Deshpande*(1) was also a case of difference of opinion between Justices Kemball and Pinhey, and a reference to Justice Melvill, who was of opinion that "when, in a proceeding in which no appeal is permitted, there appears on the face of the judgment of a subordinate Court not a doubtful question of law or fact, but a manifest error of law vitiating the decision, I think that we ought, as a rule, to exercise our extraordinary jurisdiction, and not put the aggrieved party to the delay and expense of a regular suit." A suit was there open to the aggrieved party under section 283 of the Code of Civil Procedure. *Krishnaram Kirparam* v. *Jagneshvar Dinkarji*(2) and *Garba valad Hari* v. *Suka valad Baban*(3) are similar cases. In *Ishwardas Jagjivandas* v. *Dosibai*(4) Sargent, C.J., and Kemball, J., exercised the jurisdiction, and directed the Court below to pass a judgment, to be followed by a decree, according to an award, which it erroneously had omitted to do. There are also cases of the same nature now pending—Application No. 41 of 1882 and Application No. 44 of 1883—in which the Court has granted rules *nisi*. It is, therefore, submitted that the proposition, that this jurisdiction should not be exercised where the aggrieved party has a remedy by suit, is entirely new ; and that no such restriction should be imposed on the exercise of

(1) Printed Judgments for 1881, p. 221. (3) Printed Judgments for 1882, p. 197.
(2) Printed Judgments for 1881, p. 223. (4) I. L. R., 7 Bom., 316.

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the discretion of the High Court. The effect of such a practice would be not to discourage, but to increase litigation.

The judgment of the Court was delivered by

WEST, J.—In the present case the question referred for the decision of the Full Bench is as follows :—

"Whether the High Court should exercise its extraordinary jurisdiction under section 622 of the Code of Civil Procedure, or otherwise on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases, such as the present, in which it appears the law has specifically prescribed another remedy, by suit or otherwise ? *E.g.*—Parties considering themselves aggrieved by orders passed under sections 280, 281, or 282 may, under section 283, institute a suit. Instead of filing a suit, are they entitled to ask the High Court to exercise its extraordinary jurisdiction and set aside the order ? The decisions on the point conflict, and we have, therefore, made the reference."

The matter is one of practical importance, as is shown by the frequency with which it comes up in the Court. That it is one of some difficulty is proved by the differences of opinion which have led to the present reference. We propose, therefore, to consider it in the light, both of the decisions of the Indian Courts and of those given by the English Courts in analogous circumstances ; and as the question is closely connected with others referable to the same general principles, and can be better understood by a discussion of the whole group, we will try to ascertain what are the proper grounds and limits of the Court's visitatorial and superintending,—that is, of its extraordinary, jurisdiction.

Mr. Shantaram relied much on the practice of the late Sadar Court under the wide and vague provisions of Bombay Regulation II of 1827, sec. 5. In the case of *Palmer* v. *Hutchinson* (1) the principle is stated that a Court cannot by mere practice acquire any jurisdiction not given to it by its Charter or Act of constitution(2). Thus the proper scope of the enactments regu-

(1) L. R., 6 Ap. Ca., 619.

(2) See also *per* Bayley, J., in *Khimji Chaturbhuj* v. *Sir C. Forbes*, 8 Bom. H. C. Rep. at p. 108, O.C.J.

lating the jurisdiction of the late Sadar Court was not really affected by anything done, or supposed to be done, in virtue of them. For the proper limits of the jurisdiction we must still look to the words of the law: but the decisions and the practice of the Sadar Court, and after it of the High Court, are of use, as in the case of other jural questions, as showing what view was taken by competent authorities, with or without special advertence to the questions now brought before us, of the construction and application of the language we are called on to interpret.

The provisions in Regulation I, sec. 7, of 1827, reserving to the Governor in Council for two years the power of interpretation of the then new Elphinstone Code, and after that time giving it to the Sadar Court, meant no more than that after the temporary suspension of the ordinary powers of the Chief Court these were to be resumed. It did not mean that the interpretations of the Sadar Court were to have a legislative force, or any more than that its ordinary functions were, after two years, to be exercised as if they had not been interrupted. The English Statute of Treasons, 25 Edw. III, c. 5(1), provides that new and doubtful cases arising under it shall be referred for determination of their character, as treason or felony, to Parliament, but this has never been supposed to make the Judges' power legislative in any special sense, since the judicial function was dropped by Parliament in this class of cases, and new Statutes were passed without reference to it (2).

The grounds of the superintending and of the extraordinary jurisdiction of this Court are set forth in *Mahadaji* v. *Sonu*(3), and in the same case the limits imposed by the Court, or recognized by it, as necessarily controlling the exercise of its powers, are also stated. "The words of the law," says Sargent, C.J., "impose no limit on the exercise of the power; but the Court has, in its discretion, consistently refused to exercise its extraordinary jurisdiction, except in cases which disclose some grave and patent error not otherwise to be remedied." The judgment, then, after

(1) See Reeves's Hist. of the Eng. Law, Ch. XIV; Revised Statutes, Vol. I p. 106; Steph. Hist. of the Crim. Law, Vol. II, p. 250.

(2) East's Pl. Cr., Ch. II, § 6; Blackstone's Com., Bk. IV, Ch. VI.

(3) 9 Bom. H. C. Rep. at p. 251.

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ruling that the mamlatdar's Court, though of new creation, was a "Civil Court" within Regulation II, sec. 5, of 1827, concludes: "We think we should not interfere, unless it be quite clear that the mamlatdar's order has been made without jurisdiction, and this certainly is not clear in the present case." His jurisdiction depended, as the Court thought, on a dispossession within six months, and as it was not manifest that he had determined this point erroneously, his decision on the evidence was taken as conclusive.

In *Bai Jamna* v. *Bai Jadav*(1) the point considered by the Court was whether the mamlatdar's Court, as reconstituted by Bombay Act III of 1876, had jurisdiction in the city of Ahmedabad. It was ruled that it had, and that the High Court had superintendence over the mamlatdar's Court equally after as before the recent legislation. Mamlatdars' Courts are not generally subject to the Code of Civil Procedure, nor are they included in the provisions of the Bombay Civil Courts Act XIV of 1869, so that the visitatorial power over them has to be drawn from the earlier source of Regulation II of 1827, and from the Statute 24 and 25 Vict., c. 104, sec. 9.

