THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

Council ... ... N. H. THOMSON, *Faculty of Advocates in Scotland.*

Court ... ... J. M. C. MILLS, *King's Inns.*
H. G. WEDDERBURN, *Inner Temple.*

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IN THIS VOLUME.

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Irregularity of procedure on the part of a foreign tribunal which ordinarily proceeds in accordance with recognized principles of judicial investigation is not a sufficient ground for refusing to give effect to its judgment.

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The second proviso contained in Rule IV, Section II, Madras Act VIII of 1865, does not apply to a lease which is *boná fide* and valid under the general Hindú Law, and, as such, falls under Rule I. This proviso does not amount to a repeal of the Hindú Law regarding ordinary leases, but applies only to such leases when in the circumstances in which they are made they amount to a fraud upon the power of the grantor's successor as manager, or to alienations made for the personal benefit of the grantee and to the prejudice of the successor.

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Two Courts having found against the existence of an authority to the widow given by her deceased husband, the question remained whether the manager giving his child, in the manner in which he had given it for adoption, he being a sapinda, and in a position to represent other sapindas of the deceased, was an assent by a sapinda to an adoption by a widow sufficient to support her adopting in the absence of an authority from her husband.

It was decided that under all the circumstances under which this child had been applied for by the widow and given by the father, the assent of the latter was not one which had rendered the adoption valid as against the brothers.

There was no sufficient evidence to show that the widow applied to the boy's father to give his assent as sapinda to an adoption, on the ground that she could not adopt without the sapinda's assent.

It was not necessary to determine whether this sapinda could alone have given a valid assent, if it had been given to the widow as one having no authority from her husband to adopt; and if it had been given without his mind having been influenced by other and undue considerations.

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INDIAN LAW REPORTS.

Madras Series.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Kindersley.

PRABHACARAROW, PETITIONER, *v.* **POTANNAH,** COUNTER-PETITIONER.* 1878. July 29

Execution—Limitation—Article 167, *para.* 5, *Act IX of* 1871.

Application for execution of a decree was made on the 10th November 1869, and on the 27th November 1869 notice issued under Section 216 of the Civil Procedure Code. Again on the 4th February 1873 application was made for execution and notice was issued on the 19th February 1873 under Section 216. A subsequent application for execution was made on the 31st August 1874 and the order for notice to issue, under Section 216, was made on the same day. The question raised in appeal against the order to issue execution was whether the plaintiff's right to execution was barred and had been so when the application, dated 31st August 1874, for execution was made.

Held on appeal by the High Court (Kernan and Kindersley, JJ.) that as the application for execution on the 4th February 1873, being more than 3 years after the date of issuing the last prior notice under Section 216, viz., 27th November 1869, was late, under Article 167, para. 5, Act IX of 1871, execution was barred by limitation at and before the date of that application, and that this bar was not removed by the circumstance that the judgment debtor had allowed the service of the notice on him in February 1873 to pass unchallenged: *Raja Chilicany* v. *Rajavulu Naidu* (1) distinguished. *Held* also following *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy* (2) that "applications to enforce a decree" in paragraph 4 of article 167, Act IX of 1871, mean "applications under Section 212 or otherwise by which proceedings in execution are *commenced* and not applications of an incidental kind made during the pendency of such proceedings."

APPEAL against the order of the District Judge of Vizagapatam, passed on Miscellaneous Petition No. 416 of 1875.

T. Ráma Ráu for the Appellant.

C. Rámachandra Ráu Saib for the Respondent.

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* Civil Miscellaneous Appeal No. 50 of 1878, against the order of E. C. G. Thomas, District Judge of Vizagapatam, dated 18th January 1878.

(1) 5 Mad. H.C.R., 100.

(2) I.L.R., 3 Calc., 235.

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RABHA-CARAROW v. POTANNAH.

The facts and arguments fully appear in the following

JUDGMENT :—This is an appeal by the defendant in Suit No. 35 of 1863 in the Vizagapatam Court, against an order of the District Judge of Vizagapatam, dated the 18th of January 1878, whereby he awarded execution on foot of the decree, the exact date of which does not appear, but which in the year 1866 must have been in existence.

The dates are as follows :—

1869, 10th November.—Application for execution, Section 212, and for notices to show cause under Section 216, Procedure Code.

1869, 27th November.—Notice issued under Section 216.

1870, 19th May.—Warrant to attach issued.

1871, 17th February.—Order to strike off file, the warrant.

1873, 4th February.—Application for execution and notice, Section 216.

1873, 8th February.—Application for execution and order. Order for notice, Section 216, to issue.

1873, 19th February.—Notice issued.

1873, 11th March.—Notice served.

1873, 23rd August.—Warrant of attachment issued.

1873, 29th November.—Order to strike warrant off file, batta not paid.

1874, 31st August.—Application for execution.

1874, 31st August.—Order for notice to issue, Section 216.

1875, 28th September.—Petition shewing cause against issuing execution.

1878, 18th January.—Order appealed from, to issue execution.

The question is whether the plaintiff's right to execution is barred by limitation, and was so when the application, 31st August 1874, for execution was made.

In the Court below the Judge decided that limitation did not apply, inasmuch as, on the 4th February 1873, application was made for execution, and on the 8th February 1873 an order was made to issue a notice under Section 216, and on the 19th of February 1873 such notice was issued. A question was made whether the application of 4th February and the notice issued on the 19th of February were *bonâ fide* proceedings, *i.e.*, intended to

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enforce the decree at the time. We think the Judge was right, acting on *Kondaraju Venkata Subbaiya* v. *Rámakrishnamma* (1), in holding that his decision could not be guided by intention, but by the dates. (2)

The Judge appears to have decided that the right to enforce the decree was not barred by limitation on the 4th or 19th of February 1873, and that the order of the 4th February and the notice of the 19th were issued within the period of limitation.

It was contended before us and apparently in the Court below also, that the right to enforce the decree was barred, under Article 167, Act IX of 1871, at the end of three years from the 27th of November 1869, and before the application of the 4th and notice of the 19th of February 1873 were made and issued respectively.

The plaintiff contended that defendant was precluded from going into that question, as he was served with the notice on the 19th of February, and did not shew cause or appeal, and cited *Rája Chilicany* v. *Ragavulu Naidu* (3). The principle of that case is that if a party is served with notice and does not appear and oppose an order for execution, he cannot after that object to the order on the ground that it was out of time. But at the date of that case the Court was not bound to raise the question of the statute, as it is now, under Section 4, Act IX of 1871. Plaintiff further argued that Act IX of 1871 did not apply to this suit instituted before the Act, the decree being in 1866, and referred to Section 2, and therefore that the Act did not apply to the application for execution in the suit; and that as the defendant, on the application in 1874, did not plead the statute, the Judge could not have raised it as a bar.

This contention is wrong, for it has been held in *Krishna Chetti* v. *Ramu Chetti* (4) and other cases, that application for execution in suits prior to the Act are within the Act. *Eshan Chunder Bose* v. *Prannath Nag* (5): *Jiwan Singh* v. *Sarnam Singh* (6): *Unnoda Persad Roy* v. *Koorpan Ally* (2).

(1) 4 Mad. H.C.R., 75.

(2) *See* I.L.R., 3 Calc., 518, *Unnoda Persad Roy* v. *Sheikh Koorpan Ally*, and cases there referred to.

(3) 5 Mad. H.C.R., 100.

(4) 8 Mad. H.C.R., 99.

(5) 14 Beng. L.R., 143.

(6) I.L.R., 1 All., 97.

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The important dates under Article 167 of Act IX of 1871 are, as regards this case which is governed by para. 5 of that article—

First.—1869, 27th November.

Second.—1873, 4th February.

It is clear from these dates that more than three years elapsed from the date of the notice issued, 27th November 1869, and the application for the execution, 4th February 1873.

It was, however, suggested in argument that the issuing of the warrant (1870, 17th February) was an application to enforce or keep in force the decree, and that the period of three years commenced *anew* from that date, and that, as the application of the 4th February and order for notice of the 8th February 1873 were applications to enforce or keep in force the decree within three years from the 19th February 1870, the order and notice of February 1873 were within time. The Full Bench in Calcutta, in *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy*, (1) decided that "applications to enforce a decree" in paragraph 4 of Article 167, Act IX of 1871, mean "applications under Section 212 or otherwise by which proceedings in execution are *commenced*, and not applications of an incidental kind made during the pendency of such proceedings." There the incidental proceedings alluded to were the issuing of an attachment, which was returned with certificate of execution, and an order of the Court directing the judgment creditor to deposit costs of the proclamation. In that decision we agree.

The application to the Court for warrant of attachment is an application to enforce the decree, in a certain sense, *i.e.*, as a proceeding towards and in the course of enforcing the decree, but it is not the initiatory application under Section 212. The principle of that case applies to the present case, though it is one governed by paragraph 5 of Article 167 and not paragraph 4.

In order to arrive at a correct conclusion as to the construction of the Article 167, it is necessary to recollect that that article is a substitute for Section 20 of Act XIV of 1859, the general terms used in which had led to much uncertainty and litigation. The Act of 1871, in order to avoid such uncertainty, manifestly aimed at referring to well understood and defined periods from which time should run. If the construction contended for by the plaintiff was

(1) I.L.R., 3 Calc., 235.

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correct, any application in reference to execution, though after notice issued under Section 216, should have the effect of creating a new starting-point; but this would be contrary to the very terms of paragraph 5, Article 167.

We hold that the application for execution on the 4th of February 1873 being more than 3 years after the date of issuing the last prior notice under Section 216, viz., 27th November 1869, was late under Article 167, page 5, Act IX of 1871, and that execution was therefore barred by limitation at and before the date of that application.

We accordingly reverse the decision of the District Judge, and dismiss the application for execution with costs.

The ruling in this case has been confirmed in *Unnoda Persad Roy* v. *Sheikh Koorpan Ally*, I.L.R., 3 Calc., 518.

APPELLATE CRIMINAL.

Before Mr. Justice Innes and Mr. Justice Forbes.

1878. Sept. 18.

THE EMPRESS *v.* RAMANJIYYA (PRISONER) APPELLANT.*

Criminal Procedure Code, section 122—Confession—Magistrate—Evidence—In Act I of 1868, section 1, the word "include" is enumerative.

Where a Magistrate in taking the confession of a prisoner under Section 122 of the Criminal Procedure Code omits to take it in writing, with the formalities prescribed by Section 346 of that Code, such confession is not absolutely inadmissible in evidence. Evidence may be taken to show that the prisoner duly made the statement recorded.

Reg. v. *Shivya and others* (1) dissented from.

A Village Munsif in the Madras Presidency is a "Magistrate" within the meaning of Section 26 of the Indian Evidence Act, 1872.

The word 'include' in Clause 13 and other clauses of Section 1 of Act I of 1868 is intended to be enumerative, not exhaustive.

In this case the prisoner was charged under Section 411 of the Penal Code, with receiving stolen property. At the trial the Village Munsif stated that the prisoner had confessed to him that he (prisoner) had received the stolen property knowing it to have been stolen. The prisoner alleged that the property (an ingot of gold) was his, but gave no further account of it. A full

* Criminal Appeal No. 284 of 1878, against the sentence of J. G. Horsfall, Session Judge of the Kistna Division, in Case No. 19 of the Calendar for 1878.

(1) I.L.R., 1 Bom., 219.

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confession was proffered in evidence, but the Session Judge rejected it on the ground that the conditions required by Sections 122 and 346 of the Criminal Procedure Code had not been complied with in recording it. A separate confession was, however, proved by the Village Magistrate. The Session Court, differing from the Assessors, convicted the prisoner.

The prisoner appealed.

Mr. *Wedderburn* for the Appellant.

The *Government Pleader* (Mr. *Handley*) in support of the conviction.

The Court delivered the following

JUDGMENT.—It was argued that the confession of the prisoner before the Village Munsif was not admissible in evidence, because, if the Village Munsif is a Magistrate, the formalities prescribed by Section 346 of the Code of Criminal Procedure in the case of the examination of an accused person which, under the provisions of Section 122, are to be adopted also in taking confessions, have not been observed, and are essential to the admissibility of the evidence; and if he cannot be properly regarded as a Magistrate the confession is inadmissible, as the accused was in custody of the Police at the time the confession was made, and a confession so made is not admissible unless made in the presence of a Magistrate.

Could the Village Munsif be regarded as a Magistrate within the meaning of the Criminal Procedure Code, it would no doubt have been irregular in him, in taking the confession, to have omitted to take it in writing with the formalities prescribed by Section 346. To say, however, that such a confession would be absolutely inadmissible would, we think, be going beyond what is warrar by a proper construction of the Code. If any such irregulari committed in regard to the examination of the accused p before the committing Magistrate, the Court of Session is en by the last clause of Section 346 to take evidence that the p duly made the statement recorded: with a proviso that, error does not prejudice the prisoner, it shall not be deen affect the admissibility of the statement so recorded, that is if the error does not prejudice the prisoner, the statement is admissible, notwithstanding the omission to observe the prescribed formalities. We can find nothing in the language of Section 122 which would warrant the inference that confessions taken without

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the prescribed formalities would be inadmissible. To hold them so would, we think, be quite contrary to the principles upon which the Code proceeds, and which are manifested throughout it of disregarding mere formal irregularities. We are of opinion that, if necessary, evidence might be taken that such a confession had been duly recorded, though the Magistrate's procedure had been irregular.

In arriving at this conclusion we have not overlooked the decision of the Bombay High Court in the case of *Reg.* v. *Shivya and others*. (2)

In regard to the argument that if the Village Munsif is not a Magistrate, within the meaning of the Criminal Procedure Code, he must be regarded as a private person, and that, therefore, the confession made to him, while the prisoner was in the custody of the police, is irreceivable, we are of opinion that the word 'include' in Clause 13 and other clauses of Section 1 of Act I of 1868, the General Clauses Act, is intended to be enumerative, not exhaustive. This is obviously the case in regard to the word 'person' in Clause 3.

When it is intended to exhaust the signification of the word interpreted the word 'mean' is used.

There was nothing, therefore, in this Act to restrict the meaning of the word Magistrate to a Magistrate within the meaning of the Criminal Procedure Code in force at the date of its enactment. Village Munsifs have, in this Presidency, been vested by the Legislature with magisterial powers, and are styled Village Magistrates, and this Court has, on several occasions, before the enactment of the present Code of Criminal Procedure, held that they were Magistrates. The Code, while confining the meaning of the word 'Magistrates' as used in the Code to certain classes of Magistrates, expressly saves the jurisdiction of heads of villages (Section 541), and the provisions of the Evidence Act (Section 26) do not restrict the meaning of the word 'Magistrate' to a Magistrate within the meaning of the Criminal Procedure Code.

It has also been expressly held by this Court (High Court Proceedings, 7th July 1873 and 23rd May 1874) that a confession so made is receivable.

(2) I.L.R., 1 Bom., 219.

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The propriety of the conviction does not, however, hinge solely upon the admissibility of this piece of evidence; what had to be made out by the prosecution was that there had been a theft from one Pullaya, that some of the property stolen was traced to the prisoner, and that there was evidence that he had received possession of it dishonestly knowing that it was stolen. As to this, we find that there is no evidence whatever of any theft having been committed. The fact of the theft appears to have been assumed by the Session Judge upon the evidence of another trial.

Had there been evidence of the theft from Pullaya, the evidence to the identity of the property traced to prisoner with that said to have belonged to Pullaya is very unreliable, and evidence that prisoner received it from Ghantam Rangaya, who it may be inferred from the Session trial, was the thief or one of the thieves, is, in the trial before the Session Court, altogether wanting. The confession before the Village Magistrate does not supply the main defects of the case, and, if it did supply them, it would not be safe to act upon an unrecorded confession of this character, though by law it is admissible.

We shall, therefore, acquit the prisoner. We cannot understand why the Sessions Judge did not follow the rule contained in the last clause of Section 346 of the Criminal Procedure Code to satisfy himself that the statement of the prisoner before the committing Magistrate was duly made, although the prescribed formalities were not observed.

Conviction quashed.

APPELLATE CIVIL.

Before Sir Walter Morgan, Kt., Chief Justice, and Mr. Justice Forbes.

1878. Sept. 20.

SYED MOIDIN, PLAINTIFF v. SUNDARAMURTHIA AND TWO OTHERS, DEFENDANTS.*

Debtor—Small Cause Court—Act X of 1877, *Sec.* 336, *Cl.* 5—*Act X of* 1877, *Cap.* XX.

Clause 5 of Section 336 of Act X of 1877 applies to Small Cause Court debtors, such persons can obtain the benefit of Chapter XX of that Act by applying to a Court which has jurisdiction under that Chapter.

CASE stated under Section 617 of Act X of 1877 by the Subordinate Judge of Tinnevelly. "The 1st and 2nd defendants in this case are under arrest in execution of the decree passed against them in Small Cause Suit No. 227 of 1877, and they apply under Section 336 of Chapter XIX of Act X of 1877 to be allowed the benefit of Chapter XX of the Act, and to be declared insolvents.

But I believe that Chapter XX which regulates the whole procedure in respect of insolvent judgment-debtors is not extended to Mufassal Small Cause Courts (*vide* Schedule II annexed to the Act) and I think that the application of defendants must, therefore, be refused."

The defendants relied upon Section 336, Chapter XIX, which extends to such Courts, and on paragraph 5 of that Section which permits generally a person arrested to apply to be declared an insolvent. But the Subordinate Judge thought that this paragraph did not apply to Small Cause judgment-debtors.

He referred the following questions :—

1. Whether paragraph 5 of Section 336 applies to Small Cause judgment-debtors ; and
2. Whether such debtors can be allowed the benefit of Chapter XX.

V. Bháshyam Áyyangár for the Plaintiff.

There was no appearance for the Defendants.

* Referred Case No. 9 of 1878, stated under Section 617 of Act X of 1877, by A. Annusámi, Subordinate Judge of Tinnevelly, dated 16th July 1878.

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SYED MOIDIN v. SUNDARAMURTHIA.

The Court (MORGAN, C.J., and FORBES, J.) delivered the following

JUDGMENT :—Two judgment-debtors arrested in execution of a Small Cause Court decree applied, under Section 336, to be allowed the benefit of the provisions of the Act relating to Insolvent Judgment Debtors (Chap. XX), the Sub-Judge (on the Small Cause Side of his Court) rejected the application, and in the letter above recorded, he refers the following questions for an authoritative ruling :—

(1) Whether Clause 5 of Section 336 applies to Small Cause Court debtors.

(2) Whether such persons can be allowed the benefit of Chapter XX.

We answer both questions in the affirmative. Small Cause Courts have, by Schedule II of the Code, been specifically empowered to act under Section 336, and they are bound to exercise the power, on occasion arising. It remains for a judgment-debtor who has obtained a provisional discharge under that section to take proceedings in a Court that has jurisdiction under Chapter XX, and in the present instance the remedy, we observe, could have been applied for on the subordinate side of the Court. (1).

Before Sir Walter Morgan, Kt., Chief Justice, and Mr. Justice Innes.

1876. October 11.

RÁMAN (PETITIONER) *v.* KARUNATHA THARAKAN (COUNTER-PETITIONER).*

Review—Act VIII of 1859, *Secs.* 376, 378.

Where a Judge allowed a review of his predecessor's judgment on the sole ground that it appeared to him that the judgment of his predecessor had done injustice, *Held* by the High Court (MORGAN, C.J., and INNES, J.) that though the generality of the terms used in the sections of the Procedure Code, Act VIII of 1859 relating to review of judgment, viz., " other good and sufficient reason" (Sec. 376) and " otherwise requisite for the ends of justice" (Sec. 378) confers a wide jurisdiction, this jurisdiction could not be held to authorize a Judge to revise and reverse his predecessor's decree on the ground above-mentioned. If the review is asked for in reference to the conclusions of fact drawn from the evidence, it should not be granted simply upon the same evidence. *Reasut Hussain* v. *Hadjee Abdoollah* (1) discussed.

(1) See Government notification, dated 17th October 1877, No. 2,473.

* Civil Miscellaneous Petition No. 259 of 1876, against the revised decree of K. Kunjan Menon, Subordinate Judge of South Malabar, dated 19th February 1876, confirming the decree of the District Munsif of Palghát, dated 26th May 1875.

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RÁMAN v. KARUNATHA THARAKAN.

THIS was an application under Section 35, Act XXIII of 1861, presented against the revised decree of the Subordinate Court of South Malabar in Regular Appeal No. 288 of 1875, confirming the decree of the Court of the District Munsif of Palghát in Original Suit No. 294 of 1874.

Mr. *Handley* for the Petitioner.

The facts and arguments are sufficiently set forth in the following judgments.

MORGAN, C.J.—Referring to his predecessor's judgment, the Subordinate Judge in the case before us says: " it appeared to me that this judgment had done injustice, and I consequently allowed a review."

The extreme generality of the terms used in the sections of the Civil Procedure Code relating to review of judgment (that is to say, " other good and sufficient reason," Section 376, and " otherwise requisite for the ends of justice," Section 378) doubtless confers a wide jurisdiction, extending, it has been laid down, to cases in which the parties may have failed to show that there was either positive error in law or new evidence to be brought forward which could not be before adduced. (*Reasut Hossain* v. *Hadjee Abdoollah and another*, decided by the Privy Council on the 24th May 1876.) (1).

But this jurisdiction, though wide, is not unlimited and cannot, I think, be held to authorize a Judge to revise and reverse his predecessor's decree without grounds assigned by him or otherwise appearing beyond the vague one alleged. The case itself was one in which there was a conflict of evidence. The conclusion drawn by the Subordinate Judge differed from that reached by his predecessor. This alone would not render the judgment of the former open to revision under the Code. (See *Roy Meghraj* v. *Beejoy Gobind Burral*) (2). The decree appealed against must be set aside and that of the 15th October 1875 restored.

The appellant is entitled to the costs both here and in the Lower Courts.

(1) I.L.R., 2 Calc., 131. (2) I.L.R., 1 Calc., 197.

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RÁMAN v. KARUNATHA THARAKAN.

INNES, J.—Great mischief would result if a Judge were allowed to alter the decision of his predecessor simply because he differed from him in the conclusions he arrived at upon the evidence. The Section 376 of the Civil Procedure Code, which authorizes an application for review, supposes the applicant to be supplied with "new matter or evidence which was not within his knowledge or could not be adduced by him at the time when the decree was passed," or that he makes the application "from any other good and sufficient reason." If, therefore, the review is asked for in reference to the conclusions of fact drawn from the evidence, I think the section intends that it should not be granted simply upon the same evidence. It is contended, however, that the words "other good and sufficient reason" are wide enough to admit of a review being granted upon the same evidence. But I think with the High Court of Calcutta, that these general words are in their signification controlled by the obvious intention of the preceding words, and must be confined to reasons of a new character and such as were not before the Court at the time of the decree.

The opinion of the Privy Council in the case of *Reasut Hussain* v. *Hadjee Abdoollah* (1) no doubt places a very wide interpretation on the words; but the opinion on this point was not necessary for the decision of that case, and may without impropriety be regarded rather as a mere *obiter dictum* than as a binding authority. I think, therefore, that the Subordinate Judge, having only the same matter before him and being moved to grant the review solely on the ground that the conclusion of his predecessor was a conclusion in which he did not agree, had no jurisdiction to grant the review; and I agree in setting aside the new decree made upon review, and restoring the decree of the former Subordinate Judge.

Revised decree set aside.

(1) I.L.R., 2 Calc., 131.

APPELLATE CIVIL.

Before Sir Walter Morgan, Kt. Chief Justice and Mr. Justice Holloway.

1876. *November* [illegible]

HINDE AND 3 OTHERS, APPELLANTS (DEFENDANTS) *v.* BAUDRY AND 2 OTHERS, RESPONDENTS (PLAINTIFFS).*

Libel—Debtor—Qualified Privilege.

Plaintiffs and defendants were the members of two firms, each creditors of an absconded debtor one Bávachi Kunhi Pakhi. The plaintiffs' firm brought a suit to recover the sum alleged to be due to them by the said Bávachi Kunhi Pakhi and pending that suit the defendants' firm presented a petition to the Court which contained the statements complained of, which were principally to the effect that the plaintiffs had prejudiced the petitioners by suing the said Bávachi Kunhi Pakhi for sums greatly in excess of their just claims against him. The Judge found that there was no malice in fact, but that the statements were untrue and calculated to damage, and he, accordingly, gave a decree to the plaintiffs with damages.

Held, on appeal, reversing the decision of the Lower Court, that as the defendants were creditors of an absconded debtor and deeply interested in seeing that his estate was not swept off in satisfaction of an excessive claim made by the earliest suitor, they, in presenting a petition pointing out what they considered suspicious elements in the plaintiffs' claim against such debtor, were at all events entitled to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interest.

THIS was an action for damages for libel. The circumstances out of which it arose were as follows:—Plaintiffs and defendants were the members of two firms, each creditors of an absconded debtor one Bávachi Kunhi Pakhi. The plaintiffs' firm brought a suit to recover the sum alleged to be due to them by the said Bávachi Kunhi Pakhi, and pending that suit the defendants' firm presented a petition to the Court which contained the statements complained of, which were principally to the effect that the plaintiffs had prejudiced the petitioners by suing the said Bávachi Kunhi Pakhi for sums greatly in excess of their just claims against him. The Judge found that there was no malice in fact, but that the statements were untrue and calculated to damage, and he accordingly gave a decree to the plaintiffs with damages.

The defendants appealed to the High Court.

* Regular Appeal No. 75 of 1876, against the decree of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 30th March 1876.

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Mr. *Shephard* for the Appellants contended that they were justified in presenting the petition to the Court, and seeing how deeply interested they were in the matter, they had at all events a minor privilege. [HOLLOWAY, J. (having referred to 4 Rep. 14; 4 Rep. 14 b. 2nd resolution, which he remarked was doubted by many eminent lawyers)—Your difficulty is that you are neither a witness nor a party]. *Seaman* v. *Netherclift* (1).

There was no appearance for the Respondents.

The Court (Sir W. MORGAN, C. J. and HOLLOWAY, J.) delivered the following

JUDGMENT.—In this case damages have been awarded for defamation. The defamatory matter was contained in a petition addressed to the Sub-Court in the course of an action by the plaintiffs to recover money on bills against the estate of a runaway Moplah.

The Sub-Judge finds that there was no evil intent, by which he no doubt means malice in fact; but because the statements are untrue and calculated to damage, he has decreed for the plaintiffs.

The defendants were creditors of the defendant in the suit, and were deeply interested in seeing that the estate of the runaway was not swept off in satisfaction of the claim in an investigation likely, from the position of the case, to be somewhat perfunctory. They presented a petition pointing out what they considered suspicious elements in the plaintiffs' claim. The Court in a country like this was also deeply interested that its process should not be misused to the damage of the other creditors.

The great latitude of intervention allowed by our procedure, and the provisions by which the earliest suitor is allowed to take the whole fund, render it perhaps difficult to say that these petitioners were mere strangers to the suit. If they were rightfully making an application in the suit, the principle of public policy which guards the statement of a party or witness against an action would protect them whether the statement was malicious or not. This principle has prevailed in England from the earliest times. *Cutler* v. *Dixon* (2) is an early, and *Seaman* v. *Netherclift* (1) is a very late illustration. If, however, it must be held that they were not in a position which would afford absolute protection, it seems clear that they are so placed

(1) L.R. 1 C.P. Div. 540. (2) 3 Rep. 14.

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as to entitle them to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interest. [See the Judgment of Maule, J., in *Somerville* v. *Hawkins* (1).]

The law regards statements of certain kinds as libels *primâ facie*. If made maliciously in the common understanding of the term, they render all makers of them liable to compensate, unless they stand in a position in which considerations of public policy overcome the private right. Even those who make them in good faith, but wrongfully, will be liable, unless entitled to the more qualified privilege of which the present case is an example. If entitled to such qualified privilege they will not be bound to pay compensation, even if the statements are erroneous, because guilty of no injury, unless they have used the occasion not for the fair protection of interests of their own or for the satisfaction of duties moral or legal, but for the gratification of private ill-will. In this case it is clear that the defendants are not liable.

Appeal allowed.

INSOLVENCY JURISDICTION.

Before Mr. Justice Innes.

1877. November 19.

IN THE MATTER OF THE PETITION AND SCHEDULE OF VARDALACA CHARRI, a discharged Insolvent Debtor.

Insolvent Act—11 & 12 *Vict., c. XXI, s.* 40—*cestui que trust, creditor.*

As the Indian Insolvent Act, by virtue of the terms of Section 40, incorporates all existing and future enactments passed in England for the purpose of determining what debts may be proved; and as by Section 15 of the English Act of 1869, property held by the bankrupt in trust for others is not the property of the bankrupt divisible among his creditors; such property cannot be regarded as having vested in the Official Assignee and a *cestui que trust* creditor is not entitled to come in and prove; because what is being administered in insolvency is the insolvent's estate, of which property of this nature does not form part.

Mr. *Johnstone* for Vencataramánagiri Gosáyi, claiming as a creditor.

(1) 20 L. J.C.P. 131: 10 C.B. 583.

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Mr. *Miller* for Benjamin Brooks, Esquire, the Official Assignee and, as such, the assignee of the above insolvent's estate.

The facts fully appear in the following judgment of

INNES, J.:—Mr. Johnstone moved on behalf of Venkataramánagiri Gosáyi to be allowed a primary charge on certain funds in the hands of the Official Assignee, which he holds as assets of the insolvent, T. Vardalakacharri. Venkataramánagiri Gosáyi comes here as the legal representative of one Devagiri, who was the legal representative of one Predinagiri. In appeal suit 9 of 1843 the Sadr Court gave Predinagiri a decree for Rupees 22,767-12-0. On the 12th October 1846 this decree was assigned by the holder to Judenagiri, to whom Predinagiri owed a debt of Rupees 1,751, on the understanding that he was to realize the decree amount, pay himself, and make over the balance to Predinagiri. Proceedings were taken by Judenagiri. Predinagiri died in 1849 and Judenagiri in November 1854. The father of the latter (Jannagiri) revived the suit and resumed proceedings in execution, and ultimately, during his absence at Sattara, a sum of Rupees 18,138-15-2 was recovered through the agency of his gumasta Petamba Ráu. Under the agreement of 1846 a large portion of this was payable to Devagiri, legal representative of Predinagiri, and on the 13th September 1855, Devagiri being indebted to Vardalakacharri, entered into an agreement with him in writing, and gave him a power of attorney to recover the amount on his (Devagiri's) behalf, and after paying himself the debt owing to him, and certain other debts due to other persons, viz., 11,000 and odd to Shop Venkatarangum Setti and 1,500 Rupees to others, to pay over the balance to Devagiri.

Vardalakacharri executed in favor of Devagiri a counter agreement, and gave Shop Vencatarangum a bond for the amount due to him. Vardalakacharri accordingly instituted a suit in 1859, in the late Supreme Court, against Jannagiri and Petamba Ráu for an account.

In 1864, while the suit was still pending in the Master's Office, Vardalakacharri became insolvent.

The Official Assignee revived the suit in 1865, and on the 11th July 1866, on the report of the Master, dated 4th May 1866, the High Court gave a decree to the effect that the Official Assignee, as assignee of Vardalakacharri's estate, was entitled to all the rights of Devagiri under the decree of the Court of Sadr Adálat.

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The Official Assignee, it is said, recovered Rupees 28,000 under the decree of the High Court, out of which Shop Venkatarangum's legal representative Appávu, under a decree in a suit, No. 128 of 1870, which he instituted against the Official Assignee, recovered Rupees 22,000. A balance to the amount of Rupees 6,000 or 7,000 is said by the applicant to be in the hands of the Official Assignee. There were other persons besides Venkatarangum whom Vardalakacharri undertook, under the agreement of 1855, to pay what was owing to them; and the applicant prays that he may be allowed a primary charge on the sum in the hands of the Official Assignee for the balance owing to him. The motion was opposed by Mr. Miller, who represents that the Official Assignee has no funds to the credit of Devagiri Gosáyi; that the applicant is not down in the schedule as a creditor; and that he has already instituted two suits, 691 of 1870 and 670 of 1871, with the same object; that each suit was withdrawn with leave to bring a fresh suit, and that the leave granted on the withdrawal of the second suit to bring a fresh suit was made conditional on payment of costs of first and second suits, and that they could not yet have been paid.

The amount sought to be recovered either forms part of the insolvent estate in the hands of the Official Assignee, or it has, by an error, been taken over and amalgamated with the assets of the Insolvent. It is alleged to be, and in accordance with the case of *ex-parte Smith* (1) and a later case, *ex-parte Smith, Payne and Smith* in the matter of Wm. Manning and others (2), would appear to be trust estate, which ought not to be held by the Official Assignee as assets of the bankrupt.

The Indian Insolvent Act, by virtue of the terms of Section 40, incorporates all existing and future enactments passed in England for the purpose of determining what debts may be proved; and by Section 15 of the English Act of 1869, property held by the bankrupt in trust for others is not the property

(1) Buck, 355: 2 Rose, 457. (2) 4 Deac. and Ch., 579.

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of the bankrupt divisible among his creditors: such property cannot be regarded as having vested in the Official Assignee, and a *cestui que trust* creditor is not then in my opinion entitled to come in and prove, because what is being administered in insolvency is the insolvent's estate, of which property of this nature does not form part. But assuming that the applicant would be entitled to come in and prove, I cannot find any provision in the Indian Act which admits of his proving otherwise than rateably on a par with the other general creditors of the insolvent. But that is not what is now sought. The proper course, probably, when the assignee does not feel warranted in at once admitting a claim of this nature, and paying it over, is that which was taken on two previous occasions, viz., to bring a suit, a course which is apparently only not taken now because it would entail payment of the costs of the suits withdrawn.

Without, therefore, taking upon me to pronounce upon any of the facts alleged, it appears to me that the fund on which a charge is sought to be declared, being (if it exists) by the applicant's own showing not part of the estate of the Insolvent, cannot be adjudicated upon by this Court sitting as an Insolvent Court.

The motion must be dismissed with costs.

Motion dismissed.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Busteed.

VÉDAVALLI (PLAINTIFF) APPELLANT v. NÁRÁYANA (DEFENDANT) RESPONDENT.*

1877. November 12

Widow—Administration—Burthen of proof.

Suit between a widow claiming administration to the estate and effects of her [de]ceased husband as his only legal personal representative, and a caveator claiming [t]he whole family property as an undivided second cousin of the deceased and sole surviving member of the family. The widow asserted a division and that the whole property of the deceased had been self-acquired by his father. The court of first instance found against division and against self-acquisition, laying the burthen of proof of each question entirely on the party asserting the facts. On appeal it was contended for the Appellant (the plaintiff) that the *onus* on plaintiff was sufficiently discharged when it was shown that the two branches of the family were trading separately, and that certain items of property were acquired in the names of members of the branch of the family to which plaintiff's husband belonged; [t]hat then it rested with the other side to show that there were joint funds from [w]hich the purchases could have been made.

Held, in accordance with the view of the Judicial Committee of the Privy [Co]uncil in *Dhurm Das Pandey* v. *Mussumat Soondri Dibiah* (1) and the observations [of] Couch, C.J., in *Faruck Chunder Totadar* v. *Joodhesteer Chunder Koondoo* (2) that [su]ch a contention could not be maintained.

[T]HIS was an appeal from the decree of Mr. Justice Kindersley, [m]ade in Original Testamentary Suit No. 7 of 1876.

K. Perumál Chetty died at Madras on the 24th July 1876 [i]ntestate and without issue, and his widow K. Védavalli Ammál [c]laiming to be the only legal personal representative of the deceased, presented a petition to the High Court on the 29th July 1876, praying that letters of administration might be granted to her. On the 7th August 1876 K. Náráyana Chetti lodged a caveat and [fi]led an affidavit claiming the whole family property as an undivided [se]cond cousin of the deceased and sole surviving member of the [f]amily. In her answering affidavit the widow asserted that the [f]ather of the deceased and the father of the caveator were divided [i]n interest, and that the whole of the property left by her deceased

* Appeal No. 5 of 1877, against the decree of Mr. Justice Kindersley, dated [1]0th January 1877.

(1) 3 Moo. I.A., 229; 5 W.R.P.C., 39.

(2) 19 W. R., 198.

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husband was the self-acquisition of his father. The following issues were framed :—

1. Whether the caveator was, at the death of K. Perumál Chetti deceased, an undivided member of the family of the said deceased and of the caveator? If so

2. Whether the property left by the deceased was part of the property of the undivided family of the deceased and of the caveator?

3. Whether the plaintiff is entitled to administration to the estate of the deceased?

The suit came on for final disposal before Mr. Justice Kindersley, who found for the caveator on all the issues. In the course of his judgment he made the following remarks :—"I will first deal with the question whether the petitioner's late husband, Perumál, was divided in interest from the caveator. The *onus* of proving division is of course on the petitioner, who asserts it. . . . . For all these reasons it appears to me that no separation of interest has been made out.

The next question for determination is whether the property in question was acquired by the father of the deceased without the assistance of ancestral funds. And here again it is for the party affirming this proposition to prove it. Looking at all the circumstances of the case, I do not think that the petitioner has proved that the property was acquired by the father of the deceased without the aid of ancestral funds." "The petitioner therefore is entitled only to maintenance, and is therefore not entitled to administration. Her petition must therefore be dismissed with costs."

The plaintiff appealed on the following grounds :—

1. That the First Court ought under the circumstances to have found in favor of a division, and that the defendant at the death of K. Perumál Chetti deceased, was a divided member of the family of the deceased and the defendant.

2. That the First Court ought to have found that the property left by the deceased was no part of the property of the undivided family of the deceased and the defendant.

3. That the plaintiff was entitled to administration to the estate of the deceased.

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Mr. *Miller*, Mr. *Johnstone*, and Mr. *Handley* for the Appellant.

The *Advocate-General* (Mr. *O'Sullivan*) for the Respondent.

The judgment of the Court was delivered by

INNES, J.—I think this appeal should be dismissed. It was scarcely contended that there was not abundant evidence to show that the family of the caveator and of deceased Perumál was a joint Hindu family, although for some years Dévarájulu, in Perumál's branch, and Rungasháyi, in that of the caveator, had traded separately.

There was credible evidence of their living and messing together, of their performing their ceremonies in common, of their celebrating marriages together, of their jointly instituting suits, and of Perumál undertaking to pay certain debts of Rungasháyi and of the caveator. Letters also showed that Perumál defended himself in 1874 against charges of extravagance by the caveator.

They also joined in conveyances. As to this our attention was drawn to the evidence of Náráyanasámi and his signature in the document (IV) which Perumál and he jointly executed in 1867. The ink, with which his name was signed, seems to differ from that used for Perumál's signature, but Náráyanasámi's name appears in the body of the document and there is no ground for doubting that he actually joined in the execution of the document. There are also conveyances to members of the two branches *jointly*; a circumstance which is of greater import than their joining in executing conveyances, as this is sometimes done by members of a family no longer united, for the better assurance of the purchaser.

The evidence thus satisfactorily showing that the family is joint and undivided, the plaintiff has no right to administer to her husband unless she can prove that some portion of the assets is the self-acquired property of her husband. There was a purchase by Perumál the elder in 1820, the certificate of which, issued in 1830, stands strangely enough in the name of the vendor. There was also another conveyance between 1839 and 1850 in favor of Dévarájulu, son of the elder Perumál, and one in 1859 in favor of the younger Perumál (Dévarájulu's son).

It was contended for the appellant (plaintiff) that the *onus* on plaintiff is sufficiently discharged when it is shown that the two branches were trading separately, and that certain items of property were acquired in the names of members of the branch of the family

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to which plaintiff's husband belonged; that then it rests with the other side to show that there were joint funds from which the purchases could have been made.

But this is opposed to the view of the Judicial Committee in *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (1), where it is said: "It is perfectly consistent with the notion of its being joint property that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it." See also the observations of Couch, C.J., in *Taruk Chunder Totadar* v. *Joodheshteer Chunder Koondoo* (2), in which he refers to the case last quoted, and to *Neelkisto Deb Burmona* v. *Beerchunder Thakoor* (3) to show that a similar contention to that now made by the appellant cannot be maintained.

There may be sufficient on the facts in evidence to raise a doubt whether some of the purchases were not effected from self-acquired funds. But Dévarájulu, as the evidence shows, was the manager of the joint family after his father's death, and, therefore, purchases in his name would not be inconsistent with their having been made from the joint funds.

The purchase in 1854 in the younger Perumál's name, during the lifetime of Dévarájulu his father, is more calculated to suggest the use of separate funds for the acquisition of it; and the execution, a little more than three months after this, of a conveyance by Ramánjulu in the joint names of Rungashayi and Perumál the younger, seems to point to a distinction in the character of the two several purchases. But there is no evidence to show that any of the acquisitions in the name of Dévarájulu or Perumál alone were made with separate funds, and in the absence of such evidence they must be presumed to be joint property. I think, therefore, that plaintiff's case fails, and that the appeal should be dismissed with costs.

Appeal dismissed.

(1) 3 Moo. I.A. 229 at p. 240; 5 W.R.P.C., 39.
(2) 19 W.R., 178.
(3) 12 Moo. I.A. 523; 12 W.R.P.C., 21.

PRIVY COUNCIL.*

P. C.*
1878.
July 2.

THE ZAMINDÁR OF PITTAPURAM (PLAINTIFF) *v.* THE PROPRIETORS OF THE MUTTA OF KOLANKA (DEFENDANTS).

[On appeal from the High Court of Judicature at Madras.]

Res judicata—Suit between the same parties—Sec. 2, Act VIII of 1859.

The plaintiff sued to recover possession of certain houses and grounds as belonging to his zamindári, setting forth that the premises in question had been occupied by his paternal grandmother, on whose death the defendants had taken wrongful possession. The defendants claimed to be legally entitled to the premises in question, and contended that the plaintiff's suit was barred under Section 2, Act VIII of 1859, by reason that the plaintiff had already, during his grandmother's lifetime, brought a suit against her and the defendants' father, as a co-defendant, to establish his right to the same premises, which suit had been dismissed. The defendants also pleaded limitation.

It appeared that in the former suit the relief sought by the plaintiff was substantially to restrain his grandmother from acts of waste in alienating property which had belonged to her deceased husband by assigning it to her co-defendant; but that as regards the property now claimed, although it was mentioned in the plaint, no charge had been made that she had assigned it, or intended to assign it, to her co-defendant, nor any allegation to show that the co-defendant had any interest in it.

Held, reversing the decisions of the Lower Courts, that, under the circumstances, the decision in the former suit was not a decision in a suit between the same parties, or parties under whom they claimed, and that the cause of action in the present suit was not determined in the former suit.

Held also, that the defendant's plea of limitation could not be determined without a finding as to whether the plaintiff's grandmother, who died within the period of limitation, had held the premises with the plaintiff's leave, or as a trespasser

THIS was an appeal against a decree of the High Court of Madras, dated the 14th July 1876, which confirmed a decree of the District Court of Godávarí, dated the 2nd October 1875, whereby the appellant's suit was dismissed.

The parties to the suit were the grandsons of Rajah Niladri Ráu, formerly Zamindár of Pittapuram, who died in the year 1828, leaving a widow Bhávayamma, and two sons, Rája Ráu Venkata Surya and Rája Kumara Venkata Ráu, of whom the former suc-

* *Present*:—Sir J. W. COLVILE, Sir B. PEACOCK, and Sir R. P. COLLIER.

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ceeded to the zamindárí. The plaintiff, the present Zamindár, was the son of Venkata Surya, and the defendants were sons of Kumara Venkata Ráu. The suit was brought to recover certain houses and grounds in the Fort of Pittapuram, alleged to form part of the ancient zamindárí, and to have been in the occupation of Bhávayamma up to the time of her death in 1870, from which time the defendants, who had lived with her, continued in occupation and refused to quit.

In their written statement the defendants claimed to be legally entitled to the property in dispute, and pleaded that the suit was barred by limitation. They also contended that the suit was barred under the provisions of Section 2 of the Civil Procedure Code (Act VIII of 1859) by reason that the cause of action had already been heard and determined in a previous suit brought by the plaintiff's father in the year 1862.

The District Judge of Godávarí, by whom the case was heard, gave effect to this last contention and dismissed the plaintiff's suit, and his decision was confirmed by the Madras High Court in the judgment now under appeal. The material passages in that judgment were as follows :—

"Among other defences, it was urged that the suit was barred by the second section of the Civil Procedure Code, the matter in dispute having already been adjudicated in a former suit between the parties. The Court below was of this opinion, and having considered the arguments adduced on this appeal, we have come to the conclusion that the judgment of the Lower Court should be affirmed. In the former suit, which was brought by the plaintiff's father in 1862, the defendants were Bhávayamma, the widow of Niladri Ráu, Kumara Venkata Ráu the father of the respondents, and Lakshmi Venkamma Ráu the sister of Kumara Venkata Ráu. That suit was brought to recover two estates not now in question, and also to impeach the acts of the widow Bhávayamma in regard to other property belonging to the zámindárí assigned to her for maintenance. Some doubt arose, during the argument here, whether the houses and grounds in the fort, for which the suit now before us is brought, were included in the latter property. But it sufficiently appears both from the terms of the plaint and the mode in which the particulars of the property claimed are stated, that the premises in question must have been

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regarded as a part of the property in the occupation of the widow in the same right as the villages held by her for her maintenance. The plaintiff sought to restrain the widow from making illegal transfers of the property, and also to obtain the cancellation of two documents of transfer made and registered by her. Several issues were framed, the third of which was in the following words :—'Whether the property referred to as No. 2 in the plaint and the plaint list, was given to first defendant as maintenance after her husband's death, or whether, as stated by first defendant, the property so referred to was given her by her husband for expenses to be incurred for charitable purposes, and has been in the defendant's possession for 35 years.' The suit was dismissed by the Court of First Instance, the judgment stating, as to the property now in dispute, that no evidence had been offered on either side. On appeal, the order of dismissal was, as to the property in question and the two estates sued for, affirmed, the reason assigned in regard to the former being the same as that given by the Court of First Instance. As to the remaining property, the decree of the Appellate Court declared and directed that, 'subject to the first defendant's possession and enjoyment for her maintenance, the plaintiff is entitled to absolute proprietary right in the lands described as No. 2; that the first defendant has no right or interest entitling her to alienate the said lands, and that the transfer made to the second and third defendants is not valid or binding.'

It thus appears that there has been an adjudication by a competent Court in a former suit between the same parties or parties under whom they claim. We think it is also established that this adjudication was substantially in respect of the property now in dispute, and that any addition since made by the widow or the respondents in the shape of new buildings erected on the site cannot affect the present question. As to the matter in controversy in the two suits, it is to this extent different, that in the former suit the plaintiff, as reversioner—the widow's life estate being then in existence—sought to restrain her from acts of waste, to secure the estate, and to set aside deeds of transfer made by her; whereas in this suit the plaintiff asks to recover possession on the termination of the life estate. The relief asked for is different, new circumstances having occurred; but the title now sued upon is the same which was formerly put forward. That the widow Bhávayamma

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held property belonging to the zamindárí as part of her maintenance on her husband's death, was a question raised distinctly by the pleadings in the former suit.

The failure on the plaintiff's part to produce the evidence in support of that issue, which he was bound to produce, does not make the order of dismissal, passed in consequence of his default, the less an adjudication.

The same title is the basis of the claim in both suits; and part of the matter in dispute in the former suit, as in the present one, is the question of right, that is to say, whether the property in dispute belongs to the Zamindár, the widow Bhávayamma having held it merely as a portion of her maintenance allowance.

We think the suit is barred, and that this appeal should be dismissed with costs."

The plaintiff appealed to Her Majesty in Council.

Mr. *J. B. Norton* and Mr. *J. D. Mayne* (Mr. *Eardley Norton* with them) contended, on behalf of the appellant, that the Lower Courts were wrong in holding the matter to be *res adjudicata*.

The respondents did not appear.

Their Lordships' judgment was delivered by Sir Barnes Peacock:—

SIR BARNES PEACOCK.—This is an appeal in a suit brought by the plaintiff to recover possession of certain houses and grounds appertaining thereto, situate in the fort of Pittapuram, which he claimed as part of his zamindárí of Pittapuram. He stated in his plaint that his father, "Srí Rájah Ráu (late) Venkata Surya Ráu Báhádúr, and the defendant's father, Srí Rájah Ráu (late) Kumara Venkata Ráu Báhádúr, were brothers, of whom the plaintiff's father, who was elder, succeeded to the ancient zamindárí of Pittapuram belonging to their father, Srí Rájah (late) Niladri Ráu Báhádúr; and after him the plaintiff became his successor." He further said, "As the plaintiff's paternal grandmother, Srí Rájah Ráu (late) Bhávayyamma Gáru, was a member of the plaintiff's family, she lived in some of the houses within the fort of Pittapuram belonging to the plaintiff, and had in her use some grounds appertaining to that fort; and while so she died on the 11th March 1870. The defendants retained the said houses and grounds in their possession even after her death, on the ground of their having occupied them with her until her death; and although the plaintiff demanded them to surrender them up to the plaintiff in July 1870, they have not done so yet; and therefore the cause of action arose in that month."

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The defendants, in their written statement, set up in defence that the claim was barred by the Statute of Limitations; and, further, they stated that they were entitled to the property in dispute, and that the plaintiff had no right to recover the same on the pretext that the property formed a part of his zamindárí. In paragraph 3 they said, "The plaintiff brought the suit No. 4 of 1862 on the file of the late Civil Court against the defendant's father, and others, for a decree establishing his right to these houses and other property; and the said suit having been dismissed, he has now again brought this suit for the said houses; and this suit is therefore opposed to section 2 of the Code of Civil Procedure." Upon that an issue was raised whether the plaintiff was barred under section 2 of the Civil Procedure Code from bringing the suit by reason of the cause of action or any part thereof having been previously heard and determined by a court of competent jurisdiction in a former suit between the same parties or parties under whom they claim.

The principal question in the appeal is, whether the right to recover the property in suit was determined in a former suit, and whether, as regards that property, it was a suit between the same parties or parties under whom they claim.

The former suit was brought in 1862 against the widow of Niladri Ráu, the grandfather of the plaintiff, and also against the father of the defendants and the sister of their father.

The grounds were, first, that the widow had misappropriated certain moveable property belonging to the estate of her deceased husband Niladri, and had with part of the proceeds thereof purchased certain muttas described in No. 1 of the particulars annexed to the plaint, and had alienated the same to the co-defendants by deed of gift; secondly, that the lands described in No. 2 of the said particulars were free lands to which she was entitled only for life by way of maintenance, but that she had executed a document transferring them to the co-defendants as a gift.

There was also another item in the particulars, No. 3, described as "An upstair house situated within the fort of Pittapuram belonging to the plaintiff, and valued at 4,000 Rupees, together

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with three houses attached thereto, as well as a yard and compound."

There is no doubt as to the fact that the property mentioned in No. 3 is the same property as that which is now sought to be recovered. As regards the properties described as Nos. 1 and 2, the plaintiff sought, amongst other things, to have the deeds of gift cancelled, to recover possession of No. 1, and for a prohibition against the alienation of property No. 2. As regards the property described in No. 3, and which was sought to be recovered in the present suit, there was no distinct allegation of fact either in the plaint or in the written statement, nor anything to connect the present defendants' father therewith, or to disclose any claim thereto on the part of the plaintiff; and their Lordships have come to the conclusion that substantially the relief sought in respect of it was, as stated by the High Court, to restrain the widow from acts of waste.

As regards Nos. 1 and 2, which are not the subject of the present suit, they had been assigned by the widow to the co-defendants, who, of course, were interested in them, and necessary parties to the suit; but as regards the houses and other property the subject of the present suit there was no charge that she had ever assigned or that she intended to assign them to the co-defendants, nor any allegation to show that the co-defendants had any interest whatever in them.

As regards that portion of the property, then, to which this suit relates, and as to which the High Court considered the former suit was one to restrain waste, the widow was substantially the only defendant, and her co-defendants were no parties to the suit.

No issue was raised nor any evidence offered on either side in respect of that part of the property, either to show that the plaintiff was entitled to an injunction or for any other purpose, and the plaintiff's suit was dismissed. The High Court, on appeal, affirmed the judgment. They said, "The judgment must be affirmed with respect to the houses and premises described as No. 3, there being no evidence whatever relating to this head of claim." Under these circumstances their Lordships are of opinion that the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claim establishing the right of the defendants in the former suit to the property in question

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in the present suit, and that the cause of action in the present suit was not determined in the former suit.

