came into force, the appellant's status has already been declared, and he has been recognized as the deceased's representative, so that he does not now come in as person claiming to be entitled to the effects of the deceased, but as a person who has been recognized as the owner of the decree, so that no certificate is necessary. I am of opinion that the question of *res judicata* does not come in at all. If the *darkhast* had been pending, no certificate would, I think, have been necessary, on the principle that statutes are *prima facie* deemed to be prospective only. But in the present case the former *darkhasts* had been disposed of, and there was no proceeding pending. The presentation of the present *darkhasts* was the commencement of a new proceeding. Act VII of 1889 relates to procedure. Under it the Court has to take a further substantive step in the execution [267] of the decree than was provided by the old law, and I think that the new proceeding should be governed by the law in force when the application was made—*Shivram Udaram* v. *Kondiba Muktaji* (1)."

Shantaram Narayan, (Government Pleader), for the Government of Bombay.

Shivram Vithal Bhandarkar (*amicus curiæ*), for the appellant.

Daji Abaji Khare (*amicus curiæ*), for the respondent.

JUDGMENT.

SARGENT, C. J. —The Act VII of 1889 was considered in *Balubhai Dayabhai* v. *Nasar bin Adbul* (2), where it was held that cl. (*b*) of sub-s. 1 of s. 4 did not apply to proceedings in execution pending at the time at which the Act came into force. In that case execution proceedings were pending when the Act was passed under a *darkhast* presented before the Act. Here the fact of the appellant having already presented a *darkhast* on two occasions before the Act came into operation, in which orders of arrest were made, cannot affect the question, as they had been disposed of, and there were no proceedings pending when the Act was passed, as was the case in *Balubhai Dayabhai* v. *Nasar bin Abdul*, so as to make the present application for execution to be regarded otherwise than as an initial one ; as to the circumstance that the decree was passed before the Act came into force, we think both the language and object of the Act makes it immaterial.

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15 B. 267=Chitty's S. C. C. R. 252.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice.

SULLEMAN HUSSEIN (*Plaintiff*) *v.* THE NEW ORIENTAL BANK CORPORATION, LIMITED (*Defendants*).* [15th August, 1890.]

Bill of exchange—Drawer and drawee the same person—Forged endorsement of payee—Payment by drawee on forged endorsement—Liability of drawer—Ambiguous instrument—Election to treat it as a promissory note—Negotiable Instruments Act XXVI of 1881, ss. 6, 8, 17, 30, 32, 78, 85, 92—Review—Practice.

[268] On the 29th April 1889 the plaintiff's brother-in-law, Mahomed Ebrahim, purchased from the defendant's branch at Mauritius a bill of exchange

* Small Cause Court Suit, No. 3133 of 1890.

(1) 8 B. 340. (2) 15 B. 79.

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15 B. 267 = Chitty's S. C. C. R. 282.

drawn on their Bank at Bombay payable on demand to the plaintiff's order in Bombay. The bill was in the following terms :—

The New Oriental Bank Corporation, Limited,
Mauritius, 29th April 1889.

"On demand pay this first of exchange (second of same tenor and date being unpaid) to the order of Sulleman Hussein six hundred and forty Rupees for value received. For the New Oriental Bank Corporation, Limited.

"To

The New Oriental Bank Corporation, Limited, Bombay."

Mahomed Ebrahim sent the bill by registered post to Bombay addressed to the plaintiff. During its transmission it was stolen. On the 18th May it was presented by some person to the defendants' Bank in Bombay bearing a forged endorsement in blank of the plaintiff, and it was paid by the Bank. The plaintiff as soon as he heard of the loss of the bill made enquiry at the Bank and was told that the bill had been paid. On being shewn the endorsement, the plaintiff pronounced it to be a forgery and demanded payment of the bill, which the Bank refused. He thereupon filed this suit against the Bank as drawers of the bill.

Held—

(1) That the document was an "ambiguous instrument" within the meaning of s. 17 of the Negotiable Instruments Act (XXVI of 1881), and that the plaintiff had elected to treat it as a bill of exchange.

(2) That treating the document as a bill of exchange, the defendants, as drawers, were discharged by the payment to the *de facto* holder who presented it for payment.

