Court executing decree," and the opening words of the section are: "The following questions shall be determined by order of the Court executing a decree"; then follow the words on which the learned Judges in that case relied.

With all respect we are unable to see how it can be said that Mr. Whitworth can in any sense be described as the Court executing the decree. He was not executing the decree, he had no power to execute the decree, and no application for execution had been made. Even if the order passed by him involved a question relating to the stay of the execution of a decree, it still would not be a question determined by an order of the Court executing a decree so as to fall under section 244. We should therefore have great difficulty indeed in following that decision on the ground on which it is based. But apart from that, we think, it is a sound rule that Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court, and of the respect to which that rule is entitled we have a striking illustration in the recent decision of the Privy Council in *Jaipal Kunwar* v. *Indar Bahadur Singh*[1].

Mr. Whitworth's discretion was exercised, we have no doubt, after full care and consideration and on that ground we think it would be wrong for us to interfere.

We therefore must reject the present application.

Application rejected.

(1) (1904) 26 All. 238.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

KAVASJI JAMSETJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HORMASJI NASSARVANJISHET (ORIGINAL DEFENDANT 1), RESPONDENT.*

1904.
August 16.

Suit to ascertain area of land to which plaintiff is entitled—Confusion of boundaries—Court no power to fix boundaries—No equity shown by plaintiff.

Where the plaintiff sued for recovery from the defendants of possession by severance and demarcation of a certain area of land out of the area described

* Second Appeal No. 116 of 1904.

1904.

KAVASJI v. HORMASJI.

in the plaint, allowing the defendants to retain possession of as much land thereout as they could possibly retain consistently with it, the Judge in appeal dismissed the suit on the ground that the plaintiff had no cause of action against the defendants.

The plaintiff preferred a second appeal.

Where the assistance of the Court is sought for the purpose of ascertaining the boundaries, which the plaintiff himself is unable to point out by reason of some confusion in them, and to recover possession when those boundaries have been ascertained by the Court,

Held, following *Wake* v. *Conyers* (1), that "the Court has no power to fix the boundaries of legal estates unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud or confusion."

SECOND APPEAL from the decision of F. X. DeSouza, District Judge of Khándesh, reversing the decree of B. S. Joshi, Subordinate Judge of Bhusával.

The plaintiff sued to recover from the defendants possession by severance and demarcation of 2 acres and 37 gunthas of land out of the area described in the plaint allowing the defendants to retain possession of as much land thereout as they could possibly retain consistently with it. The plaint alleged that the area in suit measured in all 22½ bighas and formerly belonged to the Kolis of Bhusával; that out of the said area 4 bighas, that is to say, nearly 3 acres and 16 gunthas of land, were let out by the Kolis to one Dadabhai Dorabji to occupy on a perpetual lease and the rest of the land was granted to the father of defendant 1; that on Dadabhai Dorabji's death, his right, title and interest devolved on Kavasji Dhanji, who sold to the plaintiff his occupancy rights over the aforesaid 4 bighas of land with the exception of about 19 gunthas which he retained for himself; that the plaintiff had thus acquired the occupancy rights of a perpetual tenant over 2 acres and 37 gunthas of land out of the area called "Koli Inám," and that the boundary line between his land and that of defendant 1 not having been fixed by partition, obstacles often arose in the peaceful occupation and enjoyment. The plaint further alleged that though defendant 1 was requested to consent to an amicable partition and demarcation, he refused to do so and that defendant 2 was joined because he was in possession of a portion of area in suit.

(1) (1759) 1 W. and T. L. C. 170 at p. 172.

Defendant 1 contended that the Kolis of Bhusával having granted to his father 18 bighas out of the "Koli Inám" on a perpetual lease, his father was in possession of it and ever since his death the defendant has continued in possession; that he had no knowledge of the plaintiff's title or that of his vendor; that as there was no allegation in the plaint that the defendant had encroached on any portion of the land in plaintiff's possession and as no document was passed either by the defendant's father or himself to the plaintiff, it could not be ascertained from the plaint what cause of action the plaintiff had against the defendant; that the suit was not maintainable inasmuch as the plaint did not aver that the Kolis had actually delivered possession of four bighas of land to the plaintiff's vendor and inasmuch as the Kolis were not joined as parties; that the allegation as to amicable partition was not correct and the plaintiff was not entitled to ask for such a partition, and that the suit was time-barred.