The issue as to *res judicata*, however, was not the only issue in the present suit; other issues were raised. The first was, "Whether the houses and sites claimed appertain to the zamindári, and, as such, are the property of the plaintiff, the zamindár, or are the property of the defendants." The Judge of the first Court did not determine that issue. He said, "I find in the affirmative on the fourth issue" (that is, the issue as to *res judicata*); "and with the evidence before me, under which I hold the plaintiff estopped from bringing this suit, I could not but find, were it necessary to record a finding, against the plaintiff on the first issue." As regards the estoppel, the same principle which applies to *res judicata* must apply to that; the parties were not bound by the estoppel, inasmuch as the former suit was not substantially as regards the houses and property in the present suit, a suit between the same parties, nor was there in it a claim or a decision as to the right.

There was also another issue, namely, whether the suit is barred by limitation. As regards that issue the Judge of the first Court, in paragraph 15 of his judgment, says: "To sum up, I find that the grandmother of the defendants, and her son, and afterwards her son's sons, lived together in the premises now sued for as their principal place of residence, not only from 1835, as stated by the defendants, nor from 1845, as stated by the plaintiff, but the grandmother and her son lived there from and before the death of Niladri Ráu in 1828, and continuously, with but few breaks or visits at times." There is, however, no express finding as to the title under which the mother remained in possession. If the houses were part of the zamindári which descended to the plaintiff, it would be important to ascertain whether the mother remained in possession by reason of an agreement or other arrangement by which she was to be allowed to remain there for her life as her place of residence, or whether she continued there as a trespasser holding the property as in her own right. There has been no finding upon that point, and therefore it will be necessary to have it determined. If she held in her own right or as a trespasser, then the Statute of Limitation would be a bar, but if she held under an arrangement by which she was allowed to remain there

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for her life, the occupation during her life would not be a bar to the present suit, inasmuch as she died within the period of limitation."

As regards the first and second issues, therefore, their Lordships think that under all the circumstances the case ought to be remanded to the High Court to determine them, and this more especially, as the respondents are not present to argue the case upon the evidence.

Under these circumstances their Lordships will humbly advise Her Majesty that the finding upon the fourth issue be set aside, and the decree of the High Court be reversed, and that the case be remitted to the High Court to determine the first and second issues, and to decide the case upon the merits.

The costs of this appeal will be taxed here, and are to be costs in the cause.

Decree reversed and case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1878. *September* 27.

IN THE MATTER OF JOTHARAM DAVAY AND ANOTHER (PRISONERS) APPELLANTS.*

Presidency Magistrates' Act (IV of 1877)—Execution creditor.

The words "to imprisonment for a term exceeding 6 months or to fine exceeding 200 Rupees" in Section 167 of the Presidency Magistrates' Act (IV of 1877) are confined in their meaning to substantive sentences, and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid.

Where the accused persons, execution creditors, in company with an authorised bailiff, broke open complainant's door before sunrise with intent to distrain his property for which they were convicted on a charge of lurking house-trespass by night or house-breaking by night. *Held*, that as they were not guilty of the offence of criminal trespass, there being no finding of any such intents as is required to constitute that offence and that as criminal trespass is an essential ingredient of either of the offences with which they were charged, the conviction must be quashed.

THIS was an appeal praying that the sentences passed in Calendar Case No. 21,974 of 1878 on the file of the Presidency Magistrates' Court (Black Town Division) may be quashed, and that pending the disposal of the appeal, the said sentences may be suspended and the appellants released on bail.

* Criminal Appeal No. 500 of 1878, against the sentences passed in Calendar Case No. 21,974 of 1878 on the file of the Presidency Magistrates' Court (Black Town Division).

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Mr. *Johnstone* for the Appellants.

Mr. *Tarrant* for the prosecution.

The facts and arguments sufficiently appear in the following judgments :—

INNES, J.—This case originally came before us on a petition of appeal. The accused persons had been convicted and sentenced by the Presidency Magistrate, Mr. Muttusámi Chetti, to 6 months' simple imprisonment, and to pay a fine of Rupees 200, or, in default, to 2 months' more simple imprisonment on a charge of lurking house-trespass by night or house-breaking by night under Section 456 of the Indian Penal Code.

The appeal was on the following grounds :—That the evidence does not disclose the offence of which they have been convicted, and such conviction is against the weight of evidence and contrary to law; that there is no evidence of criminal intent, and that the whole circumstances of the case point to an absence of the same.

At the hearing of the appeal it was objected by the Crown Prosecutor that no appeal lies in such a case, and after hearing the argument upon this point we came to the conclusion that the intention of the legislature, as apparent from the plain language of the statute, was that in such cases there should be no appeal as the term of imprisonment to which the prisoners are sentenced does not exceed 6 months and the fine does not exceed 200 Rupees.

There is no provision in the Presidency Magistrates' Act similar to that of the latter clause of Section 274 of the Code of Criminal Procedure authorising an appeal from a sentence in which two or more punishments as imprisonment and fine are combined.

All we have to do, therefore, is to see whether the Magistrate has sentenced the prisoner to a term of imprisonment exceeding 6 months, or to a fine exceeding 200 Rupees. If not, there is no appeal.

With regard to the fine there is, of course, no question. It was suggested that the alternative imprisonment in default of payment of fine must, for the purposes of appeal, be added to the term of 6 months substantive imprisonment. But we think that the words "to imprisonment for a term of 6 months or to fine exceeding 200

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Rupees" are confined in their meaning to substantive sentences and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. This view seems to be borne out by Section 11 in which the sentence of 2 years' imprisonment, which the Magistrate is authorised to pass and within which his jurisdiction is limited, is the substantive sentence, and is entirely exclusive of the imprisonment he may award in default of payment of fine. For these reasons we rejected the appeal. It was urged upon us, however, that we might take cognizance of the case under Section 147 of the High Courts' Criminal Procedure Act X of 1875. The Crown Prosecutor objected that we had no application before us on which we could act under that section, and that sitting as a Court of Appeal we could not act under a law which relates only, as the preamble indicates, to the procedure of the High Courts in the exercise of their original criminal jurisdiction. We think there is nothing in these objections. A division bench of the High Court engaged for the time being upon appellate work is not thereby disqualified from exercising jurisdiction in matters within the cognizance of the High Court arising within its original territorial jurisdiction, whether they be of a civil or criminal nature. The powers to be exercised under Section 147, which replaces the old writ of *certiorari*, are very similar, if not identical, with the revision powers conferred by the Code of Criminal Procedure; and the exercise of them is not confined to any particular branch of the Court. The section requires the Court to make the direction for "the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original criminal jurisdiction," whenever it appears to the High Court that the direction will promote the ends of justice; and as it appeared to us that the condition for the exercise of our jurisdiction had arisen, and the record was already before us, we decided to hear the case as a case transferred under that section. Several important questions having arisen in the course of the argument, we reserved judgment till to-day.

The accused persons were charged with lurking house-trespass or house-breaking and have been convicted of the offence charged. It is not very material, but we may notice in passing that unless the charge was intended to be in the alternative it should have stated definitely with which of these distinct offences the accused persons were charged.

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From the last paragraph of the judgment it would appear that the conviction was of house-breaking, and as the Magistrate convicts the offender of the offence charged, it would seem that the offence intended to be charged was house-breaking alone, and this also appears from the first paragraph of the judgment. However an essential ingredient of either of these offences is criminal trespass, and an act is not criminal trespass unless it is done with one of the intents mentioned in the section defining that offence (Section 441), viz., the intent to commit an offence or to intimidate, insult, or annoy any person in possession of the property in respect of which the criminal trespass is alleged; and the main question for our consideration is whether there is any thing on the record to show that the act of the prisoners was done with any one of these intents. The facts found are as follows.

The prisoners, execution creditors of the complainant, accompanied by a bailiff of the Small Cause Court who was entrusted with a warrant directing the attachment of certain furniture in the complainant's house, burst open the closed door of complainant before sunrise on the day in question and entered the complainant's house. It is assumed in the judgment, and no doubt with perfect accuracy, that the ultimate intent of the prisoners in breaking into the house was to execute their decree, a perfectly lawful intent. It does not, however, follow that the ultimate is the only object. An offence may be committed in the prosecution of that object, and the entry upon property with intent to commit such an offence in prosecution of a lawful ultimate object would constitute the offence of criminal trespass; similarly into the methods used in pursuance of the ultimate intent there may enter a subordinate intent to intimidate, insult, or annoy. We can only interfere under Section 147 of the High Courts' Criminal Procedure Code upon the merits, and if we found upon the record any evidence of facts relied upon by the Magistrate showing any intent upon which the decision might be supported, we should be bound to uphold it. It was said that every one must be taken to intend the natural consequence of his acts and that the natural consequence of breaking the door was to cause annoyance to the complainant,

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and that the prisoners must therefore be taken to have intended to cause annoyance. It is perfectly open to a Court to apply this rule when it is shown that the consequence has followed the act. For instance, where by the violence of a voluntary act death has directly followed, it may be inferred, in the absence of explanation, that the intention was to kill. But even then the inference is not a matter of law. It is necessary that the Court or jury should be satisfied that in the circumstances such an intent was present to the mind of the accused person. In the present case the existence of annoyance was not found, though there was some evidence of it in the statement of the sergeant that Mr. Dudley complained to him of the breakage of his doors. If the Magistrate had found upon this that there had been annoyance and that prisoners had entertained the intent to annoy, we must have accepted that finding, though we might not have concurred in the conclusion drawn. He has not, however, found this. There is no evidence of any intent to intimidate or insult Mr. Dudley. As to whether there is evidence of an intent to commit an offence, it was suggested that the breakage of the door was 'mischief,' and that there was an intent to commit this offence. It may be questionable whether to bring the act within the section the intent must not be an intent to do something subsequent to, not concomitant with, the entry, but it is not necessary to determine this as although the Magistrate finds that the door was broken open, that finding is not sufficient to show that in the opinion of the Magistrate the evidence established that the value or utility of the door was appreciably diminished or that it was affected injuriously; and without a finding to this effect we cannot hold that the offence of mischief was found by the Magistrate to have been committed.

In the position in which we are as a Court revising the proceedings of a subordinate Court we are not at liberty either as to any possible annoyance caused or as to the breaking open the door to supply intents that have not been found. It is not open to us to say that in the one case the offence of mischief was committed, or in the other that annoyance was caused, and that the intent to do either act was present to the minds of either of the prisoners. In fact I think the circumstances go to show very clearly that the sole intent contemplated and present to their minds was to obtain execution of their decree.

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The only finding of the Magistrate is that there was a breaking, and that it was unwarranted. No doubt it was so, but it is not every injurious act that is *criminally* punishable, and the bare breaking open of the door is certainly not so.

The criminal cognizance of trespasses is limited by the criminal law of India, except in certain special cases, to those defined in Section 441 of the Indian Penal Code, and as the acts found to have been committed do not answer to the definition contained in that section, there was no criminal trespass, and therefore no house-breaking by night.

I would therefore quash the convictions and sentences, and direct the release of the prisoners.

MUTTUSÁMI ÁYYAR, J.—Three questions arise for decision in this appeal—

1. Does an appeal lie?
2. Can we interfere as a Court of Revision?
3. Is the conviction bad on the merits?

I may dispose of the first two questions in a few words.

The section which gives us jurisdiction to entertain an appeal refers in terms to a sentence of imprisonment exceeding 6 months or fine exceeding Rupees 200. It does not refer either to a sentence which awards imprisonment and fine or to any alternative imprisonment awarded in default of payment of fine. The contention is that the alternative imprisonment should be added to the substantive imprisonment, and that we should treat this sentence as if it were a sentence that awarded 8 instead of 6 months, imprisonment. Such a construction would do violence to the language of the section. The words imprisonment or fine without more would ordinarily mean imprisonment or fine awarded as substantive punishments, and there is nothing in any of the other sections of the Act that indicates a different intention.

I am therefore of opinion that no appeal lies from this sentence.

With reference to the second question, I have no doubt that we can revise the sentence if it is illegal. As to the objection that it is not competent for us to revise the sentence when we sit on the Appellate Side, though it is competent for us to do so when we sit on the Original Side, my answer is that wherever we sit we form a division bench of the High Court dealing with a case decided by

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a Magistrate in the Presidency Town, and as such competent to revise the sentence when necessary.

As to the third question, I do not think that the conviction can be upheld, for the facts found do not constitute the offence charged. The Magistrate finds that the door of the prosecutor's house was forced open at 5 in the morning, and holds that it is house-breaking punishable under Section 456 of the Indian Penal Code. It is clear that the act which was intended to be done after entering the house was to cause certain property to be attached in execution of a decree, and as this is an act which the prisoners had a legal right to do, no intention, such as is necessary to constitute criminal trespass, can be inferred from it. The primary intention which it is reasonable to infer from forcing open the door to attach property is an intention to violate the right of the prosecutor to exclude strangers from his house. The breaking into the house would certainly amount to an infringement of this right, and as such be an actionable wrong, but I do not see how it is criminal. It is said that it would be an illegal annoyance. If it is every civil trespass would be so, there would be a civil right infringed, and the infringement might be regarded in one sense as causing annoyance. It has often been ruled by this Court that every civil trespass is not a criminal trespass. Section 441 seems to me to contemplate the entry into property in the possession of another as a means to another act, and to regard the intention with which it is made in relation to that act. Here the only act to which the entry can be referred as a means is the seizure of property in execution, an act perfectly legal in itself. There may be cases in which the ultimate object may be legal while the means employed to attain it may be criminal. But in this case there is no finding that any act was done in addition to breaking into the house to levy execution on certain goods.

I am therefore of opinion that the Magistrate was wrong in presuming criminal intention from the bare mode of entry.

It is argued that the entry upon the evidence before us amounts to mischief; but there is no finding that any mischief has been caused; it is not the offence charged or made the subject of investigation.

On these grounds I am also of opinion that the sentence must be quashed.

Conviction quashed.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1878. October 7.

KA'MAYYA (PLAINTIFF) v. LEMAN (DEFENDANT).*

Municipal Tax—Jurisdiction.

A suit was brought in the Court of the District Munsif of Gantúr to recover the amount of a profession tax for 1876 levied by the Municipal Commissioners of Gantúr on the plaintiff upon the supposition that he carried on business as an agent, while in fact he carried on no such business. The defendant pleaded that the Court had no jurisdiction. Upon reference, *Held* by the High Court (Innes, J., and Muttusámi A'yyar, J.) that the Court had not jurisdiction to adjudicate on the matter in contest.

Leman v. *Damodaráya*(1) distinguished.

THIS was a case stated under Section 22, Act XI of 1865, by the District Munsif of Gantúr in Small Cause Suit No. 423 of 1877.

There was no appearance for the plaintiff.

The *Advocate-General* appeared for the defendant.

The Court (INNES, J., and MUTTUSA'MI A'YYAR, J.) delivered the following

JUDGMENT :—This suit was brought in the Court of the District Munsif of Gantúr to recover back the profession tax which had been levied by the Municipal Commissioners of Gantúr for 1876-77, under Act III of 1871. The plaint stated that the tax was imposed on the plaintiff upon the supposition that he carried on business as an agent, while in fact he carried on no such business. The defendant contended that the matter in dispute was not cognizable by the Civil Courts, but the District Munsif held that he had jurisdiction, and referred for our decision the question whether he is competent to decide whether the tax was lawfully imposed by the Municipal Commissioners.

We are of opinion that the Civil Courts have no jurisdiction to adjudicate on the matter in contest in this suit. It appears that the procedure prescribed by Section 61 for the imposition of the tax has been conformed to by the Commissioners, and the tax having thus a *legal* existence, no suit will lie to contest its incidence. In *Leman* v. *Damodaráya* (1) on which the District Munsif relies,

* Case No. 18 of 1877 stated under Section 22 of Act XI of 1865 by the District Munsif of Gantúr in Small Cause Suit No. 423 of 1877.

(1) I.L.R., 1 Mad., 158.

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the machinery prescribed for imposing the tax did not exist when it was imposed, and it was held that the suit would lie as there was no *legally* sanctioned tax. The matter of fact in dispute in this suit is no part of that machinery, and in the case of error in respect to it, the only remedy the plaintiff has is the appeal allowed by Section 85.

If he either fails to prefer the appeal or if the appeal preferred by him is disallowed by the Commissioners, Section 85 is a bar to a suit to contest the assessment.

APPELLATE CRIMINAL.

1878. October 25.

Before Mr. Justice Innes (Officiating C. J.) and Mr. Justice Muttusámi Áyyar.

IN THE MATTER OF AUROKIAM, PETITIONER.*

Act X of 1872, *Sec.* 297—*High Court—Revision.*

In the course of a serious riot one S. was killed by a shot from a gun. The first prisoner and others were charged with murder. The Sessions Judge believing the statement of the first prisoner and his witnesses that he had fired in self-defence, acquitted him of the charge. Upon a petition presented by the widow of the deceased praying the Court to exercise their powers of revision,

Held, 1st, that under the provisions of Section 297 of the Criminal Procedure Code the High Court may exercise its powers of revision upon information in whatever way received:

2ndly, that it was not intended by the legislature that the powers given by Clause 1 of Section 297 should be exercised only in the particular instances of error and in the particular manner given in the succeeding clauses, which are merely intended to show the particular course which may be taken in those particular instances of error:

3rdly, that it is not a ground for revision by the High Court that all the evidence for the prosecution which might have been brought before the Session Judge has not been brought before him.

4thly, that the words 'material error' in that section cannot be held to include error in the appreciation of evidence:

* Criminal Petition No. 463 of 1878 presented under Section 297 of the Criminal Procedure Code against the finding and sentences of the Session Court of South Tanjore in Case No. 91 of the Calendar for 1878.

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5thly, that under the 1st clause of Section 297 the High Court cannot set aside findings of fact except in case of an appeal from a conviction.

THIS was a petition presented under Section 297 of the Criminal Procedure Code (Act X of 1872) praying the High Court to revise the finding and sentence of the Court of Session of South Tanjore in Case No. 91 of the calendar for 1878.

Mr. *Wedderburn* for the Petitioner.

The *Government Pleader* (Mr. *Handley*) in support of the conviction.

The Court delivered the following judgments:—

INNES, C.J. (*Offg.*)—In the course of a serious riot, one Sinnapayel was killed by a shot from a gun. First prisoner and others were charged with murder among other charges. The Session Judge acquitted upon the charge of murder. The evidence was conflicting, but there was considerable evidence to the effect that first prisoner, while in the open street, being moved thereto by second prisoner, had deliberately fired at the man and shot him down. The other evidence was to the effect that the gun had been fired off from within second prisoner's house. First prisoner had, before the Magistrate, at first denied having fired off a gun at all; afterwards he admitted having done so, but said the shot was fired in self-defence after the party to which he belonged had taken shelter in the second prisoner's house and when the other party threatened to fire the house, from which if they carried out their threat he apprehended he should not be able to escape. The Judge believed the statement of the prisoner and acquitted him. This petition is now presented by the widow of the deceased who asks the Court to call for the record and pass such order in the case as may appear right; in other words, to exercise our powers of revision.

It seems very obvious from the language of Section 297 of the Criminal Procedure Code that the High Court may exercise its powers of revision upon information in whatever way received, and consequently upon the petition, as in the present case, of a private person occupying the position of a complainant in the case in which revision is sought, and I am not aware of any case in which a doubt upon this point, which seems to have been lately discussed by the Allahabad High Court (1) has ever been raised here.

(1) See *In the matter of Hardeo*, I.L.R., 1 All., 139.

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The more material question is whether, in the particular circumstances, there is any ground for interference, and, if so, whether we have the power to interfere by way of revision.

Looking to the reasons given by the committing Magistrate for committing on the charge of murder, it would appear that from the situation and nature of the screen through which prisoner said he had fired, he was pursuaded that first prisoner's account of what occurred was absolutely false, but there does not appear to have been any evidence before the Sessions Court as to the matters which thus influenced the committing Magistrate.

I agree with the opinion of Oldfield, J., in the Allahabad case referred to, that it was not intended by the legislature that the powers given by clause 1 of Section 297 should be exercised only in the particular instances of error and in the particular manner given in the succeeding clauses, which are merely intended to show the particular course which may be taken in those particular instances of error.

In the present case, therefore, (the other clauses not applying) we may look at clause 1 and act upon it if there has been any such material error in the proceeding as would properly call for the exercise of our powers of revision.

I have noticed that the committing Magistrate has referred to certain circumstances connected with the house which in his opinion showed the first prisoner's story to be false. These circumstances were not in evidence before the Sessions Court. Can it be said that the omission (if it is one) is a material error in the judicial proceeding?

It was unquestionably in the discretion of the prosecution to tender in evidence all that it considered material, and the Court cannot be said to have proceeded erroneously in not taking evidence upon what probably was not within the knowledge of the Court, and as to which if the evidence actually existed the prosecution exercised its discretion by withholding it.

If I felt authorized in pronouncing an opinion upon the facts after an acquittal, I should be inclined, perhaps, to doubt whether the Sessions Judge had rightly appreciated the evidence as to the circumstances attending the death of Sinnapayel. It may be that the prisoners 1 to 13 took refuge in second prisoner's house after and in consequence of the fury of the other faction at the fatal shot,

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But the Judge weighing the evidence has believed the first prisoner and those witnesses who support his story, and disbelieved those who say that he deliberately shot at the man. I do not think that material error can be intended to include error in the appreciation of evidence. Section 297 is an expansion of Sections 404 and 405 of the old Code, and it was held by the Madras High Court in 1869 (1) that, when there is evidence to be considered and weighed by the Court which is called upon to determine whether a person charged with an offence is guilty or not guilty, an error as to the probative force and effect of the evidence is one of fact and not open to correction except upon appeal in the case of a conviction.

I have no doubt that this view is equally applicable to the first clause of Section 297, and that we have not under it the power to set aside findings of fact and substitute our own view of what those findings should have been except in case of an appeal from a conviction.

It would not be competent to us therefore to say that the first and second prisoners ought to have been convicted of murder and to substitute a finding to that effect.

Then it was urged upon us that at all events the law was wrongly applied to the facts found, and that the prisoner ought, upon the findings, to have been convicted of culpable homicide not amounting to murder. If the law was wrongly applied to the facts, this undoubtedly would constitute such error in law as would call for the exercise of our powers of revision. If the Judge, for instance, had found that the prisoner had deliberately and intentionally and without any excuse killed the man and had upon that finding acquitted him, it would be open to the High Court to substitute a conviction and sentence. But what are the facts found here—a furious mob attacking the house—a state of circumstances which might reasonably raise an apprehension in the minds of those within of death or grievous hurt. The right of private defence would then extend to the causing of death, and this none the less that to the calmer judgments of those not concerned in the riot it might appear that the act of firing a single shot while almost certain to be

(1) See 5 M.H.C. Reps., App. X.

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followed by fatal effects might prove altogether ineffective for the purposes of defence.

I would, therefore, refuse in the present case to exercise our powers of revision.

MUTTUSA'MI A'YYAR, J.—I concur.

Petition rejected.

APPELLATE CIVIL.

1878. October 28.

Before Mr. Justice Innes, (Officiating Chief Justice) and Mr. Justice Forbes.

SRINIVÁSA (PLAINTIFF) APPELLANT *v.* EMPERUMANAR AND 2 OTHERS (DEFENDANTS) RESPONDENTS.*

Act VIII of 1865 (Madras)—Distraint—Cause of Action.

The defendants, the landlords, distrained certain produce, the property of plaintiff, their lessee, in view to selling it for alleged claims for rent. The Sub-Collector finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. The defendants having refused to restore the property the plaintiff brought this suit under Madras Act VIII of 1865 to recover the value of the produce. *Held* that such wrongful withholding of the property being an act in direct disregard and defiance of the Act, did not constitute a cause of action triable by a summary suit under that Act.

THIS was a Second Appeal against the Decree of the District Judge of Tanjore in Appeal Suit No. 37 of 1878.

V. Bháshyam A'yyangár and *S. Gopála Charri* for the Appellants.

Mr. *Handley* for all the Respondents.

R. Baláji Ráu for 1st and 2nd Respondents.

The Court (INNES, *Offg.*, C.J.; and FORBES, J.) delivered the following

JUDGMENT :—The facts are these. The defendants, the landlords, distrained certain produce, the property of plaintiff, their lessee, in view to selling it in satisfaction of alleged claims for rent. The Sub-Collector finding that the formalities required by

* Second Appeal No. 440 of 1878 against the decree of A. C. Burnell, District Judge of Tanjore, dated 27th March 1878, reversing the decree of the Sub-Collector of Negapatam, dated 12th December 1877.

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the Act had not been observed, removed the attachment and directed the restoration of the property. The plaintiff states that he thereupon applied to the defendants, and as they refused to comply with the direction he brought this suit under Madras Act VIII of 1865 to recover the value of the produce. The Sub-Collector decreed against the defendants, but the District Judge, in appeal, reversed this decision and dismissed the suit as barred by Section 18.

Had it been the case that the suit was brought "to set aside the distraint," as is stated in the 1st para. of the appeal-judgment, the claim would have been rightly held to be barred, not having been brought within 30 days of the distraint. But the District Judge appears to us to have misunderstood the nature of the action. The distraint had been the subject of enquiry; it had been set aside in a regular way by competent authority; and the restoration of the *status quo ante* had been ordered. There was, thus, at the time the suit was instituted, no existing distraint to set aside. Up to the date of the Sub-Collector's order the defendants were in the position of distraining landlords whose acts were voidable on cause shown in a suit under Section 17. But the order brought about an entirely new condition of things. By virtue of that order, and from its date, the defendants became wrongful holders of the property: a distinct cause of action was born to plaintiff: and it was upon this cause of action, the wrongful detention, that the plaintiff based his right to recover damages. We hold that upon this point the District Judge was wrong. We have however further to consider whether the suit was cognizable under Act VIII. This, we observe, was one of the questions raised by the defendants in the lower Appellate Court. The summary remedy given to a tenant by Sections 17, 18, refers to cases in which the distraint itself is the ground of action. The other section relied on is Section 49, which allows a suit to "any person deeming himself aggrieved by any proceeding taken under color of this Act." We have no such case here. The alleged wrongful withholding of the property, so far from being a proceeding taken under color of the Act, was an act in direct disregard and defiance of it, and as such it did not constitute a cause of action within the meaning of the section. Neither in the sections referred to

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SRÍNIVÁSA v. EMPERUMANAR.

then, nor in any other part of the Act, do we find any provision for the summary adjudication of a suit such as the present. Upon this ground we must dismiss the appeal. The decree will however declare that this decision will be no bar to the plaintiff taking any proceedings that may be otherwise open to him under the general law. We make no order for costs.

Appeal dismissed.

APPELLATE CIVIL.

1878. November 29.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

VAITHELINGA (PLAINTIFF) v. SA'MINA'DA (DEFENDANT).[*]

Public Policy—Void Agreement.

In a suit upon an agreement binding defendants to remain subject to the orders of plaintiff, the head of their caste, not to carry on their trade with the assistance of any other persons than their own caste, and imposing penalties for non-performance. *Held* that it would be contrary to public policy to give effect to such an agreement.

CASE stated under Section 617 of Act X of 1877 by the Judge of the Court of Small Causes at Combaconam. This was a suit for the enforcement of penalties for non-performance of an agreement.

The *Advocate-General* for the Plaintiff.

T. Ráma Ráu for the Respondent.

The Court (INNES, J., and MUTTUSÁMI ÁYYAR, J.) delivered the following judgment in which the facts and arguments sufficiently appear:—

In the agreement in question the defendants bound themselves to remain subject to the orders of the plaintiff, the head of their caste, and not to carry on their profession of working in lead with the assistance of any other persons than their caste people, and to pay certain sums monthly "for our family goddess * * * and to pay any taxes imposed by you for the said pagoda, and to adhere to all other arrangements which you may make." In failure to perform the agreement, certain penalties are imposed.

The learned Advocate-General, who appeared for plaintiff, urged that there might be a good consideration for such an agreement,

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[*] Case No. 18 of 1878 referred under Section 617, Act X of 1877, by the Judge of the Court of Small Causes at Combaconam in Small Cause Suit No. 630 of 1878.

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but could not say that there was any consideration for this particular agreement. It is clear, therefore, that there was none; and on that ground alone the suit might have been dismissed. But the agreement is in other respects one which it would be against public policy to give effect to as a valid contract, as the provision confining the parties to it to the members of their own caste for all assistance that might be required for carrying on their profession might become a very serious restraint upon trade operations. We are of opinion, therefore, that the terms of the instrument cannot be legally enforced.

APPELLATE CIVIL.

Before Sir Walter Morgan, Kt., Chief Justice, and Mr. Justice Innes.

1877. December 10.

KÉSHAVA (3RD DEFENDANT) SPECIAL APPELLANT v. KÉSHAVA, (PLAINTIFF) SPECIAL RESPONDENT.[*]

Kánam—Otti—Time of Redemption.

Per curiam, It is settled law that in the case of Kánam and Otti mortgages it is not competent to the mortgagors to redeem before the arrival of the appointed time.

Per INNES, J., dissenting from *Mashook Ameen Suzzada* v. *Marem Reddy* (1), if in the case of any mortgage the period for redemption is postponed to a fixed date by special agreement, effect should be given to such agreement.

THIS was a Special Appeal against the revised decree of the Subordinate Judge of South Canara in R. A. No. 151 of 1875.

Mr. *Handley* and *V. Bháshyam Áyyangár* for the Special Appellants.

A. Rámachendra Áyyár for the Special Respondent.

The facts sufficiently appear in the following judgments:—

MORGAN, C. J.—The Otti document C provides for the return of the land on payment of the amount secured at a stipulated period, which has not yet arrived. It is settled that in the case of Kánam and Otti mortgages, it is not competent to the mortgagors to redeem before the arrival of the appointed time. See

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[*] Special Appeal No. 269 of 1877 against the revised decree of K. Krishna Menon, Subordinate Judge of South Canara, dated 21st December 1876, modifying the decree of the District Munsif of Bekal, dated 17th March 1875.

(1) 8 Mad. H. C. Rep., 31.

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KE'SHAVA v. KE'SHAVA.

Edathil Itti v. *Kópashon Náyar* (1) and *Kumini Ama* v. *Parkam Kolusheri* (2).

The decrees of the lower Courts will be reversed and the suit dismissed. The respondent will bear the costs.

INNES, J.—I agree in the views expressed by the learned Chief Justice so far as they go, but I would go further and say that whenever there is a stipulation of this nature, effect should be given to it. I do not agree in the judgment in the case of *Mashook Ameen Suzzada* v. *Marem Reddy* (3). There appears to me to be no reason why the period for redemption should not be postponed to a fixed date by special agreement. If to construe the stipulation thus, makes it necessary to suppose that it was intended that the land should not only be mortgaged but leased for a fixed term, I see no difficulty in this supposition. All that it means is that the land is leased for a fixed term after which it enures as the security for the re-payment of the money.

I agree in the result that the decrees below should be reversed and the suit dismissed.

Suit dismissed.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kernan.

1878. October 1.

MORGAN (APPELLANT), DEFENDANT *v.* KIRBY (PLAINTIFF), RESPONDENT.*

Easement—Artificial channel—Water, flow of.

In 1860 R, whom the plaintiff in this suit represented, agreed with Government for the lease of a plot of ground called the D. estate and got possession. In 1865 R took a lease of the estate from Government for 999 years, to enure as a lease from 1860, the time at which he entered upon possession. The defendant's estate adjoined the plaintiff's. Defendant's title, also derived from Government, dated from 1869. A formal lease was granted to his predecessor in 1874 in similar terms to that to plaintiff.

In 1864 R opened an artificial channel for the conveyance of water for the use of his estate. This channel was taken off from a ravine in Government waste land,

(1) 1 Mad. H. C. Rep., 122. (2) 1 Mad. H. C. Rep., 261. (3) 8 Mad. H. C. Rep., 31.

(*) Second Appeal against the decree of A. McC. Webster, Acting Judicial Commissioner of the Nilgiris, dated 2nd October 1877, confirming the decree of the Acting Assistant Judicial Commissioner of the Nilgiris, dated 14th March 1877.

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and before reaching the plaintiff's estate passed through land which in 1864 belonged to Government, but which subsequently formed portion of the defendant's estate.

When the lease, under which the defendant claimed, was made in 1874, the flow of water through the channel was enjoyed by the plaintiff. The plaintiff sued to restrain the defendant from interfering with and diverting the flow of water in this channel and for damages.

Held that the flow of water in the channel having existed as an apparent and continuous easement in fact at the time of the execution of the lease in 1865, a right to it passed by implication under that lease, and that the plaintiff was accordingly entitled to it; that the defendant, whose lease was subject to that right, was not entitled to interrupt the flow; but that he might use the water in a reasonable manner as it flowed through his land.

THE suit was brought to restrain the defendant from interfering with, and diverting the flow of, water, in a channel alleged to belong to the Dunsandle Tea Estate on the Nílgiris, and for damages and costs.

The following issues were settled—

1. Is the plaintiff entitled to the exclusive use of a channel running through the defendant's Sholúr Estate to the plaintiff's Dunsandle Estate?

2. Has the defendant stopped the flow of water to the plaintiff's estate?

3. What damages, if any, is the plaintiff entitled to receive from the defendant?

The facts of the case were—Mr. H. D. Rae, whom the plaintiff in this suit represented, got possession of the Dunsandle Estate from Government in the year 1860 for the cultivation of tea, and subsequently received a lease from Government of it in 1865. Between the years 1860 and 1865 Mr. Rae opened the channel in dispute to convey water from a stream to the Dunsandle Estate. At the time it was made the channel ran through Government waste land. Mr. Rae subsequently applied for some of this waste land, and obtained possession thereof in 1869, and in 1874, he having died, his widow, Mrs. Rae, obtained a lease of it.

This land is now called the Sholúr Estate, and part of the disputed channel runs through it. The Sholúr Estate is now in possession of defendant (appellant) and this action was brought to restrain him from using the water where it flows through the Sholúr Estate, or from diverting it.

The Assistant Judicial Commissioner found that Mr. Rae, by the grant of 1865 from Government, obtained a right to the

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channel as far as it lay within the limits of Dunsandle, and that the rest of the channel being at the time on Government waste ground, Mr. Rae also obtained a right to the use of it. He, therefore, gave judgment for plaintiff with Rupees 800 damages.

Against this decision defendant appealed on the grounds—

1. That the judgment was bad in law and against the evidence.

2. That the Lower Court had wrongly construed the general words in the original grant of 1865 to be sufficient to create an easement in plaintiff's favor.

3. That Government having, by the grant of 1874, expressly made over to Mrs. Rae the portion of the channel in dispute, where it flows through the Sholúr Estate, the question of the grant of the easement to Mr. Rae by Government in the original grant was raised as between plaintiff and Government, and that Government should, therefore, have been made a party to the suit.

4. That the Lower Court had ordered appellant to pay damages to plaintiff on account of an assumed erroneous act on the part of Government, and that the decision was based upon an *ex parte* judgment on the points at issue between plaintiff and Government, by which (Government not being bound by the judgment) defendant suffered a wrong without any remedy.

5. That the plaintiff had failed to prove an exclusive right to the easement.

6. That damage had not been proved.

The Acting Judicial Commissioner delivered the following judgment:—

"The appellant's pleader stated that Mr. Rae mortgaged the Dunsandle Estate to the Land Mortgage Bank from whom plaintiff (respondent) bought it; and argued that in thus mortgaging Dunsandle Mr. Rae did not give up the right to the channel, and that plaintiff should shew that the right to the channel passed to him; also that in the plan of the Sholúr Estate conveyed by the grant of 1874 the channel was shown and not specially reserved. He contended that the Government should have been made parties as it was necessary to show how far they allowed, in the grant of 1865, Mr. Rae the exclusive right to the channel for Dunsandle Estate. If plaintiff asserts a right to use by permission of

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Government he should have obtained special, not tacit, permission, and cannot come into Court to have his alleged tacit permission converted into a right. That as the channel was not originally cut with the sanction of Government, therefore it is to all intents and purposes a public channel and subject to the law as to easements of natural sources of water. He referred to the cases of *Sutcliffe* v. *Booth* (1), *Stockport Water Works Company* v. *Potter* (2), *Mittall* v. *Bracewell* (3). Contended that damages were excessive because plaintiff could have watered his tea-plants from the river and could have sued for increased cost of watering.

Respondent—plaintiff—argued that the channel was entered in the plan attached to the grant of 1865, and right to it passed to Mr. Rae by the grant. That in the plan attached to the second grant of 1874 the supply-channel was entered, and, therefore, Mr. Rae got the land subject to the former right.

From the evidence and the admissions of parties' pleaders it is clear that when the second grant was made the channel was in use for the cultivation of the Dunsandle Estate, the Sholúr Estate not having been cultivated; also that when Mr. Rae mortgaged the Dunsandle Estate to the Land Mortgage Bank the Sholúr Estate was not cultivated, and, therefore, the channel was in use only for the former estate. I am of opinion that Mr. Rae by his mortgage conveyed all rights to water on to the Land Mortgage Bank, and did not reserve any right to the channel. The deed of sale on which appellant bases his claim has not been produced, but as the right to the water for the Dunsandle Estate had been already conveyed by Mr. Rae to the Land Mortgage Bank, it could not be again conveyed to appellant, and, therefore, as between appellant (defendant) and respondent (plaintiff) I consider that the plaintiff (respondent) has made out his claim to the exclusive use of the channel.

Neither party has, however, obtained by prescription a right to the channel as against Government, but I see no reason, therefore, for making Government a party to the suit. Appellant contends that Government should be made a party because they seem to

(1) 32 L. J. Q. B. 136, 139. (2) 3 H. and C., 300.
(3) L. R., 2 Ex., 1.

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have given parts of the channel to both parties. I do not take this view of the case. Government gave both grants to Mr. Rae, and the latter grant as a sort of compensation to him for some uncultivable land in the first grant, and the channel having been in use for the Dunsandle Estate at the time the second grant was made (to the same person) that does not seem to show any necessity for specially reserving that part of the channel that passed through the Sholúr Estate. I also fail to see how Government can be made parties to suits arising out of subsequent transactions. Moreover the channel having been given to Mr. Rae by the two grants, and this gentleman having subsequently conveyed it to the mortgagees of the Dunsandle Estate, appellant's contention that Government should be made a party has no force.

For the above reasons, and because the cutting of the channel through the present Government waste land seems to have been tacitly acquiesced in by Government, I consider that plaintiff has made out his claim to the exclusive use of the channel. I find also that the damages awarded are not excessive and dismiss this appeal with costs."

The defendant appealed against this decree on the following grounds:—

That it was contrary to law, in that,—

I. The plaintiff had not proved any right or prescriptive title to the exclusive use of the channel in dispute.

II. The original grant of 1865 had been misconstrued.

III. There was no evidence as to damages.

Mr. *Wedderburn* for the appellant (defendant).

Mr. *Tarrant* for the respondent (plaintiff).

INNES, J.—Plaintiff seeks to restrain defendant from interfering with and diverting the flow of water in a channel belonging to the Dunsandle Estate. He asks for damages (1,000 Rupees) and costs.

The Court of first instance gave judgment for plaintiff with 800 Rupees damages and costs, and on appeal, that judgment was confirmed and the appeal dismissed.

The case is now before us in Second Appeal. The facts are these. In 1860, Mr. Rae, whom the plaintiff now represents agreed with the Government for a lease of the plot of ground now called the Dunsandle Estate, for the purpose of tea-planting, and

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got possession. In 1864, he opened the channel in dispute for the use of the estate. It is in its whole extent an artificial channel. It was taken off from a ravine in Government waste ground and passes through land (wh[illegible] in 1864 belonged to the Government but now belongs to a[illegible]) till it reaches the Dunsandle Estate which it enters and [illegible] several times in its passage through it. Defendant's estate adjoins plaintiff's, and the stream, as already mentioned, runs through a portion of what is now defendant's land before it reaches plaintiff's. Then after passing through the first portion of plaintiff's estate, it again reaches defendant's estate, passes through it, and again into plaintiff's estate and then again into defendant's. It is from the part of the channel where it passes through this third portion of defendant's estate that the water has been taken by defendant.

In 1865 plaintiff took a formal lease of the estate from Government for 999 years. The lease was to enure as a lease from 1860, the time at which plaintiff entered upon possession. Defendant's title, also derived from Government, dates from 1869. A formal lease was granted in 1874 in similar terms to that to plaintiff.

At the time the channel was opened, the head and source of the water was, as it now is, in Government waste land, and the entire interval between the head of the channel and the place where i[illegible] enters plaintiff's ground was from the time of his taking possession in 1860 to the date of the lease in 1865, Government waste land.

What plaintiff seeks is a right to the uninterrupted flow of water in a permanent artificial stream, and further to the exclusive right to use the water throughout the length of the stream.

Such rights are easements and may either be acquired by prescription or be the subject of grant or contract.

In the present case, if the right exists at all, it must have come into existence by grant under the lease, or by implication of law arising out of the severance of tenements under the lease. The strict definition of an easement no doubt requires the existence of two separate tenements in the ownership of two distinct persons. A lease for 999 years however differs little from an outright grant, and there is no doubt that a landlord by the contract of letting may convey rights (which though not strictly easements, are in the nature of easements) to enure for the term of the holding.

Such easements may be of three kinds—

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1*st*.—Rights of easements already existing and held by the lessor over the property of neighbouring proprietors which by his lease he passes for the term of the lease to the lessee. But in the present case the land leased to plaintiff was contiguous to no third person's property but surrounded on every side by Government waste, and no such easement could have existed upon which the language used could attach.

2*ndly*.—They may be easements of necessity, such easements arise on severance of tenements when the convenience claimed is one without which the vendee or lessee could not have the use of the tenement then severed off from the main heritage.

During unity of possession no easement strictly so called exists, but a man may, by the general right of property, make one part of his property dependent on another and grant it with this dependence to another person. Where property is conveyed, which is so situated relatively to that from which it has been severed that it cannot be enjoyed without a particular privilege in or over the land of the grantor the privilege is what is called an easement of necessity, and the grant of it is implied and passes even without any express words. It is as it were, brought into existence by the severance of tenements on the principal that together with the property sold, the vendor grants every thing without which it could not be beneficially used.

But the easement of exclusive use now claimed is not of this nature because the plaintiff can use the tenement beneficially without the exclusive use of the water though not perhaps so beneficially as he would be able to do with the exclusive use of it.

3*rdly*.—They may be continuous and apparent easements which have, in fact, been used by the owner during the unity of possession for the purpose of that part of the united tenement which corresponds with the tenement conveyed.

There is a distinction between discontinuous and continuous easements in regard to the circumstances in which they will be held to pass. A grant of a discontinuous easement as a right of way, not being a way of necessity, cannot be implied from the disposition of the severed tenements, and will not pass under a deed of grant of land or lease such as the present without express words showing that it was the intention to pass it along with the property granted.

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Such language as that used in the present lease "together with all ways, watercourses, rights, easements, privileges, advantages and appurtenances," without the further words "therewith held, used and enjoyed," or similar words, has been frequently held to be insufficient to show an intention to pass discontinuous conveniences (not being easements of necessity) which were existing in the two tenements during unity of possession, because such privileges cannot be said to have been appurtenant to the property sold prior to and at the time of sale, *i. e.*, the point of time at which the tenement sold first came into existence as a separate tenement. They are simply part and parcel of the entire tenement as it existed before severance.

To use the language of Erle, J., in *Polden* v. *Bastard* (1) which was approved of in *Watts* v. *Kelson* (2)—"there is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shows an intention that they should pass."

The right now claimed, a right in a flowing stream running from the lessor's to and through the lessee's tenement, which existed as a flowing stream prior to the lease, and which was made expressly for the purpose of the tenement leased to Mr. Rae, is undoubtedly a continuous easement requiring no express language to pass it, but which passes by implication of law.

Were it necessary to consider the application of the language used in the lease in its effect in passing the easement claimed, I should hold that the words "together with all ways, watercourses, rights, easements, privileges, advantages and appurtenances" are mere words of art inserted in the lease (which is drawn in legal form) in the place in which such a clause is usually inserted, with the intention of conferring upon the lessee such easements *in alieno solo* as might properly attach to the property leased, but without having in contemplation any specific easement upon which the words could operate.

(1) L.R., 1 Q.B., 156. (2) L.R., 6 Ch., 166.

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It is however unnecessary to construe these words if, as I conceive, the easement, being of a continuous nature, passes without any express words.

Assuming thus that a right arises to this easement by implication of law, what is the extent of it?

It is clear that Rae, in going upon the waste land and cutting a channel through a considerable portion of it including that portion of the property which was ultimately leased to him in 1865, acquired no rights in the land which at and after the date of his lease continued to be Government waste land, or to that portion of the channel passing through such part of the Government waste land.

If his act was not permitted, it was a trespass. If it was permitted, there is no room for inferring that it was not a mere license to dig a channel to conduct the water to the ground which the Government had agreed to lease to him.

There is no correspondence forthcoming to show precisely which of these legal aspects the act bore. But in neither case could Mr. Rae have acquired any right to the water flowing in such portion of the channel as lies within the portion of the Government waste which he was not authorized to occupy.

When, then, the Government leased the property what did Mr. Rae acquire?

He acquired for the term of the lease the lands described in the lease, including the area occupied by the channel and its bed, and a right to the use of the flowing water within the ambit of the property leased to him. Had there existed at the time of the grant any particular purpose for which the water had been and was intended to be be used, that user (had and to be had) might be a test of the user granted. But there was at the date of the lease no special purpose to which the water had been applied, and, from the circumstances, a larger right cannot be inferred than that Mr. Rae was entitled by the grant to a reasonable use of the water, *i.e.*, to use it and pass it on. The land above and lower down the stream which was afterwards leased by Government to the person whom defendant now represents, was necessarily granted subject to this right of plaintiff to the use of the flowing water in his own ground. This right imports that the flow of the water shall not be interrupted, and defendant is not entitled to interrupt

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it. But he may use it as it flows through his grounds. Each is entitled to a reasonable use of the flowing water.

It is admitted that defendant has used the water, and the opinion of the Courts below was that he was not entitled to use it at all. This opinion being erroneous, I think that we should require the Court to find whether the use by the defendant was or was not a reasonable use of it, and, if not, whether plaintiff is entitled to any, and what, damages.

KERNAN, J.—The two Lower Courts held that plaintiff had an exclusive right to the flow and user of the water in the channel, running through the defendants land, called the Sholúr estate, and gave Rupees 800 damages, for the diversion (admitted by defendant) of the flow of the water.

The defendant appealed (2nd appeal) alleging as grounds of appeal—

1. That plaintiff had not proved any right or prescriptive title to the exclusive use of the channel.
2. That the grant to plaintiff of 1865 was misconstrued.
3. There was no evidence as to damages.

In the argument before us it was at first contended, by counsel for defendant, that plaintiff was not entitled to any easement in the use of the channel and the flow of the water. But afterwards, as I understood, counsel for the defendant has admitted plaintiff had an easement in the use of the channel and of the water, though not an exclusive easement. Counsel contended that the defendant is entitled equally with plaintiff to the use of the water as it flows through his grounds, counsel put it thus, viz., the defendant might stop the flow in his ground for his use for a fixed time, and then give the full flow to the plaintiffs for a fixed time. It was, however, necessary for us to examine the facts and the law to determine the position of the parties, and as Mr. Justice Innes in his judgment has fully examined them, and as I agree in his conclusion, I will not go further into the matter than to state very shortly what occurs to me partly by way of addition.

The right claimed by plaintiff appears to me to be more extensive than he is entitled to, viz., the right to exclude, from reasonable use, the owner or occupier of land extending (it appears 2 to 3 miles in distance) along the channel, commencing from the Dunsandle Estate. I agree that the easement in the use of the channel

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and flow of water as it existed at the date of the grant or lease of 1865 passed to Rae, and that it is vested in plaintiff. The easement was apparent, and in its nature continuous, and was, in fact, created by Rae before the lease was executed, and with the assent of the Government, then and now the owners of the land occupied under lease by the defendant. The channel and the flow of water in it had been used by Rae before the execution of the lease. Under these circumstances the grantors in the lease of 1865 must be held to have conveyed by implication the easement. But as Rae was also tenant of the lands before and at the time of the execution of the lease, I think that the principle of the case of *Hall* v. *Lund* (1) per Martin, B., would apply, and that the lease would carry all rights then in the enjoyment of the lessee. It is not, I agree, necessary to determine the effect of the general words used in the lease of 1865, but when amongst them is to be found the general word "easement," I am not prepared to say, having regard to "*easement in fact*" (Gale on *Easements*, p. 85, *Plant* v. *James* (2)) existing, when the lease was made, that such easement should not have passed under that express term.

It was stated in argument that there were other streams on plaintiff's ground, and that the use of the flow of the water as claimed was not necessary. But the right now claimed is not one of necessity, it is a right by implication to an open, apparent and continuous easement, *in fact*, existing before and at the time of the grant.

A similar objection was taken in the case of *Watts* v. *Kelson* (3), *supra* (which is not unlike this case to a great extent), and the Court said "that (the watercourse or pipe) was at the date of the conveyance the existing mode by which the premises conveyed were supplied with water, and we think it no answer that if this supply was cut off, possibly some other supply might have been obtained." This observation, I think, is applicable to this case However, there is no finding by the Lower Courts that the other streams in the plaintiff's estate are sufficient for the supply of water. The evidence as to the length of the channel, 2 to 3 miles and the expense it would have cost would lead to the conclusion that the channel and the flow of the water in it, were of great importance, though not perhaps essential.

(1) 1 H. & C., 676. (2) 5 B. & Ad., 791. (3) L. R. 6 Ch., 166.

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The defendant represents the interest in a lease (of the estate called Sholúr estate) made by Government, in 1874, to Mrs. Rae, the widow of the lessee in the lease of 1865. It appears that he had got possession of the estate in 1869. When the lease, under which defendant claims, was made in 1874, the flow of water through the channel was enjoyed by the plaintiff, and the lessee must be held to have taken the lease of Sholúr estate, subject to the plaintiff's rights, if any, in that channel. The question is the extent of the plaintiff's right, and I think that what passed to plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises, as it did at the time of the execution of the lease of 1865, and that the defendant should be restrained, by injunction, from obstructing and diverting the stream, so as to prevent it from flowing through defendant's premises to plaintiff's in the course and manner in which it used to flow at the date of the lease of 16th June 1865.

The right of the plaintiff is one arising by implication, and I think the rule as to the extent of such right is well expressed by Wilde, B., in *Ewart* v. *Cochrane* (1) where he says, "it seems to me that in cases of implied grant, the implication must be confined to a reasonable use of the premises for the purpose for which according to the obvious intention of the parties they are demised."

Here the length of the channel is very great, and although the defendant is not entitled to obstruct the channel or diminish the ordinary flow of the water, or to divert it from flowing in its ordinary course to plaintiff's ground, yet short of that, we think that defendant is entitled to use the water as it passes through his ground.

The Court, therefore, referred to the Lower Appellate Court the following issues:—

1. Whether the use by the defendant was a reasonable one, having regard to the principles stated in the judgment of the High Court?

2. If not, whether the plaintiff is entitled to any and what damages?

The Court below found on the 1st issue that the use by the defendant was not a reasonable use: and on the 2nd issue that the plaintiff was entitled to the damages originally awarded him.

(1) 4 Macq. H. L. C.

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Upon this return to the issues sent down the High Court decreed that the decrees of the Lower Appellate Court and Court of First Instance, in so far as they restrained defendant from interfering in the channel which supplied the Dunsandle Estate, and in so far as they awarded Rupees 800 as damages for loss that had accrued to the plaintiff from defendant's use of the channel, be modified by declaring each of the parties herein entitled to a reasonable use of the flowing water, and that defendant, having used the water to an unreasonable extent and thereby caused loss to plaintiff, do pay plaintiff Rupees 800 damages in respect of such loss and that in other respects the decrees appealed against be confirmed, and that each party do bear his own costs of the second appeal.

Decree modified.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1878. October 16.

SABÁPATHI, A MINOR, (BY HIS MOTHER AND GUARDIAN AMURTHAMMÁL) PETITIONER, v. SUBRÁYA AND RÁMANÁDHA, COUNTER-PETITIONERS.*

Review of judgment—High Court.

The absence of a formal finding on an issue tried and decided by a High Court of First Instance is not an error calling for review of judgment in the High Court.

A party who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot, under ordinary circumstances, be allowed to agitate the question on review.

