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by a confessedly impecunious party. I, therefore, direct that the costs of this summons be costs in the cause; but the summons itself will be discharged. Counsel certified.

Attorneys for the plaintiff: Messrs. *Sabnis* and *Goregaokar*.

Attorneys for the defendant: Messrs. *Smetham, Byrne & Co.*

Summons discharged.

B. N. L.

ORIGINAL CIVIL.

Before Sir Basil Scott, Chief Justice.

THE WEST END WATCH COMPANY (PLAINTIFFS) *v.* THE BERNA WATCH COMPANY (DEFENDANTS) *

1910. *November* 22.

Trade-mark—Imitation—Abandonment—Intention—Defendants improperly representing that their business to be business carried on by plaintiffs—Injunction—Raising of issues—Practice—Procedure.

The plaintiffs had since the year 1887 been importing into and selling in India watches manufactured at the St. Imier Factory in Switzerland. These watches bore the name 'Berna' on the dial. In 1907 the plaintiffs complained of the watches supplied by the St. Imier Factory and began to import watches largely from other manufacturers, while they ceased giving orders to the St. Imier Factory. In the year 1908 the St. Imier Factory was purchased by the defendants and at the time of purchase the defendants asked the plaintiffs whether the defendants could positively count upon the plaintiffs to be their regular customers for the articles previously taken from the St. Imier Factory. The plaintiffs replied that they were willing in principle to reserve a part of their orders for the defendants, but that it would first be necessary for the latter to give an idea of what they were going to manufacture and the improvements they were going to make in the quality of the watches. In one of their catalogues printed in 1907 the plaintiffs announced:—

"We take this opportunity of informing our customers that the name 'Berna' will be changed to 'Service' as soon as our present stock of these watches is sold out. The trade-mark will in other respects remain unaltered. The alteration of the name is done to secure a trade-mark which cannot be imitated in India or elsewhere."

On the 6th of November 1908 the defendants opened a place of business in Bombay and issued a circular, dated February 1909, in which, on behalf of the

* Original Suit No. 297 of 1909.

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defendant Company, they referred to the plaintiffs as the defendants' agents who had sold 600,000 watches made at the St. Imier Factory in past years and proclaimed that Berna Company's watches would no longer be sold by their former sole agents-importers (meaning the plaintiffs) as the defendants had decided to get rid of any middleship and to deal directly themselves.

The plaintiffs thereupon filed a suit on the 2nd April 1909 against the defendants to restrain them from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendants' business was the business carried on by the plaintiffs.

Held, that the plaintiffs for the last three years both in their dealings with the supplying factory and with their customers evinced very clearly and consistently their intention to abandon the name 'Berna' as a quality mark for their watches, and it followed that they could no longer claim any exclusive title to the use of that name either alone or in a trade-mark.

Held, further, that the plaintiffs were entitled to an injunction restraining the defendants, their servants, agents, travellers and representatives, respectively, from in any manner representing that the defendant Company had been or were carrying on the business carried on by the plaintiffs or were the successors in business of the plaintiffs.

Per Curiam.—The importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods: *Damodar Ruttonsey* v. *Hormasji Adarji*(1) and *Lavergne* v. *Hooper*(2), referred to.

The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade-mark or that the user has waived his rights in it as a trade-mark.

The question of abandonment is one of intention to be inferred from the facts of the case: *Mouson & Co.* v. *Boehm*(3) and *Lavergne* v. *Hooper*(2), followed.

The practice of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties is very embarrassing. Issues should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the judge to frame for decision by the jury in a jury trial at *nisi prius* in England.

THE facts of this case are set out in the judgment.

Bahadurji and *Jinnah* for the plaintiffs.

R. D. N. Wadia and *Davar* for the defendants.

(1) Appeal No. 942 in Suit No. 69 of 1895. (2) (1884) 8 Mad. 149.
(3) (1884) 26 Ch. D. 398.

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SCOTT, C. J.:—The plaintiffs sue to restrain the defendants from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendants' business is the business carried on by the plaintiffs.

At the commencement of the hearing eighteen issues were proposed, very few of which touched the real questions in the suit. The first ten of those issues were founded on various statements in the narrative of facts contained in the plaint. This is in accordance with a practice which has grown up at the Original Side of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties. The effect is very embarrassing and the practice has often been condemned by trying judges. In my opinion issues should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the judge to frame for decision by the jury in a jury trial at *nisi prius* in England.