The superintending jurisdiction of this Court over all inferior Civil Courts, even those of recent creation, seems thus established in a manner analogous to that of the Queen's Bench over the inferior Common Law Courts in England. The ground of interference is limited to "grave and patent error not otherwise to be remedied". This principle, if taken in its literal sense, has been considerably widened in some of the more recent cases in this Court. It will be desirable to review these, and at the same time to consider some of the more important decisions on similar points of the other High Courts in India.

The case of *Jamsedji Cowasji* v. *Motibai*(2) was disposed of on the principle stated by Westropp, J.: "We conceive that we have full authority under Regulation II of 1827, sec. 5, cl. 2, to call for the proceedings of a subordinate Court, and to direct the Judge of it to exercise the jurisdiction conferred upon him by an Act of the Legislature which, owing to a misconception, he has declined to do."

(1) I. L. R., 4 Bom., 168.

(2) 2 Bom. H. C. Rep. 375.

In the case of *Shekh Ajmudin Saheb* v. *Hari Sadashiv Erande*(1) the Subordinate Judge was directed to make an inquiry into the claim set up by a claimant to property under section 269 of Act VIII of 1859. There was a possible remedy by suit, but the direction was to exercise a particular judicial function in a way avoided by the Court below. The inquiry incumbent on the Court below had not been made.

In the case of *Ishwardas Jagjivandas* v. *Dosibai*(2) the Court directed an inferior Court to give effect to an award, filed many years before, in the way prescribed by law. It was the enforcement of a function declined by the Subordinate Judge. It may be taken, then, as well established that the Court will enforce the exercise of jurisdiction when that is necessary, and that even the possibility of proceeding in some other way will not shut out a right to claim the assistance of the Court in getting a matter dealt with judicially, in a way that was intended by the law, but cannot otherwise be made available.

In the case of *Mana Vikrama, Zamorin of Calicut*, v. *Mallichery K. Nambudri* (3) there had been a refusal to file an award. On an application under section 622 the Court said: "Although the Judge has treated the application as a suit, it is, in fact, not a suit, and it is determined, not by a decree, but by an order refusing the prayer of the application. No appeal is given by the Act from such an order. It is, therefore, competent to this Court to admit the application."

In the *Dandekars'* case(4) this Court set aside an order of a Subordinate Judge for filing an award under section 525, Code of Civil Procedure (Act X of 1877). Under the Code no appeal would lie from a decree passed in accordance with the award. No remedy being provided by appeal or otherwise for a failure of justice in the inferior Court, the case is not such a one as that now before us. It was on a consideration of the final character of the order for filing an award that I, in the previous case referred to in the one just noticed, held in chambers that a *primâ facie* substantial objection to the award ought to prevent its being filed. He

(1) Printed Judgments for 1877, p. 162.
(2) I. L. R., 7 Bom., 316.
(3) I. L. R., 3 Mad., at p. 69.
(4) I. L. R., 6 Bom., 663.

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who brings it in, is the actor seeking to establish a right, and should not be freed from the burden of proof when his application on the award is met by a case showing its apparent nullity. The same result, however, is arrived at if the burden of proof on the rule to show cause is properly laid, without a too slavish regard to the nominal positions of the parties concerned, on him who desires that the award be filed.

The Courts semetimes underrate their powers, and the High Court is called on to enlarge their too narrow views. The case of *Subbaji Ráu* v. *Srinivasa Rau*(1) was one of a sale under a decree in which the agent of the decree holder had fraudulently aided the purchaser to buy at an under value by inducing other persons not to bid. The judgment-debtor sought to prevent a confirmation of the sale, but it was confirmed, as there had been no irregularity; and an application being then made to the High Court, it was held that the Court could rescind the order under section 622. "Fraud," according to the familiar formula, "is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice(2)." Lord Coke says "it avoids all judicial acts." "Courts of Equity" again "have an inherent jurisdiction to relieve against every species of fraud"—*Colt* v. *Woollaston* (3). The Courts of this country are Courts of Equity, and, regarding the sale as a judicial proceeding, the District Court in the case in question ought not to have declined to annul it. Regarding it as a transaction in which the Court took the place of the owner, the principle applied that "every transfer or conveyance of property.....is in equity vitiated by fraud," much more a sale still awaiting confirmation. The High Court, therefore, could most properly insist on the District Court's exercising the authority which it had declined to use on an idea that it did not exist. The former law, section 35 of Act XXIII of 1861, extended in terms only to an excess of jurisdiction by an Appellate Court; the present Code extends equally to a refusal of jurisdiction by any Civil Court through a misconception of its authority.

(1) 2 Mad. H. C. Rep., 264.

(2) *Per* De Grey, C. J., in *Duchess of Kingston's Case*, 2 Smith's L. C., 7th ed, 770.

(3) 2 P. Wms., 156.

In the case of *Mussamut Jameela* v. *Luchmun Panday* (1) there was apparently an exercise, by the High Court, of its extraordinary jurisdiction in a case admitting of a remedy in the regular course of the law. But that case may perhaps be referred more properly to the principle that the High Courts in India, acting under section 622 of the Civil Procedure Code, will, like the Queen's Bench in England by *mandamus*, enforce the exercise by inferior Courts of their proper functions. If the Munsif improperly refused to make an inquiry, he thereby declined jurisdiction in a case proper for its exercise, and falling within the express provisions of the Code.

But the High Court can also enforce, or control, the exercise of authority by reference to extrinsic circumstances misconceived, in their bearing on his jurisdiction, by a Judge of an inferior Court, and undo what he has done in a procedure opposed to the law.

The cases of *Judooputtey Chutterjee* v. *Chunder Kunt Bhuthacharjee* (2) and *Showdaminee Dossee* v. *Manickram Chowdhry* (3) illustrate this view. In the former, the Subordinate Judge had made an order in a matter which in its nature was within his competence, but without any grounds in the particular case. That is, he removed plaintiff's name without his assent. This order the High Court set aside, under the superintending power given by 24 and 25 Vict., c. 104, sec. 15. It was a case of illegality in the exercise of jurisdiction, not of want of jurisdiction, seeing that the order was assailable only under the particular circumstances. In the latter case the lower Court had exempted a particular judgment-debtor from liability under a decree. This was called an excess of jurisdiction, but Jackson, J., said: "Although the Court is competent to require the inferior Courts to exercise a jurisdiction which they possess, and which they have declined to exercise, or to set aside anything which has plainly been done without jurisdiction, that section (section 15 of the same Statute) will not enable this Court, by way of motion, to deal with an order made by a lower Appellate Court in cases where it has jurisdiction, and the law expressly declares that its

(1) 4 Cal. L. R., 74. (2) 9 W. R., 309, C. R.