THIS was an application under Section 376 of Act VIII of 1859 for review of the judgment of the High Court (Appellate Side), dated 30th January 1877, confirming the decree of Holloway, J., made in Original Suit No. 430 of 1875.

The original suit was brought for a declaration that certain properties and lands to which the Yagambara Esvara Sámi temple lay claim, be declared to be the property of the said temple.

That an application should be made to a Judge of the High Court in chambers to decide who were fit persons to be appointed Dharmakartas.

* Civil Miscellaneous Petition No. 8 of 1877, for review of the judgment of the High Court (Appellate Side) dated 30th January 1877.

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That an account be taken.

Issues were settled, the first of which was "whether the plaintiffs are entitled to maintain this suit without statutory permission." The Court of First Instance declared that the temple in the plaint mentioned was a public and not a private temple, and decreed that C. Allagadi Pillai be appointed Dharmakarta of the said temple, and that the said temple be delivered to him.

Against this decree the eighth defendant, A. Sabápathi Pillai, by his mother and guardian Amurthammál, preferred an appeal to the High Court on the ground, among others, that the Lower Court ought to have given its findings on the first issue.

The Appellate Court confirmed the decree of the Court of First Instance.

A petition for review of judgment was presented on the grounds—

1. That there was error apparent on the record in that it appeared on the record that no application under Act XX of 1863 was made to the Court for leave to institute the suit.
2. Error in that neither the Court of First Instance nor the Appellate Court did try the first issue.

Mr. *Lascelles* for the Petitioner.

Mr. *Johnstone* for the Counter-Petitioners.

The Judgment of the Court was delivered by

KERNAN, J.—A petition of review was presented to this Court, Appellate Side, by the eighth defendant in Original Suit No. 430 of 1875. The petition prayed a review of the decree, on appeal, of this Court, made the 30th day of January 1877 in Regular Appeal 21 of 1876, from the decree of Mr. Justice Holloway made the 3rd day of August 1876.

The only ground of review argued was whether there is not error apparent on the record, in this—1st, that it appears on the record that no application under Act XX of 1863 was made to the Court for leave to institute the suit, and that therefore the suit should not be entertained; 2ndly, it was argued that there was error inasmuch as it appeared on the record that the Court of first instance did not, nor did the Court of Appeal, try

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the first issue, viz., "whether plaintiffs are entitled to maintain this suit without statutory permission?"

To deal with the second ground it is enough to say that although no formal finding on the first issue was recorded in the Court of First Instance, yet it is clear the issue was decided by that Court, as there was a decree for the plaintiffs. The eighth defendant appealed and set out grounds of appeal, but did not allege as grounds of appeal that the Court of First Instance did not decide that issue, though he did allege that the Court ought to have given its finding on that issue amongst others.

We do not consider that the absence of a formal finding on an issue tried and decided by a High Court of First Instance is an error calling for review of judgment in the High Court.

Before going into the first ground of review, it is right to observe that when the case came before the Court of Appeal the first ground of review was not opened, though Counsel or Vakíl for the eighth defendant appeared in support of the appeal. The question was apparently abandoned, and, if upon no other ground we would think that, upon that ground alone, the review asked for should not be granted.

"*Interest reipublicæ ut sit finis litium.*" A party who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate the question on review.

The substantial first ground of review argued was that this suit is one of the nature contemplated by section 18 of the Act XX of 1863. Now the suits contemplated by that Act are suits against a "trustee, manager or superintendent or member of committee" in respect of the *trusts vested* in or *confided* to them respectively (Section 14).

The Act gives special suit against such person by giving right of suit under section 14, and thereby extends the ordinary remedies against such "trustees, manager, superintendent and committee." The object of the Act was to make special provisions for the due care and safety of endowments for religious purposes in the hands of such persons. Summary special powers are given to the Court against such persons. See section 16 as to arbitration, section 19 as to ordering accounts to be filed, and

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section 20 referring to prosecution of such persons for "criminal breach of trust."

It therefore appears to us that the special sections of the Act as to suits, deal only with such persons for acts by them *while* filling the office of trustee, manager, superintendent or committee. This is also the view expressed by this Court in *Jeyangarulavaru* v. *Durma Dossji* (1), see also *Agri Sharma Embrandi* v. *Vistnu Embrandi* (2). Now the defendants in this case are not, nor is any of them, a "trustee, manager, superintendent, &c." They are sued as persons who have without any authority, by election, appointment, or otherwise, intruded themselves into the management of the temple and possession of its properties since the year 1872. Plaintiff's case is "that since 9th October 1872 there has been no *Darmakartha*, and consequently the affairs of the temple are neglected and the income and endowments uncollected." The plaint prays for the appointment of Darmakarthas, or wardens, and for accounts against the defendants of the property they received, and delivery up of the property to the Darmakarthas when appointed.

The defendants therefore are intruders without authority. As they interfered with trust property knowing it to be such, they might be held liable as trustees, that is, constructive trustees. But the trustees, &c., contemplated by the Act mean duly constituted trustees, &c., *i.e.*, persons legally filling the office, and to whom is "confided" (section 14) the superintendence which the Board of Revenue formerly exercised, and from which the Act intended to relieve them. The statute does not apply to a suit such as this.

Both grounds of review fail, and the petition must be dismissed with costs.

In the above view, it is not necessary to decide a question raised, viz., Whether the Act XX of 1863 is applicable to the temples, &c., within the local limits of the High Court jurisdiction.

Petition dismissed.

(1) 4 Mad. H. C. Rep., 2. (2) 3 Mad. H. C. Rep., 198.

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P. C.*
1879.
March 18.

KRISHNAMA AND OTHERS (PLAINTIFFS) *v.* KRISHNASÁMI AND OTHERS (DEFENDANTS)

[On appeal from the High Court of Judicature at Madras.]

Cause of action—Money interest—Performance of religious services.

A claim to certain pecuniary benefits and payments in kind which a plaintiff alleges himself to be entitled to receive from the defendants in respect of the performance of certain religious services, is a claim which the Courts of Justice are bound to entertain; and if, in order to determine the plaintiff's right to such benefits, it becomes necessary to determine incidentally the right to perform the services, the Courts must try and must decide that right.

THIS was an appeal brought under special leave from Her Majesty in Council, against a decretal order of the High Court of Judicature at Madras, dated the 16th February 1877, confirming an order of the District Judge of Chingleput of the 21st December 1876, whereby he rejected a plaint filed by the present appellants in a suit brought by them, on the ground that it disclosed no cause of action.

Mr. *J. D. Mayne* for the appellants, contended that the plaint disclosed a sufficient cause of action, and that the Courts below were wrong in rejecting it. He referred to one previous litigation between parties substantially the same, in the case of *Narasimma Cháryár* v. *Sri Kristna Tata Cháryár*, (1) in which a similar suit was entertained. The same view had been taken in the case of *Archakam Srinivasa Dikshatulu* v. *Udayagiri Anantha Charlu*, (2) although in that case it was held that the claim made by the plaintiff was *res judicata*. See also *Kamalam* v. *Sadagopa Sámi* (3) in which *Chinna Ummayi* v. *Tegarai Chetti* (4) was distinguished. The present case differed from that of *Striman Sadagopa* v. *Kristna Tata Charyar* (5) in so far as the plaintiff in that case was not officially connected with the temple in respect of which his claim was brought. In the Bombay cases, *Shankara bin Marabasapa* v. *Hanma bin Bhima* (6) and *Sangapa bin Baslingapa* v. *Gangapa bin Nirajapa*, (7) the claims were

* *Present*:—Sir JAMES W. COLVILE, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

(1) 6 Mad. H. C. Rep., 449.
(2) 4 Mad. H. C. Rep., 349.
(3) I. L. R., 1 Mad., 356.
(4) I. L. R., 1 Mad., 168.
(5) 1 Mad H. C. Rep., 301.
(6) I. L. R., 2 Bom., 470.
(7) I. L. R., 2 Bom., 476.

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rejected as brought to vindicate the plaintiff's right to a mere dignity unconnected with any fees, profits or emoluments.

The respondents did not appear.

The material passages of the plaint and the order passed by the High Court will be found set forth in their Lordships' judgment which was delivered by

SIR ROBERT COLLIER:—This is an appeal from a judgment of the High Court of Judicature at Madras, rejecting a plaint under the 32nd section of the Code of Civil Procedure, as containing no cause of action—a proceeding equivalent to what in this country would be called judgment on demurrer. The only question before their Lordships is whether or not the plaint discloses any cause of action. Of course we have nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case. The declaration is by a large number of persons belonging to the *Tenkalai* sect, against other persons belonging to the *Vadakalai* sect. The substance of the plaint, which undoubtedly is not very clear, may be thus stated: It begins by declaring that the plaintiffs have the exclusive right to the *Adhyapaka mirass* of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies, and deny the right of the defendants to recite them. Then comes an allegation which appears important: "The plaintiffs and the Brahmins of the plaintiffs' *Tenkalai* sect have been for a long time past and up to this day discharging all the duties appertaining to the said *Adhyapaka mirass* right, and enjoying the incomes of the *Adhyapakam*, save those mentioned in Schedules B and C." The plaint goes on to allege that the defendants, holding the office of Dharmakartas of the pagoda, in combination with other persons in rivalry with the plaintiffs, recited the *Vadakalai* invocations, chants, and other religious prayers, the exclusive right to recite which was incident to the plaintiffs' *Adhyapaka mirass*; that thereupon a complaint was preferred to the Magistrate and a report made, and for a time the defendants ceased to recite the chant and prayers in question, but that they again wrongfully recited them, and injured the exclusive right of the plaintiffs and others to recite them; but there is no allegation that the plaintiffs did not themselves perform or were prevented from performing these rites. On

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the contrary, the allegation is that they did perform them. Section 6 goes on to say, "The defendants having withheld the payment to the plaintiffs of some of the several incomes of the *Adhyapaka mirass* due to the plaintiffs in the said Devarája Swámi's Pagoda, as well as in all the *Sannidhis* attached to it, the plaintiffs instituted Suit No. 66 of 1865, on the file of the District Munsif's Court of Conjeveram, against the defendants, and this litigation went up as far as the High Court, and continued until March 1873, when a decision was passed in favor of the plaintiffs." The plaint further alleges (and this is the present cause of action), "The defendants have withheld the payment to the plaintiffs and the others of the *Tenkalai* sect of the amount of income mentioned in Schedule C for the six years from the date of the said Suit No. 66 up to this day, to which the plaintiffs and the others of the *Tenkalai* sect are entitled, as also of the incomes which are mentioned in Schedule B, and which were being enjoyed by the plaintiffs and the others of the *Tenkalai* sect from the date of the said Suit No. 66, until the final decree was passed by the High Court, save such as are now being enjoyed. They have also withheld from the plaintiffs, and the others of the *Tenkalai* sect, the honors mentioned in Schedule A from April 1873." There follows a prayer that the Court will pass a decree directing the defendants and others to abstain from reciting, and establishing the exclusive right of the plaintiffs, and also seeking to recover the value of various items stated in the schedules. Schedule C, which is to be found at the end of the schedule attached to the plaint, is in these terms: "Amount due for six years from October 1870 up to the current month at the annual rate of Rupees 57-5-9, as mentioned in the decree in the Original Suit No. 66 of 1865 on the file of the District Munsif's Court of Conjeveram, Rupees 344-2-6." On reference to the record, this suit appears to have been brought by substantially the same plaintiffs (with some changes) against substantially the same defendants. The Munsif before whom the case was originally tried, affirmed the claim of the plaintiffs to the *Adhyapaka mirass*, and decreed that the sum of Rupees 57-5-9, as wages for the duty performed, should be paid to them by the defendants, these "wages" being in fact the money-value placed by the Court on certain payments in kind chiefly in the shape of food.

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On appeal this decision of the Munsif was reversed by the District Judge, being the first Court of appeal, on the ground that no suit would lie in respect of the matter complained of. His decision was reversed by the High Court of Madras, who remanded the case, observing, "The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principal which would exonerate the Court from considering and deciding the point."(1) In pursuance of this judgment, which appears to their Lordships to be perfectly correct, the cause was again tried by the Court of first appeal which somewhat increased the amount that the Munsif had given. The High Court upon further appeal affirmed the judgment of the Munsif, re-establishing the amount by way of annual payment at Rupees 57-5-9. It therefore appears that the plaintiffs in the present suit, having recovered in the former suit up to the date of the commencement of that suit the sum of Rupees 57 for certain services performed, are now seeking to recover the amount of wages that have accrued due to them for six years since the date of that suit at the same annual amount in respect of the same services which they allege themselves to have continued to perform, their performance not having been prevented, although possibly to a certain extent interfered with by the defendants. So much with respect to Schedule C.

Schedule B relates to another class of payments, as they are described in the schedule, in kind; that is, in the shape of rice and other food which are described as due to the plaintiffs. The first item in the schedule is to this effect: "One Poli (circular cake made of wheat flour, Bengal gram, sugar, and ghee) due to *Adhyapakam* at the close of the *Tiruppavai*;" most of the other items are of the same character. Their Lordships do not understand these articles as consisting of mere presents made by the devout, but as certain payments in kind of the same nature

(1) See 6 Mad. H. C. Rep., 449 at p. 451.

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as those comprised in Schedule C, which are now claimed by the plaintiffs from the Dharmakartas of the temple, which the defendants are, in respect of services performed. At the close, however, of this schedule their Lordships observe a statement of an approximate sum claimed for presents made annually to the *Adhyapakas* by the adjoining villagers for the *Tenkalai* people. It may be that no action will lie for the recovery of this last item or in respect of the honors mentioned in Schedule A, and alleged to have been withheld from the plaintiffs; but that circumstance would not justify the rejection of the whole plaint, if it discloses a good cause of action in respect of Schedule C and the greater part of Schedule B.

The judgment of the High Court, now appealed against, which rejects this plaint, is in these terms: "We think the plaint was properly rejected under the 32nd section of the Code of Civil Procedure. The allegations respecting the '*Mirass* of reciting prayers,' and the exclusive right of recital in a stated form and order, which the plaintiffs ask the Court to establish and to protect from infringement by the defendants, do not disclose a cause of action; nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums which are described as 'the value of the incomes mentioned in Schedules B and C.' A reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. Reading the plaint and schedules together they express no more than this, that presents and offerings usually given have been withheld. If, as now alleged, the plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this."

Their Lordships are unable to concur in this judgment. For the reasons which have been stated they take a different view of the plaint and of the schedules which have been referred to. It appears to them that the schedules are more than a mere list of cakes and offerings to which a money value is assigned, that they disclose a claim, whether well founded or ill founded, as of right to certain dues for services performed. Schedule C to an annual payment for wages which has been assessed in the previous suit, and adjudicated upon as due to them. Schedule B to

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certain other payments in kind, presumably capable of a money value, which had been made to them up to the judgment in the former suit, but which had been since withheld.

This being so, the action falls within the principle of the judgment by which the former suit (1) was remanded, and of other cases to which their Lordships' attention has been called. They are therefore of opinion that the judgment should be reversed, and the case remanded for the purpose of trial, and that the appellant is entitled to the costs of this appeal; and they will humbly advise Her Majesty to this effect.

Appellants' Agents: Messrs. *Burton, Yeates and Hart.*

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P. C.* 1879. May 7 and 8.

RÁMASÁMI (DEFENDANT) *v.* THE COLLECTOR OF MADURA AS AGENT OF THE COURT OF WARDS ON BEHALF OF BHASKARASÁMI, A MINOR (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Registration—Pattá—Section 2, Act XX of 1866—Sections 3, 8, 9 and 11, Madras Act VIII of 1865.

The pattás and muchalkas mentioned in Section 3, Madras Act VIII of 1865, must be understood to embrace those written agreements only which are mutually interchanged by a landlord and those of his tenants who are actually engaged in the cultivation of the lands to which they relate, since the remedies which the Act provides in Sections 8 and 9, can only be made available where the relation of landlord and tenant, or a holding of some sort, already exists upon such a basis that the landlord or the tenant, as the case may be, can come into Court and claim to have a writing granted to him.

Semble, if a lease granted by a zamindár to an intermediate holder could be considered a pattá within the meaning of Section 3 of the Madras Act VIII of 1865, it would, under the proviso to Section 11 of that Act, be liable to be set aside by the successor of the grantor if granted at a lower rate than that generally payable on such lands, and not for the purposes mentioned in the said proviso.

THIS was an appeal from a decree of the High Court of Madras, dated the 5th January 1877, which affirmed the judgment and decree of the District Judge of Madura, dated the 30th May 1876, made in favour of the respondent.

* *Present:*—Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

(1) *See* 6 Mad. H. C. Rep., 449 at p. 451.

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The chief question of law raised by the appeal was as to whether a lease of lands alleged to have been granted to the appellant's father by the father of the respondent on the 15th April 1867, but which had not been registered, was admissible in evidence and could have effect given to it, as falling within the provision of Section 2, Act XX of 1866, which exempts from registration "*pattás*" and "*muchalkas*" as defined in Section 3, Madras Act No. VIII of 1865. Another question arising in the case was as to whether, assuming the lease to be a pattá within the meaning of the said Act VIII of 1865, it would be binding as against the respondent who is the successor of the grantor, having been granted at a lower rate than that usually paid for lands of a similar character, and not for the purposes expressed in Section 11 of the said Act.

The facts of the case, which were not disputed, will be found set forth in their Lordships' judgment.

Mr. *J. D. Mayne*, for the appellant, contended that the instrument in question was a pattá within the meaning of the 3rd section of the Madras Act VIII of 1865, and so exempt from registration under Section 2, Act XX of 1866. It was a written agreement for the payment of rent passing between a landholder and a tenant and contained all the particulars which under Act VIII of the Madras Code a pattá should contain. The fact of the land having been leased at a rate lower than its actual value did not bring the case within the proviso of Section 11 of Act VIII, since that proviso was not of a general character, but intended only to apply to suits brought under Sections 8, 9 and 10 of the Act. It was unlikely that a proviso, incidentally introduced, should be intended to alter the general law of leases. The Act purported to be a consolidation Act, and it was nowhere provided by the old law that a son was not to be bound by his father's pattá if granted at a low rate. The Madras Regulations No. XXX of 1802, Sections 9, 13 and 15, and No. IV of 1822, showed that when these laws were passed the Government had no intention to put any such limit on the rights of landholders and tenants. The case of *Muttu Viran Chetti* v. *Rani Kattama Natchiyar* (1), in which a permanent

(1) 4 Mad. H. C., Rep. 463.

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lease made by a zamindár at a low fixed rent was held binding on his successor, shows that before the passing of Act VIII of 1865, there was no limitation of the landholder's right to lease. As to the manner in which the exemption provided under Section 2, Act XX of 1866, has been applied in the case of a pattá, see *Vakaty Ramareddy* v. *Duvvuru Ayapareddy* (1).

Mr. *Cowie*, Q.C., and Mr. *Graham* for the respondent:—The Registration Act No. XX of 1866 alters the previous Registration law, and makes all instruments which being required by the Act to be registered, are not registered, inoperative. Under that Act an unregistered lease is inoperative when it is not a pattá within the meaning of Section 3 of the Madras Act No. VIII of 1865. In the Act last named *tenants* are defined to be all persons bound to pay rent, and it is provided that landholders shall be bound to enter into written agreements with all persons bound to pay them rent. The Act consequently applies only where there is an existing relation of landlord and tenant. But the case here was not of that nature. The appellant's father was a banker not previously connected with the lands of which he obtained this lease, but who had lent money to the father of the respondent. A banker lending money to a zamindár cannot sue the zamindár to grant him a pattá; but the pattá mentioned in Section 3 of Act VIII of 1865, can be demanded as a right. In the present case the previously existing relation of landlord and tenant contemplated by the Act was not found. There was no occupation, and no binding contract to grant a lease. The relation of landlord and tenant begins only with the lease itself. To hold that lease exempt from registration would be equivalent to saying that no lease made in the Madras Presidency need be registered, and would frustrate the whole policy of Act XX of 1866. Further, the contention that the proviso of Section 11, Madras Act VIII of 1865, applies only to suits under Sections 8, 9 and 10 of that Act, is not supported by the language used in Section 11, which does not so limit its application. That section applies generally to all suits and is a substantive enactment. The authorities cited do not touch the case.

(1) 7 Mad. H. C., Rep. 234.

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Mr. *Mayne*, in reply: The respondent's contention that Act VIII does not apply where the lease is to a stranger is incorrect. It provides that a pattá may be demanded for waste lands, in respect of which there can be no anterior relationship of landlord and tenant. It is also incorrect to say that assuming the appellant's contention that the instrument in dispute is a pattá under Act VIII and so exempted from registration to be true, it would follow that no lease in Madras would require registration. All leases granted by persons other than landholders would still have to be registered.

Their Lordships' judgment was delivered by

Sir MONTAGUE E. SMITH:—This was a suit brought by the Collector of Madura, acting for the Court of Wards, on behalf of the minor Zamindár of Ramnad, against the defendant to recover possession of the village of Selugai, and also to set aside a lease of that village granted by the late Zamindár of Ramnad, the minor's father, in the year 1870. The learned Counsel on the part of the appellant, the defendant below, has not sought to impeach the judgments of the Courts below so far as they set aside the lease of 1870, but his contention has been directed to establish a former pattá which had been granted by the late Zamindár to the appellant's father in the year 1867. It does not appear that the question which has been argued at the bar was the subject of decision in the High Court. The judgment of the District Judge of Madura proceeded upon the footing that the document of 1867 was inadmissible in evidence. It is an unregistered document made before the birth of the present plaintiff. The District Judge also held that the lease of 1870 which was registered did not bind the minor plaintiff, inasmuch as it was granted after his birth, and upon considerations which did not support it against his inchoate title. Their Lordships feel regret and some surprise that the Judges of the High Court have given no reasons for their judgment; none have been reported to their Lordships.

The sole question which is now before their Lordships is whether the document of 1867, in consequence of its not having been registered, is admissible in evidence and affects the estate; the point for decision being whether it is a document that falls within the General Registration Act No. XX of 1866.

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The argument having turned entirely upon the effect of this Registration Act, which refers to a Madras Act, and upon the construction of those two Acts as applicable to the instrument, it is unnecessary to go into the previous history of the case. It is sufficient to say that the late Zamindár of Ramnad was adopted by the widow of a former Zamindár; that his adoption was disputed, and great litigation was the consequence of that dispute. The case ultimately came before this tribunal upon appeal, and a decision was given, in May 1868, in favour of the adoption. Considerable expenses were necessarily incurred, and the defendant's father, Arunáchalam Chetti, and his partners, who appear to have been merchants and bankers, made very large advances to the Zamindár and his agents for carrying on the legal proceedings. In 1867, when the document in question was granted, the advances amounted to about a lakh and a half of rupees; and at the end of the litigation the further advances and accumulated interest amounted to very nearly four lakhs of rupees. The merchants who advanced the money took security for their advances, and in the end they received the whole of their money with compound interest, and several large sums by way of presents in addition to the interest.

The document on which the question arises is dated the 15th April 1867, and professes to be a lease from the late Zamindár to Arunáchalam Chetti. Its terms are these: "In consideration of the assistance you have rendered to this Samastánam (zamindárí), you requested that the Kasba (chief) village of Selugai, in Selugai division in Raja-Singamangalam Firka, should be leased to you for 40 years, fixing a favourable poruppu (a low rent). The aforesaid Selugai village"—describing it—"has been accordingly leased to you for 40 years from this Fasli 1276 up to Fasli 1315, fixing the poruppu at 400 rupees per annum." It may be stated, in passing, that it is found that the value of this village was 1,700 rupees per annum so that it was obviously a favourable lease, which was intended to confer a valuable interest on the lessee. "You shall, therefore, raise the required crop and enjoy; and, agreeably to the kúraranáma (agreement) you have given, you shall continue to pay the fixed poruppu according to the instalments of kist year after year."

This lease was not registered. It is the document upon which the defendant now relies to resist the claim to the possession of

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the village made on the part of the minor Zamindár; for, as has been already stated, it is not now contended that the judgments below with regard to the lease of 1870 can be impeached.

It is necessary to refer shortly to Act No. XX of 1866, though the main question arises upon the Madras Act VIII of 1865, to which reference is made in it. By the 17th section of Act No. XX "leases of immoveable property for any term exceeding one year" are required to be registered. The interpretation clause, (clause 2) says of the word "lease," "'Lease' includes a counterpart, a kabulyat, an undertaking to cultivate or occupy, and an agreement to lease, but not a pattá or muchalka as respectively defined in section 3 of Act No. VIII of 1865 of the Governor of Fort St. George in Council executed in the Madras Presidency." It is contended on the part of the defendant that this document is a pattá as defined in section 3 of this Act.

The preamble of the Madras Act is as follows: "Whereas it is expedient to consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent." Section 3 seems to be confined to the relation of tenants who are cultivating the land and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be, by section 3 and the sections which specifically refer to it, to regulate the relation of landlords and tenants of that description. This 3rd section, which is the one under which this document must be brought, if it is to escape the obligation of registration, is as follows: "Zamindárs, Shrotriemdárs, Inamdárs, and persons farming lands from the above persons, or farming the land revenue under Government, shall enter into written agreements with their tenants, the engagements of the landholders being termed pattá, and those of the tenants being termed muchalka." It is said that this description embraces all cases where there is a landlord and a tenant. If that were the construction of the 3rd section as applied to the Registration Act, the consequence would be that in Madras all leases would be excluded from the beneficial operation of that Act. However large the premiums that may have been given on such leases, however small the rent, if there be a rent at all, according to the contention on the part of the appellant, the lease would fall within the 3rd section, and therefore need not be registered. One class of those who

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are described as landlords as distinguished from tenants are persons farming lands from Zamindárs and others who are previously mentioned; but if the wide construction were to prevail, every lease from a Zamindár to any such person intermediate between the Zamindár and the ryots, would be a lease which need not be registered; and the mischief against which the Registration Act was intended to provide a remedy would exist in the case of all the valuable leases which are granted by Zamindárs to intermediate holders.

The reference in the Registration Act is to a "pattá or muchalka as respectively defined in section 3." This section of the Madras Act does not strictly contain a definition, but a description only. It appears to provide for what shall be done where there is an existing relation of landlord and tenant, and requires that the landlord shall in that case enter into a written engagement with his tenant. Following the provisions of the Act, the remedies which are given in sections 8 and 9 can only be available where the relation of landlord and tenant, or a holding of some sort, already subsists, upon the basis of which the landlord or the tenant, as the case may be, may come into Court and claim to have a lease granted. Section 8 is, "When any of the landholders specified in section 3 shall for three months after demand refuse to grant such a pattá as his tenant was entitled to receive, it shall be lawful for the latter to proceed by filing a summary suit before the Collector, who shall try the case and direct a proper pattá to be granted." Under section 9, the landlord may in like manner compel the tenant to accept a proper pattá. These provisions are made upon the assumption that there is an existing relation which would warrant the application by either party for a written pattá. It cannot, of course, be contended that in this case the Zamindár was bound to grant the lease of 1867, or any lease to Arunáchalam Chetti. The other provisions of the Act are consistent with this construction of section 3. Sections 5, 10, 11, and 12 refer specifically to the class of landlords described in section 3; whilst section 13 refers to other classes, showing that section 3 was not intended to apply to all cases of persons holding under others, but to a particular class of landlords and tenants only.

A further question was raised in the first instance before the District Judge, viz., whether, supposing the document of 1867

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to be a pattá within the meaning of the Madras Act VIII of 1865, the proviso which is found at the end of section 11 would not nullify its effect as regards the respondent, the "successor" of the grantor? There seems to be ground for the contention that this proviso is not limited to cases where suits are brought under the 8th, 9th, and 10th sections, although the commencement of the 11th section refers to such suits. The commencement is: "In the decision of suits involving disputes regarding rates of rent which may be brought before Collectors under sections 8, 9, and 10, the following rules shall be observed," and then come four rules. Three of them appear to apply to such suits, but it may be doubtful whether clause 4, which relates to waste lands, is so confined. Then the proviso referred to is, "Provided also, no pattás which may have been granted by any such landholder at rates lower than the rates payable upon such lands, or upon neighbouring lands of similar quality and description, shall be binding upon his successor, unless such pattá shall have been *boná fide* granted for the erection of dwelling houses, factories, or other permanent buildings, or for the other purposes mentioned in the proviso." It is difficult to suppose that the operation of this proviso was intended to be confined to cases in which suits are brought under sections 8 or 9; and it may be that it was intended to apply to all pattás which come within the 3rd section. If so, the appellant, assuming the respondent to be a successor within the meaning of the proviso, would be placed in the difficulty which induced his advocates at the first hearing before the District Judge of Madura to take the opposite view from that which his Counsel has taken to-day, and to contend that this document was not a pattá within the meaning of the Madras Act, a view which was upheld by the Judge. It is not, however, necessary to decide this point.

On the whole, therefore, their Lordships are of opinion that this appeal fails, and they will humbly advise Her Majesty to affirm the decrees of the Court below, with costs.

Agents for the appellant: Messrs. *Gregory, Rowcliffes and Rawle.*

Agent for the respondent: Mr. *H. Treasure.*

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1878. November 27.

MODALATHA (APPELLANT), 1ST DEFENDANT.*

Act X of 1877, Sec. 584—Construction—Second Appeal—Defendant.

A defendant who obtains a judgment in his favor in the Court of First Instance, and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a rehearing, may under Act X of 1877 present a second appeal against the decree of the Lower Appellate Court.

THE appellant was defendant in a suit in the Court of the Subordinate Judge of North Malabar. The Subordinate Judge made a decree in his favor, but on appeal by the plaintiff to the District Court, he did not attend, and the case was heard *ex parte* under Section 556 of Act X of 1877, and the decree in his favor modified.

The appellant did not apply to the District Judge for a rehearing under Section 560, but presented a memorandum of second appeal to the High Court. The question was raised whether he was entitled to file an appeal from the decree of the Lower Appellate Court without first applying for a rehearing to the Lower Appellate Court, or whether an appeal lay from an appellate judgment "*ex parte*."

The matter having been mentioned by the Registrar to the Court, notice was directed to issue to the plaintiff to show cause why the memorandum of appeal should not be received.

Mr. *Shephard* for first defendant:—Section 584 gives the right of appeal from all decrees, and there is no provision of the present code prohibiting an appeal from a judgment *ex parte*. The late code contained in Section 119 a prohibition against an appeal from a dismissal of a suit for default of plaintiff, and decree *ex parte* against defendant. There is no provision in the present code corresponding to Section 119. The cases *Chidambara Pillai* v. *Kaman* (1), and *Dévappa Setti* v. *Rámanádha Bhatt* (2), were decisions under the late code. It was decided in *Dévappa Setti* v. *Rámanádha Bhatt* (2) that an application to rehear was necessary to be made by a respondent in the Lower Appellate Court who had not appeared there, and against whom the case was heard

* Admission Case No. 2 of 1878.
(1) 1 Mad. H. C. Rep., 189.
(2) 3 Mad. H. C. Rep., 109.

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ex parte. Independent of the fact that it was under the late code, it was practically overruled in *Chinnappa Chetti* v. *Nadaraja Pillai* (1). In that case there *was* an application to rehear and it was refused; but it was not there decided that such application to rehear was necessary before presenting an appeal. The special appeal was admitted from the decree *ex parte*, the Court holding that the provisions of Section 119 did not apply to a decree *ex parte* in appeal. The Court also held that as the section under which the dismissal (for default) of the appeal took place (Section 346) contained no clause prohibiting an appeal, therefore a special appeal was not prohibited. That decision in principle applies to this case. Chapter 42 in Section 587 provides that Chapter 41 shall apply, as far as may be, to appeals. Section 560 is in Chapter 41, and, if it was intended that there should be no appeal from Appellate Courts' *ex parte* decrees, exception would most probably have been made for such a state of circumstances in Section 584.

Under the new code either an appellant whose appeal is dismissed for default, or a respondent against whom there is an *ex parte* decree, may have a second appeal without resorting to a rehearing under Section 560.

The plaintiff did not appear.

The Court delivered the following judgments:—

KERNAN, J.—The right of appeal to the High Court from all decrees of the Lower Appellate Court is given in Chapter 42, Section 584, without any exception or restriction as to the parties to the record or to the circumstances under which the appeal has been heard.

There is no prohibition, express or implied, in the new code against an appeal (on the grounds contemplated by Section 584) by a defendant, as to whom the Lower Appellate Court made a decree *ex parte* under Section 556. Chapter 42, Section 587, provides that Chapter 41 shall apply, as far as may be, to appeals under Section 584.

Section 560 in Chapter 41 is clearly not inconsistent in any way with Section 584. That section (560) provides that a defendant, who has been prevented from attending the appeal in the Lower Appellate Court by proved sufficient cause, may apply to that Court to have the case reheard, and that Court

(1) 6 Mad. H. C. Rep., 1.

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is authorized to rehear it on terms or otherwise as the Court thinks fit.

Such application is treated by the code, and rightly so, of such importance that an appeal against a refusal to rehear is given by Section 588, cl. *v*.

The importance of a rehearing is obvious if the facts are in dispute, inasmuch as, upon a hearing or rehearing in the Lower Appellate Court, the evidence as to the facts, and the true result of that evidence, is open to discussion and adjudication. Upon a second appeal the weight of the evidence, or the true result, in fact, of that evidence, is not open to discussion, and the finding of the Lower Appellate Court is, except perhaps under very extraordinary circumstances, binding as to the facts found by the Lower Appellate Court.

When facts are in dispute, it is therefore clear that a rehearing under Section 560 may be essential to a defendant against whom an *ex parte* decree in appeal has been passed. But the provisions of Section 560 may be unnecessary to be resorted to by a defendant *ex parte*, when the question in dispute is not one of fact, but of law, on admitted facts or on documents. It may be that the case is one upon which, from the amount involved, each or either party may resolve to have the opinion of the High Court, or it may be that one of the parties has confidence in the judgment already given in favor of a party respondent in the appeal, and may not think it desirable or convenient to attend in the Court of Appeal. In such cases, and others that might be mentioned, the application to rehear would be utterly useless and could not properly or legally be made or complied with, as the party should not have been prevented by any sufficient cause from attending the hearing of the appeal.

Here then would be cases in which, if there was not a second appeal, there would be no appeal against a decree of the Lower Appellate Court even though there might be very sufficient grounds under Section 584 for such appeal. The result would manifestly be inconsistent with Section 584 and with Section 560. Giving therefore Section 560 its full effect, it does not provide for the circumstances under which some cases may be heard *ex parte*. It is limited to particular cases. In the present case the first defendant does not appear to require a rehearing

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on the facts. He does not offer any reason for not attending the appeal. In point of fact his case does not come within Section 560, but does come within Section 584 in point of law.

There may, perhaps, be some inconvenience caused by the High Court hearing and determining the case on arguments and views not presented to the Lower Appellate Court, but in construing the code we must look to the provisions of it and not to reasons outside it.

We will admit the memorandum of appeal.

MUTTUSÁMI ÁYYAR, J.—I am also of the same opinion.

Section 584 allows a second appeal from all decrees passed in appeal unless otherwise provided in the code or by any other law. Though Section 587 declares that Chapter 41 shall apply to second appeals as far as it may be applied, there is no prohibition in that chapter of a first or second appeal. It may be a question whether an appeal does not lie even from an *ex parte* judgment, the restriction contained in Section 119, Act VIII of 1859, being omitted in the corresponding section of the present code (108), but it is not now necessary for us to decide that question. It is true that Section 560 enables a respondent to move for a rehearing when the appeal is heard *ex parte*, provided that he can satisfactorily account for his omission to appear at the hearing; but this section is permissive and not mandatory. It is also true that an appeal is allowed from an order refusing a rehearing, but this may be, because the first Court of Appeal is also the final Appellate Court in questions of fact. The provisions of the present code seem to leave it to the party concerned to decide whether he ought to seek a rehearing or prefer a second appeal.

I would allow Mr. Shephard's application and admit the second appeal.

Appeal admitted.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

1879. January 8.

ANAKARAN KASMI (DEFENDANT) APPELLANT, *v.* SAIDAMADATH AVULLA AND 2 OTHERS (PLAINTIFFS) RESPONDENTS.*

Specific performance—Unpaid balance of Mortgage.

In a suit to compel the defendant to advance Rupees 1,800 or thereabouts to the plaintiffs, the unpaid balance of a sum of Rupees 3,000 which defendant agreed to advance on mortgage and for which a mortgage was executed and delivered to the defendant: *Held* that the Court ought not to make a decree for specific performance of such agreement.

The *Advocate-General* for the appellant.

Mr. *J. H. S. Branson* for the respondents.

The facts of this case appear sufficiently from the judgment of the Court (KERNAN, J., and FORBES, J.)

JUDGMENT.—This is a suit to compel the defendant to advance Rupees 1,800 or thereabouts to the plaintiffs, the unpaid balance of a sum of Rupees 3,000 which defendant agreed to advance on mortgage and for which a mortgage was executed and delivered to the defendant.

Defendant set up as defence that he had advanced the full sum to the plaintiffs. But the Munsif and the Lower Appellate Court both found that he had not advanced the full sum. The sum of Rupees 1,625 or thereabouts is still unadvanced to the plaintiffs.

The Munsif dismissed the suit on the ground that it was not a case in which specific performance should be granted of an agreement to lend money on mortgage.

The Lower Appellate Court reversed the decree of the Munsif and ordered the defendant to pay to the plaintiffs the sum of Rupees 1,625 and plaintiffs' costs in the Lower and Appellate Courts.

We do not agree with the District Judge. The Court ought not to make a decree for specific performance of an agreement to lend money on mortgage. Plaintiffs may obtain compensation or damages in a properly framed suit against the defendant for breach of his contract, or they may redeem the mortgage on

* Second Appeal No. 464 of 1878, against the decre[illegible] of J. W. Reid, District Judge of North Malabar, dated 26th February 187[illegible] [illegible]ersing the decree of the District Munsif of Kavay, dated 21st March 1877.

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payment of the sum due, if they wish to prevent the defendant from assigning the mortgage.

We reverse the decree of the Lower Appellate Court but without costs in the Appellate Court, as the defendant set up a false defence of the advance of the full Rupees 3,000. Defendant is to have his costs in this Court.

We restore the decree of the Munsif.

APPELLATE CIVIL.

Before Sir Walter Morgan, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyár.

1878. November 18.

RÁMANÁDAN AND TWO OTHERS (PLAINTIFFS) APPELLANTS, *v.* SRÍNIVÁSA MURTHI AND THE AGENT OF THE COURT OF WARDS (DEFENDANTS) RESPONDENTS.*

Hindu Law—Authority of Zamindár to grant lease—Madras Act VIII of 1865, *Sec.* 11, *Rule IV.*

Under the Hindu law the granting of a lease, though for a term, is an act within the scope of a Zamindár's authority as manager and owner of the zamindárí, and is, as such, binding on his successor, unless, in the circumstances in which it was made, it was otherwise than *boná fide*.

The second proviso contained in Rule IV, Sec. 11, Madras Act VIII of 1865, does not apply to a lease which is *boná fide* and valid under the general Hindu law, and, as such, falls under Rule I. This proviso does not amount to a repeal of the Hindu law regarding ordinary leases, but applies only to such leases when in the circumstances in which they are made they amount to a fraud upon the power of the grantor's successor as manager, or to alienations made for the *personal benefit* of the grantee and to the projudice of the successor.

THE suit was brought to recover damages from defendants for having ejected plaintiffs from $29\frac{1}{2}$ villages, part of the zamindárí of Ramnád, before the expiration of a lease made by the late Zamindár to the grandfather of the plaintiff. The Subordinate Judge dismissed the suit with costs.

The plaintiff appealed to the High Court on the following grounds:—

1. The plaintiffs are entitled to the relief asked for, the lease constituting a binding contract for the term therein mentioned.

* Regular Appeal No. [illegible] of 1877, against the decree of G. Muttusámi Chetty, Subordinate Judge of M[illegible], dated 31st March 1877.

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2. The possession of the plaintiff under the lease was wrongfully invaded by the defendants, who were liable to damages for their wrongful acts.
3. There was no forfeiture and no surrender in this case as found by the Subordinate Judge.

The *Advocate-General* for the Appellants.

The *Government Pleader* for the Second Respondent (defendant).

The Court (MORGAN, C. J., and MUTTUSÁMI ÁYYAR, J.) delivered the following

JUDGMENT.—This was a suit to recover compensation for the defendants having unlawfully ejected the plaintiffs from certain villages forming part of the zamindárí of Ramnád. The plaint sets forth that these villages were granted on a lease to the plaintiffs' grandfather on the 5th December 1862 for a term of 13 years, and that upon the death of the lessor the Agent to the Court of Wards dispossessed them on the ground that the lease was not binding on the minor Zamindár. It was contended for the defendants that the lease was invalid against the present Zamindár, and that, upon the second defendant's refusal to recognize it, the son of the lessee voluntarily relinquished it. The Subordinate Judge of Madura held that the lease was not profitable to the estate, and on that ground upheld the contention for the defendants. The questions for our decision are whether there was a voluntary relinquishment of the lease, and whether, in the circumstances in which it was granted, it is binding on the Court of Wards.

As to the first question we are of opinion that the alleged relinquishment was anything but voluntary. The contention rests mainly upon the omission on the part of the plaintiffs' father to resist and protest against his dispossession, but we think that it was owing to a belief that such a proceeding would be ineffectual. It is in evidence that, without any communication with the lessee or reference to his wish, Mr. Lee-Warner put an end to the lease and directed the Tahsildar to take possession of the plaint villages; and the absence of opposition to such acts is, in our opinion, no evidence of a voluntary surrender. Having regard to the net income derived from the villages during the unexpired portion of the lease, we fail to discover any motive for

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a voluntary relinquishment, and we therefore entirely concur in the finding of the Court of First Instance that there was no such relinquishment.

As to the second question, the Subordinate Judge is wrong in holding that the lease is not binding upon the present Zamindár. Under the Hindu law the granting of a lease, though for a term, was an act within the scope of the late Zamindár's authority as manager and owner of the zamindárí in 1272, and is, as such, binding on his successor, unless, in the circumstances in which it was made, it was otherwise than *boná fide*. The Subordinate Judge compares the net income realized in 1283 and in 1284, when the estate was under the management of the Court of Wards, with the rent reserved in the lease in 1272, and, assuming that the income in 1283 was also the income derived in 1272, concludes that the transaction entailed on the zamindárí a loss of income ranging from 35 to 45 per cent. per annum. This is clearly a mistake, and the proper mode of finding whether the lease was fair or otherwise ought to have reference to the income derived and the condition of the estate at the date of the lease. The document C sets forth the rent derived by the late Zamindár from 1262 to 1271; recites that that rent had been fixed on the average yield of the previous ten years; and mentions in detail the circumstances which led the parties to it to regard the transaction as beneficial to the estate; and, in the absence of evidence to show that these recitals are false, we are unable to come to the conclusion that, in granting the lease set forth in the plaint the late Zamindár acted otherwise than *boná fide* and for the benefit of the estate. Though the lease is for a term, the term of thirteen years is not so unreasonably long as to raise a presumption of *mala fides*, and, under these circumstances, we do not think that it is competent to the Court of Wards to set aside the lease on the ground that a larger income can be derived under their management eleven years after the lease had been in force.

As to Rule 4, Section 11, Act VIII of 1865, the second proviso contained therein does not apply to a lease like the one before us, which is *boná fide* and valid under the general Hindu law, and as such falls under Rule I. This proviso does not amount to a repeal of the Hindu law regarding ordinary leases, as seems to have been supposed, and it applies only to such leases when in

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the circumstances in which they are made they amount to a fraud upon the Zamindár's power as manager, or to alienations made for the *personal benefit* of the grantee and to the *prejudice* of the *successor*.

Any other construction would be at variance with the principle that a special law is not to be construed so as to repeal the general law.

As to the remark of the Court below that the lease has been forfeited for non-payment of rent after the close of Fasli 1282, it would suffice to observe that the rent fell into arrears after the unlawful cancelment of the lease by the defendants, and that this circumstance distinguishes this case from the one cited by the Subordinate Judge (1).

As to the amount of compensation mentioned in the plaint there is no dispute.

For the foregoing reasons we are of opinion that the judgment appealed against should be reversed, and that the plaintiffs are entitled to a judgment for the amount claimed in the plaint, with costs, as against the estate of the minor Zamindár.

PRIVY COUNCIL.

P. C.* 1879. May 27.

CHIDAMBARAM CHETTIAR AND OTHERS (DEFENDANTS) APPELLANTS, *v.* GAURI NÁCHIAR, WIDOW OF GAURI VALLABHA TÉVAR (PLAINTIFF) RESPONDENT.

[On appeal from the High Court of Judicature at Madras.]

Partition under the Hindu Law—Declaratory order—Separation in estate—Death of Plaintiff before final decree.

In a suit brought by the younger of two Hindu brothers against his elder brother for the partition of lands belonging to an ancestral joint estate, and against other defendants, claiming as encumbrancers or as absolute owners of portions of the said lands under titles derived from the plaintiff's father and elder brother, for the recovery of the plaintiff's share of the said lands freed from the interests claimed by these defendants, except in so far as such interests might be valid as against the plaintiff under the Hindu Law, the Court passed an order to the effect that the property claimed was partible, and that the plaintiff was entitled to a moiety, but

(1) *Cutenho v. Souza*, 1 Mad. H. C. Reps., 15.

* *Present*:—Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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directed that with a view to ascertain how far the moiety awarded to the plaintiff was affected by the acts of the plaintiff's father and elder brother, a Commissioner should be appointed to investigate accounts and report thereon to the Court. Before the inquiry thus directed to be made was completed, and before a final decree was passed for the division of the property, the plaintiff died. *Held*, that the order passed by the Court was tantamount to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from its date, if they had not previously become so; and, consequently that the plaintiff's interest in the property in suit would not pass to the defendant, his elder brother, as joint estate by survivorship, but to his own representatives as separate estate.

Apporier v. *Rama Subha Aiyan*(1) referred to and followed.

THIS was an appeal against a decree of the High Court of Judicature at Madras, dated the 19th March 1875, substantially affirming a decree and judgment of the District Court of Madura, dated the 2nd April 1872.

The question raised by the appeal was as to whether the plaintiff's suit which was brought against his elder brother for a partition of lands belonging to the estate of their father, and against other defendants, who alleged title to these lands under sales and mortgages to them by the father and elder brother of the plaintiff, for possession, should not upon the plaintiff's death without issue, before a final decree had been pronounced in the suit, have been dismissed by reason that at that date the proceedings in the suit had not effected such a severance of interest between the brothers, as would prevent the share of the younger passing to the elder by right of survivorship.

The appeal was brought by certain of the defendants who claimed as alienees or mortgagees of portions of the lands in suit.

Mr. *Cowie*, Q.C., and Mr. *J. D. Mayne*, for the appellants, contended that the suit abated on the death of the plaintiff, prior to which there had been no decree for partition, or none which bound the appellants. The decree for partition which had been made in the suit was not made till after the plaintiff's death. There was nothing in the present case to bring it within the law laid down in *Joynarain Giri* v. *Gresh Chunder Myti*(2). Apart from the decree finally passed, the plaintiff could have taken no measures to enforce his claim against the appellants.

(1) 11 Moo. I.A., 75.

(2) L.R., 5 Ind. Ap. 228, at p. 232; s. c. I.L.R., 4 Calc. 434, at pp. 437-438.

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Mr. *Leith*, Q.C., and Mr. *F. H. Bowring* who appeared for the respondent were not called on.

Their Lordships' judgment was delivered by

Sir JAMES W. COLVILE.—This appeal arises out of a suit brought by the younger son of one Gauri Vallabha Tévar, the late Zamindár of a dependent Zamindárí carved out of the great Shivaganga estate, against his elder brother and against a number of persons who claimed to be either incumbrancers upon or absolute owners of different villages comprised in the Zamindárí under titles derived from either the father or the elder brother of the plaintiff. The general nature of the suit was for a partition between the brothers, and for the recovery of the plaintiff's share freed from the interests claimed by the other defendants, except to the extent to which the alienations were valid against him under Hindu law. The litigation has now been reduced to the question whether and upon what terms the plaintiff's representatives are entitled to recover his moiety of the village Pattanam from the third defendant Ramasámi Chetti, and his moiety of the village Minnittangudi from the fourth defendant Rámanádhan Chetti. These two defendants are the present appellants.

The facts were very clearly and candidly stated by Mr. Cowie in his opening, and it is unnecessary to recapitulate them, because it is admitted that the decree impeached must stand, unless the appellants can succeed upon one ground. That ground is, that the plaintiff having died on the 28th of March 1872 without issue, the suit which was then pending ought to have been dismissed, inasmuch as the proceedings for a partition had not then gone so far as to effect that severance of interest between the brothers which would prevent the share of the younger from going over to the elder by right of survivorship. The following is the history of the proceedings in the suit, so far as they relate to this question. In August 1871 the first of the issues settled in the cause, viz., "whether the property sued for constituted a Zamindárí, and if so, whether it is partible or impartible, and whether it is liable to all the incidents of private property," was tried separately, and was determined by the Civil Judge in a judgment of the 24th of that month, which will be hereafter considered. He afterwards tried the other issues in the cause and disposed of them by his judgment and decree of the 2nd of

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April 1872. On that occasion the point now relied upon was first raised by a petition which bore date the day before, but was not filed in Court until the 2nd of April of that year. On that petition the Judge made the following order: "The case has been heard; oral judgment pronounced at the close of the hearing except in regard to details; and this day the Court delivered its written judgment; petition dismissed." The present appellants appealed against the decree of the 2nd April 1872, and the second of their grounds of appeal is the following: "The plaintiff died after the suit was brought, but before the decree was written or signed or judgment delivered," and that "under these circumstances the suit ought to have been dismissed, as no partition could be made."

On the 6th of January 1873 the High Court, before disposing of the appeal, remanded the cause to the Civil Judge, with directions to try whether the partition was complete when the plaintiff died, and when it became so; and also another issue. In his finding upon the first issue dated the 14th April 1873, the Judge said, "I am of opinion that the partition was complete, *i.e.*, that the brothers became divided in interest, at least on the 24th of August 1871, if not before. I regard that order as equivalent to a decree for dissolution of partnership and for an account. The shares were ascertained, and all that remained to be done was to see what charges, if any, on any particular properties, were good as against plaintiff. This was a question between the plaintiff and the alienees alone, and first defendant had nothing to do with it." The present appellants appealed against that finding, but the High Court in its judgment of the 5th of January 1874 expressed its concurrence in it.

Their Lordships have to determine whether that finding was not substantially right. In doing this they dismiss from consideration, as of no weight, the suggestion that in the month of February 1872, and before the written judgment of the 2nd of April of that year was delivered, there had been an oral judgment which would have effected a partition, or at least a severance of interest between the brothers, had there been no such severance previously. They proceed to consider the effect of the proceedings of the 24th of August 1871 on the separate trial of the first issue. The Judge then found that upon the evidence it was quite clear

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that the estate was in its nature partible, that the facts were incontestible, and stated that the defendants' vakils had given in their adhesion to the finding of the Court upon that issue. The judgment then proceeded as follows: "That being so, it is also not disputed that plaintiff is entitled to a moiety of the property left by his father at his death, whatever that moiety may be, subject to all charges then subsisting, and to such charges as have been incurred subsequently, as are of such a character as are recognized under Hindu law to be valid charges upon the estate, but to enable the Court to arrive at a correct conclusion it is necessary to appoint a Commissioner with power to investigate the accounts, and the result will be submitted for this Court's consideration." It then states the points which are to be referred to the Commissioners, all of which had reference to the different mortgages or alienations relied upon by the defendants, other than the plaintiff's brother, and to the question of how far the mortgages had been discharged by the usufruct of the mortgage property. It then adds, "In accordance with these observations an order will be prepared." No formal order or decree drawn up upon that judgment is to be found in the record, but their Lordships are by no means satisfied that there may not have been one. At all events they are of opinion that by this judgment there was a clear adjudication that the property was partible, and that the rights of the two brothers were that each should have a moiety, and that the only object of the subsequent proceedings in the suit was to ascertain how far the share of the second brother, which had thus been declared to be a moiety of each village, was affected by the incumbrances and alienations of his father and his elder brother. That this was the clear understanding and intention of the Judge, their Lordships think, appears from the 11th and 19th paragraphs of the judgment of the 2nd of April 1872. In the former he says, "The Court in its proceedings of the 24th August 1871 held that the estate in question was partible and subject to all the incidents annexed to property among Hindus, and that the plaintiff was entitled to a moiety of the property left by his father at his death, whatever that moiety might be, subject to all charges then subsisting and to such charges as have been incurred subsequently as are of such a character as are recognized under

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Hindu law to be valid charges upon the estate." In paragraph 19 he says, "This suit has now come before me in another form, and the points I have to determine are the conditions under which plaintiff is entitled to recover a moiety of his ancestral property." He does not in any part of this judgment deal with the question whether the brothers are to be declared separate or whether the property is partible. He treats all that as decided by the former proceedings, and deals only with the question of the plaintiff's right to recover his moiety of each village freed from the incumbrances thereon, or some part of them. It is to be observed that there was no appeal against the judgment of the 24th of August 1871 or its finding on the first issue; and that the first defendant, the elder brother, seems to have thenceforward acquiesced in the decision. For these reasons their Lordships are of opinion that the judgment of the 24th of August 1871 must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier* v. *Rama Subba Aiyan* (1), and there is no ground for the contention that upon the death of the plaintiff his interest passed to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree under appeal and to dismiss this appeal with costs.