Where the point sought to be raised in review had not been raised or argued by either party, but was first taken by the Court itself in giving its opinion upon the case referred to it, the Court granted a review, observing as follows :—"The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances, and on the very special grounds I have mentioned, we think that the review ought to be granted."

[Cons., 15 B. 376 (387).]

THE plaintiff in this case sued the defendants in the Court of Small Causes at Bombay to recover the sum of Rs. 640. The claim was stated as follows :—

"Plaintiff seeks to recover from the defendants the amount due on a *hundi*, or bill of exchange, No. 17, drawn by the defendants' Bank at Mauritius on their Bank in Bombay payable to the plaintiff under date the 29th of April last but [269] though the said bill was overdue, the defendants have failed to pay the same to the plaintiff.

"In the alternative, plaintiff will seek to recover the amount of Rs. 640 payable to him under the said *hundi*, or bill, as on a count in trover for detaining the said bill and refusing to return it or pay the value thereof, and thus converting the same to their own use."

The facts were these: On the 29th April, 1889, one Mahomed Ebrahim purchased from the defendants' Bank at Mauritius a bill of exchange drawn by the Bank there on their Bank at Bombay, where it was made payable on demand to the order of the plaintiff. The following is a copy of the bill :—

"Rs. 640. *The New Oriental Bank Corporation, Limited.*
Mauritius, 29th April, 1889.

"(Sd.) B. H. B.
"No. 6/17.

"On demand pay this first of exchange (second of the same tenor and date being unpaid) to the order of *Sulleman Hussein six hundred and*

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forty rupees for value received. For the New Oriental Bank Corporation, Limited.

Signature—— Manager.
Signature—Accountant, Assistant.

"To

The New Oriental Bank Corporation, Limited,
Bombay."

During its transmission by post from Mauritius to the plaintiff in Bombay the bill was stolen, and on the 18th May, 1889, it was presented by some person to the Bank in Bombay bearing a forged endorsement, in blank, of the plaintiff and it was paid by the Bank. The plaintiff, as soon as he heard of the loss of the bill, made enquiry at the Bank, and was there informed that it had been paid. On being shown the endorsement he declared it to be a forgery and he demanded payment of the bill, which was refused. He then brought this suit in the Small Cause Court.

The case came on for hearing before the Chief Judge on the 19th February, 1890. The defence raised was that the bill was a cheque under s. 6 of the Negotiable Instruments Act XXVI of 1881, and being duly endorsed had been paid in due course, and the drawees were thereby discharged.

[270] The Chief Judge delivered the following judgment on the 24th February 1890 :—

"This is an action against the New Oriental Bank Corporation, Limited, a Joint Stock Corporation carrying on business in Bombay, Mauritius and several other places. There is no dispute about the facts, which are as follows:—The plaintiff's brother-in-law, one Mahomed Ebrahim, residing at Mauritius on the 29th April 1889, there purchased of the defendants' company a bill of exchange for Rs. 640, drawn by themselves on themselves, and payable at Bombay to the order of the plaintiff on demand. This bill, which was stolen in the course of transit through the post to the plaintiff, was paid by the Bank in Bombay on the 18th May 1889, in the ordinary way, to a person presenting it for payment with a forged endorsement, in blank, of the plaintiff. As soon as the plaintiff was informed of his loss by a subsequent letter from his correspondent at Mauritius, he called at the Bank in Bombay and was told the bill had already been paid. He then saw the endorsement, and stated it was not in his handwriting, and demanded payment, which was refused. He accordingly brought this action against the Corporation, serving the summons on their manager in Bombay, who accepted service for the Corporation, signing his name on the back of the summons on their behalf as 'manager.'

"No objection was taken to the form of the action, or the *forum* in which it was brought. Therefore, even if any were open to them, the defendants must be held to have waived and to have acquiesced in the institution of the suit, as contemplated by s. 18 (*c*) of the Small Causes Court Act. No collusion or fraud was alleged on the part of the plaintiff and Mahomed Ebrahim, or either of them, nor was any negligence alleged on the part of the Bank in paying the bill.

"The only defence was that the payment of the bill having been made in due course, without notice of the loss or forgery, the defendants were discharged under the provisions of s. 85 of the Negotiable Instruments Act, it being contended that such a bill of exchange as the

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present falls within the definition of a cheque, as given in s. 6 of the same Act.