(3) *Ib.* at p. 387.

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order shall be final." It is obvious that the declaration of finality must apply equally to a Court of original as of appellate jurisdiction. In both cases the Legislature intends the controversy to be closed when the designated Judge has exercised his mind on the intended subject. His determination of it, even though erroneous, is not then illegal. The superintending function is to compel the exercise of judicial authority on the subject, and not beyond it; to define the subject by the elements composing it, and by reference to the prescribed, or intended, external conditions; and to exact obedience to the law of procedure in gathering the materials for adjudication, and in giving effect to them. It is no part of that function to substitute the opinion of the superintending Court for that of the Court superintended, in matters assigned by the Legislature to the cognizance of the latter. What it can exact is a real endeavour, in good faith, to apply the law. Such an endeavour is an actual application of the law, the application intended, (as the possibility of error could not have been overlooked,) except in cases of some such extraordinary misconception as cannot be deemed to fall within the purpose of the law at all. Such instances may be negative, as well as positive, — that is, there may be a refusal of relief, or of action, by the inferior Court, on grounds implying a total misconception and misapplication of the law it its limiting operation. There may also be instances in which both kinds of blunders have been combined. When these stand manifestly quite outside the positive or the negative sphere of the law, they are but in semblance an application of the law, and the High Court must annul what is obviously a mere pretext or a perversion.

It must be conceded, indeed, that some of the decisions have gone much further than this. On section 622 of the Code of Civil Procedure the High Court at Allahabad has ruled that, in a case called for under that section, the High Court may pass any order that could be passed in second appeal—*Maulvi Muhammad* v. *Syed Husain* (1). It was admitted that this was tantamount to giving a second appeal, at the discretion of the Court, in the very cases in which the Legislature had denied it. The Courts are bound to act, so far as they can, in furtherance of the inten-

(1) I. L. R., 3 All., 203.

tion of the Legislature, and the moderate construction put up this Court on the still wider terms of the Bombay Regulation seems to us more consistent with sound principles than that put by the Allahabad High Court on an enactment intended only for extreme, and wholly unusual, cases.

In *Trimbak* v. *Naro*(1) the rule is stated thus: "The extraordinary jurisdiction of this Court is exercised generally only when a lower Court has exceeded its jurisdiction, or has declined to exercise a jurisdiction with which it is clothed, or where great and irreparable wrong is done by a decree or order of a lower Court."

In *Ganesh Govind Bhole* v. *Ramchandra Bhaskar* (2) Kemball, J., thought that a wrong order, on an application by a purchaser at an execution sale for possession, ought to be set right by the exercise of the extraordinary jurisdiction. Pinhey, J., consistently with the principle lately cited, thought it ought not, there being a remedy by suit under section 333 of the Code of Civil Procedure. Melvill, J., admitting this, and acknowledging that the extraordinary jurisdiction had generally been confined to cases in which the applicant had not an ordinary remedy, thought an exception was admitted where an order was "manifestly illegal and unjust". A rule was accordingly granted.

In *Krishnarám* v. *Jagneshwar*(3) an alleged mortgagee having set up a claim upon attached property under several mortgages, the Subordinate Judge found that one of these was spurious. Nevertheless he ordered a sale to be made subject to all. The decree-holder applied to this Court. The learned Judges differed as to its being, or not being, a case for the exercise of the extraordinary jurisdiction; but a rule was granted to show cause why the Subordinate Judge's order should not be modified. That order was not subject to appeal; but, if wrong, could be displaced, not only by a suit brought by the judgment-creditor, but by the purchaser, or by the judgment-debtor.

In *Shripati* v. *Balvant*(4) a purchaser of an equity of redemption sought to raise an attachment. His claim was rejected, because

(1) Printed Judgments for 1880, p. 32. (3) Printed Judgments for 1881, p. 223.
(2) Printed Judgments for 1881, p. 133. (4) Printed Judgments for 1881, p. 221.

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the vendor had sold without possession, the property being held by the mortgagee. Pinhey, J., opposed the exercise of the extraordinary jurisdiction, and would have left the applicant to a suit under section 283. Kemball, J., thought it should be exercised, and Melvill, J., agreed with the latter, on the principle, as stated by him, that, "when, in a proceeding in which no appeal is permitted, there appears on the face of the judgment of a subordinate Court, not a doubtful question of law or fact, but a manifest error of law vitiating the decision, I think that we ought, as a rule, to exercise our extraordinary jurisdiction, and not put the aggrieved party to the delay and expense of a regular suit."

In *Garba* v. *Suka*(1) a Subordinate Judge disallowed a claim to attached property, as resting on a sale by a vendor not himself in possession, though his tenant was. Kemball, J., thought it a proper case for the exercise of the extraordinary jurisdiction: Pinhey, J., was of an opposite opinion, as a remedy was open by suit under section 283: Melvill, J., concurred with the former.

In *Uttamram* v. *Damodardas* (2) a difference of view as to whether the extraordinary jurisdiction should be exercised in a case of costs, thought by one learned Judge to have been wrongly, and by the other rightly dealt with, was, on reference to Melvill, J., dealt with on another ground, *viz.*, that there was a question of who were necessary parties defendant, which had been disposed of by the District Court in a way that, if wrong, would work an injury to the plaintiff. The rule was, therefore, granted to the plaintiff.

In *Rai Baiba* v. *Bai Daguba*(3) this Court, following an early ruling, cancelled a certificate of heirship given to a minor. This is said to have been done under the extraordinary jurisdiction; but though a refusal to grant a certificate could not, it was said, be appealed against, that being a matter of discretion(4), yet it appears from sections 23 and 38 of Act XXIII of 1861, coupled with the provisions of the Civil Procedure Code, Act VIII of 1859, sections 333, 363, 388, that an appeal might possibly be made against an order granting a certificate. That such appeals, in

(1) Printed Judgments for 1882, p. 197. (3) I. L. R., 6 Bom., 728.
(2) Printed Judgments for 1882, p, 199. (4) *Re Vasudev Vaman*, 14th April 1864.

the irregular form of applications, were several times entertained, appears from the cases referred to in *Purshotam Mansukh* v. *Ranchhod Purshotam*(1). Sections 540 and 647 of the present Code have preserved this appellate, coupled necessarily with a superintending(2) jurisdiction, if it existed, as it was probably thought by the Legislature to exist, under the former Code. If there was no appeal, then the case, being one in which no remedy in the same course of proceedings, beyond the Court supposed to have erred, is provided by the law, was one of a class to which most of the cases of interference have belonged.