Appellants' Agents: *Messrs. Gregory, Rowcliffes* and *Rawle.*
Respondents' Agents: *Messrs. Talbot* and *Tasker.*

(1) 11 Moo. I.A., 75.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

KARÍM (FIRST DEFENDANT) APPELLANT, v. MUHAMMAD KÁDAR (PLAINTIFF) RESPONDENT.*

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Pattá, right to enforce—Regular Suit.

A Regular Suit to enforce the acceptance of a pattá is maintainable.

IN this suit the plaintiff sought to obtain a decree declaring that he was a landlord and first defendant his tenant within the meaning of clauses 1 and 3, Section 1, Madras Act VIII of 1865, in respect of one acre of nanjah land, and that first defendant was accordingly bound to pay plaintiff mélwaram on the said land. Plaintiff further asked that first defendant should be directed to accept a pattá from plaintiff and to execute a muchalka for Fasli 1285 (1875-76). It was stated in the plaint that on the 2nd March 1876 plaintiff gave notice to first defendant to accept a pattá from him and execute a muchalka for Fasli 1285; that upon his refusal plaintiff filed a summary suit before the Collector to compel him to do so, and that first defendant having denied before the Collector plaintiff's title as landlord, plaintiff was referred to a civil suit. The first defendant alleged that he bought both the kudiwaram and mélwaram rights in the land from plaintiff twenty years before date of suit. The District Munsif decreed in favor of plaintiff as prayed for.

The first defendant appealed, and in argument it was urged that the present suit could not be maintained in the ordinary Civil Courts. The Subordinate Judge overruled this objection and confirmed the decree of the Court of First Instance.

The first defendant preferred a second appeal to the High Court on the grounds, among others—

That the present suit was not sustainable, being brought to declare the plaintiff a landlord within the meaning of Madras Act VIII of 1865, and to compel the exchange of pattá and muchalka which would be in the nature of a new agreement.

* Second Appeal No. 409 of 1878, against the decree of A. Annusami, Subordinate Judge of Tinnevelly, dated 31st January 1878, confirming the decree of the District Munsif of Tinnevelly, dated 27th June 1877.

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That the Court below had no jurisdiction to make a decree for exchange of pattá and muchalka under the provisions of Section 87 of the said Act.

C. Rámachandra Rau Saib for the appellant.

T. Ráma Rau for the respondent.

JUDGMENT:—In this case, while we considered the decree right in other respects, we reserved the question whether a regular suit could be maintained to enforce the acceptance of a pattá.

In Section 3, Madras Act VIII of 1865, landlords of the description therein enumerated are required in positive terms to enter into written engagements with their tenants. If, therefore, the action of the tenant precludes the landlord from doing what the law enjoins upon him, and without which he is disabled from making use of many of the summary remedies under the Act, he will have his right of action to compel the tenant to do that which will enable the landlord to conform to the law, unless such right of action is taken away by other provisions of the law.

We have not been referred to any such provision. Section 7 of this Act is no bar to the right of suit, as a suit to enforce acceptance of a pattá is not a suit to enforce the terms of a tenancy, but a suit to compel the defendant to agree to terms; and even were it so, the plaintiff having tendered a pattá would not be disabled by that section from bringing his action.

Section 87 requires the Courts in regular suits regarding rates of rent to be guided by the provisions of Act VIII of 1865, but places no explicit restriction upon the institution of other suits between landlord and tenant for the enforcement of their respective rights. In the recognition of the jurisdiction of the Regular Courts over suits for *arrears of rent or revenue* which occurs in the early part of the section, it may perhaps be doubted whether there is not an implied exclusion of the jurisdiction of the Regular Courts over other suits which may be instituted summarily under the Act. The concluding part of the section however shows that no such exclusion could have been intended, because a class of suits is there recognized as cognizable which under such interpretation would not be so.

The language of Section 9 also appears to be merely permissive of the right of the landlord to adopt the summary remedy and not to shut him out from the remedy by regular suit. The

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remedy by summary suit was originally given as an alternative remedy (see as to this *Gopálasámi Mudali* v. *Mukki Gopál Ayyar*) (1), and there is nothing to show that the landlord is debarred the remedy by regular suit in such a case as that before us. The second appeal will be dismissed with costs.

PRIVY COUNCIL.

P. C.*
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May 8, 9, 10, 13, 14; June 14.

RAMASÁMI AIYAN AND OTHERS (DEFENDANTS) *versus* VENKATARÁMAIYAN *alias* CHIDAMBARAIYAN (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Hindu law—Adoption by widow—Agreement by natural father restricting son's interest in the inheritance of his adoptive father.

The natural father of a boy whom the widow of a deceased Hindu proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father: *Held*, that the agreement was not void, but was at least capable of ratification when the adopted son became of age.

Chitko Raghunath Rajadiksh v. *Janaki and others* (2), referred to.

THIS was an appeal against a decree of the High Court of Judicature at Madras, dated the 24th January 1877, reversing a decree of the District Court of Trichinopoly, dated 15th January 1875. The defendants were the appellants, and the respondent the plaintiff in the original suit. The plaintiff sued as heir of one Rangasámi, by virtue of an adoption made by Rangasámi's widow after his death, to set aside various dispositions of the property made by the widow before the adoption. The defendants were the widow and various persons who claimed under the disputed transactions.

Neither the adoption nor the transactions in dispute were denied. The defence set up was that the plaintiff had been adopted by the widow upon the faith of an express written agreement by his natural father that none of the transactions now sought to be set aside were to be disputed, and that this agreement had been ratified in writing by the plaintiff himself nine years after his adoption and two years after he came of age.

(1) 7 Madras H. C. Rep., 312.

* *Present*:—Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

(2) 11 Bom. H.C.R., 199.

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The District Judge of Trichinopoly dismissed the suit, holding that the plaintiff was estopped by the ratification executed by him after he came of age. The High Court reversed the decree of the District Judge on the ground that the agreement entered into by the plaintiff's father on giving him in adoption was inoperative, and that the plaintiff was not bound by his own ratification since it was given without a full knowledge of the circumstances. The facts of the case are fully stated in their Lordships' judgment.

Mr. *Leith*, Q.C., and Mr. *J. D. Mayne* who appeared for the appellants contended that the plaintiff's natural father was competent to deal on behalf of his son and to enter into a valid agreement restricting the interest which his son would take upon his adoption in the inheritance of his adoptive father. There was nothing in Hindu law to invalidate such an agreement. The adoption had taken place on the terms of that agreement. If the agreement were set aside it would be impossible to restore the parties to the position in which they were before the adoption. It was a fallacy to argue that at the time of the agreement the plaintiff had rights out of which his father contracted him. What rights he got, he got under his father's agreement. Possibly, if he had thereby been deprived of all benefit under the adoption, the agreement might not have been valid. The effect of the agreement was to stipulate that the acts of the widow, whether regular or not, should not be questioned. The agreement had in fact been ratified by the plaintiff after he came of age.

Mr. *Cowie*, Q.C., and Mr. *Graham* for the respondent, contended that under the circumstances of the case the plaintiff's father was not competent to renounce the rights of the son whom he was giving in adoption; and that the alleged ratification by the plaintiff was made shortly after he came of age and in ignorance of facts which were fraudulently concealed from him.

Mr. *Leith* replied.

The following cases were referred to in the course of the argument :—*Chitko Ragunath Rajadiksh* v. *Janaki and others* (1); *Vinayak Narayan Jog* v. *Govindra Chintaman Jog* (2) *Bamundoss Mookerjea* v. *Mussamut Tarinee* (3); *Radhamonee*

(1) 11 Bom. H.C.R., 199.
(2) 6 Bom. H.C.R., 224.
(3) 7 Moo. I. A., 169.

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Debea v. *Jadubnarain Roy* (1); *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (2); *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (3); *Chowdry Pudum Singh* v. *Kooer Ooday Singh* (4).

Their Lordships took time to consider their judgment which was delivered by

Sir ROBERT P. COLLIER.—The facts of this case material to its decision are as follows :—

Rangasámi Aiyan was the youngest of three brothers of a joint Hindu family. The eldest brother died in the year 1858, leaving a widow named Thayammál. On his death the two remaining brothers made a partition of the property to which they were entitled. The second brother died in 1860, leaving a widow named Lakshmiammál. Rangasámi had a wife, the daughter of his cousin Ramasámi, who was the brother of Thayammál. Rangasámi, having no children, on the 19th of January 1861 executed the following document :—

"Agreement executed on the 19th January 1861 by me, Rangasámi Aiyan, son of Subbaiyan, residing at Minakshipuram, in the Trichinopoly Taluk, while in the possession of sound mind, in favor of Ramasámi Aiyan, son of Anantakrishnaiyan, residing at Kulumani in the said taluk, to wit :—

"In the villages of Minakshipuram aforesaid, Gouripuram, Tiruppulatturai, Analai, Rangachchipuram, Elumanur, Antamallur, Ammangudi, Kulumani, Mulangudi, Tachchagudi, and Kottattai, I hold some property. Besides, in respect of the moveable and immoveable property standing in the names of Lakshmiammál, the widow of Visvanadhaiyan, my elder brother, and others, I brought a suit in No. 5 of 1860 on the file of the Civil Court, which is now pending in appeal before the Sadr Court. My present state of health is, however, too bad to permit me to manage and take care of the said (last-mentioned) property, as well as the said (first-mentioned) house-ground, houses, cattle, &c. Besides, I have no issue, and have consequently adopted your son Krishnasámi this day according to law. You shall, therefore, yourself manage the affairs of all the moveable, and immoveable property, &c., except three cheis of land constituting

(1) S.D.A. (Bengal), 1855, p. 139.
(2) 24 W.R., 183.
(3) L.R. 4 Ind. Ap., 1.
(4) 12 Moo. I. A., 350.

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two shares in the village of Kulumani, which I have given away to my elder sister Tangammál, as manjakani (land granted for expenses), pay the Government revenue, &c., assessed thereon, render the necessary assistance in the interests of the said suit, and maintain my adopted son aforesaid. Besides, you should deliver up to the two persons aforesaid so soon as my said adopted son attained his age, all the said moveable and immoveable property, and all the other property save such as might have been legitimately expended till then. Furthermore, you should administer the charity of distributing boiled rice, &c., at my house in the village of Minakshipuram, and by applying therefor the incomes derivable from the wet and dry lands of that village left after paying the expenses, Government revenue, &c., keep an account of receipts and disbursements in that matter, and you should get Krishnasámi, my adopted son aforesaid, after he attained his age, and Lokambal my wife, these two to administer these charities in perpetuity, and in a manner allowing no scope for any shortcomings.

"You should also, while thus acting, and until my son attained his age, look after the duties of the office of manager, which I hold in my name with respect to the Tiruppulatturai pagoda.

"To this effect, I, Rangasámi Aiyan, execute the agreement in favor of Ramasámi Aiyan."

In pursuance of this instrument the child therein mentioned was adopted, and Ramasámi undertook the management of the estate.

On the 9th of February 1861 Rangasámi executed the following document, which is termed in the record a muktiarnáma :—

"Muktiarnáma (general power of attorney) executed on the 9th February 1861 by Rangasámi Aiyan, son of Subbaiyan, residing at Minakshipuram, in the Trichinopoly Taluk, in favor of Rámasámi Aiyan, son of Anantakrishnaiyan, residing in the village of Kulumani, in the said taluk, to wit:—At present the state of my health is not satisfactory, and I have no issue. Besides, for the management of my own immoveable property which I am in the enjoyment of, for the conduct of the suit which I brought in No. 5 of 1860 on the file of the Civil Court against Lakshmiammál, the widow of Visvanadhaiyan, my elder brother, touching certain property, and which I have now brought on appeal in No. 25 of the same year, on the file of the Sadr Court, and for the looking after of my adopted son, Krishnasámi, minor, my wife and myself, I have no friend to look up to but yourself. You should therefore look after us as mentioned above, and hold all my property according to your pleasure and manage the same. If the

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said Sadr Appeal No. 25 should also terminate against me, you should take upon yourself and manage the dry and wet land forming the 11 pangus (shares) in the village of Minakshipuram, the 4 pangus (shares) in Analai, 1 pangu (share) in Tiruppilatturai, and 1 pangu (share) in Tachchangudi, 1 house-ground in Kulumani, out of the property in my possession, and, without concern in the profit or loss therefrom arising, make the same over to my adopted son after he attained his majority. Besides, as I have consented to Thayammál, the widow of my elder brother, Venkataramaiyan, making an adoption, which she is attempting to do in accordance with the authority given by my elder brother aforesaid, you should get my wife to give up out of our property to the said Ammál (lady) the one-third share of my elder brother aforesaid, a dwelling-house, 1 Machchupatti house-ground, cattle, ploughs, &c., all in a group, with liberty to alienate the same by sale and to appropriate the same according to her own pleasure. The remaining lands you should get my wife to dispose of by sale, &c., in satisfaction of the debts contracted by me for the family expenses and for the costs of the said suit, and clear off my debts in full. Your are at liberty yourself to demand and recover the sundry debts due to me. All prior documents of any kind whatsoever referring to the above subject shall become null. I have thus with my full consent executed to you this muktiarnáma (general power of attorney)."

The High Court of Madras, of whose judgment some notes, obviously very imperfect, are to be found in the record, appear to have treated this document, which was not registered, as open to much suspicion. It may be, but inasmuch as it has been found to be genuine by the Lower Court, before which some of the attesting witnesses were called, while no evidence directly impeaching it was produced, their Lordships find no sufficient grounds for disbelieving its execution, or setting it aside as invalid.

Rangasámi died in 1871, not long after the execution of this document, but the precise date of his death does not appear.

On the 10th June 1862 the widow of Rangasámi, Lokambal, assuming to act under the directions of the muktiarnáma, executed a release to Thayammál of what may be described in general terms as one-third of the family property.

On the 23rd June of 1862 Lokambal, assuming to act under the same authority, executed three deeds of sale, to one Vamanaiyan, of what may be described in general terms as another

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one-third of the property for advances alleged to have been made to her for the payment of her husband's debts.

It appears that the property conveyed to Tháyammál found its way, after some interval, into the hands of her brother, Rámasámi, and that by the last three deeds Lokambal in effect conveyed the property to which they refer to Rámasámi, her father, who admits the sale to the nominal purchaser to have been benamee for him, alleging that he paid the consideration money, and that it was appropriated to the payment of the debts of Rangasámi. Almost immediately after the execution of these deeds the adopted son died.

Thereupon the widow proceeded to make a new adoption under authority from her husband (as is now conceded), and with this object entered into the following agreement with one Mutturamaian for the adoption or his son, who is the plaintiff in this suit.

"Agreement executed on the 23rd Ani of Dundhubhi, corresponding to the 5th July 1862, by Mutturamaiyan, son of Venkaiyan, residing at Dikshasamudram, otherwise known as Mullakudi in the Trivadi Taluk, in the Combaconum district, in favor of Lokambalammál, the widow of Rangasámi Aiyan, residing at Minakshiammalpuram, in the Trichinopoly Taluk, in the Trichinopoly district, and Rámasámi Aiyan, the authorized agent of the said Rangasámi Aiyan, to wit:—

"After entering into a partition, the said Rangasámi Aiyan adopted Krishnasámi, a minor, and died some time afterwards; and, some time after this, Krishnasámi also died. Thereupon, with a view to the fulfilment of the said Rangasámi Aiyan's wish to make an adoption, I gave my son, Chidambaram *alias* Venkataráman, in adoption to the said Lokambalammál according to law with my full consent. Excluding the sales of property made to third parties in satisfaction of the debts contracted by the said Rangasámi Aiyan, and the absolute disposition of property made in favor of Thyammál, the widow of Venkataramaiyan, his elder brother, for her share, all of which took place so far back as during the lifetime of the said minor, Krishnasámi, the said Lokambalammál is now possessed and in the enjoyment of 11 pangus (shares) of wet land and the wet and dry samudáyams appertaining thereto in Minakshiammálpuram aforesaid, setting aside the house-ground of Muttulinga Mudeliar and the patti manai lying to the west of it, of one pangu (share) of wet lands and the samudáyams thereto appertaining in Tirupilattorai, setting aside the house-ground of Pannai Seturaiyar, of one of the house-grounds which fell to his share in the agrahåram of the village of Kulumani, of one pangu (share) in the village of Tachchangudi, and of four pangus (shares) in the village of Analai, with the samudáyams thereto appertaining. Beyond this property which is in her possession, the said Ammál (lady) has no property. Agreeing, therefore, to my begotten son Chidambaram *alias* Venkataráman, who is the minor adopted son above mentioned, being put in possession of the said property, which now remains, after he attained his majority, I have, with my full consent, given my said son in adoption. I have therefore executed to you this agreement to show that you alone, who are henceforth entitled to all sorts of rights until the adopted son aforesaid should attain his age, and competent to solemnize his wedding, and other auspicious ceremonies, should look after the said adopted son and the said property; that, whether or not there is more property, neither I nor my begotten son, who is the adopted son above mentioned, have any sort of claim or title to the same, or to their enjoyment.

"(Signed) MUTTURAMAIYAN."

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It is in evidence that Mutturamaiyan was informed that two-thirds of the property had been alienated, and was shown the muktearnáma and the four deeds which have been referred to. Thus, if not distinctly informed of the true nature of the transactions, he was at the least put upon inquiry respecting them; it is not alleged, much less proved, that any fraud was practised upon him, and on his being called as a witness by both parties no question was put to him suggesting that he had been induced to make this agreement by any misrepresentation or concealment. Their Lordships, therefore, feel themselves bound to assume that the father consented to give his son in adoption on the understanding that he would inherit only about one-third of the late Rangasámi's property, being aware or not caring to inquire how the remaining two-thirds had been disposed of. The legal effect of this proceeding will be dealt with hereafter. The plaintiff, shortly after he became of age, which time is found by both Courts to have been in 1869, executed a lease (dated 4th October 1869) to Naganadien, a son of Rámasámi, of all or almost all the lands to which he was entitled, for 13 years, at a "swámibhogam" rent of Rupees 150 per annum; the lessee further undertaking to maintain the plaintiff and his adoptive mother.

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This lease, which put him entirely in the power of Rámasámi's son, or, in other words, of Rámasámi himself, and which he certainly ought not to have been induced or even allowed to execute, he some time afterwards very naturally desired to set aside, and, his adoptive family insisting on maintaining it, he left his adoptive mother's house, married, and went to live at the house of his wife's father. Although he returned once or more to his adoptive mother's house, it was when he was living in the house of his wife's father and surrounded by her relations that he executed, on the 19th August 1871, the agreement, on the validity of which the case chiefly depends.

This agreement is as follows:—

"Agreement executed on the 19th August 1871, corresponding to the 5th Avani of Prajotpatti, to Lokambalammál, the widow of Rangasámi Aiyan, cultivator, residing in the village of Minakshipuram, in the Trichinopoly Taluk, by Chidambaram, *alias* Venkatarámaiyan, the adopted son of the said lady, cultivator, residing at the said place, to wit:—

"Out of the wet and dry lands, topes, house-grounds, purchases, and other landed property which came to the share of your said husband on partition as his own property in the village of Minakshipuram, Gouripuram, Analai, Rangachchipuram, Tiruppilatturai, Andanallur, Ammangudi, Kulumani, Mulangudi, Tachchangudi, and Kottattai, the following being excluded, *i.e.*, the landed property which, by virtue of a muktiarnáma granted by your said husband in the name of your father, Rámasámi Aiyan, on the 4th February 1861, before ever I was adopted by you, and of an agreement granted in conformity therewith to you and your father, Rámasámi Aiyan, by my natural father, Rámuvaiyan, on the 5th July 1862, you gave away on the 10th and 23rd June 1862, in obedience to the orders of your said husband, Rangasámi Aiyan, deceased, partly under an agreement to Thayammál, the widow of his elder brother, Venkatarámaiyan, with power to sell, and partly under deeds of absolute sale, in favor of Kulumani Vamanaiyan in satisfaction of the debts contracted by your husband, Rangasámi Aiyan, and which your father Rámasámi Aiyan had cleared with his own funds; there still remain 8 pangus in the village of Minakshipuram, after deducting the 3 pangus lost owing to the railway out of the 11 pangus had there, 4 pangus in Analai, 1 pangu in Tiruppilatturai, 1 pangu in Tachchangudi, and 30 feet of a house-ground to the east of Chelamaiyan's house-ground in the northern row in the Suryavastu Agraháram of Kulumani, which you have continued to hold in full right. These I, having attained my majority, got from you, and took charge of the said property just as they were in accordance with the above said arrangements; and in 1869 I leased the said lands to Naganadhaiyan for a swámibhogam (ready money rent), and got the registry transferred accordingly. Of these lands I gave your father, Rámasámi Aiyan, 6 pangus in the village of Minakshipuram, measuring acres 10 and dec. 8, and 1 pangu in the village of Tachchangudi, measuring acres 3 and dec. 35; in all, measuring acres 13 and dec. 43 of land, together with the dry and wet lands and all other samudáyams thereto appertaining, and a house-ground in the village of Kulumani, as per the descriptive statement of lands contained in the additional paper hereto annexed, and got in exchange acres 14 and dec. 30 of land, comprised in the $5\frac{3}{16}$ pangus purchased by the said Ramasámi Aiyan from the said Thayammál and Vamanaiyan under a deed and an agreement, *i.e.*, $2\frac{13}{16}$ pangus in the village of Analai, and $2\frac{3}{8}$ pangus in the village of Rangachchipuram, including Pudutiruttukattalai, together with the wet and dry lands and all other samudáyams appertaining thereto, as also 32 feet of a house-ground where Pannai Setuvaiyan resides, and which belongs to the said Ramasámi Aiyan, in the Suryavasaka Agraháram of the village of Tiruppilatturai, and 24 feet of a house-ground purchased under a deed by the said Ramasámi Aiyan from Manamettu Chetti in the western row of the Agraháram, running north to south, in the Garudavasakam of the said village, as per the descriptive statement of lands contained in the additional paper hereto annexed. Notwithstanding all this, I have given you for your maintenance for life, in consideration of your feeling it disagreeable to live with me, the $2\frac{3}{8}$ pangus which I got in exchange as aforesaid in the said village of Rangachchipuram, and 2 of the pangus in the village of Minakshipuram, making in all $4\frac{3}{8}$ pangus, together with the wet and dry lands and all other samudáyams thereto appertaining. You shall therefore enjoy the said lands for your life, paying the Government revenue assessed thereon, and defraying the expenses of your maintenance, vows and other ceremonies, with the aid of the incomes thereof. The said lands should revert to me upon your death. You should not subject the said lands, which have been allowed to you, to hypothecation, mortgage, or sale, or otherwise encumber or alienate them. For myself, I agree that, inasmuch as the lands which I enjoy were derived from you, I shall not without your written consent subject them to hypothecation or sale, or otherwise encumber or alienate them. As regards any property other than what has come to you and me under this document, and the landed

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property passed by you under sale and agreement in obedience to the orders of your husband, I have no claim, interest, or title. As regards the 2 pangus I am entitled to enjoy by reversion on your death in the village of Minakshipuram, I shall take the share of Mettupadugai dry land appertaining thereto, out of the tract lying to the west of the Mattupadai (cattle pass). Thus I have executed this agreement.

"The lands, &c., of the village of Elamanur are included in the deed of sale you executed in favor of the said Vamanaiyan.

"(Signed) CHIDAMBARAM, *alias* VENKATARÁMAIYAN."

A schedule is appended, specifying in detail the properties to which the mother and son are respectively entitled.

In the year 1873 the plaintiff instituted a suit against the present defendants, which was by a lamentable miscarriage of justice dismissed on the ground that he declared himself to be 17 years old, and ought *until* he was 18 to have sued by his guardian.

Whereupon he instituted the present suit by his guardian, at first *in formâ pauperis*, but was not allowed to retain that character in his appeal to the High Court.

The suit is against Lokambal, Rámasámi, Nágganádha (son of Rámasámi, and lessee under the deed of October 1869), Thayammál and Manaiyan *alias* Vaidialigaian, who was made a defendant at his own request.

The plaint, which is informal and obscure, in substance seeks to set aside all the alienations of the adoptive father's property which have been described, and claims all the property; from the whole of which, even so much as the defendants admit the plaintiff to have been entitled to, he declares himself to have been ousted. The defendants maintain the genuineness and validity of the transactions which have been described, insist on the deed of 19th August 1871 being binding on the plaintiff as a family settlement, and deny his dispossession of so much as he was entitled to under it.

The District Judge dismissed the suit, on the ground that the agreement of August 1871, which he treats as a final adjustment of the family disputes, was executed by the plaintiff two years after he became of age, was not obtained by fraud or coercion, and was consequently binding on him.

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This judgment was reversed by the High Court on grounds which do not very distinctly appear. That Court appears to have considered the agreement of the plaintiff's natural father at his adoption to have been void in law in as far as it relinquished on behalf of the plaintiff his right to any part of the property which had been his adoptive father's, that he was entitled to set aside the alienations made before his adoption as having been fraudulent and void against him, and that the agreement of August 1871 was not binding on him, having been executed by him without a full explanation having been given to him of his rights. They appear also to have treated his allegation, of which he himself gave some evidence, of his dispossession from the whole of the property as established, and decree to him all the property claimed in the schedule to his plaint, that is, all his adoptive father's property, together with (as is asserted by the appellants) more property which he claimed by a supplemental schedule which he was allowed to file. The present appeal is from this judgment.

Some of the circumstances of this case are peculiar. The first adopted son became his father's heir; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favor of the second son may be a question of some nicety, on which their Lordships give no opinion. How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh* v. *Janaki* (1) certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age. The main question in the cause is therefore reduced to this, whether the son did or did not validly ratify it. Unquestionably the manner in

(1) 11 Bom. H.C. Reps., 199.

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which Rámasámi contrived to get into his hands two-thirds of the property of Rangasámi, partly through his daughter and partly through his sister, raises a very strong suspicion, to say the least, of unfair dealing against him; and if it had been shown that the instrument of 1871 had been executed by the plaintiff under his influence (as probably the lease of October 1869 was) it would be properly set aside. It must be borne in mind, however, that the plaintiff when he executed it had been of age two years, that he was sufficiently alive to his rights to be aware that the lease of 1869 was injurious to him, and to desire to set it aside, that he was residing with his wife's family, strangers it would appear to that of his adoptive mother, and that before executing the instrument he consulted members of his wife's family, upon whose advice he acted. It may be further observed that in a subsequent suit the plaintiff, about 12 months after, stated that he enjoyed the property of his adoptive father under this agreement.

Such being the evidence, and the Subordinate Judge, who had the advantage of hearing the witnesses, having found in favor of the validity of this document, their Lordships have come to the conclusion that there are no sufficient grounds for setting it aside.

The main question being thus disposed of, two subsidiary questions remain to be noticed.

It was the plaintiff's case, supported by some evidence, that he had never been allowed to take possession of any part of his adoptive father's property, while there was evidence on the other side that he had taken and kept possession of so much of it as he was entitled to under the deed of 19th August 1871. There is no issue and no express finding on this question in the Court below, but it may be assumed that the Judge adopted the contention of the defendants. The judgment of the High Court, however, assumes the plaintiff to have been wholly dispossessed, and that by all the defendants. Under these circumstances, it seems to their Lordships that the case cannot be satisfactorily disposed of without a re-trial of this question, if, indeed, it has been tried at all, and that an express finding should be come to whether the plaintiff has been dispossessed, or kept out of possession, of all or any of the property to which he was entitled

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by the last-mentioned deed, and, if so, by which of the defendants.

It further appears that compensation money was paid to Lokambal by the Railway Department for lands taken from the one-third portion of the lands of Rangasámi to which, under the deed of adoption of 5th July 1862, the plaintiff was entitled; the sum is stated by the plaintiff to be Rupees 2,500, by the defendant to be Rupees 1,700.

Their Lordships do not consider that, by the deed of 19th August 1871, the main object of which seems to have been to ratify the disposition which had been made of the specified properties mentioned in it as "having been excluded," and to assign to the widow a specific portion of the remaining land in lieu of maintenance, the plaintiff can be taken to have relinquished his claim to this money. An issue in this question was framed in the Court below, but it is not alluded to in the judgment. Their Lordships are of opinion that the question should be tried to how much of this sum the plaintiff is entitled; it will, of course, be open to the defendants to prove that the money received has been properly expended on the land, as they have alleged it to have been in their answer. On the legal effect of the plaintiff's covenant against alienation their Lordships do not think it necessary to give an opinion.

In accordance with the views which they have expressed, their Lordships will humbly advise Her Majesty that the judgments and decrees of both the Lower Courts be reversed, and that it be declared that the parties are bound by the deed of the 19th of August 1871. That the High Court be directed to remand the case to the District Court of Trichinopoly for the trial of the following issues, viz.:—

1. Whether the plaintiff has been ousted or kept out of possession of all or any of the lands to which he was entitled under the said deed; if so, by which of the defendants.
2. To how much, if any, of the said compensation money paid by the Railway Department he is entitled.

That the said District Court do return the findings on those issues to the High Court in accordance with the direction of the

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Code of Civil Procedure, and that the High Court do thereupon finally determine the case.

That each party do bear his own costs of this appeal, and that all the costs of the parties in the Lower Courts do abide the event of the final decision of the suit.

Appellants' Agents : Messrs. *Burton, Yeates* and *Hart.*

Respondents' Agents : Messrs. *Gregory, Rowcliffes* and *Co.*

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

1878. November 29.

GOODRICH (PRESIDENT OF THE MUNICIPALITY OF VIZIANAGRAM) APPELLANT, *v.* VENKANNA, RESPONDENT.*

Madras Act III of 1871—*Tolls, farming of—Execution—Agreement.*

An Agreement was entered into between the Commissioners of the town of V. and the defendant, farming the tolls of the town of V. to the defendant for one year. The agreement was duly signed by the defendant but was not executed under seal by the Commissioners as required by Madras Act III of 1871. In a suit by the President on behalf of the Commissioners, brought after the expiry of the year, for a portion of the sum due to them by the defendant

Held, that inasmuch as the plaintiff had fully performed all things to be performed on his part, and both parties had acted under the agreement though it was not formally executed by the Commissioners, and as the defendant had had the full benefit of the contract, it would be contrary to equity and good conscience to allow him to set up as ground of defence that there was no contract in point of law.

Arunachella Sástry for the appellant.

C. Ramachendra Rau Saib for the respondent.

The facts of this case are sufficiently stated by the Court (KERNAN, J., and FORBES, J.) who delivered the following

JUDGMENT.—The plaintiff, the President of the Commissioners of the Town of Vizianagram under the Towns' Improvement Act III of 1871, appeals against a decree of the District Judge of Vizagapatam, made in Original Suit 252 of 1873 on the 17th of December 1877, whereby he dismissed the suit with costs.

The suit was brought to recover from the defendant Rupees 1,497-8-0, balance due on a written agreement A, dated the 27th of March 1872, which was duly signed by the defendant. The agreement purports to be made by the defendant with several persons named therein, Municipal Commissioners of Vizianagram, and after reciting that defendant bid Rupees 8,110 for lease of the tolls leviable on carriages, &c., entering into Vizianagram from March 1872 to March 1873, and that his offer was accepted, the defendant thereby binds himself to pay that sum by monthly equal instalments, the last instalment to be paid on the 15th of March 1873.

* Second Appeal No. 422 of 1878, against the decree of E. C. G. Thomas, District Judge of Vizagapatam, dated 17th December 1877, reversing the revised decree of the Court of the District Munsif of Vizianagram, dated 10th March 1876.

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The agreement then recited a mortgage of lands by the defendant to the Commissioners to secure the Rupees 8,110, and provided that whenever delay should arise in paying instalments, the lease (of the tolls) might be again put up to auction and also the land sold to pay the loss and arrears, and that if the proceeds were insufficient defendant should make up the amount by his other property.

It provided that defendant should pay the instalments in silver coins.

In his written statement the defendant claimed a remission of about the amount sued for, principally on the ground that carts were prevented, by order of a Magistrate, from entering the town on account of cholera. By a further written statement the defendant set up other defences, not necessary to refer to.

The Munsif made a decree on the 10th March 1876 for the plaintiff for the full sum claimed.

Against that decree the defendant appealed to the District Court on the ground amongst others that the plaint document dated 27th March 1872, A, was not duly executed under Section 11 of Act III of 1871, and also on the ground that plaintiff's cause of action, if any, could not arise until plaintiff sold the mortgaged security lands and until a deficiency was found after applying the proceeds to pay the arrears.

The District Judge held that the suit was not maintainable, first, on the ground that the contract was not sealed or attested by the Commissioners and President or Vice-President, as required by the Act; and secondly, "supposing that difficulty waived (by the admission of the defendant), the terms of the document had not been acted on by the plaintiff."

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As to the second ground the District Judge considered that it was not optional to the plaintiff to sue the defendant before selling the land, and that plaintiff was bound to sell the land in the first instance.

We do not agree with the District Judge on this second point. The document A contained a positive contract by the defendant to pay the instalments, and to pay in silver coins. Then after reciting that the mortgage was given, it was provided that plaintiff might sell the land, and that any loss should be paid out of the other property of the defendant. These provisions did not contain any restraint on the plaintiff from suing the defendant on his contract or oblige plaintiff to resort to the property before suing the defendant. They merely provided security for the performance by defendant of his contract and a guarantee to plaintiff against loss.

As to the first ground, viz., that the document A was not sealed and attested as required by Section 11 (1). No doubt the document A is not sealed or attested as required by the Act. Whether Section 11 is mandatory or merely directory is not, in the view we take of the case, necessary to consider. Nor is it necessary to consider whether, if this action was brought in a Court of Common Law, the absence of the seal and attestation should afford a defence, inasmuch as the plaintiff, in our view of the facts, has fully performed all things to be performed on his part, and both parties have acted under the agreement, though it was not formally executed by the Commissioners as required by the Act. *See* the cases referred to by Byles, J., in *South of Ireland Colliery Company* v. *Waddle* (2).

Such performance on the part of the Commissioner is clearly proved.

The defendant, after signing the agreement, was put into immediate possession and receipt of the tolls leased. He received the tolls during the year he contracted for, and has had the full benefit of the contract.

The objection that the agreement was not formally executed on the part of the Commissioners never was made by him, though it was patent, until after he had got the full benefit of the agree-

(1) Act III of 1871. (2) L.R., 3 C.P., 473.

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ment, and the year had terminated, and the action was brought. Under these circumstances it would be contrary to "equity and good conscience" to allow the defendant to set up as ground of defence that there was no contract in point of law in an action for the unpaid balance of the amount agreed to be paid.

In the case of *Cook* v. *Corporation of Salford* (1) it appeared that there was a resolution of the corporation, 5th January 1860, not under seal, to grant certain lands to the plaintiff for 300 years on certain terms, and that plaintiff got possession and paid rent under it, and the corporation performed certain portions of the agreement. The plaintiff to the knowledge of the corporation laid out money in building a wall and other improvements. In 1864 the corporation served notice to quit, and the plaintiff filed his bill for specific performance. To this bill the corporation set up the defence, amongst others, that the resolution was not under seal. The defence was disallowed, and the Vice-Chancellor in giving judgment said it was quite untenable. The case was heard in appeal (2), and the Lord Chancellor, referring to the objections of the corporation, says, "one of which was that the agreement was not under seal. But the corporation has agents to see what is going on, and if the corporation allow a wall to be built and money expended on the faith of a resolution regularly entered in their books, they must be answerable."

The objection in that case was by the corporation, who were the parties to be relieved by reason of the absence of seal. Here the objection is made not by the corporation, who have already fulfilled the contract, but by the defendant, who signed and is clearly bound, if the corporation are bound. It is quite clear that the corporation are bound, having given possession of the tolls and received payments under the contract.

We shall, therefore, reverse the decree of the Lower Appellate Court and remand the case to be tried on appeal from the decree of the Munsif.

The defendant is to pay the costs of this hearing in this Court.

The costs of the appeal in the Lower Court to be provided for in the trial hereby directed.

Suit remanded.

(1) L.R., 10 Eq., 678. (2) L.R., 6 Ch. Ap., 551.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kernan.

1879. January 15.

VENKATANARSAMMAH (DEFENDANT), APPELLANT *v.* RAMIAH (PLAINTIFF), RESPONDENT.*

Mortgage—Priority—Registration.

On the 15th July 1864 two undivided brothers executed a mortgage of their joint property to the plaintiff for Rupees 500, and on the 8th January 1868 they executed another mortgage of the same property for Rupees 1,000 to the defendant, who registered it under Act XX of 1866. In August 1871 a suit was brought against the brothers by the plaintiff on the mortgage of 1864, and a decree for the sum due was made in October 1871, directing that if the sum due was not paid within two months the mortgaged property should be sold. In March 1872 the property was sold in execution of the above mentioned decree and bought by the plaintiff, who was duly put into possession. In 1871 a suit was brought against the brothers on the mortgage of 1868 by the defendant; a decree was made similar to that in the above mentioned suit, a sale of the property was had, and it was bought by the defendant. The Plaintiff was thereupon dispossessed and referred to a regular suit, and the defendant was put into possession. This suit was then brought by the plaintiff, the first mortgagee and purchaser, to eject the defendant, the second mortgagee and purchaser, and the Lower Appellate Court making a decree in favor of the plaintiff the defendant filed this second appeal.

Held that the mortgage of 1864 did not require to be registered in order to maintain its priority over the mortgage of 1868.

Held also that the plaintiff having bought the rights and interests of the mortgagors under a sale held prior to the sale to the defendant, the mortgagors had no right or interest to sell to defendant; but that as the purchase by plaintiff was subject to the mortgage to the defendant, and as defendant was not a party to plaintiff's mortgage suit, defendant's right as mortgagee was not affected by the sale to the plaintiff, though effect could not be given to that right in the present suit.

PLAINTIFF sued defendant to set aside a sale and delivery of land purchased by him at a public sale.

The Munsif disallowed a portion of the claim.

The plaintiff appealed to the District Judge, who gave judgment for plaintiff.

The defendant preferred a second appeal to the High Court.

Rámachandra Rau Sáib for the Appellant.

Ráma Rau for the Respondent.

* Second Appeal No. 798 of 1877, against the decree of E.C.G. Thomas, District Judge of Vizagapatam, dated 25th August 1877, reversing the decree of the District Munsif of Royaveram, dated 30th November 1876.

The facts and arguments are fully set forth in the following Judgments:—

KERNAN, J.—In this case the plaintiff seeks to eject the defendant from the possession of immoveable property. The facts are—On the 15th July 1864 two undivided brothers executed a mortgage for Rupees 500 of the joint property to the plaintiff, and on the 8th January 1868 they executed another mortgage of the same property for Rs. 1,000 to the defendant, who caused the same to be registered under Act XX of 1866. On the 2nd of August 1871 a suit was brought against the brothers on foot of the mortgage of 1864; and on the 7th October 1871 a decree was made for the sum due, Rupees 872-12-10, and the decree directed that, in default of payment in two months, the mortgaged property should be sold, and if the debt was not discharged by the produce of the sale, the mortgagors should pay the balance personally. In March 1872 the decree holder, in execution of the decree, set up for sale through the Court Officer, under the ordinary process of attachment, the property mortgaged. At the sale the present plaintiff, the execution creditor, bought the property for Rupees 427, and the sale was duly confirmed and the plaintiff was put into possession of the property, and so remained until he was put out of possession under process issued in the suit next mentioned. In the year 1871 a suit was filed against the two mortgagors on foot of the mortgage of 8th January 1868 by the mortgagee (the now defendant), and a decree was made for payment of the amount due on the mortgage and for a sale of the property in the same terms as in the decree on the mortgage of 1864. Under that decree a sale was had after attachment of the same property, and the defendant, the mortgagee and decree-holder, became the purchaser. The plaintiff in this case, who was the purchaser at the first sale, either put in, in the defendant's suit, a claim before the sale under Section 246, or he tried to obstruct the delivery of possession under Sections 268, 269; but he was referred to a regular suit and was dispossessed and the present defendant was put into possession.

This suit was then brought by plaintiff, who was the *first* mortgagee and purchaser, against the second mortgagee and purchaser, and there being a decree of the Lower Appellate

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Court in favor of the plaintiff, the defendant filed this second appeal. The grounds of his appeal, argued by Ramachandra Rau Sáib, are these:—

1st.—The sale to the plaintiff being of the rights and interests of the mortgagors, and those rights being subject to the mortgage to defendant of 1868, such sale did not operate to affect the interest of the defendant as mortgagee.

2nd.—Defendant's mortgage of 1868 was duly registered under Act XX of 1866; plaintiff's mortgage was not registered; and therefore the defendant's mortgage is entitled to priority over the plaintiff's prior mortgage.

3rd.—That plaintiff's mortgage was merged in the decree obtained by him, and that he cannot use it now to assert a title prior to the mortgage or to the decree obtained by the defendant.

Ráma Rau for plaintiff contended that the legal effect of the sale under the decree made on foot of the mortgage of 1864 was to vest in the plaintiff all the rights and interests of the mortgagors at the date of that mortgage; and he cited a number of cases to be found in Sutherland's Weekly Reporter, before the establishment of the new Reports, and *Biswanath Mukhopadhya* v. *Gosindas Baramadak* (1). He also referred to *Khandu Dubladás* v. *Tárachand Amarchand* (2) as an authority that the mortgage of 1864 did not merge in the decree, and also as an authority that the defendant's mortgage in 1868, though registered, does not take priority over the plaintiff's mortgage, which was executed prior to the date of the enactment of the Act XVI of 1864.

There can be no doubt that the mortgage of 1864 did not require to be registered in order to maintain its priority over the mortgage of 1868.

It seems to me equally clear that the right of the plaintiff to the security of the property pledged by the mortgage of 1864 was not merged in the decree which he obtained. On the contrary, the decree directs a sale of the mortgaged premises to give effect to the security which it expressly keeps alive. The doctrine

(1) 3 Ben. L.R., App., 140.

(2) I.L.R., 1 Bom., 574.

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"*transit in rem judicatam*" has therefore no application. The effect of this doctrine is that a second suit could not be filed in respect of the same cause of action on the mortgage, that right of suit or cause of action having passed into a judgment of record.

In *King* v. *Hoare* (1) it is said, if there be breach of contract or wrong done or any other cause of action by one against another and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained as far as it can at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose.

Now it is quite clear that the decree of a Court of Equity giving effect to the mortgage security which it preserves, is entirely different from a judgment which merges the cause of action. If the decree is a substitute for the mortgage, then the mortgage will be no longer existing. This result would lead to the destruction by a decree of Courts of Equity of securities intended to be given effect to. For if the right to the security under the decree only takes the date of the decree, then all securities given by the mortgagor after the mortgage of 1864 and up to October 1871 (the date of the decree) being prior to the decree, the decree holder would lose the benefit of his mortgage. The decree in a mortgage suit is made according to the doctrines and practice of equity, which would be utterly inconsistent with merger. It is settled practice, when there is a decree of a Court of Equity for sale, and a sale thereunder, for the mortgagee if he has a legal estate to join in the sale and conveyance; the mere decree gives no title; it is the sale and conveyance which gives title. Again this doctrine only affects the parties to the suit in which the judgment is obtained. If there is a suit on a joint and several bill of exchange against *one* of several debtors and judgment against him, actions may be brought on the same note against the other separate debtors. (*King* v. *Hoare supra*) (1). The defendant in this present case was no party to the original suit on the mortgage of 1864, and is neither bound by it nor entitled to have any advantage from it. In this particular case it is not necessary to determine whether a purchaser

(1) 13 M. and W., 494 and 504.

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under a sale "only" of rights and interest of the defendant in the property (Section 249, Act VIII of 1859) under a decree in a mortgage suit acquires not only those rights and interest but also the interest of the mortgagee under the mortgage. I may, however, observe that there is no express provision in the late or the present Code providing for the sale or conveyance of the mortgagee's rights to the purchaser. Sections 223 to 231 of the old Code refer to decrees for delivery of possession of immoveable property, and Section 249 relates to sale of rights and interest of the defendant "only." However, as the sale of the interest of such mortgagee must have been intended to be provided for, and as there is only the one process for the sale of immoveable property under the Code, I think that the construction put upon the Code by the Calcutta High Court is a necessary result, viz., that under a sale in execution of a decree for sale in a mortgage suit, the right and interest which the mortgagee and the mortgagor could jointly sell pass to the purchaser (*Syed Emam* v. *Rajcoomar Dass*) (1).

In the High Court on the Original Side it has been our practice to have sales made in execution of mortgage decrees by auction, without the intervention of process of attachment.

The present Code, Section 286, contains provisions to enable the creditor and the purchaser to know what interest is really to be sold, but still the question in this case is not satisfactorily provided for, and cannot be so until provision is made for the mortgagee joining in the conveyance, or unless effect is expressly given by legislation to the sale by the officer *as if* the mortgagee had joined.

Here, however, both plaintiff and defendant have bought rights and interests of the mortgagors under mortgage decrees. Therefore if the rights of a mortgagee did not pass in the one case, neither did similar rights pass in the other case, and *vice versâ*. The plaintiff bought the rights and interests of the mortgagors under a sale held in March 1872 and got into possession. Such sale and possession were prior to the sale to the defendant. There was therefore no right or interest in the mortgagors left to sell to defendant, and he acquired no title

(1) 14 Ben. L. R., at p. 421.

1879. January 15.

VENKATANARSAMMAH v. RAMIAH.

against the plaintiff in point of law. The plaintiff should therefore not have been put out of possession at the instance of the defendant in his suit. But although nothing passed to the defendant by the sale, yet as the purchase by plaintiff of the right and interest of the mortgagor was subject to the mortgage to the defendant, and as the defendant was not a party to plaintiff's mortgage suit, the right of the defendant as mortgagee is not affected by the sale to the plaintiff. We cannot give effect to that mortgage in this suit, and must leave the defendant to assert his rights on foot of it as he may be advised. This second appeal must be dismissed with costs.

INNES, J.—The issues were sent to the District Munsif on a misconception as to the facts, which has since been cleared.

I agree with Mr. Justice Kernan in the result. The defendant took nothing by his purchase of the rights and interests of the mortgagors, which had already been sold to plaintiff, and plaintiff is entitled to be replaced in possession of the land of which he was wrongly dispossessed by Court process issuing in execution of defendant's decree.

I do not wish to offer any opinion upon the other question of whether defendant's mortgage is still on foot and capable of being enforced. Recent legislation in regard to procedure has contracted the capacity to enforce several remedies by several suits, and it may be that defendant's mortgage right, if still existing, is barred of any further remedy. The second appeal will be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Innes.

1879. February 10.

APPASÁMI, PLAINTIFF, v. AGHILANDA, DEFENDANT.*

Act XV of 1877, Sch. II, Act 73—Shorter period of limitation.—Act XV of 1877, Sec. 2—Act IX of 1871.

The period of limitation prescribed by Article 73 of the Second Schedule to Act XV of 1877 is a "shorter period of limitation" within the meaning of the last

* Referred Case No. 22 of 1878, stated under Section 617, Act X of 1877, by the District Munsif of Chidambaram.

1879. February 10.

APPASÁMI v. AGHILANDA.

clause of Section 2 of that Act than the period prescribed by Article 72 of the Second Schedule to Act IX of 1871.

The language of Acts IX of 1871 and XV of 1877 leads to the conclusion that by each of these enactments the starting point and period given in its schedule were to take the place of those given by the Act which preceded it, in the case of all suits instituted after the date of the Act coming into force, and that the expiration of the period, calculated with reference to the Act in force at the date at which the note was executed, does not necessarily affect the remedy.

THIS was a case stated under Section 617, Act X of 1877, by the District Munsif of Chidambaram.

The following is taken from the case referred—

"The plaintiff sues to recover money lent on a note payable on demand. The note is dated 4th July 1870. Under the Act then in force the plaintiff had time to sue till the 4th July 1873. The Limitation Act of 1871 came into operation on 1st April 1873.

The plaintiff did not sue on the agreement till the 29th November 1878, and he alleges that he made a demand on the defendant for payment of this debt on the 10th September 1876.

The question raised is whether the plaintiff's suit is barred by the Limitation Act of 1877.

It is now settled that the plaintiff could have enforced his claim under the Act of 1871 within three years from the date of demand, although under the earlier Act of 1859 he was compelled to sue within three years from the date of the bond. The effect of the provision of the Act of 1871, thus interpreted, was to extend the period within which the plaintiff had to sue from three years from the date of the note to an indefinite time, though the number of years prescribed be the same in both Acts.

The time thus extended by the Act of 1871 has been curtailed by the present Act, because the starting point has been altered by requiring the plaintiff to bring his action within three years from the date of the note.

Is the curtailment thus arising a shortening of the period within the meaning of the proviso contained in the 3rd paragraph of Section 2 of the present Act? The expression 'the period of limitation prescribed' does not, I think, refer merely to the number of years but includes cases where the time is actually shortened by the adoption of a different mode of calculating the period also."

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The Munsif, doubting if his construction was correct, referred the case.

Párthasáradhi Áyyangar and *Kistnasámi Chetti* for the plaintiff.

R. Balaji Ráu for the defendant.

The Court (TURNER, C. J., and INNES, J.) delivered the following

JUDGMENT:—The question is whether the suit is barred by the law of limitation. To determine this, it is necessary, first, to look at Act XV of 1877, the Act in force at the date at which the suit was instituted (29th November 1878). Section 4 of this enactment provides that "subject to the provisions contained in Sections 5 to 25 inclusive," which need not be considered here, "every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed."

This refers us to the second schedule for the determination of the period of limitation in regard to all suits instituted after the Act is in force. The note is payable on demand, and Article 73 of the second schedule prescribes three years from the date of a note so payable.

It was executed on the 4th July 1870, and, therefore, the period would have expired on the 4th July 1873, and this suit is barred unless the remedy is saved by some other provisions of the Act.

Section 2 says "any other suit" (*i.e.*, any suit other than those of the kind provided for in Article 146 of the second schedule) "for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the said Indian Limitation Act, 1871, may be brought within two years next after the said first day of October 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years."

Now, the period allowed by the Act of 1871 is also three years, but the point from which the period was calculated was in the Act of 1871 the date of demand, while in that of 1877 the old rule was reverted to of making the date of the cause of action the starting point; such date in notes payable on demand being the date of the debt, not the date at which demand may be

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made. The Act of 1871 was thus more favorable to creditors than the new Act, as the starting point of the limitation period might be postponed indefinitely, and in the present case the demand having been made on the 10th September 1876, if the Act of 1871 were still in force, a suit might be instituted at any date within 10th September 1879.

It is obvious that the provisions of Section 2 of the present Act were intended to prevent the sudden extinction of rights of action which had arisen under the more favorable provisions of the Act of 1871, and the "shorter period" mentioned, when applied to the present and like cases, must, therefore, be taken to mean not merely the period of so many years or months allowed by the schedule, but also the point at which that period, according to the provisions of the schedule of the old Act, would terminate, and within which, therefore, a suit might have been instituted under it had it remained in force.

In this view the period allowed by the Act of 1877 is clearly shorter than that of the old Act, and the suit is within the indulgence of Section 2 of the Act of 1877.

Then Section 2 gives two years after the 1st October 1877 or as much of two years as is required to make up three years from the starting point.

This would admit of the suit being instituted at any date within the 10th September 1879, so that it is clearly in time.

