"4. That in compliance with the order of the Sessions Judge the cattle were duly pointed out to the police officer by the petitioner in the month of August 1915, since when no further action has been taken in the matter, nor have the police sent the property recovered to the Court. 5. The petitioner prays that pursuant to the order of the Sessions Judge, an inquiry into his case be continued, the accused be summoned and the prosecution evidence recorded. 6. The petitioner begs respectfully to point out that he is a poor man, while the principal accussed is a person of great influence and wealth in the district and that the delay in the matter, which the petitioner fears may be due to the influence which chief accused wields with the subordinate police, is likely to be greatly prejudicial to the petitioner's case."

The prayer contained in the above application appears to have been ignored, and a perusal of the record shows that on 19th January 1917 the District Magistrate took up the metter and suggested to the Assistant Commissioner that he should report to the Sessions Judge "that the further inquiry shows that Thakar Singh's case is false." It is hardly necessary to point out that the District Magistrate was wholly wrong in giving such a direction to the Magistrate with respect to a case which was pending before him in his judicial capacity. It was apparently in pursuance of this direction that the Magistrate made his order dismissing the complaint. The case is undoubtedly an old one, but the complainant is in no way to blame for the delay which has occurred. It is clear that the Magistrate, who dealt with this case from time to time after 2nd August 1915, took no judicial proceedings at all and simply depended upon the police for investigation. Indeed, as the Sessions Judge in his order dated 2nd April 1917 points out, the Sub-Inspector of Police was wrong in sending the papers to the "Magistrate Ilaqa," and applying to him for a kharij-ul-waqua order when the case was pending in the Court of the Assistant Commissioner. Indeed the Assistant Commissioner in his order of 11th July, 1916 himself refers to the impropriety of the procedure adopted by the police, and remarks that:

"it is regrettable that the Court to which the case was originally submitted, i. e., the Assistant Commissioner's Court, was not informed of the completion of the investigation of the police. Much trouble and time would have been saved thereby. The case had no concern with the Magistrate of the ilaqa."

Having regard to the reasons stated above I consider that a further inquries is absolutely essential; and I ,direct the Assistant Commissioner to inquire into the complaint of the petitioner and receive such evidence, oral and documentary, as he may wish to produce, and then proceed in accordance with law. I accordingly accept the application for revision and quash the order dismissing the complaint.

R.M./R.K. *Petition accepted.*

A. I. R. 1918 Lahore 124

CHEVIS AND LESLIE JONES, JJ.

Abdullah Shah and *another*— Defendants—Appellants.

v.

Muhammad Bakar Shah— Plaintiff—Respondent.

First Appeal No. 1790 of 1913, Decided 6th November 1917, from decree of Dist. Judge, Muzaffargarh, D/- 14th July 1913.

Specific Relief Act (1 of 1877), S. 42—Land awarded in private partition—Declaration for exclusive ownership can be granted.

In a suit for a declaration that plaintiff was the sole owner of the lands in suit it appeared that a dispute having arisen between the parties there was a reference to arbitration and that subsequent to the award there was a private partition by which the lands in suit fell to the plaintiff, but inspite of that the defendants had applied to the Revenue Authorities for partition:

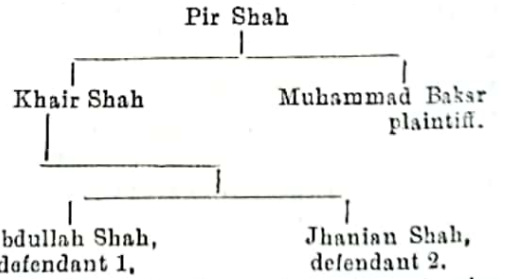
Held: that inasmuch as there had been a partition of the whole of the paternal estate between the plaintiff and the defendants, the latter were debarred from re-agitating the question and that the plaintiff was entitled to the relief sought.

[P 126 C 1]

Muhammad Iqbal and *Har Gopal*—for Appellants.

Muhammad Shafi and *Muhammad Rafi*—for Respondents.