In the case of *Vishnu valad Mansa* v. *Ramji valad Dhaku*(3) on an application to the Court, in its extraordinary jurisdiction, against a mamlatdar's decision, and not, therefore, under the Code of Civil Procedure, this Court reversed the order, because the evidence had been improperly taken. This furnishes a good illustration of the kind of irregularity which the Court may correct by its interference. The mamlatdar's order is final for its own purposes, inasmuch as no appeal lies against it, and the irregularity was of a kind not depending on any appreciation of evidence. It consisted in a gross infringement of the external conditions imposed by the law on the collection of the materials for adjudication.

It is not easy, if possible, to reduce this series of decisions to consistent results. It comes out, however, that the High Court will interfere to enforce the exercise of jurisdiction, or to restrain an excess of jurisdiction, in cases apparently calling for such interference, even though there may be a remedy by suit. When there is a remedy by appeal, the cases do not appear to warrant such interference, except under circumstances in which an appeal would manifestly be ineffectual. In cases of illegality and irregularity in dealing with matters in their nature cognizable by the inferior Court, the High Court has generally been governed by a similar principle. But where the further remedy was to be obtained, not by an appeal, but by a separate suit, the High

(1) 8 Bom. H. C. Rep., A.C.J., 152.

(2) See Statute, 24 & 25 Vict., c. 104, secs. 9, 15; Letters Patent of 1865, para. 16.

(3) Application 14 of 1882.

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Court seems, at least in recent years, to have interfered more freely in cases in which there had been some palpable perversion of the law, or what *primâ facie* seemed to be such a perversion. In the first case we have referred to, the Court thought it could interpose only where there had been an excess of jurisdiction; in the later cases, it has interfered wherever there had been "a grave and patent error not otherwise to be remedied,"—as it would seem, in the same course of proceedings,—regarding the original inquiry, and the appeal, as for this purpose continuous. The mere provision of a separate suit seems not to have been held a sufficient reason for refusing to correct a first injustice when this arose from a palpable illegality, whether in acting, or refusing to act, judicially, or in the method of judicial action.

This extension of the Court's powers, or rather of the definition of the proper limits of the exercise of its powers as they were formerly understood, has accompanied a development of the jurisdiction as conferred by the Code of Civil Procedure, which must have been caused by a similar perception of evils to be remedied, and have had similar means in view. Section 622, which in the Code of 1877 was limited to cases of jurisdiction, was, by Act XII of 1879, widened so as to embrace "illegality", or "material irregularity", in the exercise of jurisdiction by the subordinate Courts. It must have been felt that, without exceeding its jurisdiction, a Court might give orders unwarranted by the law under the circumstances, or attended with irregularities of procedure which would defeat the intention of the Legislature. It began to be no longer possible to call every error made by a Court an excess of jurisdiction. But what precisely was intended by "illegality" and "irregularity" has been left undefined. As the adjective "material" is annexed to the latter word, we must suppose that it is meant to provide against departures from rule which have prevented an investigation being made such as would enable a right or duty to be established in the way contemplated by the Code, or have given effect, or refused effect, to particular rights in ways quite different from what it prescribes. The word "illegally" presents more difficulty. In one sense, every erroneous decision or order is illegal; in another, no judicial order is "illegal" even though it may call for reversal or amendment, which is

within the general competence of the Judge who makes it. What probably was meant was an obviously perverse use of jurisdiction, or authority, which could not be justified even on the premises assumed or found by the Judge, or else, some palpable transgression of rule in the collection of the premises, an error, in either case, not admitting of reasonable question. Such an error undoubtedly warrants the interference of this Court, even under the Civil Procedure Code : the precise circumstances under which it will interfere are left to its discretion. What is abnormal cannot in its nature be provided for precisely by rules, and an extraordinary jurisdiction cannot be meant for ordinary cases. We can only say with confidence that when the Code says "final" it speaks on the supposition that there has been a reasonable attention to its rules, and to ordinary principles, in the previous proceedings ; that, where it provides an appeal, it does not intend that the appeal should be superseded ; that, even when proceedings are quashed, it does not intend the lower functions to be transferred to the higher Court ; and, lastly, that where conclusiveness for their own purposes is given to inquiries or orders of a subordinate Court, which are obviously regarded as of but a provisional effect as founded on a summary or limited investigation, the further suit or proceeding in any cases provided is not meant to be replaced by an order under our extraordinary jurisdiction. Such an order must usually be itself grounded on a defective investigation of the facts ; one, at any rate, less effectual than could, in the view of the Legislature, be had by a regular suit, and should not be made except when the mischief is demonstrable and urgent, and resort to a suit will not, for some special reason, really fulfil the purpose of the Legislature.

In such a conflict of opinion as has arisen on the subject we are now considering, it may be useful to see how similar questions have been dealt with by the Courts in England. Their decisions can, of course, only afford analogies, not precedents, for Courts so differently constituted as those in India ; but these analogies point to principles of general application, and thus repay our attentive consideration. A superintending and visitatorial jurisdiction has been exercised from ancient times by the Queen's Bench and by the Court of Chancery. The powers of the former Court have

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been executed through the writs of *certiorari*, of *mandamus*, and of prohibition.

By the last of these, the Court has been wont to check an assumption or excess of jurisdiction; by the second, it has enforced the use of powers improperly declined; by the first it has withdrawn to itself the proceedings of inferior Courts in which some illegality or irregularity required its interference, for the purpose of preventing a defeat of justice. The legal limits of its powers in this sphere it would be hard to define; few cases of hardship could be put such as it has not at some time endeavoured to remedy; but in recent times the proper grounds and limitations of its somewhat arbitrary authority have been more strictly analysed than formerly, and the consequence has been a marked contraction of the range of its interference, if not of its abstract jurisdiction.

The Court of Queen's Bench had jurisdiction over "all errors in fact or in law upon judgments by any other Court," and "to correct and reform all errors and misdemeanours extrajudicial which tend to oppression of the subject" (1). It has "not only power to reverse erroneous judgments, but also to punish all inferior Magistrates, and all other officers of justice, for wilful and corrupt abuses of authority(2).