If the starting point for the period of limitation and the period itself must necessarily be determined by the enactment in force at the date of the execution of the instrument, the note in question would be barred under the provisions of Act XIV of 1859 and not saved by the provisions of Act XV of 1877, but the language of Acts IX of 1871 and XV of 1877 leads to the conclusion that by each of these enactments the starting point and period given in its schedule were to take the place of those given by the Act which preceded it, in the case of all suits instituted after the date of the Act coming into force, and that the expiration of the period, calculated with reference to the Act in force at the date at which the note was executed, does not necessarily affect the remedy. Our opinion is that the note is not barred.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

1879. January 8.

VENKATÉSA (PLAINTIFF), APPELLANT *v.* SENGODA (SECOND DEFENDANT), RESPONDENT.*

Evidence Act, Sec. 91—Sodi Razináma.

The document called a *Sodi Razináma* (whereby a party relinquishes his right of occupancy of land in his possession to his landlord, and requests the latter to register the land in the name of another party to whom it has been sold) is not a document of the kind mentioned in Sec. 91 of the Evidence Act, and therefore does not exclude the Courts from basing their findings upon other evidence, should any such exist.

THE plaintiff brought this suit to recover possession of certain land from first defendant, under a registered deed of sale executed by him on the 22nd July 1876.

The first defendant did not appear.

The second defendant resisted the claim, stating that the property had been sold and put in his possession by the first defendant prior to the date of the sale to plaintiff, and the sale proceeds went to discharge a mortgage on the property; that the property had been since in possession of second defendant, and that the first defendant got the registry transferred to his (second defendant's) name.

The District Munsif dismissed the suit.

The Subordinate Judge confirmed the Munsif's decree.

The plaintiff preferred a second appeal to the High Court on the grounds—

That the plaintiff was entitled to possession under his registered deed of sale.

That the sale to the second defendant not having been registered was of no effect.

T. Ráma Rau for the appellant.

A. Rámachandráyyar for the respondent.

* Second Appeal No. 357 of 1878, against the decree of T. Ganapaty Áyyar, Subordinate Judge of Salem, dated 12th February 1877, confirming the decree of the District Munsif of Namkal, dated 9th August 1877.

1879. January 8.

VENKATE'SA v. SENGODA.

The Court (INNES, J. and FORBES, J.) delivered the following

JUDGMENT.—The plaintiff sued to recover certain immoveable property sold to him by a registered deed of sale, dated 22nd July 1876, by first defendant.

First defendant was *ex-parte*.

Second defendant asserted that the first defendant had sold the same property to him on the 17th March 1875, and had placed him in possession, which he had held ever since. The District Munsif held that, at the date of the sale to plaintiff, first defendant had already parted with all rights in the land and had no title to convey to plaintiff, and that plaintiff and first defendant had in this transaction colluded to defraud second defendant, and he dismissed the suit. In appeal this decision was affirmed by the Subordinate Judge, as the sale to second defendant had been immediately followed by possession.

In second appeal it was urged that the second defendant's title depended upon a document called a Sodi Razináma which required to be registered, and that, as it was not registered, it could have no effect, and plaintiff's subsequent registered document would take effect against it.

The Sodi Razináma is a document whereby the first defendant relinquishes to the landlord the right of occupancy of the land, and requests the landlord to register the land in the name of the second defendant to whom he has sold it.

Assuming it to be a document which, to have any effect as between the parties to it (the first defendant and the landlord), should have been registered, it does not follow that the failure to register it can affect second defendant's title. It was quite competent to first defendant to pass his interest in the land to second defendant without executing this Sodi Razináma, the object of which is simply to inform the landlord of the outright transfer by first defendant of his interest in the land to second defendant, and to pray him to substitute the name of second defendant as pattá holder in the registry in place of his own. But if the Sodi Razináma required to be registered, it cannot now be received in evidence of the conveyance to second defendant (Section 49, Registration Act of 1871).

The Sodi Razináma is not a document of the kind mentioned in Section 91 of the Evidence Act, which would exclude oral

evidence of the transaction between first and second defendants, and it was quite competent therefore to the Courts below to base their findings upon other evidence if any such existed.

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Now the Razináma is not the only evidence of the conveyance. There is the pattá standing in second defendant's name, there is second defendant's evidence, and there is the fact of three years' possession by him, on all of which the Courts might find as they have found, that there was a sale to second defendant in 1875 not by a writing but by oral agreement.

Such agreement followed by possession is not by the Registration Act deprived of its legal effect. At the date of the sale to plaintiff, therefore, first defendant was without title to sell and plaintiff took nothing by the registered sale. The second appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

PADMANABHA (DEFENDANT) APPELLANT, *v.* THANAKOTI (PLAINTIFF) RESPONDENT.*

1879. January 29.

PADMANABHA v. THANAKOTI.

Decree—Right of severance.

The right under a decree cannot be severed, so that the remedy against the person can remain in or pass to one, and the alternative remedy against the property pass to another.

PLAINTIFF brought this suit for the establishment of his right to a quarter share of a house and for arrears of rent. The District Munsif and the District Judge decreed in favor of the plaintiff, with modifications as to the amount of rent claimed.

The defendant preferred a second appeal.

V. Bhashyam Áyyangar for the Appellant.

Mr. *Lascelles* for Respondent.

The facts and arguments are fully set forth in the following

JUDGMENT:—In this suit plaintiff sought to establish his right of ownership in a quarter of a bungalow, of the remaining three-fourths of which the defendant was the owner, and (as the

* Second Appeal No. 527 of 1878, against the decree of F. Brandt, District Judge of Trichinopoly, dated 24th June 1878, amending the decree of the District Munsif of Trichinopoly, dated 10th April 1877.

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bungalow is not divisible) his right to share in the rent to the extent of a quarter of it.

The bungalow originally belonged to a Mr. Gray, who in 1853 sold three-fourths of the bungalow to the father of one Venkatáchallam Sámi Chetti. In 1866 Venkatáchallam Sámi Chetti brought a suit (51 of 1866) for 16,000 rupees against Mr. Gray.

By a Rázináma decree in that suit, the remaining quarter bungalow was made liable for the decree amount. Venkatáchallam Sámi Chetti became indebted to Rámanna Chetti, who in execution of his decree in Original Suit No. 17 of 1869, attached and eventually sold by Court auction the right, title and interest of Sámi Chetti in the entire bungalow. This was on the 4th January 1870.

The defendant in the present suit purchased what was put up to sale.

On the 14th July 1871 Sámi Chetti assigned to plaintiff's father his interest in the Rázináma decree. Plaintiff's father proceeded to execute the decree and attached the right, title, and interest of Mr. Gray in the bungalow, and on sale by Court auction became himself the purchaser.

His son the plaintiff, who now represents him, contends that, under his purchase, he has a right to the quarter of the bungalow which still remained the property of Mr. Gray after his sale of the three-fourths of it in 1853 to Sámi Chetti's father, and this is what the Courts below have held.

It is contended by defendant, the appellant in this second appeal, that plaintiff has only a right of redemption of the quarter share, as the mortgage right to that one quarter had already passed to defendant by the sale of Sámi Chetti's right to the bungalow on the 4th January 1870.

Plaintiff, of course, as representative of the purchaser of Mr. Gray's rights, stands in the place of Mr. Gray, and it is necessary to see what right Mr. Gray had at the date of the purchase in execution of the Rázináma decree.

That decree had remained unexecuted between 1867 and 1871, and it may be doubtful whether execution was not altogether barred, but we are not now called upon to consider that question.

That decree conferred on Sámi Chetti a right to recover the sum decreed, and, if the sums decreed were not paid, gave him a means of enforcing the decree by sale of the quarter bungalow. It gave him no right in the bungalow apart from the enforcement of the decree.

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Sámi Chetti's right and interest under the decree in a quarter of the bungalow might have been attached in execution of the decree against him in Original Suit No. 17 of 1869. Had they been so attached and afterwards sold on the 4th January 1870, this would have passed to defendant Sámi Chetti's entire right under the Rázináma decree to be paid the amount decreed, or in default to enforce the remedy allowed by the decree against the land. The right under a decree cannot be severed, so that the remedy against the person can remain in or pass to one man, and the alternative remedy against the property pass to another. The contention therefore must be erroneous that any lien or right against the property could have passed to defendant by the sale in 1870, while the subsequent sale to plaintiff's father in execution of Sámi Chetti's right to enforce the decree conveyed to plaintiff's father merely the right of Mr. Gray to redeem that lien.

Under such a decree the right of the debtor in the property charged remains unaffected, and no interest in it passes to the judgment-creditor prior to enforcement.

As in the present case, there was no enforcement of the decree until that by plaintiff's father as assignee of the decree in 1871, the interest of Mr. Gray then put up to sale transferred to the purchaser, the plaintiff's father (who is now represented by the plaintiff), the entire interest of Mr. Gray in the quarter bungalow.

The decrees of the Courts below are therefore right and this second appeal should be dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Ayyar.

1879. January 22.

THE EMPRESS *v.* KHOGAYI.

THE EMPRESS *v.* KHOGAYI (FIRST PRISONER) APPELLANT.*

Indian Penal Code, Section 300—Provocation necessary—Evidence as to the condition of mind of the offender, admissible.

The provocation contemplated by Section 300 of the Indian Penal Code should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation.

THE appellant (first prisoner) was charged with the murder of one Saradi, and a second accused (Budi) was charged with abetment of the murder.

The two prisoners were in their field strengthening the bund. Tataya and another (shepherds) drove their flock of sheep past the field. Some of the sheep went over the bund and the prisoners, annoyed at their bund being damaged, abused and struck the shepherds. At this time Tataya's father (the deceased) and another came up. Deceased caught hold of his son, asking why the prisoners were beating him and abused them. First prisoner then struck deceased one blow on the side of the head with a heavy stick that was in his hands and killed him.

The Sessions Judge convicted the first prisoner (appellant) of murder, and sentenced him to be transported for life. The second prisoner was acquitted.

On appeal by the first prisoner, Counsel not appearing for him, having heard the *Government Pleader* in support of the conviction, the High Court (INNES, J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.—It was argued by the Government Pleader, who appeared in support of the conviction, that in determining what was the provocation which induced the act of the prisoner, all that took place before deceased arrived on the scene must be left out of account, because there is nothing to show that he had any part in the trespass and assault and other aggravating

* Appeal No. 561 of 1878, against the sentence of J. R. Daniel, Sessions Judge of Ganjam, dated 9th September 1878.

THE EMPRESS *v.* KHOGAYI.

conduct of his son. Assuming it to be the law that the provocation which is contemplated by Section 300 must have proceeded from the person whose death is the subject of the enquiry either by his own acts or by acts of others which he instigated or otherwise abetted, and confining the provocation in this case therefore to the abusive language used by the deceased, we still think that it was grave enough and sudden enough to bring it within the character of that contemplated by the section.

What is required is that it should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind and was addressed to a man already justly enraged by the conduct of deceased's son. In the circumstances we think the provocation was sufficient to deprive him of his self-control, and shall set aside the conviction of murder and substitute a conviction of culpable homicide not amounting to murder, and sentence prisoner to seven years' rigorous imprisonment.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

1879. January 22.

SUBBRAMANYIAN, PLAINTIFF *v.* GANAPATHI AND ANOTHER, DEFENDANTS.*

Suit in District Munsif's Court, suit filed in Small Cause Court on same day. Election.

A suit brought in a District Munsif's Court, filed on the same day as a suit for the same amount brought on the same cause of action in the Small Cause Court is not a bar to the maintenance of the Small Cause Suit; but the Plaintiff must elect which suit he will proceed with.

THIS was a case stated by the Judge of the Court of Small Causes at Kumbakónam under Section 617 of Act X of 1877.

The question in this case was whether a suit brought in a District Munsif's Court, filed on the same day as a suit for the

* Case No. 6 of 1879, stated under Section 617 of Act X of 1877 by the Judge of the Court of Small Causes at Kumbakónam in Small Cause Suit No. 18 of 1879.

SUBBRAMANIAN v. GANAPATHI.

same amount brought on the same cause of action on the Small Cause Court side was a bar to the maintenance of the Small Cause suit.

A. Rámachandráyyar for the plaintiff.

T. Ráma Ráu for the defendants.

The Court (KERNAN, J. and FORBES, J.) delivered the following

JUDGMENT :—The question is whether the suit in the Munsif's Court for Rupees 30-8-0 filed the same day as the suit in the Small Cause Court is a bar to the maintenance of the Small Cause Suit. We think it is not. But the Plaintiff must elect which suit he will proceed with, and as he elects to proceed with the Small Cause suit, he is bound to place on the record a relinquishment of the cause of action and suit therefor in the Munsif's Court.

APPELLATE CIVIL.

Before Sir W. Morgan, Kt., Chief Justice, & Mr. Justice Forbes

1878. December 6.

MAYANDI (PLAINTIFF) APPELLANT, *v.* McQUHAE, VICE-PRESIDENT OF THE MADURA MUNICIPALITY (DEFENDANT) RESPONDENT.*

Municipal Commissioners—Contract—Notice—Madras Act III of 1871, *sec.* 168.

A suit was brought to recover from the Municipal Commissioners of Madura the balance of a sum of money due for timber supplied under a contract duly made with them. *Held* that the plaintiff was entitled to sue on the breach of contract without giving notice, such a suit not falling under the provisions of Section 168 of the Towns Improvement Act (III of 1871, Madras).

THE suit was brought against the President of the Municipality of Madura to recover the balance of a sum of money due for timber supplied by the plaintiff for use in the construction of the dispensary at Madura. For the defence it was pleaded that. the plaintiff should be non-suited as he did not give the notice prescribed in Section 168 of Madras Act III of 1871.

The District Munsif held that in the present case notice was not necessary and made a decree in plaintiff's favor.

On appeal the Subordinate Judge, holding that Section 168 applied, reversed the Munsif's decree and dismissed the suit.

* Second Appeal No. 503 of 1878, against the decree of G. Muttusámi Chetti, Subordinate Judge of Madura, dated 4th April 1878, reversing the decree of the District Munsif of Madura, dated 5th September 1877.

MAYANDI v. McQUHAE.

The plaintiff preferred a second appeal to the High Court on the ground that the Subordinate Judge was wrong in holding that the plaintiff was bound to give notice of action.

The *Advocate-General* for the appellant.

Mr. *Wedderburn* for the respondent.

The Court (MORGAN, C.J., and FORBES, J.) delivered the following

JUDGMENT.—The notice of action required by Section 168 of the (Madras) "Towns Improvement Act, 1871"(1) must be given when a suit is "brought against the Commissioners or any of their officers or any person acting under their direction *for any thing done* under the Act."

The suit in the present case was brought to recover from the Commissioners the balance of a sum of money due for timber supplied under a contract duly made with them, and the Sub-Judge, reversing the Munsif's judgment, has held that no such suit can be maintained unless after notice of action under the section. The Subordinate Judge quotes the 12th Section of the Act (whereby the Commissioners are empowered to make certain contracts) in support of his view that the making of the contract on the part of the defendant was a *thing done* under the Act, and that the defendant was therefore entitled to notice of action. This conclusion is, in our judgment, erroneous.

The contract was, doubtless, made by the Commissioners under the powers conferred by the Act; but it does not follow from this alone that a breach of the contract by non-payment of the balance due gives rise to a suit of the kind contemplated by Section 168, that is, a suit for a *thing done* under the Act. "*Actions brought*" within the meaning of this section are suits in respect of acts and defaults of a different description.

Many legislative enactments contain similar provisions expressed in different phraseology; and they are primarily intended to protect public officers and other persons acting in execution of their several duties and powers. Further, such persons have been held entitled to protection not only in suits strictly for *things done* by them, but also when the object of the suit was to recover back money illegally received by them. But

(1) Act III of 1871.

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in no case has it, we believe, been held that, by force of such a provision, a suit like the one before us, to recover the price contracted to be paid for goods sold, is not maintainable without notice and compliance with the stringent requirements found in clauses of this description. It would, we think, be a forced construction of the words used in Section 168 to hold that they apply to such a case, and that a specific contract duly made for the sale of goods cannot be enforced by suit unless the suit is brought within a few months and after written notice of the cause of action and opportunity given for tender of amends. The suit must be remanded for disposal to the Sub-Judge, who will also dispose of the costs of this appeal.

APPELLATE CIVIL.

Before Sir Walter Morgan' Knight, Chief Justice, and Mr. Justice Muttusámi Áyyar.

1878. November 15. 1879. January 21.

NÁTCHIARAMMÁL, ON BEHALF OF HERSELF AND TWO OTHERS, MINORS (PLAINTIFFS) APPELLATS *v.* GOPALAKRISHNA (2ND DEFENDANT), RESPONDENT.*

Maintenance—Family debt.

Though the maintenance of a wife and children may in certain circumstances be a charge on the husband's property as against a purchaser, it is not so in a case in which the sale took place in payment of a family debt, which it was the primary duty of the head of the family to pay.

This was a suit for maintenance brought by a Hindu wife, on behalf of herself and her minor children, against her husband, the 1st defendant, and two other persons, one of whom, the 2nd defendant, was in possession of the family lands.

The first and third defendants made no defence.

The second defendant pleaded that he purchased the lands in question at a sale held in execution of a decree against the first defendant and that the purchase had been upheld by the High Court in Special Appeal No. 362 of 1876, dated 24th June 1876, against the first defendant and his sons.

* Second Appeal No. 444 of 1878 against the decree of A. C. Burnell, District Judge of Tanjore, dated 27th March 1878, modifying the decree of the District Munsif of Negapatam, dated13th December 1877.

NÁTCHIARAMMÁL v. GOPALAKRISHNA.

The Munsif held that the plaintiffs were entitled to charge their maintenance on the property alienated.

The second defendant appealed to the District Court, which reversed the decree of the Munsif on the grounds that the suit was collusive between plaintiffs and first defendant (the father) and that, as the debt was contracted for *bonâ fide* family purposes, an alienation, even of all the family property, was valid.

The plaintiffs preferred a second appeal on the grounds—

That the judgment of the Lower Appellate Court releasing the second defendant and the property held by him from liability to the plaintiff's claim is contrary to Hindu law.

That under Hindu law the maintenance due to the plaintiffs is a charge on the estate of the first defendant and all those claiming under him.

That the first defendant having alienated all the family property, the plaintiffs, under Hindu law, were entitled to proceed against the property in the hands of the second defendant.

That there was no evidence to show collusion.

T. Ráma Rau for the appellants.

V. Bháshyam Áyyangár for the respondent.

The Court (MORGAN, C.J., and MUTTUSÁMI ÁYYAR, J.,) delivered the following

JUDGMENT:—The plaintiffs, a Hindu wife and two minor children, sued to get their maintenance charged on her husband the first defendant's property, which had been alienated among others to the second defendant. The contention for this defendant was that the purchase was for a family debt and as such upheld against the first defendant and his son in a former suit. The District Munsif of Negapatam held that the first plaintiff and her daughter were no parties to this suit, that there was no satisfactory evidence that the second defendant's judgment debt was a family debt, and on this ground decided in plaintiff's favor. But on appeal the District Court held that this suit was collusive between the plaintiff and the first defendant and that the alienation of even all the property was valid. In this view the Lower Appellate Court dismissed the suit with costs so far as the second defendant was concerned. Against this decision the plaintiffs appeal.

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In the first suit in which the eldest son was plaintiff, it was decided finally by the High Court that the debt which led to the sale in execution in second defendants favor was a family debt and that the sale was binding upon the son. As this decision is evidence in support of the second defendant's contention, we are bound to accept the finding of the Lower Appellate Court that the second defendant's judgment debt was a family debt. The only question then which arises and which is raised for decision in this appeal is whether a sale in payment of a family debt is a sale subject to the maintenance of those who are entitled under the Hindu law to be maintained by the head of the family. We are of opinion that, though the plaintiffs' maintenance may in certain circumstances be a charge on the husband's property as against a purchaser, it is not so in this case in which the sale is found to have taken place in payment of a family debt which it is the primary duty of the head of the family to pay and against which the claim to maintenance cannot take precedence. We find that the same view has been taken by the High Court at Bombay.

And we think, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.* 1879. November 5th, 6th, and 7th, and December 13th.

RÁJA VENKATA RAO (PLAINTIFF) APPELLANT *v.* THE COURT OF WARDS, ACTING ON BEHALF OF THE MINOR SONS OF RÁJA NARÁYYA RAO, DECEASED, AND OTHERS (DEFENDANTS) RESPONDENTS.

[On appeal from the High Court of Madras.]

Zamindári—Partibility—New Zamindári—Heirs.

In 1793 the ancient zamindárí of Núzvíd, which descended to a single heir, having been before British rule a ráj, or principality, held on the tenure of military service was resumed by the Government for arrears of revenue.

In 1802 the Government formed two zamindáris out of it, and granted one of them, since called Núzvíd, to the second son of the Rájá, under a "Sanad-i-milkiat istemrari," which described the zamindárí lands, comprised in it, as "the six pargannas of Núzvíd in the "Kondapalli Circar." The provisions of the sanad did not differ from those of an ordinary grant under the Permanent Settlement.

* *Present.*—Sir JAMES WILLIAM COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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On the question whether this zamindárí was, or was not, subject to the same rule of impartibility as that to which the ancient and entire zamindárí of Núzvíd had been subject before 1793. Held that the six pargannas, granted in 1802, were a new zamindárí, subject only to the ordinary obligations imposed on zamindáris in general; and the word "heirs" used in the sanad, construed to mean heirs of the grantee according to the ordinary rules of inheritance of the Hindu Law.

The Hansapúr case, *Bir Pertah Sahi* v. *Maharaja Rajender Pertah Sahi* (1) distinguished.

APPEAL from a decree of the High Court of Madras (24th July 1874) confirming a decree of the Civil Court of Gantúr (23rd August 1873).

The facts of the case are sufficiently stated in their Lordships' judgment which was delivered by Sir BARNES PEACOCK:—

This is an appeal from a judgment and decree of the High Court of Judicature at Madras, affirming a judgment and decree of the Acting District Judge of Gantúr, in a suit in which the appellant was the plaintiff, and the deceased respondent, Rájah Naráyya Appa Rao, was one and the principal one, of the defendants.

The suit was brought to recover, amongst other things, a sixth part or share of the zamindárí of the six pargannas of Núzvíd, in the Kondapalli Circar, to which the plaintiff claimed to be entitled by inheritance, as one of the six sons of Rájah Shobhanadri.

It was not disputed that the zamindárí, prior to the year 1802, formed part of an ancient and much larger estate which was indivisible and descendible to a single heir, and that prior to the British rule it was a military jaghir held on the tenure of military service, and in the nature of a ráj or principality.

It is unnecessary to trace the succession to the âncient zamindárí farther back than to the year 1772. It is found by the Judge of the First Court that in that year, Vankatádri, who had succeeded to the estate, died, and was succeeded by his son Narayya, who was proclaimed a rebel, and made a State prisoner in 1783. The entire estate was confiscated and resumed by Government, and in the year 1784 was restored to Venkata Narasimha, the eldest son of Narayya, the rebel. It may be assumed that the estate, which was restored in its entirety, was

(1) 12 Moore's Ind. Ap. 1.

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restored as it existed prior to the confiscation, and that the rule as to impartibility and descent continued as before. See the *Hunsapore Case*, 12 Moore Ind. Appeals, p. 1.

Narayya, the rebel, had three sons, Venkata Narasimha, the eldest, to whom the estate was restored, Rámachandra, and Narasimha.

In 1793 the estate was again resumed by Government for arrears of revenue, and in 1802 two new zamindáris were carved out of it, of which the zamindári of Núzvíd, now the subject of dispute, was granted to the second son, Rámachandra, and the other, Nidadavól, which was of much greater extent, to the eldest son Venkata Narasimha.

Upon the death of Rámachandra, he was succeeded by his only son Shobhanadri. In 1816 the third brother, Narasimha, brought a suit against his eldest brother, the Zamindár of Nidadavól, and against the guardian of the minor Zamindár of Núzvíd, in which he claimed one third of the whole property as being joint and divisible family property. He obtained a decree in his favor in the original Court. This was reversed on appeal by the Sadr Court, and his suit was dismissed. The ground of the decision was that the act of the Government in creating the two zamindáris was an act of State, and that the Zamindárs held by a title which the Courts could not question. No appeal was preferred against the decree of the Sadr Court, which became final. The unsuccessful plaintiff died some time after the decree, and an arrangement was made by which the two Zamindárs settled an annual sum upon his family for their maintenance. This was afterwards commuted into a grant of land in full of all claims past and future. Whatever, therefore, might have been the rights of the third brother, Narasimha, they have been extinguished.

On the 7th December 1864 the eldest of the said three brothers, the Zamindár of Nidadavól, died, leaving two childless widows, and a will, in which he expressed a wish that his estates should be divided equally between his widows. The Collector, in reporting the facts to the Board of Revenue, expressed his opinion that the elder wife should be recognized as successor, and that no division of the estates should be allowed, as they were of ancient origin.

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Shobhanadri, the second holder of the newly-created Núzvíd Zamindárí, had six sons. In 1866 his extravagance and mismanagement of the estate had caused quarrels between himself and his eldest son, Narayya, the principal defendant and the original first respondent, for the settlement of which the assistance of the Collector and the Government was invoked. In consequence of these disputes, Shobhanadri presented a petition to Government in November 1866, praying that orders might be issued for the division of his estate among his sons. On the 7th January 1867 the Government replied, referring him to the Collector, to whom instructions had been communicated on the subject of his petition. What those instructions were does not appear. From what follows, however, it is evident, as stated by the respondents in their case, that his request for a division was refused.

Shobhanadri died on the 28th October 1868, leaving six sons, of whom the plaintiff was one. The eldest, Narayya, was placed in possession of the zamindárí by the Collector, and on the 19th December was registered under the orders of the Board of Revenue as Zamindár of Núzvíd.

On the 30th November 1868 Venkata Narasimha, the plaintiff and present appellant, petitioned Government praying for a division of the zamindárí, and was informed in reply that the estate was not divisible. He repeated his application on the 26th January 1869, referring to the wish expressed by his father that the zamindárí should be divided among his sons. To this petition the Government again replied that the zamindárí could not be divided, except under the provisions of Regulation XXV of 1802, or in conformity with a decree of a competent Court.

On the 20th October 1871 the plaintiff commenced his suit against the deceased respondent, Narayya, as the principal defendant, and joined his four other brothers as co-defendants.

The first defendant, Narayya, put in a written statement, and contended that the disputed zamindárí was an ancient zamindárí and of the nature of an impartible ráj. The other defendants upheld the plaintiff's right to a division of the zamindárí, but stated that the plaintiff had no cause of action against them.

On the 8th July, the First Court framed, amongst others, the following issue, viz., "Whether the real property constituting the zamindárí of Núzvíd is divisible or not," and having found

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that issue against the plaintiff dismissed his suit, so far as it elated to the zamindárí in dispute.

The High Court, upon appeal, affirmed the decision of the First Court, whereupon the plaintiff appealed to Her Majesty in Council against the judgment and decree of the High Court.

Pending the appeal, the first and principal defendant, Rája Narayya, who was the first respondent, died, and by order of revivor the Court of Wards were made respondents in his place.

The case has been fully argued on both sides, and the only question to be considered is whether when the ancient zamindárí was divided into two, the newly constituted zamindárí of Núzvíd now in dispute was subject to the same rule as regards impartibility and inheritance as that to which the entire ancient zamindárí was subject.

The sanad under which the zamindárí of Núzvíd was granted to Rámachandra is dated the 8th December 1802. It is directed to Rámachandra, describing him as the Zamindár of the six parganas of Núzvíd in the Kondapalli Circar, and, after reciting the benefits to be derived from a permanent settlement of the revenue, it was declared, in the 2nd paragraph, that the Government had resolved to grant to Zamindárs and other landholders and their heirs and successors a permanent property in their lands in all time to come, and to fix for ever a moderate assessment of public revenue on such lands.

By Clause 4 the settlement was fixed at a certain amount. By Clause 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government, or of any other authority to whomsoever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole, or in any part of your zamindárí; such transfers of your land shall be valid and recognized by the Courts and officers of Government, provided they shall not be repugnant to the Muhammadan or the Hindu laws, or to the regulations of the British Government." And, finally, after annexing to the grant certain stipulations, the 15th Article declared that "continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named the zamindárí of . The name of the

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zamindárí is not inserted, but at the end of the sanad there was added a list headed 'A list of the villages in the zamindárí of the six parganas of Núzvíd, in the Kondapalli Circar.'"

The name of the zamindárí in dispute appears, therefore, to be in strictness, "The zamindárí of the six parganas of Núzvíd, in the Kondapalli Circar," but for convenience it is treated as the zamindárí of Núzvíd.

The provisions of the sanad differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end; the six parganas to which the sanad related became a new zamindárí, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon Zamindárs.

It is stated in the written statement of the first defendant, "that under the empire of the Mahomedans the ancient zamindárí of Núzvíd was extensive, and was governed by its chiefs with absolute power and independence; but under the policy of the British Government the same has become divested of its military character, and dwindled into a large peishkash paying zamindárí."

This is doubtless a correct statement.

In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the government of a chieftain, and was in the nature of a ráj or principality; but when the ancient zamindárí was resumed and two new estates were created out of it, of which the Zamindárs ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary Zamindárs, subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates.

There was no State policy which required that the new estate of Núzvíd should be indivisible, otherwise Clause 7 would not have been inserted in the sanad. If Rámachandra had transferred by gift, sale, or otherwise any portion of his zamindárí such portion would not have been impartible or descendible, according to the

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rule of primogeniture to a single heir of the transferree, if a Hindu or Muhammadan. Indeed it was expressly stipulated in the sanad that transfers in whole or in part should be valid, provided they should not be repugnant to the Hindu or Muhammadan laws, which they would have been if they had been limited to the eldest son or other single heir of a Hindu or Muhammadan transferree. There was no reason why the new zamindárí should have been made impartible, or limited to Rájah Rámachandra and his heirs according to the rule of primogeniture, when, so far as Government was concerned, he might have divided it by will amongst several devisees.

The limitation in para. 15 of the sanad was to his heirs, by which, according to their Lordships' interpretation, his heirs according to the ordinary rule of Hindu law were intended. Rámachandra did not at the date of the sanad hold an estate descendible to a single heir according to the rule of primogeniture, and there is no reason why the limitation to his heirs should be construed to mean a single heir according to the rule of primogeniture, when the descent from his transferrees would be regulated by the ordinary rules of inheritance. If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee, according to the rule of Hindu law, there is no doubt they would have expressed their intention in unambiguous language. Their Lordships have nothing to do with the case of Venkata's new zamindárí of Nidadavól, and therefore abstain from any expression of opinion as to whether it was impartible or descendible to a single heir or not. Nor are they, nor were the Civil Courts, bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government. Nor has the decision of the Sudder Court in Narasimha's case any bearing upon the construction of the sanad of 1802, or upon the rights of the parties to the suit. In the Hunsapore case, *Bir Pertab Sahi* v. *Maharaja Rajender Pertab Sahi* (1) the zamindárí was an impartible ráj, which by family usage and custom descended to the oldest male heir, according to the rule of primogeniture, subject to

(1) 12 Moo. I. A., p. 1.

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the obligation of making babuana allowances to the junior members of the family for maintenance. It was seized and confiscated by the British Government in 1767, in consequence of the rebellion of the Rája, who was expelled by force of arms. The Government, having kept possession until 1790, granted it in that year to a younger member of the family, on whom subsequently they conferred the title of Rája. There was no fresh sanad, and the only question raised was, what was the nature of the estate granted; whether it was a fresh grant of the family ráj with its customary rule of descent, or merely a grant of the lands formerly included in the ráj, to be held as an ordinary zamindárí. In that case, the estate whilst in the hands of the Government had never been broken up, and it was held that it was the intention of the Government to restore the zamindárí as it existed before the confiscation, and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in this case the estate was divided into two distinct zamindárıs, and a new sanad granted allowing the same to be alienated in part or in whole, and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir.

The word heirs used in the sanad must, in their Lordships' opinion, be construed to mean the heirs of the grantee according to the ordinary rules of inheritance of the Hindu law.

With reference to the effect of the sanad of 1802, some reliance was attempted to be placed on an agreement said to have been entered into between Venkata Narasimha and his brother Rájah Rámachandra, dated 17th July 1795, but their Lordships do not think that it was legally proved, and therefore reject it. In considering the effect of the sanad of the 8th December 1802 reference may be had to the letter of Mr. John Read, the Collector of Masulipatam, to the Secretary of the Land Revenue Settlement Commission, dated 25th July 1802, in which he submitted a plan for the division of the ancient zamindári of Núzvíd, and offered an opinion as to the respective claims of Venkata Narasimha and of Rámachandra, preparatory to the introduction of the permanent settlement. In that letter, of which their Lordships are of

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opinion that the official copy of the copy filed with the Board of Revenue (which was an official record) was under the circumstances admissible in evidence, Mr. Read says:—

"A perusal of the late Collector's correspondence will show that Rámachandra Rau's claim to participate in the zamindárí has been long and steadily maintained, so late, indeed, as the 17th July 1795. The views of Venkata Narasimha Appa Rau and Rámachandra Rau underwent the discussion of their relatives and adherents. In consequence, an agreement was exchanged, providing for the division of the estate, effects, and zamindárí of their deceased father, conformable to the usage in such cases.

"No doubt remains of the execution of this agreement, although I cannot find it received the sanction of the Collector. The elder Appa Rau pretends to state that the document was forcibly taken, and has presented what he terms a corrected plan for the division of the zamindárí. The charge of forcible exchange I believe to be incorrect and the agreement, to which Venkata Narasimha Appa Rau appeals, is no more than a loose memorandum in the handwriting of the Rajahmundry Peishkar."

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgments and decrees of both the Lower Courts, and to order that the appellant do recover one-sixth part or share of the villages included in the zamindárí of the six pargannas of Núzvíd, in the Kondapalli Circar, together with his costs in both the Lower Courts in proportion to the value of that property.

It was found by the First Court that the Kamatam lands and gardens in various villages to a total value of Rupees 58,500, of which a garden valued at Rupees 300 is in the plaintiff's possession, and also the forts, houses, granaries, stables, &c., valued at Rupees 1,23,500, form part of the zamindárí, and were, therefore, indivisible under the first issue, and no appeal was preferred against that finding.

Their Lordships will, therefore, further humbly advise Her Majesty that the said Kamatam lands and gardens, forts, houses, granaries, stables, &c., above mentioned, be declared to be part of the zamindárí above mentioned, and that the appellant is entitled to recover one-sixth part or share thereof, with the exception of the said garden valued at Rupees 300 in the plaintiff's possession.

Their Lordships will further recommend to Her Majesty that

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the amount of mesne profits from the date of dispossession of the share of the property ordered to be recovered to the date of restoration thereof be assessed in execution.

The costs of this appeal must be paid out of the estate of Rajah Narayya Appa Rau, deceased, the original defendant and respondent.

Solicitors for Appellant: Messrs. *Frank, Richardson* and *Sadler*.

Solicitor for Respondents: Mr. *H. Treasure*.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., C.J., and Mr. Justice Muttusámi Áyyár.

1880. May 3.

LINGAM RAMANNA AND TWO OTHERS (PRISONERS) APPELLANTS.*

Abetment—Supplying food.

The supplying of food to a person about to commit a crime is not necessarily an abetment of the crime: but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it.

THIS was a case referred under Section 263 of the Code of Criminal Procedure by the Sessions Judge of the Godávari Division.

Upon considering this case, Counsel not appearing on behalf of the prisoners, the Court (TURNER, C.J., and MUTTUSAMI ÁYYAR, J.) delivered the following

JUDGMENT:—The prisoners Lingam Ramanna, Miriyala Baladu and Valala Bulleya were charged, firstly, with having, on the 18th November 1879, abetted dacoity which was committed in consequence of such abetment; and, secondly, with having on the same day abetted dacoity which was not committed in consequence of such abetment. The evidence adduced at the trial is the following: that on the night of the 18th November the second and third prisoners were seen proceeding to Marripoliem with four bullocks laden with grain, wheat, paddy, and cholam; that

* Criminal Appeal No. 113 of 1880.

IN RE LINGAM RAMANNA.

they were sent for and brought back and were followed by the prisoner Ramanna; that on being questioned by a military officer the prisoner Ramanna stated "Karam Tamman Dora has been to our village twice and has compelled us to give him food . . . . . . The grain which I carried was for my own use only." The prisoner Baladu stated "Lingam Ramanna (meaning the first prisoner) and others have been for some time supplying Karam Tamman Dora and his people. Ramanna sent me and Bulleya with 6 rupees to purchase paddy. We went to Kottapalle, bought it, and carried it back to Marripoliem last night. Afterwards people came from Kottapalle and fetched us and the grain back here. The paddy that Ramanna sent us for was intended for Tamman Dora. Salt was also sent out through us for Tamman Dora." The prisoner Bulleya stated "Lingam Ramanna has been furnishing Tamman Dora and his gang with supplies. Recently he sent me and Baladu to fetch more paddy from Kottapalle. We carried it last night to Marripoliem and were fetched back here this morning." In the Sessions Court the prisoner Ramanna stated he sent the other two prisoners with two of his own bullocks and two belonging to one Gangayya to purchase grain for his own use. The prisoner Baladu stated Ramanna had sent him to buy grain for his (Ramanna's) own use, and that he had done so; and the prisoner Bulleya that Gangayya had sent him to buy grain and convey it to Marripoliem and there leave it, and that he took the grain at night as he thought it safer to do so.

The jury acquitted the prisoners.

The Judge considers the prisoners were aiding and abetting the dacoits and that they should be convicted, he does not say on which of the two charges.

Assuming that Karam Tamman Dora intended to commit a dacoity, and that the first prisoner knew it, although he had not conspired for its commission, and that, having such knowledge the first prisoner intended to facilitate the commission of the dacoity by supplying food to Karam Tamman Dora, and would thereby have facilitated it, there would not be sufficient evidence to convict any of the prisoners in reference to the supplies, which are the subject of the charges, even of an attempt to abet the dacoity. No more is shown than this: that the second and third

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prisoners were on their way to the house of the first prisoner, and it may be that, on receiving the grain, the first prisoner would have changed his intention, or the first and second prisoners would have refused to set out to deliver the grain to Karam Tamman Dora. They could not be convicted of an attempt until some step had been taken in the actual commission of the offence. The actual transaction which, if completed, might have constituted abetment, the despatch of food to Karam Tamman Dora, is not shown to have commenced. All that is shown (and this only by the statements of the second and third prisoners,) is that the first prisoner was furnishing himself with the intention of supplying Karam Tamman Dora.

Moreover, no evidence was adduced to show that Karam Tamman Dora was about to commit a dacoity, and, had it been established, to convict the accused it must have been further shown that the food was to be supplied to facilitate the commission of the offence and that the commission of the offence would have been facilitated thereby.

The supplying of food to a person about to commit a crime is not necessarily an abetment of the crime. Abetment consists either of instigation or of conspiracy followed by an act or illegal omission pursuant thereto, or of intentional aid in the doing of a thing; and a person is said to aid the doing of an act, who either prior to, or at the time of, the commission of the act does anything in order to facilitate the commission of that act and thereby facilitates it.—I.P.C., Section 107, Example 2. The supplying of necessary food to a person known to be engaged in crime is not *per se* criminal; but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it.

As we hold the evidence on the record is insufficient to warrant the conviction of the prisoners on either of the charges on which they have been tried, we acquit them and order their release.

Ordered accordingly.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Áyyár.

1880. October 11.

MUTHIALU CHETTI AND 9 OTHERS (PLAINTIFFS), APPELLANTS, v. BAPUN SÁIB.*

Order—Magistrate—Music.

An order of the Magistrate directing that all music should cease when any procession is passing a certain place of worship, *held ultra vires.*

THE facts and arguments of Counsel in this case are fully set forth in the judgment of the Court (TURNER, C.J., and MUTTUSAMI ÁYYAR, J.)

Mr. *Johnstone* for the Appellants.

The *Advocate-General* for the Respondents.

The Court delivered the following

JUDGMENT:—The respondents having recently erected a mosque in Shevapett, a suburb of Salem, obtained from the District Magistrate on the 17th January 1878 an order in the following terms:—"The District Magistrate hereby grants permission to the Mussulmans of Shevapett to erect a musjid in the place indicated in the petition now read, subject to the conditions therein stated by them, viz., that they agree to allow free passage to all processions (Hindu and others) while passing and repassing this musjid, and, under G.O., No. 861, dated 9th May 1874, the District Magistrate hereby directs that all music shall cease while any procession is passing or repassing the above musjid." Feeling aggrieved by this order, which interfered with the exercise of a right they alleged and apparently proved they had enjoyed from time immemorial, the appellants, on their own behalf and on behalf of the other Hindu inhabitants of the suburb, instituted this suit to obtain a declaration of their right to use music in their processions and of the invalidity of the order of the Magistrate.

* Second Appeal No. 568 of 1879 against the judgment of J. C. Hannyngton, District Judge of Salem, dated 28th July 1879, reversing the decree of the District Munsif of Salem, adted 31st March 1879.

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The District Munsif decreed the claim; the Judge has reversed the decree and dismissed the suit on the ground that the mosque being a recognized place of public worship the Magistrate's order did not go beyond the orders of Government, and must be upheld, any usage to the contrary notwithstanding.

We agree with the Judge that usage, however long, would not avail to sanction an infringement of the law, and that it is immaterial for the decision of the question raised in this suit whether the Hindus have heretofore enjoyed the right they assert, or whether the edifice now raised as a place of worship by the Mahomedans has been so used for a shorter or longer period. We cannot, however, agree with the Judge that the notifications of Government to which the Judge alludes would be decisive of the question as to the propriety of the Magistrate's order or the rights of the parties. These notifications have not the force of law.

In the proper governance of a country of which different sections of the inhabitants hold widely divergent creeds, it is of course necessary that regulations should be established securing the members of each sect, in the legitimate performance of their devotional exercises, from improper interference on the part of members of other sects, and such regulations find a place in the law of British India (Indian Penal Code, Chapter XV).

But at times the rights of the several sects to the undisturbed exercise of their religious observances may come into conflict without any criminal intention. In such cases mutual toleration is, and must be, the only and the proper rule. It has then to be determined how far the conflicting rights interfere with and necessarily modify each other.

It is, on the one hand, a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed. It is, on the other hand, a right recognized by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music, so that they do not obstruct the use of it by other persons. If persons passing in procession attended by music pass a place in which others are assembled and engaged in public worship which the music would tend to disturb, it is the duty of the persons composing the procession to refrain from such disturbance; but assemblies for purposes of

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worship are held scarcely in any place at all hours and generally at appointed hours, and therefore it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognized place of worship if attended by music. If indeed the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognized place of worship, whether persons are or are not at the time there assembled and engaged in religious worship, the members of a numerous sect might close every highway to the processions of a sect to which they are opposed by erecting in the neighbourhood of each highway a place of worship.

The law in the restriction it imposes on processions of whatever character does not go beyond the necessity. The order then passed by the Magistrate is not warranted by law, nor has he *generally* authority to declare the law on the subject and anticipate a breach of it by a prohibitory order.

For the preservation of the public peace he has a special authority—an authority limited to certain occasions. His first duty is to secure to every person the enjoyment of his rights under the law, and, by measures of precaution, to deter those who seek to invade the rights of others; but if he apprehends that the lawful exercise of a right may lead to civil tumult, and he doubts whether he has available a sufficient force to repress such tumult, or to render it innocuous, regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorized to interdict its exercise.

The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority.

In our judgment the order which this suit impugns was *ultra vires,* and the appellants had a good cause of action against the respondents who procured it. Reversing the decree of the Judge, we affirm that of the Court of First Instance, substituting for the words "as freely as they usually do in other places" the words "on all lawful occasions and in a lawful manner so

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as not to disturb the respondents or other persons assembled for the performance of religious worship or religious ceremonies."

The appellants will recover from the respondents their costs in all Courts.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Forbes.

1880. August 23.

SESHAYYANGÁR AND 3 OTHERS (PLAINTIFFS), APPELLANTS, *v.* SESHAYYANGÁR AND 4 OTHERS (DEFENDANTS), RESPONDENTS.*

Liberty to erect places of worship.

In India the members of a sect are at liberty to erect a place of worship on their own property although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect, on their own property, places of worship, either public or private, and to perform worship, provided that, in the performance of their worship, they do not cause material annoyance to their neighbours.

THIS suit was brought on the 2nd December 1877 by some of the worshippers in the Tengalai Temple of Súndrasámi near Negapatam to restrain some Vadagalais from carrying their idol in procession round the four streets surrounding the said temple. A decree was also prayed for to order the removal of a Vadagalai idol from a house in one of the said streets.

The District Judge dismissed the suit with costs.

The plaintiffs appealed.

Mr. *Johnstone, A. Rámachandráyyár, Rangacharri* and *Tirunaranacharri* for the Appellants.

The *Advocate-General* and *V. Bhashyam Ayyangár* for Respondents 1, 2, 3 and 4.

The *Government Pleader* for the 5th Respondent.

The facts and arguments of Counsel sufficiently appear in the following

JUDGMENT:—The plaintiffs, alleging themselves to be worshippers in certain temples, which are known as Savundararáju

* Appeal No. 32 of 1880 against the decree of J. D. B. Gribble, Acting District Judge of North Tanjore, dated 8th November 1879.

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Permal Pagoda and Sri Krishnaswámi Sannadi, sued on the allegation that the defendants wrongfully founded a Vadagalai idol of Vedanta Desikár for public worship in a house facing the Sundararáju Pagoda, and wrongfully carried the idol in procession, and recited prayers through the four streets belonging to the Sundararáju Pagoda; that the acts so committed were contrary to the custom of the pagoda and an insult to the Tengalai community.

They prayed that a decree might be passed for the removal of the idol of Vedanta Desikár; that the streets might be declared to be the property of the Tengalai Pagoda; that the defendants might be restrained from carrying their idol in procession, and might be ordered to pay Rupees 500 as damages for their wrongful act.

The Judge examined only the first plaintiff, who admitted that the property of the temple is held by Dharmakartas.

Although this witness claimed the streets surrounding the temple as the property of the temple, and alleged that fees were paid by persons of other sects than the Tengalai sect when carrying idols in procession through these streets, he made admissions which throw considerable doubt on the validity of the claim on behalf of the temple to any of these streets, while one of them, he allowed, was a metalled highway.

The Judge omitted to frame and try what should have been the first issue as to the right of the plaintiffs to maintain the suit, and it is to be regretted that he did not fully exhaust the evidence on the issues tried by him. Finding that the plaintiffs did not deny the public had a right of way, he held that the right of way carried with it a right to use the way for processions, and dismissed the suit without taking further evidence.

It is argued in appeal that, although the public may have a right of way, it does not necessarily follow that they have a right of way for all purposes. In the present case, while admitting the public had a right of way, the witness went on to say that processions of idols took place on payment of fees, by which we understand him to mean that the right of way was only allowed for such processions on payment of fees. On appeal, the learned Counsel relies on *Parthasáradhy Ayyangár and others* v. *Ragavah Kristnayyengár and*

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others (1) as supporting the claim for the removal of the idol. Although the decision of that case would certainly warrant the entertainment of such a claim, the principle which underlay it has long been rejected. In this country, where there is a great diversity of creeds, it would be intolerable if the members of a sect were not at liberty to erect a place of worship on their own property because it was more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect, on their own property, places of worship, either public or private, and to perform worship, provided that, in the performance of their worship, they do not cause material annoyance to their neighbours.

The claim for the removal of the idol must then be rejected. The learned Advocate-General also contends that the plaintiffs as worshippers are not entitled to sue for the declaration of right, nor for the injunction restraining the carrying the idol in procession through the streets, mentioned in the plaint, nor for damages for the processions which have taken place.

Assuming that the streets are the private property of the pagoda, the proper persons to maintain a suit to assert the title of the pagoda, to such streets, and to restrain trespass on them, would be the Dharmakartas; and the plaint does not disclose any special injury to the plaintiffs, either in the performance of their religious duties or otherwise, so as to give them a right to maintain suit for an injunction or for damages.

On this ground we shall dismiss the appeal and confirm the decree of the Lower Court, with costs (two sets).

Appeal dismissed.

(1) S.D.A., 1853, p. 231.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Áyyár.

1880 May 3.

SUBRAMANIAN CHETTI AND ANOTHER (DEFENDANTS), PETITIONERS, *v.* THE PRINCE OF ARCOT (PLAINTIFF), COUNTER-PETITIONER.*

Suit for proprietary dues—Inámdár—Small Causes Court.

Suits for proprietary dues to which the inámdár as the owner of the village lays claim, are not cognizable by a Court of Small Causes. They are not paid as rent, nor are they claimed under any contract.

THIS was a petition under Section 622 of the Civil Procedure Code against the decree of the District Munsif of Kulittalai in Small Cause Court Suit No. 352 of 1878. The petition set forth that the abovementioned suit was instituted as a Small Cause Suit in the Court of the District Munsif by the Prince of Arcot, to recover from the defendants, who are inhabitants of the village of Manamadu, certain sums for (1) rent of house sites; (2) Muggum, or loom tax; (3) Nuzur, or present; and (4) buffalo tax; and that a decree was given in favor of the plaintiff. Petitioners submitted that the proceedings of the Munsif in the case were without jurisdiction and that the decree therein ought to be set aside.

Mr. *Shephard* for the Petitioners.

Mr. *Norton* for the Counter-Petitioner.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT:—We are of opinion that the claims made in this suit are not cognizable by a Court of Small Causes.

The several items claimed are proprietary dues to which the inámdár, as the owner of the village, lays claim, and although they may be payable by persons occupying houses in the village or keeping cattle there, they are not paid as rent, nor are they claimed under any contract.

The decree of the Small Cause Court is set aside and that Court is directed to return the plaint for presentation in the proper Court. Each party to bear his own costs.

* Civil Petition No. 112 of 1880, against the decree of the District Munsif of Kulittalai in Small Cause Suit No. 352 of 1878.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Forbes.

1880. December 17.

TIRUMALA (PLAINTIFF), APPELLANT, *v.* LAKSHMI (SECOND DEFENDANT), RESPONDENT.*

Act III of 1877—Registration.

Section 50 of the Registration Act III of 1877 does not operate so as to exclude, on the ground of their non-registration, instruments executed before Act XVI of 1864 (the first of the Registration Acts) came into operation.

THE plaintiff sued for possession of certain lands, alleging that the first defendant sold the same to him (plaintiff) for Rs. 400 under a registered document dated 21st January 1879.

The first defendant admitted the plaintiff's claim, but pleaded that the second defendant held the land under a lease for twenty years from September 1864.

The District Munsif in his judgment said:—" It is admitted that the second defendant enjoyed the land for a period of fifteen years, and that he has still to occupy it for five years more." Construing the lease as a mortgage, he declared the plaintiff entitled to redeem and decreed accordingly.

Against this decree the second defendant appealed on the ground that 'The decision is against law, inasmuch as the terms of the document executed by first defendant to second defendant clearly prove that it is a lease and not a mortgage.'

The District Judge in reversing the Munsif's decree made the following observations:—" The Lower Court manifestly erred in considering the conveyance to the second defendant to be in the nature of a deed of mortgage securing payment of a sum of money. The document really is a conveyance for a term of years in consideration of the grantor being excused payment of a debt due by him. Upon consideration the parties agreed that in lieu of payment of principal and interest the obligee should

* Second Appeal No. 489 of 1880 against the decree of J. H. Nelson, District Judge of Cuddapah, dated 31st January 1880, reversing the decree of the Court of the District Munsif of Produttúr, dated 2nd July 1879.

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occupy and enjoy certain lands for his own benefit for twenty years. In other words, the grantor sold to his creditor all his rights over the lands for a period of twenty years. It cannot be permitted to the grantor now to recede from his agreement and deprive the grantee of what was deliberately and definitively conveyed to him.

"The respondent contended that his registered deed of sale must prevail against the unregistered conveyance to the second defendant.

"After a careful consideration of the provisions of the earliest Registration Act (XVI of 1864), I am clearly of opinion that the suggestion has nothing in it, inasmuch as the lease deed was executed before that Act came into operation, and therefore under Sections 13 and 16 thereof could not be registered, and therefore is not now '*unregistered*' within the meaning of Section 50, Explanation, of Act III of 1877."

The plaintiff presented a second appeal to the High Court on the grounds—

(1.) That the document in question had been misconstrued. It was a mortgage, and not a lease or conveyance for a term of years.

(2.) That the registered deed of sale under which the plaintiff claimed took priority as against the unregistered document given in favour of second defendant.

(3.) That the plaintiff was entitled to redeem.