Judgment.—The genealogical tree is



Plaintiff states that Khair Shah having died in his father's lifetime, defendants were not entitled under Mahomedan law to share in Pir Shah's estate, but that as a dispute arose on Pir Shah's death the matter was referred to Khwaja Ghulam Farid as arbitrator, and that his award gave 2/ 3rds of the estate to plaintiff and 1/ 3rd to defendants. That subsequently there was a private partition by which the lands now in suit fell to the plaintiff. The defendants having re-

cently applied to the revenue authorities for partition plaintiff has brought this suit for a declaration that he is sole owner of the lands in suit. The defendants allege that according to custom the sons of a pre-deceased son inherit, that the award is not binding on the parties, that the award cannot be proved as the original award, document was insufficiently stamped and it not being forthcoming, the secondary evidence cannot be admitted on payment of penalty, that there was no award and even if there was it is not binding on defendant 2 who was a minor at the time, that there was no partition, and that if there was the lists relating to the award signed by the parties are inadmissible in evidence for want of registration that the suit is time-barred and that plaintiff not being in possession he cannot sue for a declaration.

The lower Court found in plaintiff's favour on all points and decreed the claim. The defendants appeal. We consider it unnecessary to go into the matter of the award for even if there was no award still the plaintiff must succeed if he can prove a private partition by which the lands in suit fell to him. Defendant's counsel has said nothing as to grounds Nos. 8 and 9 of this appeal, so we take it that these grounds are given up. We need only add that defendants' application for partition was an invasion of plaintiff's rights, and that this suit was brought within six years of that application.

The learned counsel for the appellants has taken us through the whole of the evidence, and we are of opinion of the lower Court's finding as to the partition is perfectly correct. In face of the application dated 16th January 1899, printed on p. 6 of the paper book, it is useless to deny that the defendants made a partition of landed property between themselves. Defendants' counsel suggests that the property so divided was not part of the ancestral estate inherited from Pir Shah, but he is unable to show us that defendants ever acquired a marla of land in any way other than by inheritance from their father. We note that defendants themselves never suggested that the lands which they divided inter se were not part of the paternal estate. What defendant 2 said in his evidence (vide p. 285) was that the partition did not cover the whole estate and that by a mistake their agent had included in the application of 16th January 1899, property in Bahawalpur state and the Montgomery District. It is clear to us that defendants divided between themselves lands which formed part of the paternal estate and this they could not have done without making plaintiff a party to the transaction unless there had previously been a partition between themselves and the plaintiff.

With regard to the argument that the partition cannot be proved because the lists signed by the parties were not registered, we note that there is no proof beyond a mere statement of one of the plaintiff's witnesses that any such lists were signed by the parties. We hold then that there was a partition between the plaintiff and the defendants of the paternal estate, and we can find no proof that the partition did not cover the whole estate. It is true that so far as the lands situated in the Muzaffargarh District are concerned the parties are still shown as joint owners but we note that it was never the defendants' case in the First Court that there was a partition covering a part of the estate only. A reference to the pleadings will show that defendants' case was that there was no partition at all. So we hold that the whole estate was divided, as there is no good ground for pronouncing in favour of a partial partition. Defendants have never alleged that the lands in suit fell to them in partition. So we must take it that the plaintiff, who is as the evidence shows, in possession of the lands in suit acquired them in partition.

We have not referred to the oral evidence produced by either side. Defendants' counsel has attempted to pick holes in plaintiff's evidence, but to do so is useless in face of the clear fact that the defendants have effected partition inter se. This is the best proof of a partition between plaintiff and defendants. Defendants' counsel has argued that unless the award is upheld the partition which is based on the award cannot be upheld. But reference to the plaint will show that plaintiff's primary claim was for a declaration that he was sole owner of the lands in suit. This claim was based solely on the alleged partition, and such a partition could have taken place without any award. The award is here recited simply as a matter of history leading

up to the partition. Plaintiff's secondary claim was one for a declaration that under the award he was owner of 2/3rds; this subsidiary claim was only put in case plaintiff failed to prove the alleged partition. We hold the partition proved and so there is no need to go into the question of the award.