The great powers thus vested in it the Court exercised over the subordinate Courts usually by calling for their proceedings by writ of *certiorari*. This authority was so essential to the Court that "there are numerous cases in the books which establish that, notwithstanding the privative clause in a Statute, the Court of Queen's Bench will grant a *certiorari*"—*Colonial Bank of Australasia* v. *Willan* (3). This power conferred on a Supreme Court in a colony was held not to be extinguished even by a clause expressly taking away the power to remove the proceedings from a particular Court into the Supreme Court (4), though an appeal was provided to the Chief Judge of the inferior Court (5). But, then, the power, it was said, could be used only in extreme cases not practically admitting of another remedy. "In any such

(1) Co. 4 Inst., 71.

(2) Bac. Apr., Vol. II, p. 143.

(3) L. R., 5 P. C., at p. 442.

(4) *Ibid.*

(5) See Vin. Abr., tit. Certiorari.

case that Court will not quash the order removed, except upon the ground, either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it" (1). These are the most obvious grounds, apart from express legislative authority, for the interference by a Chief Court with the proceedings of one inferior to it, in the exercise of a superintending or extraordinary jurisdiction. The proceedings are conceived, not so much as a fulfilment of the statute or law, as a perversion, or mere semblance of applying it. By the Code of Civil Procedure, as it now stands, the High Court can not only check an excess of jurisdiction, but may compel the exercise of jurisdiction, and control its exercise so as to correct illegality or material irregularity. These are the powers formerly vested in the Court of Queen's Bench, reduced now, where *certiorari* has been withdrawn, to the limits already indicated: *The Colonial Bank of Australasia* v. *Willan*(2).

Then, it is said in the same judgment (at page 443): "Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings, or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry(3), but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide. Accordingly, the authorities, of which *Reg.* v. *Bolton*(4) and *Reg.* v. *St. Olave* (5) may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that

(1) L. R. 5 P. C. at p. 442.
(2) L. R. 5 P. C. at p. 437. Argument of Mr. DeGex.
(3) As to this see *Reg.* v. *Proud*, L. R., 1 Cr. C., 71.
(4) 10 L. J. Q. B., 95; S. C., 1 Q. B., 66.
(5) 8 E. & B., 529.

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the Court of Queen's Bench will not, on *certiorari*, quash such an adjudication on the ground that any such fact, however essential, has been erroneously found." And, again, it is laid down (at page 446) that the Supreme Court should not enter on a re-trial of the questions within the competence of the inferior Court, and disposed of by it upon the evidence. A contrary course, it is said, would be opposed "to the principles established by *Reg.* v. *Bolton* and that class of cases."

We may, from this judgment, gather with reasonable certainty the opinion of the highest present authorities, that the power of control almost essential to the conception of a Supreme Court cannot be divested except by the most express and pointed statutory provisions (1), but also that it is not to be used so as to supersede the lower Courts in their proper functions, by substituting its own judgment for theirs in matters committed to their jurisdiction by the Legislature. It is further to be observed that their Lordships of the Judicial Committee (2) rely on the fact that the Statute they had to expound gave an appeal to the Chief Judge of the Court of Mines as a ground for holding that the general power of *certiorari* was withdrawn, even in the case of proceedings under a previous Act connected with the later one only by a general provision in the latter giving a right of appeal from the subordinate Courts of Mines to that of the Chief Judge. In argument for the respondents, who had to maintain the *certiorari*, Mr. Benjamin put his case thus (3): "A right of appeal can be given only by express words.....there was no appeal open to the respondents, and, therefore, it was a case to be set right by a Supreme Court on *certiorari*; for, when the Legislature creates a Court without appeal, it is presumed that *certiorari* lies to restrain excess of jurisdiction." The exception allowed by this able advocate implies that he felt he could not contend for a *certiorari* where the remedy intended by the law was an appeal, and where there were not some special circumstances in the case making that remedy inapplicable, or ineffectual, or else such as to place the case altogether outside the intention and scope of the privative clause.

(1) See also *Ex. p. Bradlaugh*, L. R., 3 Q. B. D., 509.

(2) L. R. 5 P. C. at p. 441.

(3) *Ibid.* at p. 433.

That this conception of the grounds and limits of interference was historically a correct one is easily shown by reference to the earlier authorities. Several of these are collected in Bacon's Abridgement, Tit. Certiorari, to prove that the Court "will not grant *certiorari*, where an appeal is given, if the objection be, not to the want of jurisdiction, but to the merits; for that is more properly the subject of appeal." *A fortiori*, they will not grant it, pending an appeal. Similar propositions are set forth in Comyn's Digest, Certiorari (D). For more recent times reference may be made to the case of *Ex. p. Blewitt re The Justices of Shropshire.*(1) In that case the allegation was that the justices had convicted without any evidence at all; yet, as they had jurisdiction over the subject-matter, and the conviction was formally valid, the Queen's Bench refused a *certiorari*.

"The grant of the writ being discretional"—*Zink* v. *Langton*(2) and *R.* v. *Bass*(3)—it will be refused on such a ground as that the party seeking to get an inquisition into compensation quashed has allowed the time to expire within which he could have "got an award set aside under the same (Lands' Clauses Consolidation) Act"—*The Queen* v. *Sheward*(4). In India, as in England, the grant of a rule under the extraordinary jurisdiction is discretional, and the power should be used only to sustain, and not further to disturb, the regular course of judicial administration; to prevent distortions, or sham applications of the law, but not to promote uncertainty and restlessness, by an over-nice scrutiny of proceedings that aim at promptness rather than refinement.

It does not appear, indeed, that the principles now recognized were always strictly adhered to in the earlier English cases, and in *R.* v. *Eaton*(5) it could be argued that a *certiorari* issued of course; but in that case it was definitely laid down that a cause must be shown. In *R.* v. *Sparrow*(6) a *certiorari* was quashed on account of an appeal having been made against a commitment to the sessions. In *R.* v. *Bass*(3) the Court still looked into the evidence; but finding the justices had, as it

(1) 14 L. T. N. S., 598.
(2) 2 Doug., 749.
(3) 5 T. R., 251.
(4) L. R., 5 Q. B. D., 179, 182.
(5) 2 T. R., 89.
(6) 2 T. R., 198.