[271] "However that may be, it is clear that s. 85 operates only to discharge the *drawee*. The present, however, is an action against the *drawer*, who would clearly be liable, in such a case as the present, under s. 78 of the Negotiable Instruments Act. It is true that in this instance the drawer and the drawee were the same Corporation, but the action is brought by the plaintiff as payee against the defendants as *drawers*, in which character alone they could be answerable to him on a demand draft such as this, they not having incurred any liability to him as drawees by acceptance. As it is clearly no answer to an action against the drawer to say that the drawee is not liable, and that is the only defence which has been attempted in the present case, my judgment must be for the plaintiff for Rs. 640 and costs."

A case was subsequently stated by the Chief Judge for the opinion of the High Court. He set forth the facts as follows :—

"The bill of exchange hereto annexed, marked A, was drawn on the 29th April 1889, by the defendants at Mauritius on themselves payable to the plaintiff's order on demand in Bombay, and was on the same day sold at Mauritius for Rs. 640 to the plaintiff's brother-in-law, who sent it by registered post to the plaintiff at Kathor. It was, however, stolen in transit, and a sheet of blank paper was substituted for it in the registered cover delivered to the plaintiff, who on receipt of it wrote to his brother-in-law, his only acquaintance at Mauritius, for an explanation. In reply he was informed of the particulars of the bill of exchange originally enclosed in the registered cover. With these he came to Bombay, and on enquiry at the defendants' Bank was informed, as the fact was, that the bill had been paid on the 18th May, 1889, on an endorsement, in blank, purporting to be that of the payee. On being shown this, the plaintiff pronounced it a forgery and demanded payment as the payee named in the bill, which was refused. Neither party suggested any fraud, collusion or negligence against the other, and I found that in making payment on the bill the defendants had, in fact, made it to a person not authorized to receive it, and on an endorsement which was not that of the plaintiff, the payee named in the bill, but had acted, according to their usual practice, without negligence and without notice of the theft of the bill or the forgery of the endorsement.

[272] "3. The defence raised at the hearing was payment and satisfaction of the bill sued on, and the argument addressed to me on behalf of the defendants proceeded solely on the theory that because the defendants were drawees of the bill they were discharged from their liability to the plaintiff by virtue of the provisions of s. 85 of the Negotiable Instruments Act XXVI of 1881. It was not suggested, nor did it occur to me, that such discharge of the drawees, before the plaintiff was entitled to have recourse to the drawers, would operate to prevent the liability of the latter ever attaching, so that there had, in fact, never been any cause of action against them.

"4. I, therefore, held that as the defendants' liability to the plaintiff could only be that of drawers, it was not a sufficient answer to say that the drawees were not liable, and on the 24th February I passed judgment for the plaintiff for the amount claimed (Rs. 640) and costs (Rs. 49-5), and certified his professional costs (Rs. 51)."

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The Chief Judge then submitted for the opinion of their Lordships the following questions :—

"1st.—Whether the drawers of the bill of exchange, the subject of this suit, are discharged, under s. 85 of the Negotiable Instruments Act XXVI of 1881, by payment in due course?

"2nd.—If so, whether the defendants are liable under s. 78 or under any other section of the Act last above named?"

The case came on for argument before the Appeal Court (SARGENT, C. J., and BAYLEY, J.)

Macpherson, for the defendants.—The defendants are both drawers and drawees. The document sued on is a cheque within s. 6 of the Negotiable Instruments Act XXVI of 1881. Section 85 of that Act logically applies to a bill of exchange payable on demand and drawn on a banker, and if so, the drawees in this case are discharged: see also Stat. 16 and 17 Vic. cap. 59, s. 19; Bill of Exchange Act, 1882; Stat. 45 and 46 Vic., cap. 61, s. 60; Chalmers on Bills of Exchange (3rd ed.), p. 196. The bill of exchange here was paid on the 18th May 1889, without any negligence on the part of defendants (see the **[273]** Chief Judge's judgment, *supra*). That being so, s. 85 applies. As to payment in due course, see s. 10; and compare s. 59 of the English Act (see Chalmers on Bills of Exchange, (3rd ed.), p. 188). If this section applies, the drawee is discharged. The drawee being discharged, what is the position of the drawer? Section 30 defines his liability. In order to make a drawer liable under s. 30 there must be dishonour by the drawee under s. 92. It is clear that if a drawee is discharged under s. 85, he cannot dishonour under s. 92.

