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the interest and prevent the Company from having it, and dealing with it as their own; without being bound to bear the burthen attached to it": *London and North-Western Railway Company* v. *M' Michael.*[1]

This view of the position of a share-holder pleading minority when registered was taken by Stirling J. in *Re Yeoland Consols Limited (No. 2)*[2] and the learned Chamber Judge has, we think, rightly adopted it in the present case. The same principle underlies section 248 of the Contract Act. *Qui sentit commodum sentire debet et onus.*

Attorneys for the appellant: Messrs. *Jehangir, Sirvai, Minocheher and Hiralal.*

Attorneys for the respondents: Messrs. *Payne and Co.*

Appeal dismissed.

K. McI. K.

(1) (1851) 20 L. J. Ex. 97 at p. 101. (2) (1888) 58 L. T. 922.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SUBAPPA BIN SHENKAREPPA NADGAUDA (ORIGINAL PLAINTIFF), APPELLANT *v.* VENKAPPA BIN GOLAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Limitation Act (IX of 1908), Articles 142, 144—Suit for possession— De facto *possession with defendant—Burden of proof.*

Where the plaintiff alleges possession of land, and it is found that part of the land is *de facto* in possession of the defendant, the case falls under Article 142, and not Article 144, of Schedule II to the Indian Limitation Act (IX of 1908). Every suit for possession of immovable property, in which the plaintiff alleges that he has had possession, must fall under Article 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Article 144. In the former class of cases the

* Second Appeal No. 543 of 1913.

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plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within twelve years of the date of the suit.

SECOND appeal from the decision of D. S. Sapre, First Class Subordinate Judge at Bijapur, modifying the decree passed by R. G. Shirali, Subordinate Judge at Muddebihal.

Suit to recover possession of land.

The plaintiff let the land in dispute to defendant No. 1 in 1900 for a period of nine years. He alleged that he was requested by his tenant at the end of the term, to prolong the tenancy but as he declined to accede to the request, defendant No. 1 colluded with defendants Nos. 2 and 3 and got a portion of the land transferred to their names in the Record of Rights. The defendant No. 1 having declined to deliver possession of the land, the plaintiff sued to recover its possession.

The defendant No. 1 admitted the tenancy; but expressed his unwillingness to deliver possession of the land as the term of the lease had not expired.

Defendants Nos. 2 and 3 contended *inter alia* that they were all along in possession of a portion measuring 9 acres of the land ; that the same was awarded to them for maintenance as plaintiff's *bhaubandhs :* and that they had become owners of the land by their adverse possession for more than 12 years.

The Court of first instance held that the plaintiff was the owner of the land in suit ; that the plaintiff was in possession of the same within 12 years before the date of the suit ; and that the suit was in time. The suit was therefore decreed.

On appeal, the lower appellate Court held that defendants Nos. 2 and 3 had made out their title to 9 acres of the land ; and that the plaintiff was not in possession

of that portion within 12 years before the date of the suit. The decree of the lower Court was therefore modified by releasing the nine acres from its operation.

The plaintiff appealed to the High Court.

Baptista, with *S. R. Bakhale*, for the appellant.

P. D. Bhide, for respondents Nos. 2 and 3.,

BEAMAN, J. :—The plaintiff brought this suit to recover certain land from the possession of defendant No. 1, who, he alleged, was his tenant. He appears to have joined defendants 2 and 3, because, in collusion, as he says, with defendant No. 1, the name of defendant No. 2 had been entered as owner of this land, or part of it, in the Record of Rights.

The learned Judge of first appeal has broken up the land into two parts, in respect of one of which he has decreed the plaintiff's claim in full, holding that that land was in the possession of defendant No. 1 as tenant of the plaintiff. In respect of the other portion of the land in suit, the learned Judge of first appeal appears to have come to the conclusion that that land was *de facto* in possession of the defendants, and therefore, that the plaintiff's suit fell under Article 142 of the second schedule to the Limitation Act. Accordingly, he held that the plaintiff had been unable to prove possession of this portion of the plaint land within twelve years of the suit as required by that Article, and so in effect dismissed his suit as against these defendants in respect of the land so found in their possession.

It has been contended here that the plaintiff's suit against defendants Nos. 2 and 3 really fell under Article 144, and not under Article 142. The written statement of these defendants certainly appears to set up a claim by adverse possession, as well as on a title which the Courts below found was not proved. Having regard, however, to the fact that in respect of all the

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land the plaintiff has certainly alleged possession, and still alleges possession, we think that as soon as any part of that land is found to be *de facto* in the possession of other persons against whom a suit is brought, the case must necessarily fall under Article 142, and not under Article 144. It is quite clear from the wording of those Articles that every suit for possession of immovable property in which the plaintiff alleges that he has had possession must fall under Article 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Article 144. In the former class of cases the plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within twelve years of the date of the suit. The learned Judge below has found, and the finding is a finding of fact, that the plaintiff has not proved his possession within twelve years of suit of the land in the present actual possession of the defendants 2 and 3. Indeed the learned Judge has gone much further, and upon the evidence appears to have found that these defendants have satisfactorily proved adverse possession for more than twelve years before suit. It would not, therefore, be a matter of much importance now under which Article of the Limitation Act this suit falls to be classed. Under either Article we are bound by the findings of fact of the learned Judge of first appeal, and those findings sufficiently dispose of the plaintiff's case. We must, therefore, dismiss this appeal with all costs.

Appeal dismissed.

R. R.