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appeared, drawn the right conclusion, it refused the *certiorari* prayed for. But a greater strictness prevailed as the grounds of interference became more distinctly conceived, and as, no doubt, the general administration of justice by the inferior Courts improved in regularity, until jurisdictional errors have, as we have seen in recent years, become almost the sole admitted ground of interference.

As a *certiorari* is the appropriate means of restraining an excess of jurisdiction, so by *mandamus* the inferior Courts in England are made to do a duty which they have sought, in any case, to decline. It is a combrous process, and has been superseded(1) in some cases by more expeditious methods(2); but the principles of interference and control remain what they were. The object of the writ is to prevent a failure of justice, and it is granted only where there is no other specific remedy—*R.* v. *Bank of England*(3); *R.* v. *The Mayor of Colchester*(4); *R.* v. *Commissioners of Dean Inclosure*(5)—by which such a failure can be prevented—*R.* v. *Windhan*(6); *R.* v. *Bishop of Chester*(7). Thus it lies to compel an inferior Court to adopt the requisite proceedings—*Amherst's Case*(8); and to record correctly—*R.* v. *Warnford*(9); but not to come to a particular decision, even though it appears the one actually arrived at may have been erroneous—*R.* v. *Wards of Farringdon Without*(10); *R.* v. *Justices of Monmouthshire*(11). The Court will not substitute its own judgment for that of the Court, or body invested by law with authority—*R.* v. *Justices of Middlesex*(12). On an application grounded on an affidavit of gross injustice, the Judges said they could command the Judge of an inferior Court to give judgment, but could not thus review his proceedings, or try an alleged irregularity—*Ex. p. Morgan*(13); and in another case, where a judgment-creditor complained that an inferior Court refused to

(1) As in India, see Specific Relief Act, I of 1877, Chap. VIII.
(2) See Common Law Procedure Act, 1854, secs. 68 to 77.
(3) 2 Doug., 524.
(4) 2 T. R., 259.
(5) 2 M. & S., 80.
(6) 1 Cowp., p. 377.
(7) 1 T. R., 396.
(8) 1 T. Raym., 214.
(9) 5 D. & R., 489.
(10) 4 D. & R., 735.
(11) 7 D. & R., 334.
(12) 4 B. & Ald., 298.
(13) 2 Chit., 250.

allow him to sign judgment, it was pointed out that there was a remedy by writ of error; and the Court added—*R.* v. *Marq. of Conyngham*(1) —"It is our constant practice to refuse the writ of *mandamus* to a party who has another remedy, which the plaintiff in this case certainly has."

In the case of the County Courts, the Statute, 9 and 10 Vict., c. 108, s. 43, abolished the writ of *mandamus*, but allowed any person interested to call on a Judge, or officer, of a County Court to show cause in a superior Court why he should not do some specified act. Before this, a Judge, who had refused to receive a plaint for an insufficient cause, was compelled by *mandamus* to accept it—*R.* v. *Stapylton*(2). Still, however, if he had once heard the case on the merits, though no appeal lay, yet no *mandamus*, it was held, could be issued, however erroneous his decision, to compel him to rehear the case on its merits—*Milner* v. *Rhoden*(3). Much less would the Court of Queen's Bench take into its own hands the adjudication of a case already disposed of by the tribunal designated by the Legislature.

In the case of the *King* v. *The Directors of the E. I. Co.* (4) the Board of Control had directed an alteration to be made in a despatch intended to be sent by the directors to India. The directors refused, and the Board applied to the King's Bench for a *mandamus*. The directors replied that the proposed change amounted, in effect, to a direction by the Board of Control on a matter not within its authority, as not relating to the civil or military government of India. Section 16 of Statute 33, Geo. III, c. 52, provided that, in the event of a dispute on this point, an appeal might be made by the directors to the King in Council. It was urged for the directors that, notwithstanding this provision, the Court would not, by *mandamus*, enforce the performance of what it did not consider a legal duty; but Lord Ellenborough said: "this is an objection which the Court of Directors ought to submit to the decision of the Privy Council" ..... "as far as we are concerned it is perfectly *alieni fori*, and upon which we, therefore, sedulously abstain from pronouncing any opinion." Afterwards the directors appealed to the Privy

(1) 1 D. & R., 529.
(2) 21 L. J., Q. B., 8.
(2) 15 Jur., N. S., 1037.
(4) 4 M. & S., 279.

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Council, and the decision having been against them, the rule for a *mandamus* was made absolute. In this case, the Court having a general power to enforce legal duties (see *Simpson* v. *S. Union F. and L. Ins. Co.*) (1) declined to refrain from exercising the power on an assertion that the alleged duty did not exist, and refused to examine that question because the law intended it to be disposed of by appeal to another tribunal. The competence specially assigned to that other tribunal involved, in the opinion of the Court, an incompetence to deal with the same subject itself.

The ordinary means of preventing the exercise of a jurisdiction not at all vested in a Court, in England, is by writ of prohibition. The application of the law may be illustrated by the case of *Selston* v. *Rose*(2). There a Judge of a County Court had given himself jurisdiction, in a case of ejectment, by a misconstruction of the section as to valuation. Cockburn, C. J., says: "If there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, the Court will not interfere except upon very strong grounds. The Judge has then really exercised his discretion; but when he has given himself jurisdiction by coming to an erroneous conclusion upon a point of law, the case in very different, and he is, in fact, without jurisdiction, and has no authority to entertain the question. It is apparent that that was the case here, and, I think, therefore, that the writ of prohibition ought to issue."

In the same case Blackburn, J., say: "On the second point I would refer to *Thompson* v. *Ingham* (3), where, to a declaration in prohibition against a County Court Judge, which stated that title to land was in question, there was a plea alleging that the Judge heard the evidence of both parties upon the point, and adjudged that title was not in question. The plea was demurred to, and judgment was given for the plaintiff; the ground of the decision being that, although the Judge must of necessity decide the point for the time, his determination was not conclusive, as in the analogous case of a plea to the jurisdiction, and as there was no writ of error from the County Court, the question, whether there was jurisdiction or not, must be open to one of the

(1) 32 L. J., Ch. 329. (2) L. R., 4 Q. B., 4.