Defendant 2 contended, *inter alia*, that as the plaint did not disclose what portion or how much of the plaintiff's land had been encroached upon by the defendant, the suit was unsustainable; that he was in possession of exactly as much land as came to him under his title-deed, and that the suit was time-barred.

The Subordinate Judge found that the allegations in the plaint as to the plaintiff's title were proved; that the plaintiff was entitled to 1 acre and $32\frac{2}{11}$ gunthas in all, while he was in possession of only 1 acre and 12 gunthas; that he was entitled to recover possession of $20\frac{2}{11}$ gunthas, and that the claim was not time-barred owing to the defendant's failure to prove that plea. He, therefore, passed a decree directing plaintiff to recover "from defendant 1 possession of $20\frac{2}{11}$ gunthas of land out of the Koli Inám by severance and demarcation in continuation of the area of 1 acre and 12 gunthas which he already holds in his possession and eastwards from it."

On appeal by defendant 1 the Judge (Mr. Dayaram Gidumal) reversed the decree and dismissed the suit holding that the plaint did not disclose any cause of action.

The plaintiff having preferred a second appeal, No. 657 of 1901, the High Court (Jenkins, C. J., and Batty, J.) set aside the decree of the Judge on the 9th October, 1902, and sent back the case to be tried according to law.

1904.

KAVASJI v. HORMASJI.

On the remand the Judge found that the first Court erred in holding (1) that the plaintiff was entitled to recover $20\frac{2}{11}$ gunthas of land and (2) that the claim was not time-barred. He, therefore, reversed the decree and dismissed the suit.

The plaintiff preferred a second appeal.

G. S. Rao appeared for the appellant (plaintiff).

D. A. Khare appeared for the respondent (original defendant 1).

JENKINS, C. J.:—The prayer in the plaint in this suit is for recovery from the defendants of possession by severance and demarcation of 2 acres and 37 gunthas of land out of the area described in the plaint, allowing the defendants to retain possession of as much land thereout as they can possibly retain consistently with it. The result of the litigation on this point has been that the plaintiff's suit has been dismissed.

Now a claim of this character suggests a two-fold method of approaching the case. It may be regarded either as a simple suit for the recovery of the possession of land whose boundaries the plaintiff is able to indicate; or it may be a suit where the assistance of the Court is sought for the purpose of ascertaining the boundaries which the plaintiff himself is unable to point out by reason of some confusion in them, and to recover possession when those boundaries have been ascertained by the Court.

Mr. Rao has just told the Court, in answer to a question put to him, that he could not hope to succeed in a suit of the first of these two classes for the reason that he does not know where the boundary is, and so the essential element of success in a simple suit for recovery of the possession of land is absent. Accordingly we have to see whether the plaintiff has made out a right in himself to come to the Court and ask that the boundaries shall be ascertained and possession given to him in accordance with that ascertainment.

The facts may be very briefly stated so far as they are necessary for this question: out of a definite plot of land said to measure 22 bighas, 4 bighas was granted to the plaintiff's predecessor in title and 18 to the defendants' predecessor. It is not however known what the standard of measurement of these bighas was; for admittedly it was not that of the bigha of the present day,

and so the plaintiff starts under the disadvantage that he cannot satisfy the Court what is the present measurement of the land granted to him. And this becomes the more important when it is borne in mind that the title created in favour of the defendants' predecessor was earlier in date than that created in favour of the plaintiff's predecessor. For aught we now can tell, the defendants may not be in possession of more than the 18 bighas originally granted, though it may be that the plaintiff is in possession of less than the 4 bighas. Nor does that exhaust the plaintiff's difficulties, because when he asks for this very special remedy, he must make out a right in himself to the equitable interference of the Court.