We fear the defendants have played a very discreditable part. According to Mahomedan law, which presumably applies (though this question was not put in issue), they, as sons of a man who predeceased his father would get nothing. Yet it appears that they got 1/ 3rd by arbitration. Then having divided with their uncle and subsequently divided between themselves they now, seeking to take advantage of technicalities and the fact that the entries in the Muzaffargarh revenue records are not up to date, wish to disregard the award by which they got 1/ 3rd and also the partition and to grab 1/ 2 of the estate. The appeal fails and is dismissed with costs.

R.M./R.K *Appeal dismissed.*

A. I. R. 1918 Lahore 126

CHEVIS AND BROADWAY, JJ.

Talawand and *others*—Plaintiffs—Appellants.

v.

Fateh Din and *others*—Defendants—Respondents.

Second Appeal No. 901 of 1914, decided on 9th March 1918, from the decree of Addl. Divl. Judge., Gujranwala, D/- 28th January 1914.

Oaths Act (1873), S. 11—One of several plaintiffs agreeing to be bound by defendant's oath—Other plaintiffs are not bound by oath.

Under S. 11 an oath is conclusive as against the person who offers to be bound by it; as agasnst other persons it is not conclusive evidence and a Court has no right to treat it as such. [P 126 C 2]

F. and other plaintiffs sued *M.* for possession of certain land. After the plaintiffs' evidence had been recorded *F.* agreed to let the decision of the suit rest on *M.*'s oath. *M.* took the oath and on this the Court dismissed the suit as regards all the plaintiffs:

Held: (1) that the suit was correctly dismissed as regards *F*; [P 126C 2]

(2) that the oath was not binding as against the other plaintiffs unless the defendant could show that they joined in *F.*'s challenge to the defendant or agreed to the dismissal of the suit either personally or by agent duly authorised in that behalf; [P 127 C 1]

(3) that the mere presence of other plaintiffs or of their Pleader at the time of *F*'s challenge was no proof of assent, inasmuch as a man may disapprove of what is being done, though if he thinks it is to affect some one else only and not himself, he may not trouble to express his dissent. [P 127 C 1]

Ganpat Rai and *Dunichand*—for Appellants.

M. N. Mukerje—for Respondents.

Judgment.—In this case Fateh Din and other plaintiffs sued Mohkam Din for possession of land. After plaintiffs' evidence had been recorded Fateh Din agreed to let the decision of the suit rest on defendant's oath on the Koran. Defendant accepted this challenge and took the oath. The first Court then dismissed the suit as regards all the plaintiffs, plaintiffs other than Fateh Din appealed to the Additional Divisional Judge, who held that the decree passed was one under O. 23, R. 3, and that no appeal lay under O. 43, R. 1 (m), and that the appellants' only remedy was, as pointed out in *Ala Bakhsh Khan* v. *Kasim Ali Khan* (1), an application for review or (in the case of fraud) a regular suit to set the decree aside, or an application to the Chief Court for revision. So the Divisional Judge dismissed the appeal. Hence this second appeal. We are quite unable to see that, as regards the present appellants O. 23, R. 3, has any application; that is, assuming that their contention is correct, viz., that they never jointed in challenging defendant to take the oath nor authorized the challenge by Fateh Din, and never agreed in any way to any adjustment of the suit. We note here, as regards *Ala Bakhsh Khan* v. *Kasim Ali Khan* (1), that that part of S. 375 of the old Code which declared that the decree should be final is not embodied in O. 23, R. 3 of the present Code, and that O. 43, R. 1 (m), is a new provision, there being nothing in S. 588 of the old Code allowing an appeal from an order under S. 375 recording an adjustment.

Fateh Din would, of course, be out of Court, but not so other persons who never joined in the challenge. S. 11 of the Oaths Act, shows that the oath is conclusive as against the person who offered to be bound by it. As against other persons it is not conclusive evidence, and the Court has no right to treat it as such. We are unable at present to hold that the present appellants are in any way bound by the oath, and we consider that they have the ordinary right of appeal from the decree, So far as the record shows Fateh Din alone agreed to be bound by

(1) (1895) 45 P R 1895.