Section 78 has no application to this case. It only applies when the drawer is liable under s. 30 and prescribes when and whom he is to pay being liable. The sections on which we rely are ss. 6, 85, 10, 92, 30.

Starling, for plaintiff.—We contend that the judgment of the Chief Judge is right. Section 85 of Act XXVI of 1881 is of limited application. It only exonerates the drawee; s. 60 of the English Act of 1882 does not exonerate the Bank. It only shows when the Bank is to be held to have paid in due course.

A cheque is only one document; a bill of exchange is drawn in sets. This document is one of two.

In order to discharge the maker of such a document as this, payment must be made to the holder: see s. 78. The "holder" is defined by s. 8, which provides also for the case of loss. Under this section the plaintiff was the holder, and he was not paid, as required by s. 78. He applied for payment and was refused. This amounted to dishonour.

[SARGENT, C. J.—You contend that the fact that the defendants' Bank is both drawer and drawee does not affect the question.]

We say only the drawee is protected by s. 85, and the drawer's liability remains. No notice of dishonour was requisite, the drawer and drawee being the same: see s. 98.

Macpherson in reply.—Section 85 is our defence. If it applies, all remedy on the bill is gone.

[SARGENT, C. J.—No doubt in such case all the drawee's liability is gone, but is the drawer's liability gone?]

[274] The bill is discharged by payment in due course. A bill cannot be dishonoured after it has been paid in due course. A man

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cannot be duly required to pay a bill which he has already paid in due course. The drawer is only a surety for the drawee. He cannot be liable till after default of his principal. Section 92 is conclusive. The drawer cannot make default unless he is liable. But how is he liable if he has already paid in due course? To make default he must fail to do something he is bound to do. He cannot be liable unless the Bill has been dishonoured.

The Court delivered its decision on the questions referred on the 4th July. It was of opinion that the document in question was an ambiguous document within the meaning of s. 17 of Act XXVI of 1881, and that it was open to the plaintiff to ask the Court to treat it as a promissory note, *i.e.*, a promise by the defendants' Bank in Mauritius to pay in Bombay, and that in that case the Bank would not be discharged by s. 78, as there had been no payment to the holder, *i.e.*, the person entitled to the possession, as defined in s. 8. The answer to the first question was in the negative and to the second in the affirmative.

On the 25th July 1890 an application for a review of that decision was made on behalf of the defendants. One of the grounds for review set forth in the memorandum of review was the following:—

"2. That the said learned Judges ought to have held that the plaintiff had made his election, and treated the said instrument as a bill of exchange, and that the defendants were, therefore, discharged under s. 85 of the Negotiable Instruments Act XXVI of 1881 by payment thereof in due course."

On this ground the application was granted. In giving the decision of the Court allowing the review the Chief Justice said:—"The point which it is now desired to argue, was not raised or argued by either party when the matter was last before the Court. It was, indeed, first alluded to by the Court itself in giving its opinion upon the case referred to it. The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances and on the very special grounds. I have mentioned we think that the review ought to be granted."

[275] The case was then argued on review.

Macpherson, for defendants.—With regard to s. 17, we say that if the plaintiff elected at all, he elected to treat the document in question as a bill of exchange and not as a promissory note. Section 17 points to an election once for all, and a treatment of the document thenceforth in accordance with such election. The summons in Small Cause Court treats the document as a bill of exchange; so also does the plaint. All the cases cited in argument for the plaintiff were cases on bills of exchange. In all the proceedings up to the present time the plaintiff has treated this document as a bill of exchange and not as a note.

[SARGENT, C.J.—Does the fact of his calling the document a bill amount to an election so as to prevent him afterwards calling it a note?]

Yes. He indicates his election by saying so. In none of the proceedings in the Small Cause Court is there any suggestion of its being a note; nor when the case was argued here before the High Court. We say he elected to treat the document as a bill of exchange; and we hold him to his election.

But if he has not done so, then we say he has made no election at all, and then the document is to be taken as what it appears *prima facie* to be, *viz.*, a bill of exchange.

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[SARGENT, C. J.—May he not elect now?]