The leading case on the point is that of *Wake* v. *Conyers*[1], decided as far back as 1759 by Lord Keeper Henley as he then was, reported in White and Tudor's Leading Cases. Vol. 1, at page 170, and at page 172 the Lord Keeper says "the Court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of *legal* estates, *unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud, or confusion, where one party has ploughed too near the other, or the like; nor has this Court a power to issue such commissions of course, as here prayed.*"

The matter has met with fuller discussion later and in particular at the hands of Sir William Grant in *Speer* v. *Crawter*[2] where it was said:—

"But, on what principle can a Court of Equity interfere between two independent proprietors and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided? In some cases, certainly, the Court has granted commissions, or directed issues, on no other apparent ground than that the boundaries of manors were in controversy. In *Wake* v. *Conyers*"[1] (the case to which we just referred) "Lord Northington held, that it was in the case of manors, that the exercise of the jurisdiction, which (he says) 'had been assumed of late,' was peculiarly objectionable. He refused either to grant a commission or to direct an issue."

(1)(1759) 1 W. & T. L. C. (7th Edn.) 170 at p. 172. (2) (1817) 2 Merivale 410 at p. 417.

1904.

KAVASJI v. HORMASJI.

"So did Lord Thurlow in the case of two parishes."

"In the same case of *Wake* v. *Conyers*[1], Lord Northington says, that, in his apprehension, this Court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes, *per se*, no ground for the interposition of the Court."

"The present bill, in point of statement, laid a sufficient ground for such interposition, for it alleged the confusion to have taken place by the fault, or the neglect, of the owners of *Imworth*, while lessees of *Weston*. But that is not only not made out, but it is disproved. If the ancient boundaries of the two manors be really unknown, as the plaintiff alleges they are, how are commissioners to ascertain them? or what is to be done if they cannot be ascertained? When it is through the default of a tenant or copyholder, that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased. But, because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbour's estate."

In the same way Lord Eldon in *Miller* v. *Warmington*[2] says:—"But if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission. This is the case of persons claiming by an adverse title: there is no connection between them, to serve as a foundation for the Court to proceed on in ordering a commission. This subject was very luminously considered by the late *Master of the Rolls* in *Speer* v. *Crawter*[3]; and that case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere between independent

(1) (1759) 1 W. & T. L. C. 170 at p. 172. (2) (1820) 1 J. & W. 484, 492.
(3) (1817) 2 Merivale 410 at p. 417.

1904.

KAVASJI v. HORMASJI.

proprietors, and confusion of boundaries *per se* is no ground to support such a bill."

In this case the litigants are independent proprietors, and it is impossible to regard them as individuals having such relations the one to the other as would entitle us to treat the whole of land in their possession as a common fund capable of adjustment in such a way as to enable us now to give $\frac{4}{22}$ of the whole to one and the remaining $\frac{18}{22}$ to the other. In our opinion the plaintiff has not shown a sufficient equity in himself as against the defendants in the suit, more especially when regard is had to the findings of fact by the lower Appellate Court, and therefore the decree of the lower Appellate Court must be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

NAWAB MIR SADRUDIN (ORIGINAL APPLICANT), APPELLANT, *v.* NAWAB NURUDIN AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

1904. *August* 22.

Partition suit—Decree—Application for execution by defendant—Order for execution subject to payment of court fees.

A defendant to a partition suit applied for execution in his favour of the decree therein. The Judge ruled that on the defendant's "paying the court fees, the matter will be sent to the Collector for partition." The decree itself imposed no such term as to court fees.

The defendant having appealed against the said order,

Held, reversing the order, that the executing Court having regard to the terms of the decree was not justified in requiring payment of an additional court fee on the plaint.

APPEAL against an order passed by Krishnamukh A. Mehta, Acting First Class Subordinate Judge of Surat, in an execution proceeding.

One Hazrat Amtulnissa *alias* Mamdi Begum, widow of Nawab Mir Kamaloodin Husenkhansaheb, brought a suit for partition of certain properties, including three villages, against Mir Nurudin Husenkhan and twenty-three others, in the Court of

* Appeal No. 86 of 1900.