(3) 14 Q. B., 710; S. C., 19, L. J. Q. B., 189.

superior Courts on motion for a prohibition. If the value of the land was above £20, there would be good ground for issuing the writ; and I am quite prepared to hold that, if the evidence upon that point was conflicting, that circumstance, though not conclusive upon us, so as absolutely to deprive us of the discretionary power of granting the prohibition, would so far influence us, that we should require very strong grounds before we should interfere. It is clear, in the present case, that what the Judge found was simply that, taking his view of the law, and deducting the ground rent, the value of the ground was below £20. I think that he was wrong in the conclusion at which he arrived, because he applied a wrong rule of law to the facts, and, therefore, that he had no jurisdiction."

It is to be observed that the learned Judge puts the competence of the Queen's Bench to examine the facts, in the case he refers to, on the circumstance of there being no writ of error from the County Court. There was no remedy after a wrong judgment should be delivered; and, therefore, the Judges were forced to see whether the facts did or did not, on any reasonable construction, give jurisdiction, as the Judge of the County Court had supposed. This agrees with the view expressed by the same learned Judge in *Pease* v. *Clayton*, quoted in *Colonial Bank of Australasia* v. *Willan* (1); while the opinion of the Chief Justice is substantially the same as that expressed by him in *Ex. p. Vaughan* (2). According to either view, the Court's visitatorial or superintending power of interference is to be very sparingly exercised when another remedy is provided in the regular course, and in a case of conflicting evidence as to facts, on which the jurisdiction of a lower Court depends, it would, except in a very extreme case, be held contrary to sound principles to interfere. In *R.* v. *Davis* (3) the Court said: "If there be any evidence of an offence, over which a Justice of the Peace has summary jurisdiction, the Court will not estimate its value." And in *Re Thompson* (4) a conviction by Justices of the Peace on a minor charge was sustained, merely because they might have believed so much of the evidence only as sustained that charge, and not

(1) L. R., 5 P. C., at p. 441.
(2) L. R., 2 Q. B., 117.
(3) 6 T. R., 177.
(4) 30 L. J., M. C., 19.

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the rest which went to prove one beyond their jurisdiction. When no reasonable construction of the facts affords a ground for the assumed jurisdiction, the superior Court always may interfere, but will always be reluctant to do so when, by writ of error, or otherwise, a wrong judgment may be set right.

In *Oram* v. *Brearey* (1) the case was not within the jurisdiction of the Salford Court. A clause in the Constituting Act required any objection by a defendant on that ground to be made by special plea, and added, "if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." The defendant had not pleaded want of jurisdiction; but he obtained a prohibition, the clause being construed as applicable only within the Court, not as ousting the jurisdiction of the superior Court, where the inferior Court had, by its constitution, been excluded from cognizance of the cause.

The case of the *Liverpool Gas Company* v. *Everton* (2) was disposed of on the ground of want of jurisdiction. The Recorder of Liverpool thought that the Gas Company required a time for making up their minds whether to appeal or not against a poor rate which entitled them to a hearing at the next quarter sessions but one, instead of the next quarter sessions. The Court of Common Pleas thought that so much time was not required. They held that the admission of the appeal was an excess of jurisdiction, and granted a prohibition. It would seem that as the Recorder had a general jurisdiction over the subject-matter of the appeal, the trial before the Recorder, apart from any prohibition, could not have been regarded as *coram non judice*, and the case would, on the principles recognized in *Sadasiva Pillai* v. *Ramalinga Pillai* (3), rather be referred to an illegal exercise of jurisdiction than to a want of jurisdiction. An error as to limitation is not generally regarded as jurisdictional—see *Mangal Pershad's Case* (4). The case shows, however, that the facts may be looked into, and appreciated differently, in the higher Court, when the very point to be determined, the legality or illegality of the course taken by the subordinate Court, depends on that investigation, as showing a particular state of things to have existed

(1) L. R., 2 Ex. D., 346.
(2) L. R., 6 C. P., 414.
(3) L. R., 2 I. A., at pp. 222, 223.
(4) L. R., 8 I. A., 123.

or not existed. Illegality in the exercise of an acknowledged jurisdiction was a ground on which many prohibitions issued in former times from the Common Law Courts in England. It is recognized in *Gould* v. *Gapper* (1) as sufficient, where the Spiritual Court had misconstrued a Statute, though it had jurisdiction of the subject; but Lord Ellenborough owns that, apart from precendents, the *dictum* of Buller, J., in *Lord Comden* v. *Home* (2) would be worthy of respect, that "If the Courts below have jurisdiction over the subject, though they mistake in their judgment it is no ground for prohibition, but only matter of appeal."

The great increase in the number of public boards in England in recent times, and the various duties imposed on them, have led to many applications to the superior Courts, grounded on complaints of failures of duty which these Courts could correct. The Courts have thus been driven to consider, more closely than in former days, the extent to which they can properly use their undefined powers, in relation to bodies vested with special duties, and a discretion requisite to the due performance of them. The result has been a recognition of the impropriety of checking the exercise, in good faith, of any special competence—see *per* Lord Selborne in *Clark* v. *School Board for London*(3); *per* Sir G. Jessel in *Duke of Bedford* v. *Dawson*(4); and in *Bagshaw* v. *Buxton Local Board*(5). In the case of the *Attorney General* v. *Great Western Railway Company*(6) James, L. J., says: "It is very important, no doubt, that all these special jurisdictions, and powers, which are given to departments of the Government, and other similar bodies, should not be exceeded, and that such bodies should keep themselves within the jurisdiction which is given to them. But, as it appears to me, it is no less important that we should set them the example of keeping ourselves within our proper jurisdiction, and I am of opinion that we have no jurisdiction to sit as Judges on appeal from a finding of the Board of Trade on the facts properly brought before them in this matter, and that we ought not to try to find reasons for substituting our judgment and decision for theirs."

(1) 3 East. 472.
(2) 4 T R., 397.
(3) L. R., 9 Ch. Ap., 122.
(4) L. R. 20 Eq., at p. 358.
(5) L. R., 1 Ch. Div., at p. 224.
(6) L. R., 4 Ch. Div., at p. 743.