He must begin *de novo*, and we shall be ready to meet him. But we say it is too late for him to elect now. No election can be made after we have paid the bill in due course. An election now would be to our prejudice. If the document is presented to us as a bill of exchange (the plaintiff not having otherwise elected,) and we pay it as such, then it is no longer open to him to elect; see s. 10 as to payment according to *apparent* tenor. If it is a promissory note, it is a foreign note; see ss. 11 and 12 of Act XXVI of 1881. Being a foreign note, the law of Mauritius applies, and we should have to prove the foreign law: see ss. 134 and 137. The Code de Commerce (see Encyclopædia Britannica, p. 641 and p. 883) applies at Mauritius; see Code de Commerce, arts. 145—187; Dictionnaire de Commerce, p. 1058.

[276] *Starling*, for plaintiff, *contra*.—The plaintiff made his election to treat the document as a note when he abstained from giving any notice of dishonour. In *Edis* v. *Bury* (1) there was no express election, just as in the present case: see also *Miller* v. *Thomson* (2). The plaintiff has never done anything inconsistent with his election. The Small Cause Court proceedings do not formally declare the nature of the document.

If there has been no previous election, there was an election by me as plaintiff's counsel in arguing the appeal.

This document is not a cheque; so s. 85 does not apply. A cheque is not drawn in duplicate—*Ramchurn Mullick* v. *Luchmeechund Radakissen* (3). If it be a cheque and if s. 8 applies, then only the drawee is discharged and not the drawer. If it is a bill of exchange, then ss. 78 and 82 show the way in which it is to be discharged.

JUDGMENT.

SARGENT, C. J.—In this case we granted a review of our judgment on the questions referred to us by the Chief Judge of the Small Causes Court, on the ground that our decision in favour of the plaintiff was rested on a section of Act XXVI of 1881 which had never been relied on by the plaintiff, nor had been the subject of argument before us at the hearing of the reference. In granting this review we acted upon the view taken by the Privy Council in *Gunga Pershad Sahu* v. *Maharani Bibi* (4). The grounds of our previous decision were that the instrument sued on was an ambiguous instrument within the meaning of s. 17 of the Negotiable Instruments Act XXVI of 1881, and that the plaintiff could elect to treat it as a promissory note. With respect to the first proposition, we thought, and are still of opinion, that—having regard to the English law upon which the Indian Act, as Mr. Chalmers remarks in his notes on the Act, was passed, and more particularly to the case of *Miller* v. *Thomson*(2), where the instrument was similar to the present one, and lastly, to the fact that by the English Bills of Exchange Act, ss. 5 and 73, such an instrument is treated as an ambiguous instrument—the **[277]** instrument sued upon is one within the contemplation of s. 17.

It has, however, been now contended that in any case, there could be no election after payment by the Bank in Bombay, and that even if it were otherwise, the plaintiff had already elected to treat the instrument

(1) 6 B. & C. 433.
(2) 3 M. & G. 576.
(3) 9 Moore's P. C. C. 46 (69).
(4) 12 I. A. 47 (51).

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sued on as a bill of exchange by the form of his summons and particulars and the issues raised at the hearing, and that no fresh election could, therefore, now be made. It is not necessary to consider the first objection, as we are of opinion that the second must prevail. The summons and particulars of claim which had not been alluded to in the first argument before us, and were not present to our minds when we answered the questions referred to us, show that the plaintiff treated the instrument as a bill of exchange drawn by the Oriental Bank at Mauritius on the same Bank at Bombay, and the statement of the Judge of the Small Causes Court further shows that the only question between the parties at the hearing was, whether the instrument was a bill of exchange, as contended by the plaintiff, or a cheque as contended by the defendants. It was, indeed, argued by Mr. Starling, for the plaintiff, that the plaintiff had previously elected to treat the instrument as a promissory note, because he had not given notice of dishonour; but it is plain that the omission to do so cannot be so regarded, as any such intention to elect to treat the instrument as a promissory note is rebutted by the subsequent pleadings in the case to which we have referred. The above remarks suffice to distinguish the case from *Miller* v. *Thomson* (1), where the plaintiff declared as on a promissory note, and so excused himself for not having given notice of dishonour. We must, therefore, accede to the argument that, having already elected to treat the instrument as a bill of exchange, it was no longer open to him to elect, under s. 17, to treat it as a note.