Having eliminated ten issues the Court recorded eight, but they do not specifically cover the questions chiefly in issue in the suit, which are, in my opinion, as will appear from this judgment, whether the plaintiffs have abandoned their most popular trade symbol and whether the defendants have improperly represented that their business is the business carried on by the plaintiffs.

At the outset it is necessary to trace the history of the plaintiffs' firm in relation to the Watch Factory at St. Imier which is now the property of the defendants. In 1884 a watch business, the name of which in 1887 became the West End Watch Co., was started in Bombay by the Swiss firm of Droz & Co. and one Charpie. Droz & Co. were the owners of a watch factory at St. Imier, and it was chiefly their watches which were sold by the West End Co. Charpie retired in 1887 from the Bombay firm which then became the property of Droz & Co. exclusively, and so remained until 1891 when A. Amstutz was introduced as a partner with Droz & Co. In 1904 Droz & Co., the exclusive owners of the St. Imier Factory, got into difficulties and converted their manufacturing business into a Joint Stock Company

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under the name of the Fabrique D'horlogerie Berna. The West End Watch Co. supported the flotation by taking up a large number of shares in the new Company.

At the same time the firm of Droz & Co. retired from the West End Watch Co. and their interest therein was purchased by A. Amstutz and Constant Droz, the younger of the Droz brothers who are interested in this suit.

The result of this arrangement was that the owners of the St. Imier Factory no longer had any interest in the West End Watch Co., but the partners in the latter firm were interested in the factory as large shareholders and by covenant with the Joint Stock Company became entitled to the monopoly of all the products of the factory sent to India for a period of ten years.

The Joint Stock Factory did not prosper, and in or about December 1907 went into liquidation. The liquidators carried on the business till August 1908 when they agreed to sell it to a new Company of which the promoters appear to have been a watchmaker named De Goumois and Louis Droz, the elder of the two Droz brothers above mentioned, who had all his working life been interested or employed in the St. Imier Factory. It is probable that the ill success of the Fabrique D'horlogerie was due to want of support from the Bombay firm upon whose custom they were very dependent. At any rate the Bombay firm complained in the year 1907 of the watches supplied by the factory and began to import watches largely from other manufacturers while they ceased giving orders to the St. Imier Factory.

In view of the importance of the Bombay connection De Goumois before buying the factory wrote to the plaintiffs (Exhibit G) on the 11th of August 1908, as follows:—

"With reference to the conversation I had the pleasure to have the other day with Mr. Amstutz I have the honour to inform you that I am on the point of buying the Fabrique Berna. Before deciding definitively however I wish to approach you once more because I have been able to ascertain that up to the present year you were one of the best clients of this factory.

I have already given you express assurances as to the improvements which I am anxious to make to the products of the Berna and as your dissatisfaction

arises from the defects you have found in those products it appears to me that there should be nothing in the way of our continuing the business relations which you entertained up to recently with the Berna since I give you the assurance that I am able to remedy the defects in question. I am of opinion that the Indian market is necessary to the vitality of the Berna and I am persuaded that it would be to the mutual interest of both our houses if yours were to resume the old relations with the new house.

In fact I would be pleased to know—

(*a*) If I can positively count upon you to be my regular customers for the articles which you previously took from the Berna.

(*b*) From what date you could eventually give me your regular orders."

Amstutz replied, by Exhibit A 4, on the 13th August, that they were willing in principle to reserve a part of their orders for the eventual successor of the Berna, but that it would first be necessary for the latter to give an idea of what he was going to manufacture and what improvements he was going to make to the calibres and qualities the West End Watch Co. were taking from the Berna.

In the following month it appears from Exhibit 13 that the relations between De Goumois and Amstutz had become strained in consequence of a dispute as to the right to use the word 'Berna' in connection with the sale of watches in India.

De Goumois had complained to the liquidators, his prospective vendors, that Amstutz had declared he would prevent De Goumois from using the word in India, and the liquidators warned Amstutz that, if he harassed De Goumois in India, they would take severe measures against Amstutz in Switzerland.

To this Amstutz replied that his firm would claim in India by all means the ownership of the word 'Berna' as a trade-mark on the basis of a twenty years' user of the same to designate one of their qualities of watches.