Mr. *Gould* and *N. R. Narasimmiah* for the Appellant.

Mr. *Handley* for the Respondent.

The Court (KINDERSLEY, J., and FORBES, J.) delivered the following

JUDGMENT:—The first defendant, finding himself indebted to the second defendant in the sum of Rupees 171, executed an instrument on the 11th September 1864 letting the land in suit to the second defendant for twenty years from the expiry of a lease formerly granted to one Nagaya.

On the 21st January 1879 the first defendant sold the same land to the plaintiff, who has brought this suit to eject the second defendant.

The question is whether by virtue of the Registration Act III of 1877, Section 50, the sale to the plaintiff, which was by an

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instrument duly registered, should take effect against the second defendant's instrument of the 11th September 1864, which was not registered. The Act XVI of 1864 did not come into operation until the 1st of January 1865. It was therefore not in force when the deed in favour of the second defendant was executed. It might have been registered under Section 17 of that Act, but that was not compulsory. Having regard to the terms of Sections 17 and 50 of the Registration Act of 1877, we are of opinion that Section 50 does not operate so as to exclude, on the ground of their non-registration, instruments executed before Act XVI of 1864, which was the first of the present series, came into operation.

We dismiss this second appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Innes, and Mr. Justice Forbes.

SAKKAJI RÁU AND ANOTHER (HEIRS OF PLAINTIFF), APPELLANTS, *v.* LATCHMANA GAUNDAN (DEFENDANT), RESPONDENT.*

Mírásidárs—Right to dues—Enquiry—Custom.

It can by no means be laid down as a uniform rule that Mírásidárs are entitled to dues from cultivators holding lands within the area of the mírási estate under pattás from the Government. To avoid injustice, where the right is denied, there should be an enquiry whether by custom it prevails on the estate, or, if there are not sufficient instances on the estate to afford grounds for decision, on similar estates in the neighbourhood.

There has been no law depriving Mírásidárs of any privileges they may have customarily enjoyed. On the other hand, in the Regulations the intention of the Government is declared to respect the privileges of land-holders of all classes.

THIS was a hearing on review of the judgment of the High Court in Special Appeal No. 687 of 1875.

C. Rámachandra Ráu Sahib for the Special Appellants.

Mr. *Handley* for the Special Respondent.

The facts and arguments fully appear in the following

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* Special Appeal No. 687 of 1875 against the decree of M. Foord, District Judge of Chingleput, in Regular Appeal No. 109 of 1874, reversing the decree of the Court of the District Munsif of Chingleput in Original Suit No. 463 of 1872.

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JUDGMENT:—The plaintiff, the sole Mírásidár of the village of Kalliakkunnam, sued the defendant to recover possession of 10 kánis, 6 vélies and 8 maws of nanja and punja lands in that village, and arrears of Thoondu tirwa at 3 annas 6 pies per káni of punja and of Thoonduvarakuppatham at 1 kalam 2 marcals per káni of nanja.

It appears that the lands in suit were granted to the defendant by the Revenue Officer; it is not clear whether the Mírásidár had applied to engage for them or not. The plaintiff claims that, notwithstanding he is not under engagements to pay revenue in respect of these lands, and that a revenue engagement has been taken from the defendant, he is entitled to receive dues as Mírásidár from the defendant.

The plaintiff failed to establish his allegation that he had at first received such dues from the defendant, but the Court of First Instance, finding it was customary for ryots cultivating the lands of the village to pay such dues as were claimed, and at the rates indicated by the plaintiff, awarded a decree for the arrears for three years, but refused to eject the defendant.

The District Court, on the appeal of the defendant, held that by omitting to take a revenue engagement for the lands plaintiff had relinquished his mírási rights in them, and reversed so much of the decree of the Court of First Instance as awarded the claims for dues.

The High Court considered that, while the omission of the Mírásidár to cultivate might authorize the Revenue authorities to introduce a cultivator, it did not further prejudice the prescriptive rights of the Mírásidár, and that these rights would not be lost by the Mírásidárs declining to receive a pattá for the lands.

A review of judgment was subsequently allowed and the case re-argued. We have postponed our decision in the hope that the questions raised in the course of proceedings, which we understood had been taken by the Revenue Officers, would effect a settlement of the respective claims of the Mírásidárs and ryots holding pattás in the Chingleput District.

If it were possible, it is certainly desirable that a general rule should be established. The absence of certain law or uniform custom gives rise to disputes which would have been avoided by

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the enactment of a rule similar to that obtaining in Bengal under Regulation VII of 1822. By that Regulation, when waste lands are considerably in excess of the requirements of the land-owner, the Government is empowered to make settlement of them with strangers, reserving to the land-owner certain proprietary dues.

We are not informed that any arrangement has been made in the village in which the property in suit is situate, and must proceed to dispose of the appeal.

In investigating land tenures in India, it will be found that, although tenures resembling one another in their general features are met with in many Provinces, it is unsafe to infer, from this similarity, that these incidents are identical in different Provinces or even in the same Province. The political circumstances of each Province or District have more or less affected tenures; other differences in the incidents of tenures have their origin in the caste of the land-owning and cultivating classes in the greater or less abundance of labour, facility for irrigation, and fertility of soil, and in the more or less frequent change of ownership. It must not then be assumed that the incidents of the mírási tenure are everywhere alike; while the dues paid in recognition of that right, even where the right of levying dues is enjoyed to the full extent by the Mírásidár, are not to be assumed to bear, in all places, a similar proportion to the outturn or value of the produce of the land.

Of these variations, as well as of a conflict of opinion as to the right of the Mírásidár to levy dues, even on lands for which revenue engagements are given directly by the Government to the ryots, we find evidence in the selected papers of mírási rights published in 1862.

Mr. Place, then Collector of Chingleput, in a letter to the Board of Revenue, dated October 6th, 1795, stated that "the proprietary russum of the Mírásidár does not prevail in every village, but is highest in those the right of cultivation of which is vested in Malabars," p. 20. In January 1796, the Board reported to the Government that the Mírásidárs of some villages of the Jaghire enjoyed, in addition to the lands in their cultivation and rent-free Maniams, "what is considered a proprietary russum or marah out of the produce of the Sircar lands included in what is termed *pur die marah* denominated by the Collector proprietary in defeasible dues of hereditary cultivators," p. 32.

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Although in Mr. Place's final report on the Jaghire, June 6th, 1799, he gave his opinion that the land of a Mírásidár left uncultivated escheated to the Government, who might confer it on whom it pleased (p. 68), it will be seen that this opinion must be accepted with qualification.

Mr. Hodgson, September 24th, 1807, reported that, in the district of Tinnevelly, if a Mírásidár were unable or unwilling to procure tenants to cultivate the waste, and that if the Government or its representative should assign the land for cultivation to a stranger, the Mírásidár would still consider himself the proprietor of the land, claim his swámi-bogam, and not deem his title invalidated by his temporary inability. He added that, "by allowing the pyacarry of the Sircar to cultivate it, subject to the usual small fee as an acknowledgment of his property in the land, the Mírásidár does not preclude either the Sircar or the Sircar's representative from rendering the land an available resource" (p. 107). In the same paper Mr. Hodgson observed that "in opposition to this right long established by custom, not only in Tinnevelly, but in other parts of the Carnatic, it had been contended the Zamindár or Mittahdár has an exclusive right to all land not under cultivation, and that whatever land the Mírásidár may decline or be unable to cultivate, the Sircar or its representative, the Zamindár may grant the mírási property of that land to another as an inducement to him to cultivate without subjecting the new settler to any demand from the Mírásidár;" but he stated he entertained not the slightest doubt the Mírásidárs would be able to establish their right in a Court of Law by an appeal to custom (p. 108).

In 1814, under the orders of Government, questions were addressed to several Collectors as to the rights of Mírásidárs; of those questions, the most important for our present purpose are the first, second, third, fourth, and fifth, which are to the following effect:—Is mírási right recognized where the Mírásidárs are not the renters (by which term we understand persons under engagements to Government for the revenue)? Does it extend to the waste? Is it lost if cultivation is discontinued for a single season? Has it been respected by the settlement officers? Where it has not been so respected, has it been respected by the people?

Mr. Peter replied, January 10th, 1815, that, in Dindigul and Madura, if the Mírásidárs were not renters, their rights would,

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nevertheless, be respected, and they would receive their established shares for the lands which should be cultivated; that the right extended to the waste, and that, if waste was brought under cultivation even by a renter, the Mírásidár would be entitled to his share; that the right was not forfeited by discontinuance of cultivation for a single season; and that it had been usual to respect it (p. 158).

Mr. Cotton (May 8th, 1817) gave very similar replies respecting the Mírásidárs in Tinnevelly. It, however, appears that, at that time, there were in Tinnevelly or in Dindigul and Madura but few "renters" of mírási lands other than the Mírásidárs themselves. Mr. Ellis (May 30th, 1816), reporting on the mirasi rights within the Collectorate of Madras, drew a distinction between waste that had been cultivated and immemorial waste, asserting that the right in the former was similar in character to the right in the cultivated land; while the right in the latter was limited to quarrying stone and cutting firewood, and did not extend to breaking up the land for cultivation. Mr. Ellis considered the right was not lost merely by discontinuance of cultivation, but that, if a Mírásidár neglected or became unable to cultivate his land, the Government might give it to pyacarries and perhaps resume the mírási Sivatantrams (dues), though this he admitted would be a harsh measure; he stated that mírási rights had not been uniformly respected by Revenue Officers, and he believed that, in some instances, the Mírásidárs had retained their privileges, although the cultivable lands had been given to Government renters (pp. 184-189). B. Sancaraya, the Sheristadár of the Madras Collectorate, whose answers were transmitted by Mr. Ellis, reported that, where Government granted to a stranger any portion of mírási lands not excepting waste, the Mírásidár was entitled to compensation; but, regarding the rights as vesting chiefly in possession, he was of opinion that, if the Mírásidár failed to cultivate and loss accrued to the State, the Government enjoyed and exercised the right to cause the land to be cultivated and to issue cowles for that purpose; he was also of opinion that, although the right was not lost by the omission of the Mírásidár to cultivate for a year, yet, if the Mírásidár absented himself for a long period and neither cultivated nor leased the lands, and, in other respects, acted in opposition to the State, the Government was competent to resume them and

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grant them to strangers. If the Mirásidár declined to pay a reasonable assessment, the Sheristadár considered he might be passed over and a lease given to a stranger, but that in that case the cultivation should be conducted through the Mirásidár, and he should be allowed the established *varam* (share of produce). On this answer Mr. Ellis noted Sancaraya had framed his reply according to his conception of what was just and to the practice he had known to obtain when the rights of the people had been really respected, but that he (Mr. Ellis) had reason to believe that in districts in which villages had been rented the Mirásidárs had been deprived of their mírási rights for refusing to engage. In answer to the question whether if the mírási right had not been respected by the Revenue Officers it had nevertheless been respected by the people, the Sheristadár replied that the lands held by the Mirásidárs rent free the cuppatam and other merahs (fees for village servants) and the thundavaram remained to the Mirásidár, although the mírási lands were rented to a stranger.

In a letter to Government, dated September 8th, 1817, the Board of Revenue intimated its intention to forbid Collectors to admit to engagements under the ryotwar system any persons who were not by hereditary or prescriptive right entitled to pay their dues directly to the State, their objects being to preserve the Mirásidárs * * from that infraction in favor of their inferior tenants, the pyacarries, which, by admitting both on a footing of equality, was the just ground of complaint under the former ryotwar system (p. 365). To this the Government replied, 16th December 1817, that the ryotwari settlement should not be attended with any invasion of the rights of the Mirásidárs or others in the soil, but that further than that object might require it did not appear to be necessary to preclude the Collector from entering into agreements with ryots who up to that time might not have paid revenue directly to Government (p. 365).

In a lengthy minute prepared by the Board in January 1818 on the land tenures of the Presidency the omission of Mirásidárs to obtain tenant cultivators of lands was attributed to the high assessment which left no profit to the Mirásidár, and it is stated that the Government, to prevent loss to the revenue, had been obliged to resort to the expedient of transferring arable land temporarily to tenants of their own selection, and as a result

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had greatly contributed to level the ancient distinctions between the mírási landlords and their pyacarry tenants; "for, notwithstanding the pyacarries thus employed by the Government often admitted the justice of the Mirásidár's demand for his coopatum marahs and thunduvaram, they too frequently asserted * * * their inability to discharge these dues in addition to the public assessment" (pp. 384-385). In the same minute the Board noticed the proportion borne by the dues to the outturn of the lands varied in different districts and with the caste of the Mirásidárs in the same district (p. 387).

In November 1820 Mr. Smalley, who was engaged in the introduction of the new ryotwar settlement in Chingleput, calculated that the thunduvaram varied from less than 1 to 11 per cent. on the gross rent. He proposed to assess the land at a gross rent, and to allow the Mirásidárs, if they engaged for the revenue, a uniform deduction from the gross rent of $3\frac{1}{2}$ per cent. as thundutirwa; if a Mirásidár refused to engage, he or his heir might nevertheless come and claim to engage at any time within 105 years, and would then receive the thundutirwa which had meanwhile been enjoyed by the State. As to waste, he proposed that the Government should offer it to the Mirásidár, and if he refused to engage for it should lease it to a stranger; but if within 105 years the Mirásidár claimed to engage for waste so leased, it was to be restored to him on payment of all expenses incurred by the temporary possessor. The "coopatum" or waste land cultivated by a stranger was to be paid to the Mirásidár if he engaged for his share in the cultivable lands; if he did not, it was to be carried to the credit of Government (pp. 398-404).

Before the Board replied to Mr. Smalley's proposals a report was received from Mr. Hyde, the Collector of South Arcot, where mírási right was not so strong as in Chingleput (minute by Sir T. Munro, p. 433). On the 4th December 1820, in answer to Mr. Hyde's report, the Board declared that mírási rights must not merely be recognized but strenuously supported; but that if the Mirásidár failed to perform the service and pay the revenue * * the compact between the Mirásidár and the Government was broken, and the Government must look to some other person to fulfil the obligation. The Board pointed out that if the Mirási-

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dár quitted his land and it was given to another, and the Mírásidár were to be permitted at any time within 99 years to resume his rights, either the ryot or the Government must be ousted, whereby confidence would be shaken and the interests of agriculture suffer; or if the ryot were left in possession, the Government must remit a portion of the rent to the ryot to enable him to pay the fees to the Mírásidár. The Board affirmed the rights of the State to oust the land-holder when he neglects or refuses to cultivate (pp. 410-411), and declared that if the Mírásidár neglected to carry on the cultivation and pay the usual revenue, so far as his means would go, he forfeited his right as a Mírásidár; and that if the Mírásidár neglected or refused to get a tenant for the waste, and the State was obliged to find one to keep up or increase the revenue of the village, the Mírásidár had no right to a fee (pp. 415-416).

This minute of the Board was on 28th December 1820 communicated to Mr. Smalley, in reply to his report already noticed, with an observation that persons admitted to engage by reason of the refusal of the Mírásidár should be charged only the assessment at which the land had been offered to the Mírásidár. On the 18th May 1822 Mr. Smalley reported that certain Mírásidárs had resisted every mode of settlement, and shamefully neglected cultivation, and he proposed their privileges should be forfeited. The Board, on the 1st July 1822, expressed its disinclination to so strong a measure, but declared, if the Mírásidárs continued contumacious, it was in the power of the Collector to give their lands to others, allowing to the Mírásidárs the usual swámibhogam (p. 448).

Mr. Smalley's report and the order of the Board are noticed in a despatch from the Court of Directors, dated 25th July 1827; and it is observed that the course of proceeding pointed out for the adoption of the Collectors appeared to be analogous to that prescribed in similar cases by the Bengal Regulations, and the Government was invited to consider the propriety of defining by Regulation the powers it might be necessary to commit to the Revenue authorities for the purpose of enabling them to conduct the settlement of the land revenue (p. 430).

In a minute on a second report from Mr. Smalley, the Board, on the 14th April 1823, ordered that if the Mírásidárs refused to pay an equitable assessment on the cultivated land, it should be given to others who would agree to pay the assessment, and that the persons so agreeing should not be ousted so long as they paid the assessment. Admitting it was understood to be the common law of some parts of India that the Mírásidár who had been thus dispossessed did not entirely forfeit his rights, and that he and his descendants to the fourth generation might claim possession and should be assisted in recovering it, the Board denounced this rule as inexpedient to the State and unjust to the ryot who had been brought in, and directed that all claims of this nature should be settled by pancháyat according to the ancient custom of the country (pp. 424-426).

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Sir Thomas Munro, in his minute of the 31st December 1824, after stating that in Arcot the nature of mírási or hereditary property in land was very different and much less perfect than the right in Malabar, combated the opinion that in Arcot and the Tamil countries the Mírásidár was bound to pay revenue only for the land he cultivated, and that if the Government introduced a ryot to cultivate land left uncultivated by the Mírásidár, that Mírásidár had a right to exact from the ryot the landlord's share or rent. He argued that if this right existed anywhere, it was to have been expected it would have been found in Malabar and Canara, but he asserted there was in those Provinces no trace of it, and he expressed his opinion that there was no proof of its existence in Arcot, and that if the Mírásidár neither cultivated the land himself nor found a tenant and the Government provided one, the Mírásidár had no claim for rent on this tenant of the Government (pp. 433-435). In another paragraph Sir Thomas Munro expressed his belief that by the usage of the country the Government possessed the absolute right of disposing of the waste as it pleased in villages which were mírás, as well as in those which were not (p. 438). It appears from this minute that at the time Sir Thomas Munro made his observations the value of mírási right had been almost destroyed by high assessments (p. 444).

On the 24th July 1839 Mr. Freese, Collector of Chingleput, asked for an expression of the views of the Board as to the rights of the Mírásidárs, and especially whether they had the right to sell poramboke and immemorial waste. He

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observed the rights of the Mírásidárs appeared to him to extend only to the lands generally under cultivation, and that if the Mírásidárs failed to cultivate those lands, or to arrange for their cultivation, the Government was entitled to make them over to others, and the Mírásidárs, though entitled to receive certain coopatums or "grain fees," lost the power of ousting the cultivator actually in possession; and that with regard to the poramboke and immemorial waste, their right extended no further than to the privilege of grazing their cattle on them when waste and receiving the "coopatums" when cultivated. Mr. Freese urged the necessity of having a general and definite rule promulgated (p. 452).

The Board replied briefly that the Mírásidárs could not sell immemorial waste, but that their rights were confined to grazing and cutting firewood and similar common privileges, but that these must give way to any proposition ensuring the extension and realization of the public revenue (p. 452).

In 1841 the Provincial Court, on an appeal from Chingleput, ruled that the Mírásidár was entitled to engage for the cultivation of waste in preference to a stranger (p. 463), and this decision was approved by the Court of Directors (p. 478). It did not, however, declare what were the rights of the Mírásidár if he refused to engage.

In 1849 the question was raised in a civil suit as to the rights of the Mírásidárs to levy dues from ryots who did not hold from them, but had at their own expense brought waste into cultivation under cowles granted by the Government. The Sadr Amín held it was not customary to pay dues in such cases, and on appeal the Civil Judge affirmed this ruling, observing that the point had been frequently settled in the negative (p. 485). The Civil Judge did not refer to any cases in support of this statement.

The policy of the Government in and after 1856 was to disregard the claim of the Mírásidárs to fees from ryots admitted by the Government to cultivate lands left unoccupied by the Mírásidárs, but in 1874-75 the attention of Government was attracted to a consequence which had not been foreseen. Having a preferential *right* to engage, the Mírásidárs took pattás for lands far in excess of their means to cultivate, seeing that if they fore-

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went the right, they received no dues from the ryots introduced by the Government. The result was that the Mírásidárs were unable to pay the revenue and the estate was brought to sale for arrears. At the auction there were no bidders, and the Government was compelled to buy in the estate at a nominal price. In view of this consequence of the refusal to recognize the claim of the Mírásidár, it was proposed that, in future, with the grant of a pattá to a ryot, introduced by the State, an agreement should be taken from him in which the amount and nature of the Sivatantrams or fees immemorially payable to the Mírásidár by the cultivator, and his liability to pay them should be clearly set forth. The Government approved of this proposal in their Proceedings of April 13th, 1875.

From the variety of opinions expressed in the documents, to which we have referred, it results that it can by no means be laid down as a uniform rule that Mírásidárs are entitled to dues from cultivators holding lands within the area of the mírási estate under pattás from the Government. To avoid injustice, where the right is denied, there should then be an enquiry whether by custom it prevails on the estate, or, if there are *not* sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood.

The Court of First Instance, in the case before us, upheld the claim as supported by custom, though it does not appear that evidence was taken on the point. The Judge considered the circumstance that the ryot held under a pattá from the Government sufficient to dispose of the claim, and did not enter into the question of custom.

While on the one hand we cannot assume, with the Court of First Instance, the existence of a settled custom in view of the conflict of opinion which we have shown to obtain, we are unable to assent to the ruling of the Lower Appellate Court, that the circumstance on which its judgment proceeds disposes of the claim. There has been no law depriving the Mírásidárs of any privileges they may have customarily enjoyed. On the other hand, in the Regulations the intention of the Government is declared to respect the privileges of land-holders of all classes.

At the hearing of the appeal on review another point was suggested by the learned Counsel for the respondent, that, if the

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claim could be maintained, there must be deducted, from the dues, the amount paid by the ryot as revenue. The pattá was granted in 1867 at a time when the policy of Government was to take the cowle rent from the tenant. If the Mírásidár is entitled to dues which would increase the obligation of the ryot to more than a fair return for the occupation of the land, it may be that he should seek relief by applying for a reduction of the assessment; but, in order to enable us to determine this and the other questions raised, we shall remit to the Lower Appellate Court for trial the following issues:—

Is the Mírásidár entitled, by the custom of the estate or neighbourhood, to demand the payment of any and, if any, what dues from ryots cultivating, under pattás from the Government, lands for which the Mírásidár has refused to engage?

If the Mírásidár is entitled to such dues, is the ryot entitled to deduct from the amount of such dues, in part or in whole, the amount of the revenue?

The Lower Appellate Court will admit such evidence as the parties may adduce on these issues, and will return its findings with the evidence to this Court within three months from the date of receiving this order, when ten days will be allowed the parties wherein to file objections.

The Lower Appellate Court having considered the evidence, oral and documentary, brought forward, returned the following:—

"My finding on the first issue is that the Mírásidár is not entitled by the custom of the estate or neighbourhood to demand the payment of any dues from ryots cultivating, under pattás from the Government, lands for which the Mírásidár has refused to engage.

"No evidence was offered by either party on the second issue, and as the burden of proving it lay on the defendant this issue must be found against him, in the event of my finding on the first issue not being upheld."

On receipt of this return to the issues sent the case was posted for re-hearing and the appeal was finally dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Innes.

THE EMPRESS v. ACHI.*

1880. January 27.

Jurisdiction—Act III of 1865 (Madras)—Act X of 1872, Sec. 8—Act XVI of 1874—Magistrate.

Madras Act III of 1865 declared every Magistrate in the Madras Presidency authorized to take cognizance of every offence committed against any special or local law then in force in the said Presidency, notwithstanding any provision to the contrary in any Act or Regulation then existing, and also of any offence against any special or local law which might thereafter be passed unless such law should make the offences to which it might refer punishable by some other authorities therein specially mentioned. The effect of this Act was to remove the restrictions imposed by special or local laws theretofore passed and to enable Magistrates within the limits of their ordinary powers to deal with offences punishable under any such special or local law notwithstanding the special or local law indicated a particular tribunal as alone competent to try such offences, and to confer upon them jurisdiction also in the case of any special or local laws that might be passed after the enactment of Act III of 1865, unless jurisdiction was in any such later law specially conferred upon some other authority. Section 8 of the subsequent enactment, Act X of 1872 (the Criminal Procedure Code), limited the jurisdiction of Sub-Magistrates over offences punishable under special and local laws, a third-class Magistrate's jurisdiction being restricted to the trial of offences punishable under such laws with less than one year's imprisonment, while a second-class Magistrate's jurisdiction was similarly restricted to the trial of offences punishable with less than three years imprisonment. Act XVI of 1874, while repealing Act III of 1865, left unaffected the jurisdiction of the Sub-Magistrate under that Act so far as it still remained in existence as limited by the provisions of Section 8 of Act X of 1872 (Criminal Procedure Code).

THIS case came before the Court on the following reference from the District Magistrate of South Arcot:—

"In their Proceedings of the 29th September 1876, No. 2,230, the High Court ruled that Magistrates in the Madras Presidency were not divested of their jurisdiction over offences against special and local laws, which was conferred on them by Madras Act III of 1865, notwithstanding its repeal by Act XVI of 1874. Again in their Proceedings of the 30th August 1879, No. 1,382, and 4th September 1879, No. 1,424, the High Court have held that Second-class Magistrates have no jurisdiction over offences created by the Indian Arms Act 1878, whereas they have jurisdiction over such offences by virtue of the abovesaid Act III of 1865,

* Revision Case No. 1 of 1880.

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which provided that they shall have jurisdiction over offences against any special or local law which may be enacted after the passing of the above enactment, provided that such law did not make the offence therein referred to punishable by some other authorities therein specially mentioned. The Indian Arms Act of 1878 contains no such special mention.

" Now four cases of offences under the Arms Act have occurred in this district, and they have been tried by the Second-class Magistrate of Cuddalore Taluk.

" As the aforesaid two rulings are inconsistent with the ruling of 1876, I beg to submit the matter for the consideration of the High Court, as instructed in G.O., dated 28th November last, No. 3,009, of which a copy is herewith submitted."

The order of Government referred to in the District Magistrate's letter is in the following terms :—

" It is observed that the ruling of the High Court, dated 30th August 1879, No. 1,332, cannot be reconciled with their F. B. ruling, dated 29th September 1876, No. 2,230.

"The Magistrate of any district where another similar case arises will submit the aforesaid two rulings as inconsistent for the consideration of the High Court, and instruct the Government Pleader to appear and argue the question."

Upon perusing the letter of the District Magistrate, the Proceedings of the Second-class Magistrate of Cuddalore submitted therewith, and the Order of Government, dated 28th November 1879, No. 3,009, and upon hearing the arguments of Mr. *H. H. Shephard*, Acting Government Pleader, the Court (TURNER, C.J., and INNES, J.,) recorded the following opinions :—

INNES, J.—The Magistrate is mistaken in supposing that there is any inconsistency between the ruling of the Court of the 29th September 1876, No. 2,230, and the more recent rulings which he quotes relating to the Arms Act.

The ruling of the 29th September 1876 simply decided that the jurisdiction conferred upon Sub-Magistrates in the Madras Presidency by Act III of 1865 (Madras) was unaffected by the repeal of the Act itself by Act XVI of 1874.

The Act III of 1865 gave all Magistrates authority to try offences against all special and local laws notwithstanding any provision to the contrary in any Act or Regulation existing at

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the date of the enactment, and also any offence against any special or local law which should thereafter be passed unless such law should make the offences to which it refers punishable by some other authorities therein specially mentioned.

Before the enactment of the Repealing Act of 1874, the Criminal Procedure Code had already in 1872 worked a partial repeal of the jurisdiction conferred by Act III of 1865, by means of the provisions of the second clause of Section 8, which, in the case of Second and Third Class Sub-Magistrates, limited their jurisdiction to deal with charges of offences under special and local laws to offences punishable with less than one and three years' imprisonment respectively. This being a provision of a later Act than III of 1865, and inconsistent with the unrestricted jurisdiction conferred by Act III of 1865, to this extent repealed it, but the jurisdiction existing at the date of Act XVI of 1874 was left unaffected by that Act, as was laid down by the High Court in the ruling of the 29th September 1876. The question then before the Court related to the jurisdiction of Subordinate Magistrates in offences against the Salt laws, and the Court had not then to consider the effect upon the jurisdiction under Madras Act III of 1865 of Section 8 of the Criminal Procedure Code in regard to offences punishable with one or three years respectively.

TURNER, C.J.—I can find nothing necessarily inconsistent in the rulings to which our attention is invited. The Criminal Procedure Code of 1861 declared that the Criminal Courts of the several grades . . . . . . should have jurisdiction in respect of offences punishable under any special or local law except offences which were by any such law made punishable by any other authority therein specially mentioned. The Madras Act III of 1865 declared every Magistrate in the Madras Presidency authorized to take cognizance of every offence committed against any special or local law then in force in the said Presidency notwithstanding any provision to the contrary in any Act or Regulation then existing, and also of any offence against any special or local law which might thereafter be passed unless such law should make the offences to which it might refer punishable by some other authorities therein specially mentioned. The effect of this Act was then to remove the restrictions imposed by special or local laws theretofore passed and to enable Magistrates within the

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limits of their ordinary powers to deal with offences punishable under a special or local law notwithstanding the special or local law indicated a particular tribunal as alone competent to try such offences. But the jurisdiction thus conferred on Magistrates by the Madras Act III of 1865 is controlled by the provisions of Section 8 of the General Act of the Government of India, X of 1872, the Criminal Procedure Code. That Act while it declared that offences punishable under any law other than the Indian Penal Code containing no distinct provision as to the Court or Officer before which or before whom they are to be tried may be inquired into and tried by the Criminal Court appointed by such Act, also provided that Magistrates of the Third Class should be incompetent to try offences punishable with imprisonment extending to one year, and Second-class Magistrates incompetent to try offences punishable with imprisonment extending to three years.

The Act XVI of 1874, in repealing Madras Act III of 1865, left untouched any "existing jurisdiction, but did not restore any jurisdiction" ...... "not then existing or in force." The Second and Third Class Magistrates in Madras were deprived of jurisdiction to the extent above indicated by Act X of 1872, and the jurisdiction so curtailed was the established jurisdiction when Act XVI of 1874 was passed and the larger jurisdiction was not then existing nor in force. The ruling in 1876 while it noticed the abolition of the restrictions imposed by Special or Local Acts did not go on to notice the more limited restrictions imposed by the General Act, the Code of Criminal Procedure 1872. Seeing that the case in which the ruling was given did not fall within the limited restriction of the Act of 1872 for the offence (an offence under the Salt laws) did not render the offender liable to conviction to imprisonment for three years and had been tried by a Second-class Magistrate, it was unnecessary that reference should be made to the provisions of the Act of 1872. The rulings of the Court are, therefore, substantially not in conflict.

Order.—The conviction of the accused in the case of *The Empress* v. *Achi* and in three other cases on the file of the Second-class Magistrate of Cuddalore, for an offence punishable under Section 19 of Act XI of 1878, are accordingly hereby annulled. The fines paid by the accused must be refunded.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kindersley.

1880. January 12.

UMMER KUTTI (FIRST DEFENDANT), APPELLANT, v. ABDUL KÁDAR AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Limitation—Act IX of 1871—Mortgage—Receipt of rent not payment of interest.

In 1858 land was mortgaged to the plaintiff with possession for a term of five years, and in 1861 the defendant, the mortgagor, took a lease of the land from the plaintiff, under which he paid rent until 1870-71. The mortgage debt was repayable on the expiry of the term. Plaintiff brought the suit out of which this appeal arose to recover the debt from the mortgagor. It was pleaded that the suit was barred by limitation, to which plaintiff replied that the receipt of rent was in fact a payment of interest, and that from the last payment of interest a new period of limitation arose. *Held* that, the case being governed by the provisions of Act IX of 1871, the payment of rent under an agreement entirely independent of the original mortgage could not be regarded as a payment of interest.

PLAINTIFF, the younger brother of the second defendant, sued in 1877 for recovery from the defendants personally and by sale of property mortgaged, of Rs. 1,394-10-1, being his half share of the estate of their deceased father Malikahmed, consisting of a Kánam purankadom of Rs. 1,700 on land situated at Cannanore, granted by the first defendant and his deceased brother, and of the rent due therefrom for a period of seven years by first defendant as tenant in possession under a lease of the mortgagee Malikahmed, granted 25th April 1861.

The first defendant contended that the Kánam claim due by him to the deceased Malikahmed was only Rs. 1,000, and was granted in 1857-58 or 1858-59; that no purankadom was granted as alleged in the plaint; that the plaintiff's claim was barred by the Act of Limitation.

The second defendant supported the plaintiff.

The District Munsif decreed payment by first defendant of Rs. 1,051-7-2 out of the sum sued for within three months from the date of the decree, and in default the sale of the property

* Second Appeal No. 541 of 1879 against the decree of S. T. McCarthy, Acting District Judge of North Malabar, dated 21st July 1879, modifying the decree of the District Munsif of Chavacherri, dated 20th March 1878.

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mortgaged, and directed the sale-proceeds to be applied in payment of what should be found due to plaintiff.

On appeal the District Judge agreed with the Munsif in finding that the suit was not barred by the Law of Limitation, but modified his decree as to the amount payable by the first defendant, declaring him liable for rent for the three years preceding the institution of the suit.

The first defendant presented a second appeal to the High Court on the grounds that the plaintiff's suit was barred by the Law of Limitation, and that there was no payment of interest as such within the meaning of Section 21 of Act IX of 1871.

Mr. *Shephard* for the Appellant.

A. Rámachandráyyar for the first Respondent.

The Court (TURNER, C.J., and KINDERSLEY, J.) delivered the following

JUDGMENT:—This suit is governed by the provisions of Section 21, Act IX of 1871. It appears that in 1858 land was mortgaged to the plaintiff, with possession for a term of five years, and that in 1861 the defendant, the mortgagor, took a lease of the land from the plaintiff, under which he paid rent until 1870-71. The mortgage debt was repayable on the expiry of the term. The plaintiff now sues to recover the debt from the mortgagor personally and by a sale of the property. It is pleaded the suit is barred by limitation, to which the plaintiff replies that the receipt of rent was in fact a payment of interest, and that from the date of the payment of rent a new period of limitation is given for the recovery of the debt. Under the present law this may be so if it be held that payment of rent by the mortgagor is such a receipt of produce in virtue of a usufructuary mortgage as is to be deemed equivalent to a payment of interest; but this provision is not to be found in Act IX of 1871, and although, if the payment of rent had as part of the original agreement or otherwise been agreed on as a provision for the interest in the debt, we might have held it fell within the narrower terms of Act IX of 1871, yet, in the circumstances of the present case, it is impossible, in our judgment, to hold that the payment of rent under an agreement entirely independent of the original mortgage, can be regarded as a payment of interest as such. The

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appeal is in part decreed. The decrees of the Courts below, so far as they decree the claim, must be reversed, except in so far as they award the claim for arrears of rent for three years. Proportionate costs in all Courts.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

KUNJUNNERI NAMBIAR (THIRD DEFENDANT), APPELLANT, v. NILAKUNDEN (PLAINTIFF), RESPONDENT.*

1880. November 10.

Suit—Karaima Samudáyam—Uralers.

Plaintiff, alleging himself to be "Karaima Samudáyam" of the Malamal Ayyappan Dévaswam, sued to redeem lands which had been mortgaged by the Dévaswam. *Held* that he was not entitled to maintain the suit; that the Uralers are the persons in whom the estate and property of the temple is vested, and that the plaintiff was an agent accountable to the Uralers and subject to be dismissed by them for misconduct.

THIS suit was brought to redeem a mortgage of certain lands in Malabar, the property of the Malamal Ayyappan Dévaswam. The plaintiff alleged himself to be the Karaima Samudáyam (hereditary manager) of the dévaswam.

The District Munsif in his judgment dismissing the suit made the following observations:—"The plaint alleges that plaintiff is the Karaima Samudáyam of the Malamal Ayyappan Dévaswam.

"The mortgage documents sued upon recited the word 'Samudáyam,' but make no mention of the word 'Karaima Samudáyam.' The plaintiff has stated in his deposition that it has been the practice for thirty years to insert in documents the words 'Karaima Samudáyam.' If a practice which was not in existence thirty years ago has since been begun, it is necessary that there should be some special documentary authority from the Uralers. The plaintiff does not allege or produce any such document." . . . . "The single fact that members of the plaintiff's house have as Samudáyam looked after the business of the Malamal Ayyappan Pagoda is no sufficient to establish the Karaima Samudáyamship of the house.

* Second Appeal No. 482 of 1880 against the decree of T. V. Ponnusámi, Subordinate Judge of South Malabar, dated 8th March 1880, reversing the decree of the Court of the District Munsif of Kutnád, dated 22nd December 1879.

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The office of Samudáyam is similar to that of an agent and is never entitled to the property of the pagoda. The Uralers are the owners. When the Samudáyam does not attend to the orders of the Uralers and questions their authority, they are entitled to dismiss him from his office."

The Subordinate Judge reversed the finding of the District Munsif on the ground that, for the purposes of the present suit, the Samudáyamship was a hereditary one, and therefore that the plaintiff was entitled to bring the suit.

The third defendant preferred a second appeal on the ground that the plaintiff had no right to sue for the lands without the consent of the Uralers, and that such consent had not been proved.

Mr. *Shephard* for Appellant.

Mr. *J. H. S. Branson* for Respondent.

The Court (KERNAN and FORBES, JJ.) delivered the following

JUDGMENT :—The decree of the Subordinate Judge, declaring that the plaintiff (alleging himself to be Karaima Samudáyam) was entitled to maintain this suit, is wrong. We will follow the decision in *Ráma Varar* v. *Krishnen Nambudri*.(1) The Uralers in this case applied to be made parties in the Court of First Instance, but the application was opposed by the plaintiff and was refused; and it is plain, upon the papers, that there is some hostility between the plaintiff and the Uralers.

The Uralers are the persons in whom the estate and property of the temple is vested. The plaintiff is an agent accountable to the Uralers and subject to be dismissed by them for misconduct.

We reverse the decree of the Lower Appellate Court and restore the decree of dismissal by the Munsif, with costs.

Appeal allowed.

(1) Reported in this volume.

APPELLATE CRIMINAL.

Before Mr. Justice Innes and Mr. Justice Kernan.

1881. February 4.

ANANTHACHÁRRI AND THREE OTHERS, PETITIONERS, *v.* ANANTHACHÁRRI AND ANOTHER, COUNTER-PETITIONERS.*

Criminal Procedure Code, Secs. 502 and 294—Order—Appeal—Magistrate.

A First-class Deputy Magistrate decided that a bond for keeping the peace had been forfeited, and proceeding under Section 502 of the Criminal Procedure Code levied the penalty. An appeal was entertained from this order by the Sessions Judge of South Arcot and the order was reversed. A petition was then presented under Section 294 of the Criminal Procedure Code, praying the High Court to reverse the order of the Sessions Judge. *Held* that the order of the First-class Deputy Magistrate was not open to appeal.

The effect of the penultimate clause of Section 502 considered.

THIS was a petition presented under Section 294 of the Criminal Procedure Code, praying the High Court to reverse the proceedings of the Court of Session of South Arcot, dated 18th September 1880, and to restore the order of the Temporary Deputy Magistrate of South Arcot, dated 20th July 1880, passed under Section 502 of the said Code, directing payment of the penalty of the recognizance entered into by the counter-petitioners on the ground that the same had been forfeited.

Mr. *Handley* for all the petitioners.

S. Gopálachárri for the first petitioner.

V. Bháshyam Áyyangár for the counter-petitioners.

The Court (INNES and KERNAN, JJ.) delivered the following

JUDGMENT :—The Deputy Magistrate of South Arcot decided that a bond for keeping the peace had been forfeited, and, proceeding under Section 502, levied the penalty. An appeal was entertained from this order by the Sessions Judge and the order was reversed.

The question before us is whether such an order as that mentioned is or is not appealable. This depends upon whether an appeal is provided by the Code of Criminal Procedure in such cases or by any other law in force. (Section 286.)

* Criminal Petition No. 671 of 1880 presented under Section 296 of the Criminal Procedure Code, praying the High Court to reverse the proceedings of the Court of South Arcot, dated 18th September 1880.

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There is no other law giving an appeal in such case, and the solution of the question is, therefore, left to depend on whether an appeal is given by the Code. Section 269 allows an appeal to the Court of Session in all cases in which a person has been convicted on a trial held by the Magistrate of the district or other Magistrate of the First Class. The question is, therefore, practically narrowed to a consideration of whether the person held liable to the penalty was within the meaning of the Code convicted on a trial held by the First-class Deputy Magistrate.

It is apparent from Section 4 that a trial is a proceeding following a charge and includes the punishment of the offender. In the proceeding under Section 502 no charge is required to be drawn up; but, after the Magistrate has satisfied himself by evidence of the breach of the bond, he may at once call upon the person concerned to pay the penalty, or show cause why it should not be paid.

It would seem, therefore, that the proceeding cannot be held to be a trial in the sense of the Code. If it were a trial in that sense, it is scarcely possible to understand why the initial proceeding under Section 497, requiring the person to enter into the bond, is not also a trial and conviction. If it were so, the order to enter into the bond would be appealable; but Section 286, Illustration *c*, clearly shows that it is not appealable, and this nowithstanding that non-compliance with the order may entail imprisonment for one year. The same difficulty would also arise upon Section 506, an order under which is also, by Illustration '*d*' to Section 286, shown to be unappealable.

It was contended that the legislature may have thought fit to allow an appeal in the case of an order for levying the penalty, though not in the case of an order for entering into a bond for keeping the peace or for furnishing security for good behaviour, and that this view is supported by Illustration '*e*' which in contrast to Illustrations *c* and *d* applies to all the proceedings under the Chapter XXXIX, while the Illustrations *c* and *d* relating to security for keeping the peace and for good behaviour are confined to the proceedings terminating with the *making* the order to enter into the bond, and this it was urged implies that orders in other proceedings under the same chapters were not unappealable. These illustrations, however, are not intended to

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be exhaustive, and we do not think that the implication contended for arises, having regard to the fact that orders made under Sections 497 and 506, which may interfere with the liberty of the subject far more seriously than an order under Section 502, are declared to be unappealable.

It is our opinion, therefore, that the appeal was entertained by the Sessions Judge without jurisdiction, and that his proceedings and order should be quashed. We were asked, however, to consider the case on the merits to determine whether there was sufficient ground for restoring the order of the Deputy Magistrate. We thought it right to hear argument upon this point and are satisfied that the order of the Deputy Magistrate was well founded and should be restored. The bond was a recognizance entered into for keeping the peace with respect to what is called Sadagopam. The particular proceeding out of which the order to enter into the bond arose had respect to disputes arising as to honors paid to worshippers, but the bond does not limit the obligation to preserve the peace with reference to Sadagopam offered to worshippers, but applies to Sadagopam generally. In consequence of the restraining order of the Deputy Magistrate, the Dharmakartas, of whom third and fourth defendants are two, decided upon directing the entire cessation of the service of these honors. Afterwards these directions were modified and the Sadagopam or service of honors to the Álwárs was by common consent resumed. They were directed to be observed when Prabandham and Vedas were being recited. But through the jealousy of the two factions, the one of which, that of the defendants, desired to confine the honors to the time of the Prabandham, and the other, that of the complainants, to the time of the recital of the Vedas, disputes arose in December of last year at one of the festivals, and five of the Dharmakartas, including the complainants (in contemplation of the obligations of the security bond), issued an order to the first defendant, the Monigar, enjoining caution on him, and apprising him that he would be responsible in case of any breach of the peace occurring. Again on the 9th January a dispute attended with some disturbance arose between the two factions on the occasion of the Sadagopam honors being paid to the Thondaradipully Álwár.

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The complainants apprehended that a disturbance would take place on the 29th January when the festival of Thirumalasi Álwár would be celebrated and issued the order M to first defendant to cease offering these honors till an order of a Civil Court was obtained, or till a compromise should be effected between the parties. It is immaterial to determine whether this order was proper in the circumstances, or whether the complainants had authority to issue it. It is merely a fact tending to show the apprehension to which the circumstances had given rise; third and fourth defendants were not ignorant of the disturbances in December and on the 9th January, and it must have been apparent to them, from the amount of public excitement shown on these occasions, that the service of these honors was likely to be attended with disturbance at the coming festival. Nevertheless, they issued orders to the first and second defendants directing them to continue the service of the honors according to the custom of the past thirty years.

The consequence was that the peace was actually broken and that the intervention of the Police, as is found by the Magistrate, alone prevented the disturbance from assuming a serious complexion.

But it was contended by Mr. Bháshyam Áyyangár that to entail forfeiture of the penalty it is not sufficient that an act should be done likely to occasion breach of the peace or that the peace should be broken, but that some offence must have been committed. This view of the law he deduces from the penultimate clause of Section 502.

The security bond is in terms a bond providing for the forfeiture of the penalty, if the person bound commits a breach of the peace, or does any act that may probably occasion a breach of the peace.

If this stood alone, there could, in our view, be no doubt that third and fourth defendants, in urging first and second defendants to proceed to the service of Sadagopam of the Álwárs, did an act which was likely to occasion a breach of the peace and became liable to the penalty, but the penultimate clause of Section 502 says: "The commission or attempt to commit or abetment of any offence whatever and wherever it may be committed is a breach of the bond." Whatever may be the extent of the application of this very wide language, we are satisfied that it is intended merely as an illustration of some modes in which the peace may be broken, and is not to be read as a definition of the acts which will give rise to the liability to the penalty of the bond so as to confine the liability to occasions on which some actually punishable offence has been committed, or to render it incumbent on the prosecution, in calling upon the defendant to show cause why the penalty should not be levied, to establish the actual commission of an offence. All that it is necessary to show is that some act was done which was likely in its consequences to provoke a breach of the peace, and it is not material to consider whether the person bound did the act himself with his own hand or, as in this case, made use of other persons to do it.

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We must rescind the order and quash the proceedings of the Sessions Court in appeal and restore the order of the Deputy Magistrate, which there appears to us to have been sufficient evidence to sustain.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kindersley.

DÉVAJĪ, PLAINTIFF, v. RĀMAKRISTNIAH, DEFENDANT.*

1880. January 29.

Hundi—Act I of 1879, *Sec.* 10.

A hundi for a sum of Rs. 380 payable otherwise than on demand cannot be stamped with an adhesive stamp. The words "drawn or made out of British India" in Clause '*b*' of Section 10 of the Stamp Act of 1879 apply to the entire clause.

THIS was a case stated under Section 617, Act X of 1877, by the Subordinate Judge of Bellary in Small Cause Suit No. 422 of 1879.

There was no appearance for the plaintiff.

C. Rámachandra Ráu Sáib appeared for the defendant.

The Court (INNES and KINDERSLEY, JJ.) delivered the following

JUDGMENT:—The question referred is "whether a hundi for a sum of Rs. 380 payable twenty-one days after date, *i.e.*,

* Referred Case No. 25 of 1879.

otherwise than on demand, can be stamped with an adhesive stamp." Our answer is that it cannot, because the stamp required is more than one anna.

The words "drawn or made out of British India" in Clause '*b*' of Section 10 of the Stamp Act of 1879 apply to the entire clause. The defendant will have the costs of this reference.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

1880. November 25.

VENKATARÁYALU (APPELLANT) *v.* NARASIMHA AND 5 OTHERS (RESPONDENTS).*

Decree—Execution—Limitation—Act XV of 1877, *Art.* 179, *Cl.* 2.

Plaintiff obtained a decree against defendant on the 24th November 1875 and on the 14th October 1876 he got execution and sold some lands of the defendant. On 9th February 1877 he applied to the Court for payment thereout of monies lodged by the purchaser and got on that day the money.

In the meantime an appeal was presented by the defendant and dismissed on the 28th March 1877. The present application for execution was made on the 7th February 1880.

Held that Article 179, clause 2 of the Limitation Act of 1877, which fixes the date of the order of the Appellate Court, when there is an appeal, as the point from which the three years is to count, applied, and that the plaintiff was therefore in time. When there is no appeal the date of the decree or of application is the point from which limitation counts, but not when there is an appeal.

Held further, that the application by plaintiff to the Court (9th February 1877) for the money paid in by the purchaser was a step taken to aid in the execution of the decree.

C. Rámachandra Ráu Sáib for the Appellant.

S. Gopalachárri for the Respondents.

The facts of this case appear sufficiently from the judgment of the Court (KERNAN and FORBES, JJ.)

JUDGMENT.—We think that the plaintiff is not barred by limitation from executing the decree of 24th November 1875.

On the 14th October 1876 he applied for and got execution and sold some lands; and on the 9th of February 1877 he applied by his Vakil to the Court for payment thereout of Rs. 148 lodged there by the purchaser and he got on that day the money.

* Civil Miscellaneous Second Appeal No. 447 of 1880 against the order of G. A. Parker, District Judge of Chingleput, dated the 24th June 1880, confirming the order of the Court of the District Munsif of Poonamallee dated 8th April 1880.

In the meantime an appeal was presented by the defendant and that appeal was dismissed on the 28th of March 1877.

Then present application for execution was made on the 7th February 1880. Clause 2, Article 179 of the Limitation Act of 1877 fixes the date of the order of the Appellate Court, when there is an appeal, as the point from which the three years is to count.

On this ground the plaintiff is in time.

Defendant contends that when, as in this case, execution has been applied for before the date of the Appellate Court's decree, then the latter is to be held not the point to count from but the application for execution is the proper point. We do not see any foundation for this contention. It seems to us that when there is no appeal, the date of the decree or of application is the point, but not when there is an appeal.

Moreover it appears to us that the application by plaintiff to the Court for the money paid in by the purchaser is a step taken to aid in the execution of the decree.

We reverse the orders of the Lower Courts and direct that the plaintiff shall have execution according to law with costs in the Lower Courts and in this Court.

Appeal allowed.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muthusami Áyyar.

1879. April 7th.

SAMMANTHA PANDARA (2ND DEFENDANT), APPELLANT, *v.* SELLAPPA CHETTI (PLAINTIFF), RESPONDENT.*

Debt contracted by the head of a mattam—Liability of the successor in office.

The property belonging to a Mattam is in fact attached to the office of Mattamdár, and passes by inheritance to no one who does not fill the office. Though it is in a certain sense trust property, the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution, he

* Appeal No. 36 of 1877 against the decree of the Subordinate Court of Tinnevelly, dated 18th December 1876.

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may contract debts for purposes connected with the *mattam*, and debts so contracted might be recovered from the *mattam* property, and would devolve as a liability on his successor to the extent of the assets received by him.

The origin of Mattams discussed and explained.

THIS was an appeal against the decree of A. Annusamy, Subordinate Judge of Tinnevelly, in O.S. No. 60 of 1875.

The *Advocate-General* and *T. Ráma Ráu* for the Appellant.

Mr. *Handley* and *R. Balaji Ráu* for the Respondent.

The facts of the case and the arguments of counsel are fully stated in the following

JUDGMENT.—The respondent, Sena Pena Chellappa Chettiar, sued to recover Rs. 9,703-0-4, the balance of interest due on a bond for Rs. 7,000, dated February 11th, 1872, purporting to be executed by the Chokanatha Thambiran as agent of the Gnana Sammantha, Pandara Sannadhi of the Darmapuram Athinam. He has impleaded as defendants the Thambiran Swáminátha by whom he asserts the bond was executed, and the present appellant and another Thambiran who at the time the suit was instituted claimed adversely to one another the office of Pandara Sannadhi of the mattam. He prayed for a decree awarding payment of the sum claimed with interest at 12 per cent. per annum up to the date of payment, and costs with interest on costs by the defendants and out of the property of the mattam.

The defendant, Swáminátha Thambiran, did not appear to defend the suit. The appellant and the other defendants pleaded that they had no knowledge of the debt, nor that it was contracted for the purposes of the mattam; that Swáminátha Thambiran had no authority to contract the debt; and that neither the appellant nor the other defendants nor the property of the mattam could be held liable for its satisfaction.

The Court of First Instance found that the bond was executed by Swáminátha Thambiran as the agent and in the presence of the late Pandara Sannadhi of the mattam; that the bond had been given on a settlement of accounts arising out of debts for cloths sold, hundis provided, and cash advanced for the purposes of the institution and on payment of a further sum of money; that the debt was from time to time contracted through a person who acted as agent for the mattam; and that the executant of the bond, whether he filled the office of Chokanatha Thambiran or Subramania Thambiran, was equally competent to execute a bond as

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agent of the Pandara Sannadhi, inasmuch as both the Chokanatha and Subramania Thambiran transact the business of the Pandara Sannadhi.

The Court of First Instance therefore passed a decree for the sum claimed against the head of the mattam, whoever he might be, whether the appellant or the other defendants claiming that office and against the property of the mattam. Against this decree the appellant presented the appeal now before the Court which originally came on for hearing in 1877, but, it appearing that proceedings were pending to determine the succession to the office of Pandara Sannadhi, it was arranged that the hearing of the appeal should be adjourned till the question of succession had been determined. It has since been decided that the appellant is the lawful successor of the deceased Pandara Sannadhi, and the appeal has now been again brought on the file for disposal.