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This may be received as expressing the latest conviction of the English judicial mind as to interferences with constituted authorities. In the particular case of those vested with judicial powers, the Lord Chancellor of Ireland disapproved even of censorious comments, where there had been no excess of jurisdiction by the inferior authority such as to warrant the superior Court in quashing its proceedings. The remarks are cited with approval by Sir D. Evans in his edition of Pothier on Obligations, Vol. II, p. 353.*

The Specific Relief Act, I of 1877, ch. VIII, in abolishing the writ of *mandamus*, enacts that the High Court may require "any specific act to be done or forborne within the limits of its ordinary original civil jurisdiction by any . . . inferior Court of Judicature;" but the conditions are imposed (*a*) of a wrong to the applicant; (*b*) of a duty clearly incumbent on the interior Court; (*c*) consistency of the order sought with justice; (*d*) "that the applicant has no other specific and adequate legal" remedy; and (*e*) "that the remedy given by the order will be complete." These provisions, which express the results of an experience of centuries gained by superior Courts in England, working without statutory limits to their jurisdiction, show very clearly the proper conditions of peremptory interference, even when there has been an excess of jurisdiction, or a failure to exercise it, by the lower Court. It is very desirable that there should, as far as possible, be a complete

* In the course of his judgment, his Lordship said: "It has been urged at the bar that the Commissioners and Sub-Commissioners of Excise are illiterate, and that they are partial and interested men. But if the Legislature has thought fit to commit judicial powers to men of that description, we should very much exceed our jurisdiction, and grossly mistake the authority committed to us, if, in giving judgment upon this record, we were to enter into a consideration of the policy of that establishment. Sitting in a Court of law, I am not at liberty to enter into an examination of the justice or injustice of any judgment of a Court of competent jurisdiction, unless it comes before me by writ of error. All parties to such a judgment are bound by it, until it is reversed by a tribunal having competent authority to review it. I know of no such dangerous and extravagant excess into which any Court of justice can be betrayed, as entering into a discussion of legislative policy in erecting particular tribunals. If the Parliament has thought fit to commit judicial powers to excise officers of a particular description, we can only see that they do not exceed the jurisdiction intrusted to them. If they do not exceed their jurisdiction, we have no authority to pronounce that they are incompetent or corrupt Judges."

agreement of principle between the working of this Court at its original and appellate sides, in giving effect to kindred jurisdictions. The terms imposed on the one may well serve for guidance to the other branch of the Court, unless they contravene some law which the latter branch has to administer. It does not appear that, in regulating the exercise of our ill-defined authority by the principles in question, we shall diminish our power to correct abuses of the law, which the Legislature does not intend to be corrected in other ways, by other means. Where it intends the first stage of a judicial inquiry to be the last also; where it intends possible errors in such an inquiry to be set right by an appeal; our supersession of the designated Courts would be a usurpation, by whatever motives it might be induced. If the law as administered, with a restrained exercise of our powers, should prove ineffective, the Legislature can readly widen our sphere of activity by enactments adapted for that purpose.

From the consideration we have given to the whole subject, the following conclusions may, we think, be deduced :—

(1). The visitatorial or superintending power of a Supreme Court is so necessary, and almost indespensable, that it is not to be wholly excluded even by a clause in a Statute withdrawing cases under the Statute from its control. When such a Statute has been made a mere pretext, or has been wholly misapplied, the case will be treated as one not really arising under the Statute, but on an evasion or perversion of the Statute, and, as such, subject to the general control of the Court, by which a rational application is to be secured to both the positive and the negative provisions of the law.

(2). The Court, having called up the record or proceedings of a subordinate Court, will itself investigate the facts on which a jurisdiction has been assumed or declined; on which it depends whether the subordinate Court could, or could not, legally deal with the matter in question, either at all, or on the principle to which it has referred the case; or according to which its mode of inquiry, or of action, may or may not, have been in contradiction, rather than obedience, to the rules of procedure, or the principles implied in them, to such a material extent as to defeat the purpose of the law.

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(3). If the Court finds that the external conditions of jurisdiction, of investigation, and of command, have been statisfied by the inferior Court, it will not substitute its own appreciation of evidence or its own judgment thereon, for the determination of the inferior Court, in any matter committed by the Legislature to the discretion of such Court, whether for the sake of promptness, or finality, or because the lower Court has been thought by the Legislature the best tribunal for dealing with the matter in question.

(4). Where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of the law, and a grave wrong, are manifest, and are irremediable by the regular procedure.

(5). Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final, or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should, in such cases, be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed ; but where the alleged, or apparent, error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method, an adequate remedy, or the intended remedy, cannot be had.

(6). The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for, or against the Court's intervention, due weight is to be given to them, regard being always had to the principles already enunciated.

(7). The Court will "sedulously abstain from making" any order, or refusing to make it, on grounds the appreciation of

which is exclusively assigned by law to some other authority, provided the legal competence be exercised, in good faith, on matters that may reasonably be understood as within its lawful range.

It seems to us that the question put by the Division Court does not admit of a precise categorical reply; that the Court cannot impose on itself limitations without regard to circumstances; but that it should generally be governed, in the class of cases in question, by the principles contained in the fifth of the propositions just stated.

APPELLATE CIVIL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

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April 17.

JANARDAN VITHAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANANT MAHADEV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act XV of 1877, *Sch. II, Art.* 171 *B—Application to sue in formâ pauperis—Death of opponent—Substitution of heirs—Subsequent granting of application—Code of Civil Procedure, Secs.* 48, 368 *and* 410*—Practice—Partition suit—Omission of property in possession of a party—No ground for dismissal.*

Neither article 171 B of Schedule II of Act XV of 1877, nor any other section of the law of limitation, applies to an inquiry into a claim to sue in *formâ pauperis*, and there is no limitation of time within which a mere applicant to sue as a pauper is bound to apply for the substitution of the name of a deceased opponent's heir in place of such opponent. Article 171 B applies to applications made under section 368 of the Code of Civil Procedure, which section only applies to the case of the death of a party to a suit, presupposing therefore the institution of a suit; and, in the case of an application to sue in *formâ pauperis*, no suit is instituted until the application is granted, when by section 410 it is deemed the plaint in the suit.

In a partition suit the fact that the plaintiff has not included, or has relinquished his share in, property liable to division, affords no ground for dismissing the suit where the co-parcener, in whose possession it is, is a party to the suit; for it is competent to the Court, in disposing of the case, to make any order in respect of such property that may to it appear right.

THIS was an appeal against the decision of Khan Bahadur M. N. Nanavati, Subordinate Judge (First Class) of Ratnagiri.

The plaintiff claimed his share of the undivided property of the family from seven defendants, of whom the first five defendants were brothers, the sixth the plaintiff's own brother, and the

* Regular Appeal, No. 47 of 1882.