The history of the use of the word 'Berna' in connection with watches sent from St. Imier to the plaintiffs in Bombay is as follows :—

In the year 1887 a trade-mark was designed at the factory at St. Imier consisting of a bear and flag with the word 'Berna' and was marked on new watches sent to India. The bear was

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objected to by the West End Watch Co. as not suited to Indian tastes and was quickly abandoned for the Indian trade. The word 'Berna,' however, was used on a certain quality of watch, and in 1901 was included in a new trade-mark, registered by Droz & Co. in Switzerland in that year, consisting of two concentric circles, the inner being occupied by a star and crescent and the outer by the words Berna and Swiss Made. This mark has been transferred on the Swiss Registry to the successive owners of the Factory including the defendants, and the defendants have also registered another mark with concentric circles, the inner being occupied with the initials B W and the outer with the words 'Berna Watch Co. Swiss Made.'

Watches bearing the word 'Berna' on the dial whether alone or in the star and crescent trade-mark above described were styled Berna watches in the plaintiffs' catalogues, exhibited in this case, for the years 1897 to 1907 inclusive. The watches so designated may be roughly described as the twenty rupee quality watches.

In the extra edition of the plaintiffs' undated Catalogue No. 43, which I take to have been published in the latter part of 1907, the Berna is called the Berna or Service Watch, the alternative designation being explained by the following remark :—

"We take this opportunity of informing our customers that the name 'Berna' will be changed to 'Service' as soon as our present stock of these watches is sold out. The trade-mark will in other respects remain unaltered. This alteration of the name is done to secure a trade-mark which cannot be imitated in India or elsewhere."

Catalogue No. 44 is in the same terms as regards these watches, but in Catalogue No. 46 (the succeeding Catalogue relating to watches), which is the last one produced and probably belongs to the latter part of 1908, there is no Berna watch advertised but in its place the 'Secular,' which is introduced with the following remarks :—

"The Secular replaces the class of watches which we were formerly selling under the designation of Berna watches as the latter were watches which were designed twenty years ago and had become somewhat out of date."

The change from 'Berna' to 'Service' and 'Secular' is rather differently explained by the plaintiffs and the defendants ;—

9. In the year 1907 the plaintiffs discovered that the word "Berna" as used in their trade-mark for many years in India had without their knowledge been registered in 1901 by Droz & Co. as a trade-mark in Switzerland and the plaintiffs resolved to change the name of the particular quality of watch marked "Berna" to "Railway Service" and "Secular" and they notified in their catalogues the change of name. The plaintiffs however continued to receive and still receive orders for Berna watches. (Plaint).

8. The allegations contained in para. 9 of the plaint are absolutely untrue. In 1906 when the said Constant Droz was in Switzerland he told Louis Droz, then delegate of the Council of administration of the said Fabrique Company, that as the word Berna had been the registered trade-mark of the Fabrique Company the plaintiffs had resolved to change the mark Berna on the watches imported by them into "Railway Service" and "Secular". The change was on his instructions accordingly made from the year 1907. (Written statement).

The plaintiff Constant Droz, however, is not prepared to deny that a conversation, such as is alleged in the written statement and sworn to in evidence by Louis Droz, did take place. Such a conversation is, moreover, consistent as regards the change to 'Service' with the remark in Catalogue No. 43 extra edition.

I have come to the conclusion that the real reason of the change was the certainty that the plaintiffs had that they would have to sever their business relations with the Factory at St. Imier (which it may be noted is referred to by Amstutz on the 13th August 1908 (Exhibit A 4) as the Berna) and their desire to have a mark for their twenty rupee quality watch which would not involve them in controversy with the registered owners of the mark 'Berna' in Switzerland.

On the 4th of November 1908, the new Company, started by De Goumois under the English name of the 'Berna Watch Co.', took an assignment of the factory and its properties, and on the 6th of November Louis Droz, as representative of the new Company, came to Bombay and opened a place of business. He then prepared and issued a circular, dated February 1909, in which, on behalf of the defendant Company, he referred to the plaintiffs as the defendants' agents who had sold 600,000 watches made at the St. Imier Factory in past years and proclaimed that Berna Co.'s watches should no longer be sold by their former sole agents-importers (meaning the plaintiffs), as the defendants had decided to get rid of any middleship and to

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deal directly themselves. References are given at the close of the circular to every wearer of one of the 600,000 Berna watches in use in India and every maker who has sold one Berna watch.