It becomes necessary, therefore, to arrive at a distinct conclusion on the question, which we left undecided, whether treating the instrument as a bill of exchange, *i.e.*, having regard to its terms as a cheque, to which s. 85 is applicable, the Bank, [278] as drawers of the instrument, are discharged by payment to the *de facto* holder, who presented it for payment. It is to be remarked that the language of the corresponding s. 60 of the English Bills of Exchange Act of 1882 differs materially from that of s. 85. The former provides that the payment by the banker "shall be deemed to have been made in due course," which again, by s. 59, is declared to have the effect of discharging the bill, and, therefore, of preventing any further proceedings on it. But under s. 85 (which is found in a chapter dealing with the discharge of drawers and drawees, respectively) the drawee only is stated to be discharged, and such discharge would not of itself also discharge the drawer, as by s. 37 the maker of a cheque is the principal debtor and not the surety. However, by s. 30 the drawer of a bill of exchange or cheque is only bound to compensate the holder in case of dishonour by the drawee or acceptor, and by s. 92 a promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill, or drawee of the cheque makes default in payment upon being duly required to pay, *i.e.*, (reading this section in connection with s. 30) by the holder, who by the definition in s. 8 must mean the *de jure* holder.

The question, therefore, is, whether the cheque was dishonoured when payment was required by the plaintiff and refused on the ground that it had already been paid to the *de facto* holder of the bill, and this must depend upon whether there was "default" in payment. "Default" is explained in Wharton's Dictionary as "the omission of that which a man ought to do," and construing "default" in that sense, it may be said

(1) 3 M. & G. 576.

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that, having regard to s. 85, it was not the duty of the Bank, as drawees, to pay the plaintiff when required to do so. This question is discussed by Cockburn, C.J., delivering the judgment of the Court of Appeal in *Charles* v. *Blackwell* (1), in construing the effect of s. 19 of 16 and 17 Vic., Cap. 59, which provides that a cheque payable to order on demand under the circumstances contemplated by s. 85 of the Indian Act shall be a sufficient authority to the Bank to pay the amount of [279] the draft to the bearer thereof. The Chief Justice says: "On refusing to pay it a second time, the bankers would not dishonour it. If the plaintiff should say, 'Yes, you have paid it, but to one who had no title to the cheque,' the answer would be that it had been paid to one to whom the banker was authorized to pay it by operation of the statute." Here the language of s. 85 is different, but it may be said that the banker had presumable authority to pay, because by the terms of the section he is discharged if he pays it. By this course of reasoning the conclusion is arrived at that the bill was not dishonoured by the Bank's refusal to pay the plaintiff in Bombay, and, therefore, that the Bank, as drawers, are not liable. This conclusion is clearly the effect of the English Act, and we think it should be accepted. But it is to be regretted that on a question of so much importance to the commercial world the answer should not be found in an express provision, but should be left to be inferred, by a process of reasoning.

We must, therefore, answer the first question in the affirmative and the second in the negative.

Attorneys for the appellants (defendants) :—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the respondent (plaintiff) :—Messrs. *Chalk, Walker and Smetham.*

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15 B. 279.

ORIGINAL CIVIL.

Before Mr. Justice Farran and Assessors.

IN THE MATTER OF THE LAND ACQUISITION ACT X OF 1870; MUNJI KHETSEY (*Claimant*).

[14th August, 1890.]

Land Acquisition Act, X of 1870—Compensation—Mode of determining the amount of compensation to be given—Land in vicinity of town where building is going on—Market value at time of awarding compensation, meaning of.

The recognized modes of ascertaining the value of land for the purpose of determining the amout of compensation to be allowed under the Land Acquisition Act X of 1870 are—

1. If a part or parts of the land taken up has or have been previously sold, such sales are taken as a fair basis upon which, making all proper allowances for situation, &c., to determine the value of that taken.

[280] 2. To ascertain the net annual income of the land, and to deduce its value by allowing a certain number of years' purchase of such income according to the nature of the property.

3. To find out the prices at which lands in the vicinity have been sold and purchased, and making all due allowance for situation, to deduce from such sale the price which the land in question will probably fetch if offered to the public.

In the case of land in the vicinity of a town where building is going on it would be unjust to adopt the second of the above methods, if there is a fair

(1) L. R. 2 C. P. D. 159.