It has been contended by the Advocate-General that a decree can pass in this suit neither against the appellant nor against the property of the mattam; that a Pandara Sannadhi is a mere trustee of the property of the mattam; and that although a trustee may be at liberty to incur a liability, which may become a charge on the property of the trust for proper purposes connected with the trust, there is no evidence to show that the purposes for which debt was incurred to the respondent were proper purposes connected with the trust.

It is also argued that although a Pandara Sannadhi might have power to expend out of funds in his hands sums for the purposes for which it is alleged the late holder of that office incurred the debt now sued for, he is not at liberty to contract debts for such purposes, and that debts so contracted would not be binding on his successor nor recoverable from the trust estate. Lastly it is contended that the authority of Swáminátha Thambiran to execute the bond in suit is not sufficiently established, and that if it be established he had no authority to create a charge on the property of the mattam, and in fact did not create a charge on it.

We deal first with the objection regarding the insufficiency of the evidence to establish the authority of Swáminátha Thambiran to execute the bond in suit as the agent of the Pandara Sannadhi. It is not denied and there is evidence to show that the Pandara Sannadhi does not execute instruments under his own hand, but

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that he employs for that purpose officers who are termed Chokanatha and Subramania. The bond purports to be executed by Swáminátha as Chokanatha, and the appellant's witnesses have denied that he at any time filled that office; but it is admitted by one of them, Kondappa Pillai, the Kurnam of the Mattam, that the Subramania as well as the Chokanatha Thambirans used to execute bonds under the orders of Pandara Sannadhi. Although, then, Swáminátha Thambiran may not (we do not say that he did not) at the time fill the office of Chokanatha the circumstance that he so described himself in the bond would not justify us in finding that he had not authority to execute it, if on other evidence we were satisfied that in executing it he acted under the orders of the Pandara Sannadhi.

Now we have the evidence of Dharma Perumal Pillai's son Vasudévan that the debts were contracted through his father on behalf of the Pandara Sannadhi, and this evidence is corroborated by the evidence of Nelliya Pillai who was engaged as a clerk to keep the accounts of the mattam, and in support of the testimony of these witnesses as to the existence of dealings with the respondent on behalf of the Pandara Sannadhi and as to their employment we have the letter (document C). These witnesses have also deposed that the account was settled and the bond executed with the sanction of the Pandara Sannadhi, and we accept their evidence on this point notwithstanding the discrepancy in it to which the Advocate-General has called attention, viz., that Vasudévan says the account was settled and the bond executed in the presence of the Pandara Sannadhi, while Nelliya says that he and Vasudévan Pillai went inside and explained the particulars of the account to the Pandara Sannadhi who assented to it and ordered the bond to be written. It appears to us probable that further examination would have elicited from Vasudévan that the bond was not executed in the immediate presence of the Pandara Sannadhi, but by using that term he meant it was executed when he was in the neighbourhood and could be consulted, and after he had been consulted and had approved of its execution.

We find, then, that the Thambiran Swáminátha executed the bond in suit as the agent of the Pandara Sannadhi, and with his authority.

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It remains for us to determine whether the amount due on the bond can be recovered from the appellant as the successor in office of the Pandara Sannadhi, by whose authority it was executed.

The origin of mattams is ordinarily as follows: A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order, and instructs in its religious tenets. Such of these disciples as intend to become religious teachers, renounce their connection with their family and all claims to the family wealth, and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being, and a home for the school is erected and a mattam constituted. The property of the mattam does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own life-time installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the gaddi, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his mattam, and debts so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the assets received by him.

We do not of course mean to lay it down that there are not mattams which may have been established for purposes other than those we have described, nor that the property may not in some cases be held on different conditions and subject to different incidents. We have described the nature of the generality of

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such institutions and the incidents of the property which is devoted to their maintenance. It is not shown that the Darmapuram Athinam differs from the institutions we have described, nor that the property held by its superior is held subject to any peculiar conditions. It is therefore in our judgment liable to the satisfaction of all debts properly incurred by the late Pandara Sannadhi in the execution of his office. The respondent has produced evidence which establishes *primâ facie* that the debt he seeks to recover was so incurred. A portion of it arose from the sale of cloths which the Pandara obtained to distribute to the disciples and to other persons on ceremonial occasions, and it is shown that such distributions are usually made by the Pandara Sannadhi. Other portions of the debt were incurred in the purchase of hundis to remit moneys necessary for the expenses of litigation in which the institution was engaged, and the residue was taken for the general purposes of the institution.

It has not been alleged that the gifts of cloths were disproportionate to the large revenues of the institution; although it is no doubt true that considerable debts had been contracted, the Darmapuram Athinam still held considerable properties, and it has not been shown, as the appellant might have shown by the production of the accounts, that the funds taken for the general purposes of the mattam were not so applied. We find that the debt was incurred by the late Pandara Sannadhi for proper purposes, and we consequently hold that it can be enforced against the appellant to the extent of the assets which have come to his hands as the present incumbent of the office. The decree of the Court below is substantially affirmed, but it may be corrected so as to declare more specifically the relief to which we hold the respondent entitled and to avoid the suggestion that the debt is a direct charge on the property.

The appellant must bear his own costs and pay the respondent's costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

DARMA ÁYYAN (PLAINTIFF), PETITIONER, v. RÁJAPA ÁYYAN AND ANOTHER (DEFENDANTS), COUNTER-PETITIONERS.*

1879. April 8.

Claim for the produce of land—Denial of plaintiff's title—Jurisdiction of Small Cause Court.

If the right of the plaintiff be a question raised in a suit brought in a Court of Small Causes for recovery of value of produce, it is quite open to the Judge of the Court of Small Causes to try it, and determine it incidentally to the main question in the suit—the right to the produce claimed.

THE plaintiff alleged that he and the first defendant were in joint possession of a parcel of land, and that his share of the produce for the year 1877 was carried away by the first defendant with the aid of the second defendant. He claimed Rupees 18-7-0, the value of his share of the produce. The defendants pleaded that the plaintiff had no right to the possession of the land. The Judge was of opinion that a question of title was raised in good faith by the defendants, and that the suit was not cognizable by a Court of Small Causes. The plaintiff applied to the High Court, under Section 622 of Act X of 1877, to direct the Judge to decide the case on merits.

T. Ráma Ráu, for the Petitioner.

The Court (INNES, J., and FORBES, J.) delivered the following

JUDGMENT:—It appears to us that the District Munsif clearly had jurisdiction in this case. The suit was for the produce of the land. There seems to be ground for saying that the right of plaintiff to the share of the land from which the produce claimed was derived had been already determined; but, even if this still remained undetermined, and was a question raised in the suit, it was quite open to the Munsif to try it and determine it incidentally to the main question in the suit—the right to the produce claimed. The District Munsif having refused to exercise a jurisdiction which appertained to him, we set aside his order and direct that the suit be replaced on his file and proceeded with in due course. Costs will abide the result.

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* Civil Miscellaneous Petition No. 425 of 1878, under Section 622 of Act X of 1877, against the decree of Venkata Rau, District Munsif of Manargudi, in Small Cause Suit No. 5 of 1878, dated 18th March 1878.

FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Innes, and Mr. Justice Forbes.

1879. July 15.

RAMAPPA NAICKEN (FIRST DEFENDANT), APPELLANT, *v.* SI'THAMMA'L (PLAINTIFF), RESPONDENT.*

Under the *Mitákshará* law a divided son (no undivided sons surviving) is entitled to succeed to his father's share in preference to his father's widow.

The son's right of inheritance under Hindu law is distinguished from that of all other heirs in that it is 'apratibandha,' not liable to obstruction; and the functions assigned to the son, and the character ascribed to him in the religious system of the Hindus, explain the preference in the succession accorded to him.

THIS was a suit brought by a widow against her divided step-son for the recovery of her husband's estate, which, she alleged, descended to her on his death in 1875.

The defendant, while admitting the division, contended that a widow is not entitled to succeed while a son is living.

The District Munsif gave judgment in plaintiff's favor.

The first defendant appealed.

In his Judgment the District Judge made the following remarks: "The law on this point relied on by the appellant is in *Mitákshará* II, 1, 39 (according to Colebrooke's version). This runs 'therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue.'

"The real question is, what does this passage mean? At first sight it would appear that by the qualification 'without a son' (*aputra*), which Colebrooke translates by 'leaving no male issue,' it is intended that if the deceased left a son of any kind, he would succeed in preference to the widow; but this is not the case. 'Without a son' merely provides for the case of an undivided son, for then he would of course exclude the widow: it does not provide that if the deceased left a son or sons divided from him,

* Second Appeal No. 512 of 1878 against the decree of A. C. Burnell, District Judge of South Tanjore, dated 12th July 1878, confirming the decree of the Court of the District Munsif of Negapatam, dated 10th December 1877.

they are entitled to the preference. The use of the words 'not reunited' makes this clear. The word '*vibhakta*,' divided, which Colebrooke translates 'separated from his co-heirs,' expressly excludes divided children, as the additional qualification 'not reunited' shows."

He dismissed the appeal, but without costs.

The first defendant preferred a second appeal to the High Court on the grounds that he was, under Hindu law, the real heir to succeed to the property of his deceased father, and that the plaintiff was not the heir of the deceased and was simply entitled to maintenance.

T. Ráma Ráu, for the Appellant.

Mr. *Tarrant* and *A. Rámachandráyyar* for the Respondent.

The Full Bench (TURNER, C.J., INNES, J., and FORBES, J.) delivered the following

JUDGMENT.—The son's right of inheritance under Hindu law is distinguished from that of all other heirs in that it is "apratibandha," not liable to obstruction; and the functions assigned to the son, and the character ascribed to him in the religious system of the Hindus, explain the preference in the succession accorded to him. The son confers on the father the highest spiritual benefits; to the son the father looks for the continuance of a line of descendants, who may in their turn celebrate the sacrifices to the manes of their forefathers; the son is spiritually identical with the father. "From the several limbs (of my body) art thou produced; from very heart art thou born; thou art *self* called son; mayest thou live a hundred centuries."

Bauddháyana (cited in West and Bühler, second edition, 535): "If the wife be half the body of her husband, may she not exclusively take his wealth although sons or other male descendants be living? No; for, as it appears from the words of *Sankha* and *Likhita,* the bodies of his ancestor are born again if he let him figuratively address his own *soul* in the person of his child, that a son or other male descendant is consubstantial with his father or other ancestor."

The rule that in Hindu law overrides all other laws of succession is declared explicitly in the text of *Bauddháyana,* cited in *Víromitrodáya* and in *Dáyabhága,* Chapter IV, Sections 2 and

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21—apparently without any exception—" Male issue of the body being in existence, the wealth goes to them."

We have then to consider whether and to what extent this general rule is rendered ineffectual by a partition. In the learned work recently published by Mr. J. D. Mayne there is an admirable exposition of the development of the present law of partition. It is shown that in the undivided Hindu family the right of partition was not originally recognized, and that, having presumably its origin at a time when property had acquired some security in the desire of those of the families who perceived the avenues to wealth open to them to secure themselves the advantages they might by their individual efforts earn, it was fostered by the Brahminical priesthood from the multiplication of ceremonies resulting from it. The right, it is suggested, did not at first involve an equal division, nor could it take effect without the father's consent until the natural or civil death of the father, nor indeed, according to some authorities, until the death of both parents. Where, however, the doctrines of the *Mitákshará* obtained, that property in the ancestral wealth was acquired by birth, and that " both (father and son) have indiscriminately a right in the grandfather's estate," the right of a son as a coparcener to insist, against the will of the father, on a partition of the ancestral estate followed as an almost necessary consequence.

The right of partition having attained this development at the date of the *Mitákshará*, we can hardly doubt that its effect on the laws of succession (so far as it had any effect) would have been explicitly declared in that treatise. But with an exception we shall presently notice, and which in itself restrains rather than abrogates the general rule to which we have adverted, no authority has been cited either from the *Mitákshará* or from any other works accepted as authoritative in the school, that by partition a son and his descendants are deprived of their preferential right of succession.

The effect of partition is not to interfere with the right of inheritance, but to resolve joint rights into several rights. It frees so much of the estate as falls to the lot of his father from any present proprietary right on the part of the divided son, but it does not annul the filial relation nor the right of succession,

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which, in the absence of disqualification, is incidental to that relation.

The text of *Bauddháyana*, " Male issue of the body being in existence, the wealth goes to them," is cited in the *Viromitrodáya* apparently without any exception, and in the *Dáyabhága*, Chapter IV, Sections 2 and 21. In the *Vyavahára Mayúkha*, Chapter IV, Sections 9 and 16, we find it declared, a son, whether reunited with his father or not reunited, shall obtain the entire paternal share, since the power of intercepting the right to take a share lies in the filial relation. Disputing the position that the right of sons is annulled by partition *Jagannátha* declares, " If a father, having made a partition with his sons, die after reuniting himself with any parcener whomsoever, it would follow that his property could not be inherited by the divided sons; but no other persons ought to take the succession while sons live, since none can, like them, have a present right to his property." (Col. Dig., Vol. II, Chapter VIII, Section 433.)

There are no doubt texts which declare the right of the son born after partition to take the whole wealth of his father and so to debar the separated sons from any share in it. Such is the text of *Vrihaspati* cited in *Mitákshará*, Chapter I, Sections 6 and 4— " A son born before partition has no claim on the wealth of his parents, nor one begotten after it on that of his brother"—which must not be understood as declaring that separated sons would under no circumstances take by inheritance the separated share of the father, any more than as declaring that the son begotten after partition could under no circumstances claim succession to his brother who had separated before his birth. The text declares no more than the relative rights of the sons born before and after partition where both classes exist; and on a competition between separated sons and sons begotten after partition there are obvious reasons why a preference should be accorded to the latter: they have not received their shares; they are probably in union with the father at the time of his death. That partition does not destroy rights of inheritance is shown in the case in which a separated brother of the whole blood dies after reunion with a brother of the half blood; here the principle of survivorship flowing from reunion operates to secure a right of succession to the brother of the half blood, but not to the exclusion of a

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separated brother of the whole blood who has not reunited; the principles of survivorship and consanguinity competing, the reunited brother of the half blood and the separated brother of the whole blood share equally the property of the deceased. The treatise of the *Mitákshará* observes the following arrangement in declaring the laws of inheritance. It defines inheritance and distinguishes two classes, unobstructed and obstructed. It then states what powers are possessed by a father over the several kinds of property, ancestral or self-acquired property, and what powers are conceded to the sons in restraint of the father. It then proceeds to treat of the partition among unobstructed heirs, whether occurring in the lifetime of the father or subsequently to his death; and having exhausted the directions it deems requisite concerning the succession of this class, it proceeds in Chapter II to deal with the other class of heirs whose inheritance is liable to obstruction. Underlying the statements in the whole of the chapter is the presumption that the propositus has died without male issue. It commences with the statement, "That sons principal and secondary take the heritage has been shown." The order of succession among all (tribes and classes) on failure of them is next declared. Here we find the wife at the head of the obstructed sapindas declared "the heir to the estate of one who has departed for heaven," but with the reiterated condition "having no male issue." By the law of the *Mítákshará* it is indeed directed that a share should, on partition, be set aside for the mother, but her right to a share is plainly distinguishable from the right of the father or the sons. Before partition she had no title as a coparcener and could not call for partition. What she receives is termed in the *Smriti Chandriká* "amçam" (a portion), as distinguished from "dáya," inherited wealth. She does not, on partition, receive a share. When she takes anything, it is given her to discharge the inheritance from the obligation for her maintenance; and whether she takes anything or not, she acquires by partition no greater interest in the share which falls to the lot of her husband now that it has been separated than she had in the whole estate prior to partition.

The passage in *Mítákshará*, Chapter I, Sections 6 and 16, "so among brothers dividing the allotment of their parents who were separated from them after the demise of those parents, &c.," while it affirms the conclusion already stated, that partition does not destroy the right of inheritance, is not to be understood as implying that there can be no succession to the father's share in the lifetime of the mother, but that, on the death of either parent, his or her property may be divided, but not, as the section goes on to declare, so as to annul any gift which the father may have made out of their separate shares. The gist of the section is to declare that valid gifts may be made to their children, by parents separated from their children, out of shares which on partition have fallen to or been allotted to them. The separated son then must be held entitled to succeed to the estate of his father in preference to the widow.

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The appeal is decreed, and the decree of the Lower Appellate Court reversed with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1879. July 23.

VENKATE'SHWARA (DEFENDANT), APPELLANT, *v.* KE'SAVA-SHETTI (PLAINTIFF), RESPONDENT.*

Mortgagee in possession under an agreement to pay rent to the mortgagor—Accidental destruction of the mortgagee's premises by fire—Right of the mortgagor to rent.

The plaintiff borrowed Rs. 1,400 from the defendant, and mortgaged to the latter for eight years a piece of ground with a warehouse standing thereon. There was an agreement between the parties that the rent of the warehouse should be Rs. 16-12-0 per mensem, and that out of this amount the mortgagee should appropriate Rs. 14 towards the payment of the interest on the principal sum and pay Rs. 2-12-0 as rent to the mortgagor. Within four years from the date of the mortgage the warehouse was destroyed by fire, and thereupon the mortgagee ceased to pay rent to the mortgagor. The latter sued to recover the site together with arrears of rent. The District Judge was of opinion that the defendant should lose the interest on the loan up to the date of the term for the redemption of the mortgage, and that he was bound to pay to the plaintiff the rent claimed by him.

Held by INNES, J.—That the loss of the premises which had arisen from accidental causes could not affect defendant's right to recover the full amount due to him on the

* Second Appeal, 646 of 1878, against the decree of H. Wigram, Acting District Judge of South Malabar, dated 31st August 1878, reversing the decree of the Subordinate Court of Cochin, dated 30th March 1878.

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mortgage. There was no alteration in the liability, but merely in the source and mode of discharge. The premises having ceased to exist, nothing arising from the income could be credited towards the mortgage and there was no residue available to pay plaintiff.

Held by MUTTUSÁMI ÁYYAR, J.—That defendant's right of possession rested on the usufructuary mortgage and not on tenancy, and his right to recover his debt with interest thereon could not be extinguished or modified by the destruction of the warehouse. As to the surplus payment, the existence of the warehouse, which produced the income of Rs. 16¾ a month, was the basis of the contract to make it; and the basis having failed, the obligation resting thereon must likewise fail.

THIS was a second appeal against the decree of the District Judge of South Malabar in Appeal Suit No. 451 of 1878.

T. Ráma Rau for the Appellant.

Messrs. *Grant and Grant* for the Respondent.

The facts of the case are fully set forth in the Judgments of the Court (INNES, J., and MUTTUSA'MI ÁYYAR, J).

INNES, J.—Plaintiff on the 9th November 1872 mortgaged to defendant certain land with a warehouse standing on it. On the ground of defendant's failure to pay the rent he now sought to recover the land, including the site of the warehouse (which latter had been accidentally destroyed by fire on the 7th January 1876) together with rent from 1st July 1877.

A suit brought for the rent before the Sub-Judge, as Judge of the Small Cause Court, had been already dismissed by the Sub-Judge on the ground that, by the act of God, the fulfilling of the contract had become impossible.

The defendant contended that the warehouse and site were mortgaged to him for eight years, and that plaintiff could not recover until the expiry of the time; and that since the destruction of the premises he was not liable for rent. He claimed also to set off the interest on the mortgage.

The Sub-Judge dismissed plaintiff's suit.

The District Judge on appeal found that the arrangement had been that the rent of the destroyed premises should be Rs. 16¾ a month, out of which Rs. 14 monthly were to be carried to the credit of interest on the principal sum advanced, and Rs. 2¾ were to be paid as rent to the landlord, the mortgagor, and that plaintiff by the agreement was bound to repair. Upon this state of facts he considered that the English Common Law rule, which would require the tenant to rebuild the premises in the absence of an agreement on the part of the landlord to repair, did not

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apply, and that in certain circumstances an injunction might be granted to prevent the landlord (who had undertaken to repair) from suing to recover the rent until he had rebuilt the premises; but that, as matters stood, it was equitable that the loss arising from the accident of the fire should be apportioned equally. He thought that defendant should lose the interest on the advance up to the date of the term for the redemption of the mortgage at the rate of Rs. 14 a month, which he was to have received from the rents, and that he was still bound to continue to pay the balance of Rs. 2¾ to the plaintiff, who, on the other hand, would lose the value of the destroyed premises.

He considered the construction placed upon Section 56 of the Contract Act by the Sub-Judge to be erroneous. He allowed Rs. 38½ rent for fourteen months at Rs. 2¾ a month, but disallowed plaintiff's claim to recover the premises as he was not entitled to do so within the time fixed by the mortgage.

The second appeal is made on the grounds—

(1) That the suit should have been a suit for redemption.

(2) That rent was not recoverable, as the warehouse was destroyed in a general conflagration and plaintiff has not rebuilt the premises.

(3) That defendant should not, under the circumstances, lose the interest on the amount advanced on the mortgage.

(4) That the agreement to pay rent has become void under Section 56 of the Contract Act.

(5) That plaintiff's claim for recovery of the rent is barred by Section 13, Act X of 1877.

(6) That the decision of the Lower Appellate Court is not in conformity with the relief sought for by the plaintiff in his plaint.

We agree with the District Judge upon the question of the applicability of Section 56 of the Contract Act to this case. That section clearly does not apply to a case in which, although the consideration of the contract is lost, the performance of the promise on the other side is still possible. In the present case the defendant, though he can no longer enjoy the premises, can nevertheless pay Rs. 2¾ a month.

The contract for the payment of rent to plaintiff appears to be only incidental to the contract of mortgage. Defendant advanced

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a sum of Rs. 1,400, and plaintiff secured the repayment of that sum by placing certain premises in defendant's possession for eight years free of rent, except Rs. $2\frac{3}{4}$ a month, to be paid to plaintiff. At the close of the term, if the sum were not repaid, defendant might recover on the security of the premises.

There was a usufructuary mortgage, out of the rents and profits of which, equivalent to Rs. $16\frac{3}{4}$, defendant was to apply Rs. 14 in discharge of the mortgage, while Rs. $2\frac{3}{4}$ was to be received by the mortgagor through the defendant.

How, then, have the relative obligations of the parties been altered by the circumstance of the fire?

The gist of the arrangement was the liquidation of the mortgage at the rate of Rs. 14 a month through the rents and profits of the security, with payment of the monthly balance of the rents and profits to plaintiff. The result to the defendant through the fire is that he no longer receives the equivalent of Rs. $16\frac{3}{4}$ monthly, so that the basis for the credit of Rs. 14 a month to the amount due on foot of the mortgage and of payment of Rs. $2\frac{3}{4}$ a month to plaintiff no longer exists. In the loss of the premises also he loses the main portion of his security. But this loss, which has arisen from accidental causes, cannot affect defendant's right to recover the full amount due to him on the mortgage. He cannot on this account (as the District Judge seems to suppose) be deprived of the right to recover eventually the amount which it was contemplated by the parties would be discharged by the monthly payment from the rents. There is no alteration in the liability, but merely in the source and mode of discharge.

Another question is whether—an agreement to pay rent entering into part of the contract of mortgage—plaintiff is entitled to call upon defendant to pay the arrears of rent due, notwithstanding the destruction of the premises and before he is in a position to redeem.

If the agreement to let the premises be regarded as a contract apart from the mortgage, the undertaking to repair and the agreement to pay rent, would, under English law, be independent covenants, and the performance of either would not be a condition precedent to the performance of the other; and as the English rule is founded upon the reason, which equally existed here, that the

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breach of such a covenant goes only to part of the consideration, probably the same rule should apply in this country; and in that case plaintiff would be entitled to recover the rent notwithstanding his failure to rebuild, and defendant would have his cross action for damages for plaintiff's failure to rebuild. But it is impossible to regard the agreement to let the premises as a contract apart from the mortgage.

The rent was a deduction from the profits of the usufruct, which was part of defendant's security for the amount advanced.

The parties evidently regarded the Rs. $2\frac{3}{4}$ as the residue of the estimated value of the income after crediting Rs. 14 towards discharge of the mortgage.

The gist of the agreement was not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises with a certain small portion of the income of it made payable to plaintiff. The agreement imported that the premises should be in existence, and be available for yielding an income out of which monthly sums should be relinquished to the mortgagee and the residue should be paid to plaintiff, and plaintiff expressly undertook to keep up the premises. The premises have ceased to exist through no default of defendant. Nothing therefore arising from the income can be credited to the mortgage, and there is no residue available to pay plaintiff. It seems obvious that plaintiff cannot recover the rent that has fallen due and is unpaid.

The application of the income of the premises is properly an item in the account between the mortgagor and mortgagee which cannot at present be taken.

It follows from this also that plaintiff's claim to recover the land in defendant's possession under the mortgage, on account of defendant's failure to pay the rent, is unsustainable.

The decree of the Lower Appellate Court must be reversed and the suit dismissed with costs.

MUTTUSAMI ÁYYAR, J.—I am also of the same opinion. I may, however, add in accordance with the finding of the Courts below, that the transaction between the parties is really a mortgage with possession for a term of eight years. The contract to pay Rs. $2\frac{3}{4}$ per mensem is rather a subsidiary arrangement regarding the disposal of the surplus usufruct, or, in other words, an agreement to treat as money had and received for the plaintiff's use the

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surplus which, as mortgagee, the defendant might otherwise credit to the principal amount of the mortgage, than an independent engagement to pay rent as in an ordinary lease. I take the defendant to have really got into possession not as a tenant—not because he engaged to pay the plaintiff Rs. 2¾ a month for the use of the warehouse—but as a mortgagee, and because of the assignment of the usufruct in lieu of interest amounting to Rs. 14 per mensem. The case before us is not the one in which the mortgagor retains actual possession of the property under mortgage by becoming the tenant of the mortgagee, but it is the converse, in which the mortgagee obtains possession in his own right to the usufruct, and specially undertakes to pay the plaintiff the excess usufruct instead of crediting it to the debt. Defendant's right of possession rests, therefore, on the usufructuary mortgage and not on tenancy; and his right to recover his debt, with interest thereon, cannot be extinguished or modified by the destruction of the warehouse, which formed the material portion of what was given as security by way of strengthening that right, unless such destruction is imputable to his fault or he is under an obligation, which by express contract he is not, to rebuild or restore the building. It is therefore unnecessary to express an opinion in this suit whether, as between landlord and tenant, rent ceases or continues to be payable after the destruction of the premises let, or whether we can take power to readjust the original contract on an equitable basis supposed to be better suited to the altered state of things. As to the surplus payment, the existence of the warehouse, which produced the income of Rs. 16¾ a month, is, according to the intention of the parties, the basis of the contract to make it, and the basis having failed, the obligation resting thereon must likewise fail.

I would also reverse the Judgment appealed against and dismiss the suit with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1879. December 10.

SHEKHARA PANIKER (PLAINTIFF), APPELLANT, *v.* RARU NAYAR (1ST DEFENDANT), RESPONDENT.*

Although the right to hold for 12 years is inherent in every kánam according to the custom of the country, it is competent to the jenmi to exclude this right by express agreement.

THIS was a second appeal against the decree of the Subordinate Judge of North Malabar in Appeal Suit No. 252 of 1878.

A. Rámachandráyyar for the Appellant.

Mr. *Shephard* for the Respondent.

The facts sufficiently appear in the following Judgments:—

KERNAN, J.—This is a suit to redeem a "kánam," dated 14th October 1875. Exhibit A is the kánam. Looking at the proviso for redemption, it seems to have been the contract of the parties that the grantor in the kánam could redeem without waiting for any fixed number of years. The proviso is that the Kánamdár should receive the amount of improvements and kánam when demanded.

As the Lower Appellate Court decided the appeal on a preliminary point, viz., that plaintiff could not redeem within 12 years, and as we think that decision was wrong, we will reverse the decree and remand the case to be tried on appeal from the Munsif's decree.

MUTTUSA'MI A'YYAR, J.—I am also of the same opinion. Although the right to hold for 12 years is inherent in every kánam according to the custom of the country, it is competent to the jenmi to exclude its operation by express agreement. The kánam (document A) expressly provides for the surrender of the property demised *on demand,* and the construction placed upon

* Second Appeal No. 278 of 1879 against the decree of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 17th December 1878, reversing the decree of the Court of the District Munsif of Painád, dated 30th March 1878.

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it by the Lower Appellate Court is not warranted by the language of the instrument. As the Subordinate Judge has expressed no opinion as to the value of improvements payable to the defendants, I think we should reverse the decision of the Lower Appellate Court and remit the suit for disposal on a consideration of the evidence on record as to the value of improvements.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Kindersley.

1880. January 6.

KATHAPERUMAL AND 4 OTHERS (SECOND, THIRD, FOURTH, FIFTH, AND NINTH DEFENDANTS), APPELLANTS, *v.* VENKABAI (PLAINTIFF), RESPONDENT.*

By Hindu law two widows of one and the same husband take a joint interest in one undivided estate; and although the widows may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition converting the joint estate into an estate in severalty. *Semble* The interest of one of two such widows cannot be sold.

Jijoyiamba Báyi v. *Kámákshi Báyi* (1); *Kindama* v. *Venkatarámapa* (2); *Nilamani* v. *Radhamani* (3); *Bhugwandeen Doobey* v. *Myna Báyi* (4) followed.

THIS was a second appeal against the decree of H. J. Stokes, Acting District Judge of South Tanjore, in Appeal Suit No. 432 of 1878.

Mr. *Lascelles* and Mr. *Palman* for the Appellants.

T. Ráma Ráu for the Respondent.

The facts and arguments in the case fully appear in the Judgment of the Court (KERNAN and KINDERSLEY, JJ.)

JUDGMENT:—The plaintiff and the first defendant are the two widows of a deceased Hindu named Ráma Ráu. This Ráma Ráu died in 1857, and, ten years afterwards, one Anandha Padmanabha instituted a suit, 57 of 1867, to establish the fact that he had been adopted by Ráma Ráu. In that, however, he failed. In 1869 the first defendant executed in favor of the second defendant an hypothecation bond purporting to hypothecate her late

* Second Appeal No. 331 of 1879 against the decree of H. J. Stokes, Acting District Judge of South Tanjore, dated 24th February 1879, confirming the decree of the Subordinate Court of Tanjore, dated 18th September 1878.

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husband's property in renewal of two hypothecation bonds alleged to have been executed previously by the pretended adopted son, Anandha Padmanabha Ráu. The District Munsif has found that those transactions were a sham, intended to defraud the plaintiff. It is clear that the bond was not executed in circumstances which would justify a Hindu widow in creating a charge upon her late husband's estate. The second defendant, not relying on the hypothecation, obtained a money decree in Original Suit 42 of 1870 in the Court of Small Causes at Kumbakonam, *ex parte*, against the first defendant, and, in execution of that decree, the second defendant himself purchased the first defendant's interest in her late husband's lands. The other defendants claim to hold from the second defendant. The plaintiff has brought this suit to recover those lands, she having been no party to the suit in which they were sold.

When the second appeal came on for hearing before us the exception of limitation was given up, and the only point which was argued was that the first defendant's purchase at the Court sale was good at least to the extent of the first defendant's life-interest in the lands of her deceased husband. It is quite settled that the undivided interest of one of several male coparceners may be attached and sold in execution of a decree. But by Hindu law two widows of one and the same husband take a joint interest in one undivided estate, and it has been held that, although the widows may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition converting the joint estate into an estate in severalty. *Jijoyiamba Báyi* v. *Kámákshi Báyi* (1); *Kindama* v. *Venkatarámapa* (2); *Nilamani* v. *Radhamani* (3); *Bhugwandeen Doobey* v. *Myna Báyi* (4). The estate of a deceased Hindu is thus not liable at all events to compulsory partition at suit of any one of two or more widows, and the argument by which the interest of a male coparcener who could claim a share was held to be liable to attachment and sale, falls to the ground. No case has been quoted at the bar or is otherwise known to us, in which any of the superior Courts have held that the interest of one of two co-widows was liable to attach-

(1) 3 Mad. H. C. Reps., 424-452.
(2) 3 Mad. H. C. Reps., 268.
(3) I.L.R., 1 Mad., 300.
(4) 11 Moo. I.A., 487.

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ment and sale; and we think that all that has been decided as to the interest which such persons have by Hindu law in the estate of their late husband, points to the conclusion that the interest of one of two such widows cannot be sold.

It is not necessary to decide this point in the present case, because whether such sale in execution was legal or not, it is quite clear that the purchaser of the first defendant's interest could have no higher right than the first defendant, and the first defendant could have no right to the possession of the whole of the lands or of any specific portion of them to the exclusion of the plaintiff. The only right the first defendant could have is to joint enjoyment with the plaintiff, or, if circumstances (pointed out in *Jijoyiamba Báyi* v. *Kámákshi Báyi* (1), *Nilamani* v. *Radhamani* (2)) existed, to have a separate possession of portion of the inheritance decreed in a suit for that purpose.

The possession of the second defendant and of those deriving under him, viz., second, third, fourth and fifth defendants, is illegal as against the plaintiff.

Though the first defendant may be the senior widow, she is found to have colluded with the second defendant to injure the plaintiff, and we think that the decree of the Court of First Instance, confirmed by the Appellate Court, was necessary in order to restore plaintiff's rights. At the same time, it does not decide any question between the first defendant and the second, third, fourth, fifth, and other defendants. If the second, third, fourth and fifth defendants have rights against the first defendant and her interest in the property, they must be left to assert such rights by legal means.

We do not encourage the notion that second and other defendants could establish against plaintiff any right, through first defendant, of separate possession of any portion of the joint inheritance of the widows; but we do not decide that question, as it is not properly a subject of decision in this suit.

We shall therefore affirm the decree of the Lower Appellate Court and dismiss the appeal with costs.

(1) 3 Mad. H. C. Reps., 424–452. (2) I. L. R., 1 Mad., 300.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., C.J., and Mr. Justice Innes.

1880. January 6.

FAKURUDIN SAHIB AND 7 OTHERS (DEFENDANTS), APPELLANTS, *v.* ACKENI SAHIB AND 6 OTHERS (PLAINTIFFS), RESPONDENTS.*

Religious Endowments—Act XX of 1863, Section 14—Removal from office of an hereditary trustee.

Section 14 of Act XX of 1863 is sufficiently general in its terms to empower any person interested in any temple, mosque, or religious endowment, or in the performance of the trusts relating thereto, to sue the trustee, manager, or superintendent, or the member of a committee appointed under the Act, for misfeasance, and also to empower the Court to order the removal of a trustee, &c.

The tomb of a reputed saint became a place of pilgrimage and an endowment was made for the maintenance of the shrine and for the performance of certain religious ceremonies. There was a practice on the part of the proprietors and the managers of the institution to divide among themselves the residue of the income, and to dispose by way of sale or mortgage of the share enjoyed by them. *Held* that this was a religious institution within the meaning of Act XX of 1863.

The 14th section of the Act empowers the Civil Court to remove trustees for misfeasance, &c., and it does not recognize any difference in respect of trustees whether hereditary or selected.

THIS was an appeal against the decree of A. C. Burnell, District Judge of South Tanjore, in Original Suit No. 2 of 1877.

The plaintiffs sued for the removal of the defendants from the management of the Darga at Nagore. It was alleged that the plaintiffs, the defendants, and many others were the proprietors of the said Darga; that the defendants were the headmen and the managers of the institution; and that the latter were guilty of several acts of misfeasance and non-feasance specified in the plaint. The defendants pleaded that the property was of the kind called *Altamga* in the Muhammadan Law; that the defendants were the descendants of the saint in whose honor this institution was founded; that they were hereditary trustees, and not amenable to Act XX of 1863; and that they did not commit any breach of trust.

The District Judge was of opinion that, though the parties admitted the practice of sharing among themselves the residue of the income, there was no documentary evidence to support the

* Appeal No. 22 of 1879 against the decree of A. C. Burnell, District Judge of South Tanjore, dated 18th December 1878.

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claims; that the building was a public mosque; and that the shrine was a place of pilgrimage, and that this was a "religious establishment" within the meaning of Act XX of 1863. Upon the evidence he found that the defendants had committed breach of trust, and that the interests of the institution required that they should be removed from office. He decreed accordingly, and the defendants appealed to the High Court on the grounds that the plaintiffs were not entitled to institute the suit; that the defendants ought not to have been required to render an account of their trusteeship; that the District Court acted throughout without jurisdiction; and that the defendants were not guilty of breach of trust or neglect of duty.

The *Advocate-General*, Mr. *Tarrant*, and *A. Rámachandra Áyyar* for the Appellants.

Mr. *Shephard* and *V. Bashyam Áyyangar* for the Respondents.

The Court (TURNER, C.J., and INNES, J.) delivered the following

JUDGMENT:—Regulation VII of 1817 gave the Board of Revenue the general superintendence of all endowments for religious and charitable purposes. Act XX of 1863, in relieving the Board of the duties imposed on it by the Regulation in regard to religious endowments, distinguished between endowments of which the trustee or manager was nominated or confirmed by the Government, and which are referred to in Section 3 of that Act, and those of which the trustee or manager was not so appointed; and although it has been held that the provisions of Section 13 of the Act relating to the rendition of accounts by the trustees and managers to the committee constituted by the Act apply only to the institutions mentioned in Section 3, we can find nothing to control the generality of the terms of Section 14, which empower any person interested in any mosque, temple, or religious endowment, or in the performance of the trusts relating thereto, to sue the trustee, manager, or superintendent, or the members of a committee appointed under the Act, for misfeasance, and also empower the Court to order the removal of a trustee, &c. The plaintiffs, as resident Muhammadans, apart from any pecuniary interest they may have in the income of the institution, are in our judgment sufficiently interested therein to entitle them to maintain suits if the institution be a religious establishment. It does not admit of question that the institution is a religious establishment. It

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is not uncommon among Muhammadans to regard the tombs of reputed saints with reverence, and in some cases to ascribe to them so much sanctity that they become places of pilgrimage. The Darga of Kádir Sáhib, the institution to which the suit relates, is such a place of pilgrimage, and for the maintenance of the shrine, and for the performance of certain religious exercises connected with it, the property mentioned in the plaint has been devoted. Whether the plaintiffs or defendants, or any of them, are entitled to the residue of the income, after providing for the proper charges, we need not now consider. It is sufficient to say that there is no documentary evidence in support of their claims, although undoubtedly there has been for a considerable time a practice on the part of the parties to this suit, and of the persons under whom they claim, to divide among themselves something more than such surplus, and to dispose by way of sale or mortgage of the share enjoyed by them. That the endowment was made mainly for the purposes to which we have adverted—the maintenance of the shrine and the performance of ceremonies—is not denied. In our judgment the Darga is a religious institution within the meaning of the Act.

The Court below having rightly entertained the suit, we have next to determine whether the trustees are removable from office by this Court, although they may be hereditary and have descended in regular succession from the original trustees. The 14th section of the Act of 1863 empowers the Civil Court to remove trustees for misfeasance, breach of trust, or neglect of duty, and it does not recognize any difference in the powers conferred on the Courts in respect of trustees whether hereditary or selected.

It remains then to determine whether sufficient cause has been shown for the removal of the trustees. Although some of the specific acts of misconduct imputed to the trustees may be excused on the ground that they may have believed long usage sanctioned them, yet it is sufficiently shown that the properties appertaining to the shrine have been grossly neglected and thereby lost or left uncollected, and that no proper accounts have been kept. This amounts to neglect of duty, which justifies the removal of the trustees. For these reasons we shall affirm the decree of the Lower Appellate Court and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Innes.

1880. January 7.

VI'RASA'MI NA'YUDU (FIRST DEFENDANT), APPELLANT, *v.* ARUNA'-CHELLA CHETTI AND 2 OTHERS (PLAINTIFFS), RESPONDENTS.*

Dharmakarta, dismissal of—Parties to suit for.

In a suit brought for the dismissal of a Dharmakarta all the members of the district committee should join as parties. The district committee cannot divest themselves of their rights in favor of a few of their number.

APPEAL against the decree of the Subordinate Judge of South Arcot in Original Suit No. 16 of 1878.

The *Advocate-General* and *A. Subbaráyalu Reddiar* for the Appellant.

A. Rámachandráyyár for the Respondents.

The Court (TURNER, C.J., and INNES, J.) delivered the following

JUDGMENT:—The suit has been brought by three gentlemen, who are described as members of the Temple Committee for the Cuddalore Taluk, to establish their right to the management of the pagoda of Sri Padalivaraswámi at Tirupatirupuliur, and to recover possession of the pagoda and its property from the appellant, the former Dharmakarta, and other persons, who, with the appellant's permission, have respectively taken possession of portions of the lands appertaining to the temple.

The appellant pleaded in the Court of First Instance (among other pleas) that the respondents had no *locus standi*, inasmuch as the Government had not appointed a special committee for the taluk, but a committee of the whole district, of which committee other persons are members who have not joined in this suit.

It is argued, on the part of the respondents, that it is not necessary that all the members of the committee should join in

* Appeal No. 93 of 1879 against the decree of K. Kunjan Menon, Subordinate Judge of South Arcot, dated 9th December 1878.

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lines. This is contrary to the *Smriti Chandriká*, which stops at the second in descent in any branch line, and contrary to the literal language of the *Mitákshará* in Chapter II, Section V, of the translation of the treatise on inheritance, but in accordance with *Vijíyanéswara's* commentary on another portion of *Yajnyaválkya's* treatise, the *Achárakanda*, verses 52 and 53, quoted and translated in West and Bühler's book, second edition, pages 174 and 175, which clearly shows that the limit of descent in the branch line given in Chapter II, Section V, of the *Mitákshará* is not to be taken literally, but that the heritable descent may be traced to the sixth in descent below the point of divergence of the two lines. Plaintiff occupies the position of fifth in descent from the point of divergence and is therefore competent to inherit.

The will A, though addressed to the plaintiff, conveys authority to second defendant to adopt a boy standing in the relation in which first defendant stands to the deceased Thiruvengada in the event of plaintiff not being willing to give his son in adoption. This, however, cannot be held sufficient to imply a sanction to a second adoption on failure of the first. The authority conveyed by the will A is an authority for one single adoption, and that authority was exhausted by the first adoption made. That a second adoption failing the first is valid has been recognized by the Privy Council in *Venkata Krishna Ráu* v. *Venkata Ráma Lakshmi* (1), but without the express or implied authority of the husband such a second adoption could be made only under the sanction of the nearest sapindas, and with such sanction a second adoption would probably not be recognized as valid in the face of an express prohibition of a second adoption on the part of the husband. In the present case there is no such prohibition, and it can scarcely be doubted from the circumstances in which the authority was conveyed that a second adoption, failing the first, would have been approved of by the husband had he had such a contingency in contemplation, as the object of continuing the honors and emoluments in his own line is quite as much manifested in the will A as his desire for the spiritual advantages that would result from the adoption. It was expressly

(1) L.R., 4 I.A. 2, at pp. 9 and 10.

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alleged by second defendant that she obtained the necessary sanction.

The third issue questions the validity of the adoption generally, and evidence was given of the consent of the sapindas. The seventh witness for first defendant, who is numbered 23 in the second branch of the pedigree and is equally near with plaintiff, gave his consent to the adoption. Plaintiff and he are the only two surviving sapindas in the family of their common ancestor Strivatsachinna Bhattar.

The deceased husband of second defendant and these two persons each represent, as already mentioned, divided branches of the family of the common ancestor Strivatsachinna Bhattar. This is not, therefore, a case in which the consent could be sought within the undivided family itself, for in the family itself no sapindas are surviving. It is not governed, therefore, by the *Chinna Kimedí case* (*Sri Raghunadha* v. *Sri Brozo Kishoro*) (1), in which the Privy Council held that, if the husband had not authorized the adoption, the consent of a divided sapinda would be sufficient in the absence of the consent of the undivided brothers of the deceased husband.

The *Rámnád case* (2) perhaps decided no more than that an adoption was valid when the assent of the majority of the sapindas was accorded, see *Arundádi Ammál* v. *Kuppammál* (3), but it has never been decided that an adoption is absolutely invalid by reason of the consent of less than the entire body of sapindas having been obtained to it.

It seems apparent from the Judgment of the Privy Council in the *Chinna Kimedi* (1) *case*, that, if it had been necessary to consider that point, the consent of the undivided brother alone would in that case have been held sufficient, and where the only surviving members of the family are divided from the deceased husband for whose benefit it is desired to make the adoption, and also from each other and equally distant from the deceased, there seems nothing in principle to throw doubt upon the sufficiency of the assent of some of them when *boná fide* given, if it

(1) L.R., 3 I.A., 191; S.C. I.L.R., 1 Mad., 69.
(2) 12 Moo. I.A., 397.
(3) 3 Mad. H.C. Reps., 283.

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be shown that the consent of the others is refused from interested or improper motives or without a fair exercise of discretion. In the present case the assent of both sapindas was sought, and plaintiff's assent to a second adoption was not absolutely withheld, but it was coupled with a condition that the widow should adopt his third son. In Suit No. 156 of 1869 he had stated that this boy was already given in adoption in another family. That assertion is found now to have been false (see Appeal No. 51 of 1879) but the widow, upon the ground stated, refused to make an adoption which might turn out to be invalid. It is clear that plaintiff's assent was subsequently withheld from purely interested motives, and the evidence shows that the assent of the seventh witness for plaintiff—who belongs to a branch of the family senior to that of plaintiff, and who is at least equally entitled with the plaintiff to succeed to the reversion—was given with complete good faith and in the exercise of a deliberate discretion.

As to this the Advocate-General referred to document N, dated the day after the adoption, to show that seventh witness could not have consented at all as there is no express mention in N of such assent; but the omission of any express mention of this in this letter, which is addressed to the manager of the pagoda and was intended to apprise him of the adoption, does not appear to be very material in the face of the evidence of the seventh witness, and the letter, document 23, in which the witness expressly mentions that second defendant had asked his consent and expresses his high approval of the step she proposed to take.

We hold that the adoption took place under all the conditions required to render it valid, and the suit must therefore be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Muttusámi Áyyar.

1880. April 5.

SENNANDAN (SECOND DEFENDANT), APPELLANT, *v.* KOLLAKIRAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Unstamped Mortgage Instrument in defendant's possession—Notice to produce—Secondary evidence of its contents.

Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it, can only be admitted in the absence of evidence to show that it was unstamped when last seen.

THIS was a second appeal against the decree of Arunáchala Áyyár, Subordinate Judge of South Tanjore, in Appeal No. 248 of 1879, reversing the decree of the District Munsif of Trivádi in Original Suit No. 381 of 1877.

R. Balají Ráu, for the Appellant.

T. Ráma Ráu, for the Respondents.

The facts of the case are sufficiently set forth in the following

JUDGMENT :—In this case plaintiffs sued to redeem a mortgage, which, they alleged, was executed about thirty-five years ago for Rs. 95 and for a term of fifteen years. First, second, and third defendants admitted that they were in possession as mortgagees, but contended that the mortgage executed in their favor was for Rs. 100 and for a term of 100 years from the 3rd August 1839. Both the Lower Courts found that the instrument of mortgage produced by the defendants and marked as exhibit I was open to suspicion, that the document relied on by the plaintiffs was unstamped, and that the defendants who had it in their possession fraudulently denied its existence. Following the decision in *Muttukaruppa Kaundan* v. *Ráma Pillai* (1), the Court of First Instance rejected the secondary evidence tendered by the plaintiffs as to the contents of the document in defendants' possession on the ground that according to plaintiffs' own witnesses

* Second Appeal No. 31 of 1880, against the decree of Arunáchala Áyyar, Subordinate Judge of South Tanjore, dated 24th September 1879, reversing the decree of the District Munsif of Trivádi, dated 11th July 1879.

(1) 3 Mad. H. C. Reps., 158.

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it was not stamped, and dismissed the suit as premature with costs. But the Lower Appellate Court relied on *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (1), admitted the secondary evidence, and passed a judgment in plaintiffs' favor. Second defendant appeals on the ground that the Lower Appellate Court erred in admitting secondary evidence as to the contents of the mortgage set up by the plaintiffs. The case relied upon by the Lower Appellate Court is not in point. It only decided on the authority of *Farr* v. *Price* (2) that in a suit upon a promissory note written on unstamped paper, the plaintiff might recover upon the original consideration. In this case before us we think we may follow *The Marine Investment Co.* v. *Haviside* (3) in which it was held that secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it can only be admitted in the absence of evidence to show that it was unstamped when last seen. We think therefore that this appeal must be allowed, the judgment of the Lower Appellate Court reversed, and that of the Court of First Instance restored.

In the peculiar circumstances of this case, we shall direct that each party do bear his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Muttusámi Áyyar.

1880. August 31

PONNUSÁMI NÁDAN (PLAINTIFF), APPELLANT, *v.* DORASÁMI ÁYYAN AND 3 OTHERS (3RD—6TH DEFENDANTS), RESPONDENTS.*

Native Christians—The Indian Succession Act—Family governed by the Hindu Law before 1866.

The Indian Succession Act governs the succession in Native Christian families; and since the passing of that Act such families have not been at liberty to adhere to the Hindu Law of Succession.

Held also that if the family continued to observe the Hindu Law of Succession until the Indian Succession Act altered their rule of succession, the members of the

(1) I. L. R. 3 Cal., 314. (2) 1 East, 55. (3) L. R., 5 P.C., 624.

* Appeal No. 35 of 1880 against the decree of R. Vasudéva Ráu, Subordinate Judge of Negapatam, dated 23rd January 1880.

family who were born before the latter Act came into operation could not be deprived of the rights acquired by them under the Hindu law.

THIS was an appeal against the decree of R. Vasudéva Ráu, Subordinate Judge of Negapatam, in O. S. No. 20 of 1879.

The *Advocate-General* and *S. Nevins Pillay* for the Appellant.

Mr. *Shephard* for the third and fourth Respondents.

R. Balaji Ráu for the first and second Respondents.

The facts of the case and the arguments of Counsel are sufficiently set forth in the following

JUDGMENT:—The plaintiff sued to recover his one-third share of certain joint family property from his undivided brother the first defendant, and his nephew the second defendant, the other defendants being persons to whom portions of the property had been alienated, the third defendant having purchased some portions in execution of a decree. The first, second, seventh, eighth, and ninth defendants did not defend the suit, but the third, fourth, fifth, and sixth defendants, among other pleas, objected that the plaintiff and first and second defendants were Christians, whose law of succession was regulated by the Indian Succession Act, 1865.

The Subordinate Judge dismissed the suit with costs because he found that the family, of which the plaintiff and first and second defendants were members, were Roman Catholic Christians, and as such they were governed by the Indian Succession Act, and the plaintiff had not taken out letters of administration to his father's estate.

On appeal by the plaintiff to this Court, it was admitted that the family were Roman Catholic Native Christians, but it was submitted that until the date of this suit they followed the Hindu rules of succession, and that it was questionable whether it was the intention of the Indian Succession Act to compel them to abandon those rules and to adopt the very different rules contained in the Act. A similar argument was used in the case of *Joseph Vathiar* (1), and was overruled by the Judge, whose decision was approved of by this Court on appeal. In Original Suit No. 180 of 1879, which was decided by Mr. Justice Innes on the Original Side of this Court, the family had been Native

(1) 7 Mad. H. C. Reps, 121.

Christians, apparently Protestants, for several generations, but had adhered to the Hindu Law of Succession. Christian Kumaren Pillay died in 1858. He left a widow, two daughters, and a son Joseph Kumaren, who died in 1878. It was decided that the succession in 1858 was governed by Hindu law, but that the succession in 1878 was governed by the Indian Succession Act, and that decision has not been appealed against. The two cases leave no room to doubt that the Indian Succession Act governs the succession in Native Christian families; and that since the passing of that Act such families have not been at liberty to adhere to the Hindu Law of Succession. The case of *Abraham v. Abraham* (1) shows that, before the passing of the Indian Succession Act, 1865, Native Christian converts from the Hindu religion were at liberty to renounce the Hindu Law of Succession or to adhere to it. But now they are bound by the Act.

The Subordinate Judge has given, as one of his reasons for dismissing this suit, that Section 190 of the Indian Succession Act requires that the plaintiff should have taken out letters of administration. We do not concur in this view, because we are told that in the present case letters of administration have already been granted to the plaintiff's mother. The plaintiff has not made his mother a party to this suit, which is based upon the plaintiff's view of his supposed rights under Hindu law.