The immediate result of the circular was the institution, on the 2nd of April 1909, of this suit by the plaintiffs, who allege that one of the qualities of their watches was well-known as the Berna watch, that the name Berna came to denote to the public in India and Burma a particular quality of watch imported and sold by the plaintiffs, and that though the name has been changed by the plaintiffs they have continued to receive orders for Berna watches.

The plaintiffs' case, therefore, as originally framed, was based upon acquisition by user in India of the name Berna as a trade-mark. This is a case which is not affected by the successive registration in Switzerland of the Berna trade-mark as appearing on the plaintiffs' watches by the different owners of the St. Imier factory: see *Rey* v. *Lecouturier*[1].

That the importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation, even against the producer of the goods, has been recognized by this Court in the unreported case of *Damodar Ruttonsey* v. *Hormusji Adarji*[2] and by the Madras High Court in *Lavergne* v. *Hooper*[3].

Although the word 'Berna' originated with the manufacturers, it is proved that buyers in India are not interested to inquire at what factory imported watches may have been made. Importing firms have acquired reputations by selling and advertising watches of grades suitable to different classes of Indian buyers, and by taking care that all but the very cheapest watches are properly regulated before they pass to the buyers. Amongst importing firms the plaintiffs' reputation stands at least as high as any. It is contended that the plaintiffs never used the word Berna as a trade-mark because it is always found in conjunction

(1) [1908] 2 Ch. 715.
(2) Appeal No. 942 in Suit No. 69 of 1895.
(3) (1884) 8 Mad. 149 at p. 154.

with the name West End Watch Co. This argument is based upon the decision in *Richards* v. *Butcher*[1], where the Court was only concerned with the question whether a word had been "used as a trade-mark" in the sense contemplated in section 10 of the Trade Marks Registration Act, 1875. That case has no application here. The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade-mark or that the user has waived his rights in it as a trade-mark. Thus in *Braham* v. *Bustard*[2] and in *Lavergne* v. *Hooper*[3] the successful owners of the marks used their own names in conjunction with them, and this is, so far as I am aware, the general practice.

The evidence, I think, establishes that the word 'Berna' had up to the date of suit been associated in the minds of watch buyers in India with a very popular grade of watch sold by the plaintiffs, and it follows that, if there has been no abandonment, the plaintiffs are entitled to an injunction against any other persons importing and selling watches under that name notwithstanding that the plaintiffs' name has, in addition to the word or trade-mark Berna, always appeared on every one of their watches and is well-known to all dealers.

I propose, therefore, to discuss whether the plaintiffs have abandoned their right in the name Berna as a symbol of a particular quality of watch sold by them. The matter is by no means settled by a reference to the declaration of Amstutz that his firm would claim in India by all means the ownership of the word Berna as a trade-mark, for there can be no property in a trade-mark in gross apart from goods of which it has become the symbol: see *Thorneloe* v. *Hill*[4]. The question of abandonment is one of intention to be inferred from the facts of the case see *Mouson & Co.* v. *Boehm*[5] and *Lavergne* v. *Hooper*[3].

In the first place the declaration of Amstutz may be met by the statements in the catalogues to which I have above referred in discussing the use of the word Berna prior to suit.

(1) [1891] 2 Ch. 522 at p. 543.
(2) [1863] 1 H. & M. 447.
(3) (1884) 8 Mad. 149 at p. 154.
(4) [1894] 1 Ch. 569 at p. 577.
(5) (1884) 26 Ch. D. 398 at p. 405.

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Passing now to the other evidence on the point I gather that owing to the conservatism of Indian buyers the efforts of the plaintiffs to substitute watches named 'Secular' in place of those named 'Berna' were not at once successful, but the difficulties encountered in carrying out the change have not, so far as I can judge, interfered with the plaintiffs' determination to discontinue the use of the word 'Berna.'

Baksh Elahi, the Calcutta dealer, says that when he received orders for 'Berna' or 'Secular' he would send the plaintiffs' watches. He has no Bernas in stock so has to supply Seculars, but they are only taken by the illiterate. Those who can read do not buy Seculars. In 1909 after he had learnt that the plaintiffs had discontinued the issue of Bernas he tried to sell some of the defendants' Bernas to customers asking for Bernas but they would not buy on seeing that the watches were not West End Co.'s Bernas.

The Lahore dealer, Tricumlal Lalla Motilal, proves orders sent by him to the plaintiffs Company as late as the 15th of November 1908 for Berna watches, but he also says that the plaintiffs have for the last two years invariably supplied Seculars or Railway Service in execution of such orders. He would now ask a wholesale dealer asking for Bernas whether he wants West End Co.'s Bernas or Berna Watch Co.'s Bernas.

The Delhi dealer, Dhanamal Goela, proves many orders (Exhibits D and E) sent for Bernas to the plaintiffs during 1908, 1909 and 1910, but it is only in the 1910 orders that he shows by ordering Berna-Secular that he is aware of the new name introduced by the plaintiffs in place of Berna.

The evidence of Mohundas Kamalsey, the other large dealer, is not very intelligible, but he seems to attach great value to the name 'Berna' in connection with the plaintiffs' watches and says he finds it difficult to sell 'Secular' watches to illiterate people (which is the reverse of Elahi Baksh's experience).

The evidence of the plaintiffs themselves establishes that their large customers, the Traffic Superintendents of the Oudh and Rohilkhand and the N. W. Railways, continued to order 'Berna' watches for guards throughout 1908 and 1909 and into the present

year, the orders being almost invariably executed by the supply of the 'Railway Service' watch (see Exhibit M, *de bene*).

The last order for 'Bernas' was given by the plaintiffs to the St. Imier factory in 1907, and the date of the last invoice for Bernas sent to the plaintiffs from that factory was 30th June 1908 (see Exhibit N). The watches so invoiced would be received about September 1908.

Between 1908 and the date of the institution of this suit 131 orders for Berna watches were satisfied by the supply of Bernas. Between the date of suit and March 1910 only thirty Berna watches were supplied to wholesale dealers.

On the 24th April 1909, three weeks after the institution of this suit, the plaintiffs received from a dealer at Neemuch an order for twelve 'Berna' watches. Constant Droz then made the following memo with regard to it (Exhibit 9):—

"Write Berna not made any more, these (*i.e.*, Railway Service) are the watches we now supply in its stead to all the Railway and Government offices. They are of the most modern construction, etc., etc."

There are, it is said, a few 'Berna' watches still on hand but their number cannot be easily ascertained from the stock-book.

It may, therefore, be taken that the plaintiffs' stock of Berna watches is practically finished.

The conclusion at which I arrive from this evidence is that the plaintiffs for the last three years both in their dealings with the supplying factory and with their customers evinced very clearly and consistently their intention to abandon the name 'Berna' as a quality mark for their watches, and it follows that they can no longer claim any exclusive title to the use of that name either alone or in a trade-mark with concentric circles.

The plaintiffs' case for relief, however, does not altogether fail with their inability to make out an exclusive title to the word or trade-mark 'Berna.' They complain that the defendants have been representing that they are now carrying on a business which was formerly carried on by the plaintiffs as their agents, in proof of which the circular of February 1909 is referred to. This circular is admittedly indefensible and the defendants have

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offered to destroy it. The plaintiffs also rely on an advertisement in a Rangoon paper of the 13th November 1909, which was inserted by the defendants' agent Danker and is shown to have had the approval of Louis Droz, the defendants' representative in Bombay. (See advertisement Exhibit A 2 and Exhibit Q.)

The watch figured in the advertisement is a new watch introduced recently by the defendants under the name of Berna New D. P. having a new adaptation of an old movement not found in the watches theretofore known in India as Berna watches through the business dealings of the plaintiffs.

The advertisement is, however, headed in large type '*The Berna*' and includes a statement as to the official adoption of the watch by certain Railway Companies, a statement which is wholly false as regards the defendants' Berna New D. P. and is copied verbatim from the plaintiffs' unamended Catalogue No. 43.

The relation of the defendants and Danker, the Rangoon advertiser, were those of principal and agent. Danker did not buy from the defendants but received watches of which he was bound to remit the proceeds when sold at the end of each month. The advertisement though paid for by Danker was approved by Louis Droz who said the defendants would pay Rs. 10 per month towards the cost of the advertisement translated into the Burmese language (see Exhibit Q).

In my opinion the advertisement is both a direct misrepresentation as to the business and goods of the defendants and a breach of the injunction of the 6th April 1909 whereby the defendants, their servants and agents, were restrained from publishing or representing that the defendants' business has anything whatever to do with the plaintiffs' business.

Other complaints of the plaintiffs relate to the marks known as The West End Co. with Eagle and The Matchless with Locomotive. As to the first it is sufficient to say that the evidence does not disclose that the Eagle mark has acquired any reputation among Indian buyers, and that the defendants are only using an eagle mark without the words West End Co. As regards the Matchless with Locomotive, it is common ground that the Locomotive mark is *publici juris* and that the word Matchless was

adopted by the plaintiffs as distinctive from the word Maxim which in combination with a Locomotive was a registered trade-mark of the factory in Switzerland which has now passed by assignment to the defendants. In my judgment no case of passing off has been made out against the defendants in respect of either of these marks.

The plaintiffs also complain that the defendants are imitating the boxes in which the plaintiffs' watches have generally been sold. These are red boxes, having a representation stamped on them of the St. Imier Factory together with reproductions of certain medals awarded at Exhibitions for products of the St. Imier Factory. The evidence does not satisfy me that buyers attach any importance to these boxes. If there were such evidence it is doubtful if the Court would grant relief to the plaintiffs in respect of them now that their business relations with the St. Imier Factory have ceased. Much time has been consumed in the discussion of various assignments, executed in Switzerland in the years 1901, 1904 and 1908. I do not think they help the plaintiffs' case. The two matters seriously in dispute are the right to the use of the word 'Berna' and the question whether the defendants are or were improperly representing their business to be the business formerly carried on by the plaintiffs. The defendants can use the word 'Berna' in India only if the plaintiffs abandoned its use. Once the abandonment is established the Swiss assignments, assuming them to assign the Berna trade-mark to the plaintiffs absolutely, can be of no assistance to them.

I pass a decree for the plaintiffs for an injunction restraining the defendant Company, their servants, agents, travellers, and representatives respectively, from in any manner representing or causing or procuring to be represented or doing anything which shall lead to the belief that the defendant Company have been or are carrying on the business carried on by the plaintiffs or are the successors in business of the plaintiffs, and from employing using or circulating or causing to be employed used or circulated any circulars, notices, or advertisements which shall in any manner represent or lead to the belief that the defendant Company are carrying on or have succeeded to the business of the plaintiffs.

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The plaintiffs will have their costs of suit up to and including the first day's hearing, and must pay to the defendants costs of four days' subsequent hearing. Each party must bear their own costs not otherwise provided for.

Attorneys for the plaintiffs: Messrs. *Captain* and *Vaidya*.

Attorneys for the defendants: Messrs. *Bicknell*, *Merwanjee* and *Romer*.

Suit decreed.

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911.
June 14.

SAMBHU BIN HANMANTA KOHAL AND OTHERS (ORIGINAL DEFENDANTS NOS. 2 TO 4), APPELLANTS, *v.* NAMA BIN NARAYAN NAIKDE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

Limitation Act (XV of 1877), Articles 132, 144—Mortgage—Third person redeeming the mortgage at mortgagor's desire—Sale by mortgagor of his rights—Sale-deed unregistered—Sale-deed could be looked at for evidence of payment of money—Suit by mortgagor to redeem ignoring sale—Lienor's rights—Adverse possession by lienor—Registration Act (III of 1877), section 17—Evidence Act (I of 1872), section 91.

The plaintiff mortgaged certain property with possession with defendant No. 1 for Rs. 601, on the 4th April 1873. On the 25th November 1878, defendants Nos. 2 to 4, at the request of the plaintiff, paid off the mortgage to defendant No. 1; and for the sum so paid and for a further payment of Rs. 50, the plaintiff sold the property to defendants Nos. 2 to 4. The document as to the sale was not registered; but ever since the purchase, the defendants Nos. 2 to 4 were in possession as owners. In 1907, the plaintiff filed a suit to redeem the mortgage of 1873. The defendants Nos. 2 to 4 set up in reply the sale of 1878 and contended that the suit was barred by limitation:—

Held, that the sale-deed being unregistered could not be looked at for proving the sale, but it could be looked at as evidence of payment of money.

Mahadnappa bin Danappa v. *Dari bin Bala*(1) and *Waman Ramchandra* v. *Dhondiba Krishnaji*(2), followed.

* Second Appeal No. 950 of 1909.

(1) (1875) P. J., p. 299. (2) (1879) 4 Bom. 126.