We think that the plaintiff's mother, and any other members of the family who, under the Indian Succession Act, would have an interest in the property, should be joined as parties to the suit.

We also think that there should be some further enquiry into the facts. It is admitted that the plaintiff's father died after the Indian Succession Act came into operation. The plaintiff appears to have been born long before that Act came into operation, but the fact should be ascertained. If any portion of the property was ancestral as between the plaintiff and his father, and if the family continued to observe the Hindu Law of Succession until the Indian Succession Act altered their rule of succession, the plaintiff may at his birth have acquired an interest in such ancestral property, of which the subsequent enactment of the Succession

(1) 9 Moo. I.A., 195.

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Act would not in our opinion deprive him. By Section 331 of that Act it is provided that it shall not apply to any intestacy occurring before the 1st of January 1866. The succession to the share of the deceased in any ancestral property, and to any self-acquired property of the deceased, would of course be governed by the Indian Succession Act.

The Subordinate Judge having dismissed the suit without investigating the facts, we remand the suit with the direction to add all members of the family who may have an interest in the result; and, guided by the observations which we have made, to raise and try the issue whether the property in dispute, or any part of it, was ancestral property as between the plaintiff and his father, and any other material issues which may arise between the parties, and to dispose of the suit on its merits. The costs of this appeal will be provided for in the decree of the Subordinate Court.

Suit remanded.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Forbes.

1880. September 29.

CHINNAYYA RAWUTAN AND TWO OTHERS (FOURTH AND FIFTH DEFENDANTS), APPELLANTS, v. CHIDAMBARAM CHETTI AND OTHERS (FIRST PLAINTIFF AND FIRST AND SECOND DEFENDANTS), RESPONDENTS.*

In India, as in England, a mortgagee may transfer his rights to a third person by way of assignment: but such transfer must be without prejudice to the rights of the mortgagor.

THIS was an appeal presented, under Section 561 of the Code of Civil Procedure, against the decree of the Subordinate Judge of South Tanjore in Original Suit No. 24 of 1877.

V. Bháshayam Áyyangár for the Appellants.

T. Ráma Ráu for the first Respondent.

W. Gopálacharri for the second Respondent.

The Court (KINDERSLEY and FORBES, JJ.) delivered the following

* Appeal No. 82 of 1879 against the decree of the Subordinate Court of South Tanjore, dated 21st March 1879.

CHINNAYYA RAWUTAN v. CHIDAMBARAM CHETTI.

JUDGMENT:—The plaintiff in this suit became indebted to one Arnáchellam Chetti in the sum of Rupees 38,000, which was secured by three simple bonds. On the 18th February 1872 the plaintiff executed in favor of the first defendant's late husband, Anamalai Chetti, a bond hypothecating certain villages for Rupees 30,000, which sum Anamalai undertook to pay to Arnáchellam Chetti, on account of plaintiff's debt to Arnáchellam Chetti. On the same day the plaintiff let some of the same villages to Anamalai at an annual rent of Rupees 4,400, by the receipt of which Anamalai was to recover his advance with interest within 15 years. Anamalai died 1873, having paid only a portion of the Rupees 30,000, which formed the consideration for the hypothecation of the villages to him. In 1874 Arnáchellam and his nephew brought Suits 75 and 76 to recover balances due on two of his three bonds, and recovered from the present plaintiff money amounting with interest to Rupees 21,132-3-9, which the plaintiff now sues to recover. In the meantime, on the 1st of September 1874, the first and second defendants, who are the widow and brother of Anamalai, assigned the mortgage, with possession of the rented villages, to the third defendant, Chinnaya Rawuthan, whose brothers are the fourth and fifth defendants.

The Subordinate Judge found that Anamalai had paid Rupees 8,000 to Arnáchellam, for which the plaintiff had not given him credit. He therefore decreed for the plaintiff the sum of Rupees 14,690-1-10 against all the defendants. The third defendant had pleaded that he was not liable, because there was no privity of contract between him and the plaintiff. But the Subordinate Judge held that the third defendant was liable, because he was in possession, and had taken the place of the first and second defendants. The third, fourth, and fifth defendants appeal to this Court mainly on the ground that there was no privity of contract between them and the plaintiff.

This may be regarded as substantially a suit to recover damages for breach of contract; and there can be no question as to the general rule that no one can be bound by a contract, except those who are parties to it. We took time to consider whether the plaintiff had any remedy against the third defendant, who was in possession of some of the villages as assignee of the hypothecation. It is clear that in India, as in England, a

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mortgagee may transfer his rights to a third person by way of assignment. But such transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another into his own position, but he cannot create a title in a third party distinct from his own title (Macpherson on Mortgages, 122, Ed. 1877); and in a suit by a mortgagor for redemption, where an assignment has been made without the knowledge of the mortgagor, the assignee is bound by the state of the account between the mortgagor and the mortgagee, although he may have paid more. [*Mathews* v. *Walwyn* (1), *Chambers* v. *Goldwin* (2), *Walker* v. *Jones* (3)]. The present case is one of partial failure of the consideration for the hypothecation. The case of *Parker* v. *Clarke* (4) was one of total failure of consideration. A person named Cruchley, who was imprisoned for debt, assigned all his interest under his father's will to one Thomas without consideration, and under a promise to release the mortgagor from prison, which was never performed. Thomas transferred this mortgage to the defendant, Clarke, who had notice of the circumstances under which it had been obtained; and Clarke deposited the mortgage and transfer with Philips to secure payment of a debt. Philips had no notice of the circumstances under which the mortgage had been obtained. The bill was filed against Clarke and Philips for a declaration that the mortgage was void, and for an order for its delivery up to be cancelled. For Philips it was argued that he was a purchaser for value without notice. But the Master of the Rolls was of opinion that Philips could only take what Clarke could give him, and that he could not stand in a better situation than Clarke. He must therefore deliver up the deeds; and his only remedy would be against Clarke. In the present case there has been only a partial failure of consideration; and we are of opinion that the third defendant is bound by the state of the account between the plaintiff and the representatives of the deceased mortgagee, and that the plaintiff is entitled to a declaration that, if the first and second defendants do not pay that which may be due to the plaintiff on account of the money which Anamalai failed to pay to

(1) 4 Ves. 118.
(2) 9 Ves. 264.
(3) L.R.P.C. 30.
(4 30 Beav. 54.

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Arnáchellam, the mortgage in the hands of the third, fourth, and fifth defendants will be good only for the amount actually paid for the mortgage with interest. It is admitted at the second hearing that the late Anamalai paid Rupees 22,000 and not only 14,000 to Arnáchellam on account of the mortgage of Rupees 30,000. The Subordinate Judge was therefore right in deducting that sum from the damages claimed by the plaintiff in respect of the suits brought against him by Arnáchellam. It further appears that the Subordinate Judge should have deducted the sum of Rupees 7,351 as counter-interest on the sum of 8,442 rupees from April 1872 to the date of the plaint. The counter-interest is due, because of the debt of Rupees 38,000 due by plaintiff to Arnáchellam; Anamalai undertook to pay only Rupees 30,000. It was the plaintiff's duty to pay the odd 8,000, and therefore that amount with interest is fairly to be deducted from the sums which Arnáchellam recovered from the plaintiff. This sum mentioned as counter-interest includes interest on the Rupees 442 which plaintiff improperly collected as rent. Upon the evidence we do not think that the plaintiff is fairly chargeable with the grain rent, which he seems to have collected under the arrangement mentioned in his letter Exh. I, by which the operation of the lease was postponed to the commencement of Fasli 1282; but it was agreed that Anamalai was to take the produce for a few months of the preceding year on account of interest on certain sums which he had already paid. We shall modify the decree of the Subordinate Court by deducting from the sum of Rupees 12,690-1-10 the sum of Rupees 5,321 chargeable to the plaintiff on account of counter-interest. The first and second defendants will pay the balance, Rupees 7,369, to the plaintiff with costs in proportion with further interest on the principal sum of Rupees 7,369 at 6 per cent. from the date of plaint. The decree as against the third, fourth, and fifth defendants will be reversed, but it will be declared that the mortgage in their hands will be good only for the sum of Rupees 22,000 found to have been paid by Anamalai to Arnáchellam Chetti, and the plaintiff will be entitled to redeem after the lapse of eleven years from the commencement of Fasli 1282.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Kindersley.

1880. October 29.

PAUPAYYA AND SUBAYYA (COUNTER-PETITIONERS, 4TH AND 5TH DEFENDANTS), PETITIONERS, *v.* NARASANNAH AND K. SUBBAYYA (PETITIONERS AND TRANSFER PLAINTIFFS), COUNTER-PETITIONERS.*

A decree-holder within the meaning of the Civil Procedure Code is the person whose name appears on the record as the person in whose favour the decree was made, or some person whom the Court has by order recognized as the decree-holder from the original plaintiff or his representatives.

Section 235 of the Civil Procedure Code puts on the party applying for execution the obligation of stating any adjustment between the parties after decree; that is, any matter not done through the Court as well as any agreement through the Court.

THIS was an appeal against the orders of the Court of the District Judge of Cuddapah issuing a warrant of execution in O. S. No. 3 of 1876 on the file of that Court.

The *Advocate-General* and *N. R. Narasimmiah,* for the Appellants.

Mr. *Shephard* and *C. Rámachandra Ráu Sáib,* for the Respondents.

The facts and arguments fully appear in the following:

On the 20th October 1876 one Johnston, calling himself agent of Messrs. Arbuthnot and Company, obtained a decree in his own name against defendants for Rupees 15,000, and on the 3rd November 1876 plaintiff applied for a warrant of arrest. On the 30th December 1876 plaintiff and defendants adjusted the debt by an agreement of that date, that plaintiff would accept 12,000 rupees in lieu of Rupees 15,000 on the terms of 6,000 rupees being paid down and 6,000 rupees in instalments, of which 1,400 rupees, the last, was to fall due on the 1st of January 1880. Defendants paid down the 6,000 rupees, and paid all the instalments due before the proceedings next mentioned were taken, leaving Rupees 1,400 alone due on the 1st January 1880.

That adjustment was not certified to the Court nor was the Court informed of it until October 1879. On the 16th September

* Civil Miscellaneous Appeal No. 465 of 1880 against the orders of W. F. Grahame, Acting District Judge of Cuddapah, dated 24th July and 28th July 1880, passed on Civil Miscellaneous Petitions, Nos. 194 and 205 of 1880 respectively.

1879 plaintiff applied for execution of the decree, admitting that 10,000 rupees had been paid. Notice was issued. On the 20th October 1879 defendants filed the agreement of the 30th December 1876. This agreement was admitted by plaintiff Johnston 27th October 1879, and the motion for execution was by consent dismissed; but the defendants did not then require the agreement to be recorded under Section 258. On the 20th July 1880 the petitioners Narasannah and K. Subbayya applied as transferrees of the decree, under deed dated 23rd February 1880, to have execution issued. This deed of transfer was not signed by the plaintiff on the record, but by Messrs. Arbuthnot and Company. The fifth defendant did not get valid notice of the application of the 20th July. An order for execution was made and warrant ordered on the 26th July 1880. Defendants applied to the Court, stating the agreement of 30th December 1876 and the payment of all the instalments, except that of January 1880, and asking to have enquiry and that execution should only go for the instalment unpaid.

This petition was dismissed.

The order for the warrant is dated 24th July.

The Court (KERNAN and KINDERSLEY, JJ.) delivered the following

JUDGMENT:—As there has been no transfer from the plaintiff on the record to the alleged transferrees, we set aside the order for transfer and the warrant.

Mr. Shephard contends that the plaintiff was agent for Messrs. Arbuthnot and Company, and that this transfer is therefore sufficient. We do not agree in this proposition. The decree-holder within the meaning of the Code is the person whose name appears on the record as the person in whose favour the decree was made, or some persons whom the Court has by order recognized as the decree-holder from the original plaintiff or his representatives. Now the decree in this case is that the defendants do pay to the *plaintiff, i.e.,* Johnston, the amount. He, therefore, is the decree-holder, and is the proper party to transfer.

Again Mr. Shephard says that the defendants should have got the adjustment by agreement dated 30th December 1876 certified and put on the record. This is a section which the defendants should take advantage of for their own protection. But Section

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235 puts on the party applying for execution the obligation of stating any adjustment between the parties after decree, that is, any matter not done through the Court, as well as any agreement through the Court.

The party making the application for execution of July 1880 did not state the adjustment as he was bound to do, and the result was that the Court was misled in granting the execution for the full unpaid balance.

We set aside the order for execution in favour of the alleged transferrees with costs.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Muttusámi Ayyar.

1881. January 21.

NÚKANNA AND TWO OTHERS, MINORS (BY THEIR MOTHER AND GUARDIAN SÍTAIRINA), v. RAMASÁMI.*

Under the Civil Procedure Code (Act VIII of 1859) an application to the Court to continue the attachment of immovable property, but to stay the sale of it; *Held* to be a proceeding to keep in force the decree.

THIS was a second appeal against the order of the Acting Sub-Judge of Cocanada reversing the order of the District Munsif of Peddápuram.

Ratnavélu Mudaliar for the Appellant.

Subba Ráu for the Respondent.

The Court (KINDERSLEY, J., and MUTTUSA'MI AYYAR, J.) delivered the following

JUDGMENT:—Under the final clause of Section 230 of the Code of Civil Procedure, the Limitation Act of 1871 should be applied to the present case. We think that the application of the 5th October 1876, which in substance was to stay the sale, but to continue the attachment, which would otherwise be terminated by the sale, was one to keep in force the decree. It follows that in our opinion the application made on the 29th November 1878 is not barred.

We dismiss this appeal. There will be no order for costs.

* Civil Miscellaneous Second Appeal No. 589 of 1880 against the order of K. Kristnasámi Ráu, Acting Subordinate Judge of Cocanada, dated 13th August 1880.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

BAVACHI PACKI (PETITIONER), APPELLANT, v. PIERCE, LESLIE & Co. AND 3 OTHERS (JUDGMENT-CREDITORS), RESPONDENTS.*

1879. March 31.

Chap. XX of Act X of 1877—Order under Sec. 351 refusing to discharge petitioner—Right of appeal—Bad faith regarding the matter of the application—Recklessly contracting debts.

An appeal lies against an order passed under Section 351 of Act X of 1877, although it was an order refusing to declare petitioner an insolvent.

The words used in clause *d* of Section 351, "the matter of the application," embrace the insolvency, and all the facts and circumstances material to explain the insolvency. Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency may be held to be part of the matter of the application.

A Judge would not be exercising a right discretion under Section 351 if he refused relief in the case of persons who, although knowing that they had not the means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually.

THIS was an appeal under Chapter 20 of the Code of Civil Procedure against the order of V. P. D'Rozario, Subordinate Judge of North Malabar, on Miscellaneous Petition No. 114 of 1878.

The applicant was a trader and carried on business at Tellicherry. About the end of April 1874 he absconded, and only reappeared in January 1878, when he was arrested by virtue of warrants issued by the Sub-Court of North Malabar at the instance of four of his creditors who had obtained decrees against him. He then applied to that Court under Chapter 20 of the Procedure Code to be declared an insolvent, and his application was resisted by five of his creditors. The Subordinate Court found that there was no evidence to prove that the applicant had, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suits in which were passed the decrees in execution of which he was arrested. The Court, however, refused his application on

* Civil Miscellaneous Appeal No. 424 of 1878, against the order of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 21st November 1878.

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the grounds (1) that his flight was an act of bad faith towards his numerous creditors, (2) that his liabilities were not honestly incurred, and (3) that he had, on more than one occasion, received money from his creditors on false pretences. Against this order an appeal was made to the High Court.

Mr. *Shephard*, Mr. *Ross Johnson*, and *A. Rámachandra Áyyar* for the Appellant.

The Advocate-General (Hon'ble *P. O'Sullivan*) and Mr. *Wedderburn* for the second Respondent, and Mr. *Cooper Abbs* for the first to third Respondents.

The Court (INNES and FORBES, JJ.) delivered the following

JUDGMENT:—In this case we held, at the hearing, that an order having been passed under Section 351, although it was not an order declaring petitioner an insolvent, an appeal would lie, and that the preliminary objection taken that there was no appeal must therefore be set aside.

There is the most ample evidence of bad faith on the part of the petitioner towards some of his creditors in obtaining large advances from them on the eve of his absconding.

It was argued that the 'bad faith' upon which the Judge was entitled to exercise his discretion in withholding petitioner's discharge was bad faith in respect of his application, and we were referred to some cases upon the construction of Section 281 of the old Procedure Code, in which it was held that 'bad faith' meant bad faith of the applicant for the purpose of procuring his discharge without satisfying the decree, and that the words did not refer to bad faith on previous occasions.

The decisions upon the precise meaning of the language of Sections 275 and 281 of the old Code upon this point are conflicting, it having been held in some of the decisions that bad faith in contracting the debt would justify the Judge in refusing a discharge. The weight of authority, however, seems to have inclined to the opinion that the inquiry must be confined to bad faith immediately connected with the application.

We think, however, that we are not bound by these decisions in determining the meaning of the language of Clause '*d*' of Section 351 of the new Code.

The words used are "bad faith regarding the matter of the application," and the application is not simply that the petitioner be dis-

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charged from the particular debt or debts on which he may have been arrested, but that he be declared an insolvent. The matter of the application therefore embraces the insolvency, and therefore all the facts and circumstances material to explain the insolvency. Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency and about to abscond are so connected with the insolvency and so necessary to show the real character of it, that they may be properly held, we think, to be part of the matter of the application. Although, therefore, there has been a long interval between the acts of bad faith immediately preceding the flight of petitioner to Arabia and his arrest on his return in 1878, when he no doubt had hopes of availing himself of the provisions of insolvency contained in the new Procedure Code, those acts of bad faith are still open to consideration, and the appeal might be dismissed upon the ground that the Judge had rightly found acts of bad faith towards creditors in connection with the insolvency.

But there was a further point also which we wished to consider, viz., whether the order for discharge had been rightly withheld on the ground that there was evidence that the applicant had recklessly contracted debts.

We were referred to Section 159 of the English Bankruptcy Act of 1861, and the cases upon the construction of it. The language of Section 159 of the Act of 1861 is different from that of Section 351 of the new Civil Procedure Code. It runs "or that he could not have had at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same." The two decisions to which we were referred, *In re Marks*(1) and *Ex parte Bayley*(2), turn upon whether in the particular circumstances of each case there was reasonable ground for the applicant expecting to be able to pay the debts at the time he contracted them. In the first case Lord Cranworth held that the absence of a reasonable ground of expectation of being able to pay the debts had not been made out. In the later case the firm was insolvent in January 1867, but continued trading till June. One of the partners had believed that they were still carrying on at a profit. The other

(1) L.R., 1 Ch. Ap., 334. (2) L.R., 3 Ch. Ap., 244.

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admitted that he had believed the firm to be insolvent in January, but not to such an amount as was actually found, and he said that he thought the firm was then making profits and that they would be able to recover themselves. In these circumstances the Judges thought that the bankrupts might not unreasonably have entertained the idea that they would eventually be able "to pay for the drugs they bought and by the use of them make profits which would, by degrees, pay off their old debts."

The language of Section 351 of Act X of 1877 is "that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts."

The provisions of insolvency in the Code were intended for the relief of persons who, without dishonesty, had become embarrassed by debt, and a Judge would not be exercising a right discretion under this section if he refused relief in the case of persons who, although knowing that they had not the means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually. So far, therefore, the standpoint from which the conduct of the insolvent is to be viewed is the same as that in the English cases mentioned.

But there is no room in the present case for any presumption of an honest belief that it was possible to pay the debts contracted, which amounted altogether to 32 lakhs of rupees, to meet which the assets were only 6 lakhs.

The Judge may have been wrong in thinking that the fixing the prices of the coffee to be supplied under the contract F at 43½ rupees arose from recklessness. But the loss resulting from this was only 3 lakhs, but a small portion of the 26 lakhs of liabilities remaining after realization of the assets. In the absence of accounts, the disappearance of which is not satisfactorily accounted for, and in the absence of explanation to justify the contracting this large amount of debt with so small an amount of assets to meet it, it must be held that the Judge was right in the view he took that there had been recklessness on the part of the applicant and that the discharge was rightly refused.

The appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1879. April 28.

ASANSAB RÁVUTHAN (PLAINTIFF), APPELLANT, v. VÁMANA RÁU AND 2 OTHERS (DEFENDANTS), RESPONDENTS.*

Two villages held under one mortgage—Mortgagor's interest in one of the villages sold by public auction—Right of the purchaser to sue for the redemption of the entire mortgage.

The purchaser of the equity of redemption of part of an estate under mortgage is entitled to redeem the whole of the mortgaged estate, if the mortgagee insists on his right to have it so redeemed. When the former elects to pay the entire mortgage debt, he puts himself in the place of the mortgagee redeemed, and acquires a right to treat the original mortgagor as *his* mortgagor, and to hold that portion of the estate in which he would have no interest but for the payment as a security for any surplus payment he may have made.

THIS was a second appeal against the decree of A. C. Burnell, District Judge of Tanjore, in Appeal No. 267 of 1877, confirming the decree of the Judge of the Court of Small Causes at Kumbakónam (on the Subordinate Judge's side) in Original Suit No. 34 of 1877.

The second and third defendants were members of an undivided Hindu family, of which the second defendant was manager. On 18th February 1859 the second defendant mortgaged Thribuvanam and another village to the first defendant for Rupees 1,595. The second defendant's right, title and interest in the village of Thribuvanam was sold by public auction in 1871, and the plaintiff purchased it. The latter sought to obtain possession of the village and he was resisted by the first defendant. The plaintiff then brought Original Suit No. 61 of 1872 for recovering possession of Thribuvanam, and offered to pay the mortgage amount due on that village. The first defendant insisted on his right to have the entire mortgage redeemed, and the Court dismissed the plaintiff's suit. The present suit was then brought for the redemption of the entire mortgage. The first defendant resisted the claim on the ground that the plaintiff had no right to recover possession of the

* Second Appeal No. 248 of 1878 against the decree of A. C. Burnell, District Judge of Tanjore, dated 21st December 1877, confirming the decree of the Judge of the Court of Small Causes at Kumbakónam (on the Subordinate Judge's side), dated 27th February 1877.

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village, which was not included in his sale certificate. The Court of First Instance thought that the defendants' contention was well founded. With the consent of the parties, however, a decree was given for the plaintiff for possession of Thribuvanam only on his paying the entire mortgage amount, and the Court reserved to him the right of appeal as to whether he was not entitled to the possession of the other village also. The plaintiff's appeal to the District Court was unsuccessful. The District Judge observed that the fact that the plaintiff had to pay a surplus amount was incidental to his recovering his rights under the purchase, and that the payment of the surplus amount would not entitle the plaintiff to anything more than the recovery of the village he had purchased, but that it would be a cause of action on which to recover the amount in a suit for contribution. The plaintiff made a second appeal to the High Court.

T. Ráma Ráu, Vakil for the Appellant.

R. Balají Ráu, Vakil for the first Respondent.

The Court (INNES and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENT:—This was a suit by the purchaser at a Court sale of the right, title and interest of the second defendant in the village of Thribuvanam to redeem that village and another village jointly mortgaged to the first defendant for Rupees 1,595 on the 8th February 1859. Plaintiff first sought possession of his purchase tendering the proportionate mortgage debt in Suit 610 of 1872, which was dismissed on the ground that the mortgage of the two villages was an indivisible security. It was contended for the first defendant that as the plaintiff purchased only one village he was not entitled to recover two villages. The Court of First Instance and the Lower Appellate Court held that the payment now made, in excess of the proportionate mortgage sum, was incidental to the plaintiff enforcing his rights under the purchase, and that such payment would not entitle him to anything more than he was entitled to under that purchase, though it might be a ground for a suit for contribution against the mortgagor. The question for our decision is whether the plaintiff is entitled to redeem both villages.

We think that the plaintiff has clearly a right to recover both villages and to hold the village which is not included in his

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purchase as security for the surplus payment he may have had to make to render his purchase effectual. It has long been the recognized doctrine of Courts of Equity in England (*Cholmondely* v. *Clinton*) (1) that the owner of the equity of redemption of *part* of an estate under mortgage is entitled to redeem the *whole* of the mortgaged estate if the mortgagee, as in this case, insists upon his right to have it so redeemed. When the former elects to pay the entire mortgage debt he thereby puts himself in the place of the mortgagee redeemed and acquires a right to treat the original mortgagor as *his* mortgagor, and to hold that portion of the estate in which he would have no interest but for the payment as a security for any surplus payment he may have made. The sale of the equity of redemption of a part of the estate carries with it an implied authority from the original mortgagor to render what is in law necessary to make it effectual, and this, we think, is the foundation for the equity arising from the extra payment made by the purchaser. The purchaser *must* redeem the entire estate, or not at all, if the mortgagee objects to his security being divided, and the rule of equity that makes it incumbent on him to pay more than what he would be bound to pay as between himself and the original mortgagor gives him also a right to hold the village not included in his purchase as a security for the extra payment he may have made. The Lower Courts are in error in having failed to give effect to the equity arising from the surplus payment, and we are, therefore, of opinion that the judgments of the Courts below should be so modified as to adjudge to the plaintiff possession of the village not included in his purchase.

As to the mortgage amount payable, including further advance and interest, we concur in the opinion of the Lower Appellate Court that it is Rupees 1,595 only.

It is to be observed that the Document I has not been registered, and that the sum of Rupees 338 mentioned therein cannot under Section 17, Act XX of 1866 be treated as a charge on the property under mortgage.

The respondents will pay the appellant the costs of this appeal and those incurred in the Lower Appellate Court.

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(1) 2 Jac. & W., 184.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Áyyar.

1879. May 5.

AMMU (FOURTH DEFENDANT), APPELLANT, *v.* RAMAKISHNA SÁSTRI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Suit for redemption—Adverse possession by a stranger for more than 12 years—Period of Limitation—Denial of landlord's title—Section 116 of the Evidence Act.

Article 148, Schedule II of the Limitation Act, 1871, applies to suits for redemption, and to such suits instituted against mortgagees or persons claiming under them, except purchasers for value, but it does not apply to suits against strangers, nor to suits which are not suits for redemption.

When the plaintiff brought the suit for redemption, it was found that the defendant, who was in possession, did not claim under the mortgagee, and that, for more than 12 years before the date of the suit, he had held possession from the Government by a title adverse to that of the plaintiff.

Held that the claim was barred under Article 145.

The contention that, so long as the mortgagor is entitled only to the equity of redemption there can be no invasion of his interest, cannot be assented to. There are cases in which the rights and interests of the mortgagor and mortgagee are equally invaded, and in such cases the mortgagor must come into Court within the time allowed for the recovery from trespassers of interests in land.

Section 116 of the Evidence Act does not debar one who has once been a tenant from contending that the title of his landlord has been lost or that his tenancy has determined. It precludes him only during the continuance of the tenancy from contending that his landlord had no title at the commencement of the tenancy.

THIS was a second appeal against the decree of J. W. Best, District Judge of South Canara, in Appeal Suit No. 127 of 1877, modifying the decree of the District Munsif of Mangalore in Original Suit No. 497 of 1875.

C. Rámachandra Ráu Sáhib for the Appellant.

S. Raghunatháya for the Respondents.

The facts of the case are fully set forth in the following

JUDGMENT:—On the 16th November 1829 Ganapati Sástri mortgaged a garden to Janaki, and gave the mortgagee possession.

* Second Appeal No. 672 of 1878 against the decree of J.W. Best, District Judge of South Canara, dated 19th August 1878, modifying the decree of the District Munsif of Mangalore, dated 13th January 1877.

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On the death of Janaki her interest passed to her heirs. The defendant Túngu, as one of the heirs, eventually obtained possession of the three plots of land in suit in virtue of a decree passed in 1852. Before the proceedings in 1861, to which we shall presently advert, the defendants Samuel and Ammu were let into possession of two of the three plots as tenants, and the third plot was held by the mortgagee.

In 1861 the Deputy Collector instituted an enquiry as to whether the three plots of land formed part of the warg of the mortgagor or of the waste land of Government. At this inquiry the plaintiff, Rámakishna Sástri, son of Ganapati, was represented by his mother. On August 20th, 1862, the Deputy Collector held that the lands in suit were the property of Government, assessed them, and granted them, under three separate pattás, to the defendants, Túngu, Samuel, and Ammu, respectively. The defendants Samuel and Ammu have paid no rent to the mortgagee since 1861, but from the date on which pattás were issued to them they have paid the assessment to Government.

In February 1862 the plaintiff sued Túngu and certain other persons to establish his right to redeem; but to this suit he made neither Samuel, Ammu, nor the Government parties. On the 27th February 1866 he obtained a decree.

In 1876 he instituted the present suit for redemption, and originally impleaded only Túngu and her daughter Timmu as defendants. By an order passed under Section 73, Act VIII of 1859, Samuel and Ammu were made defendants on May 23rd, 1876. The Munsif decreed the claim against Túngu and Timmu, holding that by the decree passed in 1866 they were precluded from denying the plaintiff's title; but he dismissed the suit against defendants Samuel and Ammu, holding that, although by Section 116, Indian Evidence Act, these defendants were, during the continuance of the tenancy, estopped from denying that their landlord had, at the commencement of the tenancy, a title to the plots held by them respectively, yet that, inasmuch as the tenancy under the mortgagee, and therefore under the mortgagor, had been determined by the action of the Collector, these defendants were not estopped from showing that for more than twelve years before they were impleaded they had held their plots from the Govern-

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ment by a title adverse to that of the plaintiff, and that, consequently, as against them the suit was barred by limitation.

On appeal the Judge ruled there could be no trespass on the title of the mortgagor so long as he had only an equitable interest, and *Vittobha Bin Chaba* v. *Gangaram* (1) was referred to in support of this ruling. The Judge consequently held that the claim to the plots held by Samuel and Ammu was not barred, and finding that they constituted part of the plaintiff's warg, and had been included in the mortgage, he decreed the claim for the redemption of these plots also. Ammu alone has appealed, and contends that the ruling of the Judge is erroneous; that the suit of the mortgagee is barred by limitation. The Indian Limitation Act of 1871 governs this suit. Article 148 of the second schedule to that Act prescribed a period of 60 years from the date of the mortgage as the period of limitation for suits against a mortgagee to recover possession of immoveable property mortgaged. This provision has been construed as applying to all persons claiming under the mortgagee, except *bonâ fide* purchasers for value (Article 134), but it does not apply to suits against strangers nor to suits which are not suits for redemption.

Does then the appellant claim under the mortgagee, or is she estopped from denying that she claims under the mortgagee? That she does not claim under the mortgagee is clear. It is found that in 1861 she ceased to pay rent to the mortgagee, and that in 1862 the plot held by her was assessed by the Deputy Collector as Government land and a revenue engagement taken from her as a ryot paying revenue directly to the Government. Assuming she is at liberty to set up this title, she has proved a title adverse equally to the mortgagor and the mortgagee.

We cannot assent to the contention that so long as the mortgagor is entitled only to the equity of redemption there can be no invasion of his interest. Of course there may be cases in which the estate of the mortgagee is alone the subject of trespass and the interest of the mortgagor is not assailed. A title by prescription may be acquired to the estate of the mortgagee, leaving the interest of the mortgagor unaffected, *e.g.*, where a wrongful claimant establishes himself in the place of the mortgagee, admitting the interest of the mortgagor and claiming rights

(1) 12 Bom. H. C. Reps. 180.

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only on the footing of the mortgage. But there are other cases in which the rights and interests of the mortgagor and mortgagee are equally invaded, *e.g.*, when under a sale for arrears of revenue a purchaser acquires possession and thenceforward holds adversely both to the mortgagor and mortgagee, or when the mortgagor has remained in possession and a stranger ousts him from the lands.

If a mortgagor in actual possession of the mortgaged estate seeks to question a revenue sale and to recover the interest he has lost or to oust the stranger who has obtained possession, under such a sale, his remedy does not lie in a suit for redemption, for as between him and these alleged wrong-doers there is neither privity of contract nor unity of possession: he must come into Court within the time allowed for the recovery from trespassers of interests in land. And in like manner, where the mortgagor may have made over possession to the mortgagee if the interest of the mortgagor be invaded, although he has not actual possession of the land, he cannot bring a suit for redemption against the wrong-doer, but a suit for the recovery of the interest from which he has been ousted.

According as he has, or has not, been actually dispossessed of the land, the limitation which would have applied to his suit under the Act of 1871 is prescribed by Clause 143 or 145 to the second schedule of that Act.

If in the case now before the Court the appellant had not at one time held the plot now in her possession as tenant of the mortgagee, we fail to see that she could be regarded otherwise than as a trespasser who has acquired by prescription a right to hold the plot directly from the Government and adversely to the title both of the mortgagor and the mortgagee. The section of the Indian Evidence Act on which the respondent relies as precluding the appellant from maintaining that she is not the tenant of the mortgagee does not, as the Munsif has pointed out, debar one who has once been a tenant from contending that the title of his landlord has been lost or that his tenancy has determined. It precludes him only during the continuance of the tenancy from contending that his landlord had no title at the commencement of the tenancy. The tenancy under which the appellant held the plot of which she is now in possession was determined when the Deputy Collector declared the land

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to be the property of Government and granted it to the appellant as a ryot of the Government, and thereafter the appellant was not estopped from contending that the interest of her former landlord had expired.

The appeal must then be allowed and the decree of the Lower Appellate Court, so far as it reversed the decree of the Munsif, reversed and the suit dismissed with costs as against the appellant.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1879. May 7.

LAKSHMI (FIRST PLAINTIFF), PAUPER APPELLANT, v. ANANTA SHANBAGA (DEFENDANT), RESPONDENT.*

In the Limitation Act it was intended to draw a clear distinction between what are styled 'applications' and what are styled 'appeals.'

The language of the Limitation Act precludes any other construction than that while a pauper may apply for a review of judgment with the same indulgence as to delay in making the application as a person who is not a pauper, yet, in making his application for leave to appeal, similar indulgence is not extended to him.

THIS was an application for leave to appeal as a pauper.

A. Rámachandráyyár for the Pauper Appellant.

C. Rámachandra Ráu Sáib for the Respondent.

The facts and arguments are set forth in the following

JUDGMENT:—In this case the preliminary objection was taken that the application for leave to appeal as a pauper was barred at the time the order was made to admit the pauper appeal, and that the Court has no jurisdiction to entertain the appeal.

The decree was passed on the 21st December 1877 and the application for leave to appeal as a pauper was not made till 25th July 1878. Article 170 of the 3rd Division of the 2nd Schedule allows only 30 days from the date of the decree. Section 12 allows the day on which the judgment was pronounced and the time requisite for obtaining a copy of the decree to be excluded from the period between the date of the decree and the date on which

* Appeal No. 71 of 1878 against the decree of K. Krishna Menon, Subordinate Judge of South Canara, dated 21st December 1877.

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the application was made; but, after excluding this period, there was still a delay of 66 days over and above the 30 days allowed.

Section 5 of the Limitation Act authorizes the admission of an appeal or application for review after the prescribed period, if sufficient cause be shown for the intermediate delay, but the section does not in express terms admit of the same indulgence being shown in the case of a pauper application so presented.

It is contended, however, on the language of the explanation to Section 4 that the word 'appeal' in Section 5 includes the application for leave to appeal as a pauper, because it is said in that explanation that " a suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed, and what applies to original pauper suits as to their starting-point must be intended to apply equally to appeals." But, if this were so, Article 170 would be objectless. Because the 'appeal' would then be presented when the 'application' was filed and the time allowed for appealing would be 90 days under Article 156, applicable to 'appeals.'

Having regard also to the language of the Act throughout, it would appear that it was intended to draw a clear distinction between what are styled 'applications' and what are styled 'appeals.' Separate portions of the schedules are allotted to appeals and applications respectively.

In Section 4 of the Act, suits, appeals and applications are mentioned separately in terms which are certainly unfavorable to the supposition that it can have been intended to confound applications with appeals in the very next section.

Then again in Section 12, an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment are separately named, and the language used does not leave room for the hypothesis suggested that, in Section 5, it was intended to class an application for leave to appeal as a pauper under the head of appeals.

Although, therefore, it may appear strange that the same indulgence should not be shown to a pauper applying for leave to appeal as to an ordinary appellant, and that, while a pauper may apply for a review of judgment with the same indulgence as

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to delay in making the application as a person who is not a pauper, yet, in making his application for leave to appeal, similar indulgence is not extended to him, the language of the Act precludes, we think, any other construction of it upon this question than that contended for, and under Section 4 of the Limitation Act it is necessary to dismiss the appeal.

We must dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes (Officiating Chief Justice) and Mr. Justice Muttusámi Áyyar.

1879. August 1.

VENKATÁCHALAM CHETTI (PLAINTIFF), APPELLANT, *v.* ANDIAPPAN AMBALAM AND 27 OTHERS (DEFENDANTS), RESPONDENTS.*

Land in possession of a tenant—Criminal trespass—Right of the landlord to sue.

Many of the tenures in India are in the nature of a partnership, in which he to whom the land belongs participates with the cultivators in the crop. Therefore the law of England, that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interests, does not apply to landlords in India.

THIS was an appeal against the decree of K. Krishnasámi Ráu, Subordinate Judge of Madura, in Original Suit No. 6 of 1877.

The plaintiff alleged that the land in dispute belonged to the Mahajanams of the village of Kalanivasal; that he acquired possession thereof in 1874 under an agreement and a mortgage instrument executed by the latter; that his tenants cultivated it for him; and that the defendants, in January 1876, trespassed on his property and wrongfully carried away the produce raised by his tenants in Fasli 1285 (1875-76). The plaintiff claimed Rs. 5,150-6-6 for damages for loss of produce. The defendants denied the plaintiff's right and that of the Mahajanams to possession of the property, and pleaded their right of occupancy. The plaintiff's tenants, who cultivated the land in Fasli 1285 (1875-76),

* Appeal No. 97 of 1878 against the decree of K. Krishnasámi Ráu, Subordinate Judge of Madura, dated 5th August 1878.

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had executed muchalkas to him, agreeing to give him a specified portion of the produce for rent, and to make good any loss he might sustain by reason of their negligent cultivation. The Subordinate Judge found that the defendants did not prove the title which they set up, and that the Mahajanams were the owners of the property. He however dismissed the suit on the grounds that the plaintiff himself was not in possession of the property; that the tenants were the proper parties to sue for compensation for the loss of produce; and that the plaintiff had no right to sue, inasmuch as he did not allege that the defendants had done an injury of a permanent nature to his reversionary interest. The plaintiff appealed against the decree.

The *Advocate-General* for the Appellant.

A. Rámachandráyyar for the Respondents.

The Court (INNES and MUTTUSÁMI ÁYYAR, JJ.) delivered the following

JUDGMENT:—We think that in this case the Subordinate Judge has taken a wrong view of the nature of the tenancy. No doubt he has rightly stated the law as to trespass in the case of an ordinary English tenancy.

But if the reason of the law be considered, it will be found that, in regard to a very large proportion of tenancies in India, the rule must be different.

In England, the rule that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interest, rests upon the ground that the landlord has for the term of the tenancy parted with his interest, and that temporary damage, the consequences of which cannot be prolonged beyond the term of his tenancy so as to affect his reversionary interest, does not concern him.

Many of the tenures in India, however, are in the nature of a partnership, in which he to whom the land belongs participates with the cultivators in the crop. Under the Masalman rule this kind of tenure went by a name "Muzarant," which imported a partnership, and there are indications throughout the case—indeed the written agreement appears to us to go very far to show—that that was the nature of the relation between plaintiff and his so-called tenants. If this be so, the tenants should have

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been joined, as they would be entitled to share in the compensation or the damage. And we think it desirable that they should be joined as plaintiffs so as to give them an opportunity of protecting their interests in this suit. Without, therefore, expressing any decided opinion as to the exact relation of the present plaintiff to the tenants under the agreement with them, we shall set aside the decree of the Subordinate Judge and remand the suit, with directions that the tenants be made plaintiffs jointly with the present plaintiff and that the suit do proceed *de novo*.

The costs hitherto will be costs in the cause.

It is right to observe that the suit has been treated as a suit for damages for simple trespass, but although doubtless the trespass was intended to form an element in the wrong for which compensation was sought, the cause of action is stated to be the wrongful appropriation of the proceeds of the crop, and the relief sought to damage for the loss of produce wrongfully taken away.

The suit therefore would appear to be substantially a suit praying for redress, not only for the trespass, but for the wrongful conversion of the produce.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1880. January 5.

THE ZAMINDÁR OF RÁMNÁD (PLAINTIFF), APPELLANT, *v.* RÁMAMANY AMMÁL AND 6 OTHERS (DEFENDANTS), RESPONDENTS.*

Grant of a maganam by a Zamindár to be held in perpetuity by the grantee—Poruppu or rent due to the Zamindár—Maganam in the hands of different individuals—Apportionment of rent.

The rent due to a Zamindár from the grantee of a *maganam* or division of the zamindárí is not a charge upon the *maganam*. It is a debt due to the Zamindár and nothing more.

When the Zamindár instituted the suit for rent the *maganam* was in the possession of third parties, who had become owners of different portions of it by purchase. The Zamindár sought to make all of them jointly and severally liable for the entire amount of rent due to him. The Lower Court apportioned the rent upon the

* Appeal No. 22 of 1879 against the decree of K. Krishnasámi Ráu, Acting Subordinate Judge of Madura, dated 27th September 1878.

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several villages in the hands of the purchasers. *Held* that, in the absence of a sub-division under Section 9 of the Regulation of 1802, the apportionment might not be binding upon the Government, but it did not follow that it might not be good as between the parties to the suit, and that there was no foundation for the contention that the purchasers were jointly and severally liable for the rent fixed upon the whole *maganam*.

THIS was a regular appeal against the decree of K. Krishnasámi Ráu, Acting Subordinate Judge of Madura, in Original Suit No. 82 of 1876.

Under the rázinámáh filed in Original Suit No. 3 of 1843 on the file of the Civil Court of Madura, the *maganam* or sub-division of Pidaranendal was granted by the Zamindár of Rámnád to Muttu Virayi Náchiár, to be held in perpetuity by the latter on payment of the rent of Rupees 2,793-3-9 per annum. The first and second defendants, the heirs of the grantee, were in possession of the *maganam*. In execution of a decree made against them the sub-division (which consisted of twenty-three villages) was sold by public auction. Seventeen villages were bought by the third defendant, three villages by the seventh defendant on account of the fourth, fifth, and sixth defendants, and the remaining three villages were bought by the eighth defendant. The rent due to the Zamindár for the Faslis 1283, 1284 and 1285 (1873-74-75-76) remained unpaid, and the present suit was brought against all the defendants. The Zamindár prayed that the villages might be made liable for the arrear of rent, and that the defendants might be made jointly and severally responsible for the whole amount. The purchasers pleaded that the rent did not form a charge on the villages; that each of them was bound to pay only a proportionate share of the rent on account of the villages in his possession; and that they were not liable to pay the rent that accrued due before the date of their purchase. The Subordinate Judge upheld the contention of the defendants, and the plaintiff appealed to the High Court, urging (1) that the defendants ought to have been made jointly and severally liable for the whole rent, (2) that the arrears of rent were a charge upon the *maganam* and upon every part of it, and (3) that the Lower Court erred in apportioning the rent among the different defendants according to the villages held by them.

The Government Pleader (Mr. *Handley*) for the Appellant.

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The Advocate-General (Hon'ble *P. O'Sullivan*) and *V. Bháshyam Áyyangar* for Defendants 4, 5, 6 and 7.

The Court (INNES and MUTTUSÁMI ÁYYAR, JJ.) delivered the following

JUDGMENT:—In this case the appellant sued the respondents to recover from them, with interest at 12 per cent. per annum, arrear of poruppu or rent due for Faslis 1283–85 upon the villages comprised in the Pidaranendal *Maganam* or division in the Aranuttimangalam Taluk of the Zamindárí of Rámnád. In Suit 3 of 1843 on the file of the Civil Court at Madura, the second respondent's paternal grandmother claimed the zamindárí from the appellant's paternal grandmother, but this litigation ended in a compromise, whereby the former renounced all pretensions to the estate, and the latter granted in return the *maganam* or division in question, to be held in perpetuity subject to the payment to the Zamindár for the time being of such péshcash as might be fixed under Section 9, Regulation XXV of 1802. In 1847 the Collector of Madura proposed to fix the péshcash, and submitted the account marked X to the Board of Revenue, who, however, do not appear to have taken any action upon it. In 1854 the District Court of Madura fixed the péshcash due on the *maganam* at Rupees 2,793-3-9 at the instance of the late Zamindár. In Suit 39 of 1873 on the file of the Subordinate Court of Madura, in which appellant sought to recover the rent due for Faslis 1279 and 1280 upon the *maganam* now in dispute and upon four other villages granted for the support of certain choultries, the first and second respondents contended that, by an oral agreement made in 1847, the rent due on the last-mentioned villages was reduced to a moiety of the amount originally fixed upon them. The Subordinate Judge, who upheld this contention in his Judgment as regards the chattram villages, erroneously stated in his decree that the appellant was entitled to half of the rent originally fixed as well upon the villages now in dispute as upon the four chattram villages. Under the rázinámáh in Suit 3 of 1843 the *maganam* passed into the possession of Muttu Virayi Náchiár and Sivasámi Tevar, and upon their death into that of Kolandai Náchiár, the senior widow of Sivasámi Tevar, and after her into that of the first and second respondents. The twenty-three villages included in the Pidaranendal division are now held by the third to seventh respondents by right of purchase at the Court-sales held in execution of decrees passed against the first and second respondents in Original Suit 11 of 1872 on the file of the District Court, and in Original Suit 61 of 1873 on the file of the Subordinate Court of Madura. During the three years for which rent is now claimed the first and second respondents enjoyed the villages Nos. 1, 4, 5, 7, 8, 9, 10, 11, 12 and 13 up to the end of Fasli 1283; the villages 3, 6, 14, 18, 19, 20, 21, 22 and 23 until the 13th January 1874, when they were purchased by the third respondent; and the villages 2, 15, 16 and 17, until January 1874, when they passed into the possession of one Periya Náchiár, from whom the seventh defendant obtained them in May 1875. In 1284 Nos. 1 and 13 were held by the first and second respondents; Nos. 2, 15, 16 and 17 by one Periya Náchiár until May 1875, and by the third respondent during the remainder of the fasli; Nos. 3, 6, 9, 10, 11, 14, 15, and 18 to 23 by the third respondent; Nos. 5, 7 and 8 by the fourth to sixth respondents; and Nos. 4 and 12 by the seventh respondent. In 1285 the villages Nos. 2, 3, 6, 9, 10, 11, and 13 to 23 were held by the third respondent; Nos. 5, 7 and 8 by the fourth to sixth respondents; and Nos. 1, 4 and 12 by the seventh respondent. It was alleged by the appellant that the rent or poruppu was a charge upon the *maganam* and every part of it; that no sub-division having been made and the péshcash apportioned, the respondents were jointly and severally responsible for the whole amount claimed, whether it accrued due before or after they became entitled to those villages and upon some or all the villages. The first and second respondents alleged that the entire *maganam* was the security for the appellant's demand, and that they were not personally responsible for the claim. The other respondents denied their joint and several liability for the arrears of rent due upon the entire *maganam*, or that it was a charge upon the *maganam;* and contended that the suit was not maintainable, as distinct causes of action available against them separately were joined together; that the appellant declined to receive from them their respective proportions of the rent; and that he was not entitled to interest or costs. The fourth to seventh respondents alleged further that the claim to more than a moiety of the proportion of rent chargeable on the villages in their possession was *res judicata*. The Lower Court apportioned

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the rent due on the *maganam* or division upon the several villages which are included in it; decided that there could be no apportionment with reference to change of ownership and possession in the middle of the fasli; and decreed payment of proportionate rent severally by the respondents, together with interest at 6 per cent. per annum from the date on which the rent became due.

As to the pleas of *res judicata* and misjoinder the respondents have submitted to the decision of the Lower Court, and the main question therefore for consideration in this appeal is whether the rent claimed is a charge on the *maganam* and whether the respondents are jointly and severally responsible for it. We concur with the Subordinate Judge in the opinion that it is no charge upon the *maganam*. We think that it is a debt due to the Zamindár and nothing more, though it is so far favored by special legislation as to enable him to enforce its payment in the manner prescribed in Act VIII of 1865. In this case it no doubt represents nothing more than the assessment or the proportion of the péshcash which would be payable by the Zamindár if he still continued to hold the villages in his possession, and it is also clear that under Regulation XXV of 1802 and Act II of 1864 the péshcash due by the Zamindár to Government is a charge on every part of the zamindári; but it must be observed that the right of the Crown to the péshcash and the right of the Zamindár to rent are distinct rights, and the remedies specially provided by the Legislature in the one case ought not to be extended to the other by analogy. Act VIII of 1865 only enables the Zamindár to sell in liquidation of arrear of rent the saleable interest, if any, which the tenant may possess; while Act II of 1864 hypothecates the zamindári as a security for the péshcash. Nor does it clearly appear that the parties to the rázinámáh in Suit 3 of 1843 intended that the whole *maganam* should be regarded as a security for the rent.

Although it provides for the péshcash being apportioned upon the *maganam* or division under Section 9, Regulation XXV of 1802, it declares that the péshcash shall be paid to the Zamindár for the time being. It appears to have been the intention of the parties to indicate a mode of determining the rent payable rather than to create a separate independent estate directly

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responsible to Government for the péshcash which may be fixed upon it. It may be that the Zamindár was intended to be a mere conduit-pipe, but the payment made to him is in its nature only rent. It is next argued that it was not competent to the Subordinate Judge to apportion the rent upon the several villages in the possession of the respondents, and that a valid apportionment can only be made under Regulation XXV of 1802. It is true that in the absence of a sub-division under Section 9 of the Regulation of 1802 the apportionment may not be binding upon the Government, but it does not follow that it may not be good as between the parties to this suit. We also fail to discover any foundation for the contention that the respondents are jointly and severally responsible for the rent fixed upon the whole *maganam* This is not the case of a grant to several persons on a single rent like Agrahárams or Dharmasánam villages. By the rázinámáh the Zamindárni transferred her right to a part of the zamindári, reserving a right to an annual payment, and this can no more bar an apportionment at the instance of subsequent purchasers than it could in the case of zamindári ryots who transfer portions of their holdings. As to the contention that interest ought to have been awarded at 12 per cent. per annum, we have to observe that it can only be claimed in this case by way of damages, and that a rate of 6 per cent. per annum does not seem to be inadequate. For these reasons we confirm the Judgment appealed against and dismiss the appeal with costs.

PRIVY COUNCIL.

MARCAR AND ANOTHER (DEFENDANTS), *v.* SIGG AND ANOTHER (PLAINTIFFS).

P.C.* 1880. January 13, 14, 15, and 16, and February 21.

[On appeal from the High Court at Madras.]

Construction of agreement as to duration—Effect of recital in a document in regard to control over operative words.

The parties during several years had transactions consisting of the deliveries of produce by the defendants to the plaintiffs' agent, under advances, upon separate contracts, specifying prices, and of consignments by the defendants through the

* *Present*:—Sir J. W. COLVILE, Sir M. E. SMITH, and Sir R. P. COLLIER.

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plaintiffs. A "purchase account" and an "interest account," kept between them, resulted in a "general account;" and in 1872 a large sum was due thereon to the plaintiffs, to whom, in 1873, the defendants sent letters mortgaging property with instruments of title accompanying.

In the beginning of 1874 the parties entered into a written agreement, which described the balance due in respect of previous advances as the "block account," comprising also an "interest account," and the transactions proceeded. The intention was shown that the advances should be liquidated "by returns," but the only date mentioned from which an inference could be drawn as to the intended duration of the arrangement between the parties was the 30th June 1875.

In this suit, brought in December 1875, it was contended that the right construction of the agreement of 1874 required that it should continue to subsist (unless rescinded either by mutual agreement, or on breach of its stipulations by one party justifying its rescission by the other) until the liquidation of the balance by returns; at all events, as regarded the "block account."

In order to the working of an agreement for a liquidation in such a way, it would have been necessary to imply obligations, for which no express provision had been made; nothing, for instance, having been fixed as to the extent, or duration, of the business, or as to the rates at which produce was to be offered or accepted.

Held, that such provisions could not now be supplied, and that the stipulations as to the "block account" were binding only during the continuance of the arrangement for the conduct of the business by the parties, such arrangement being terminable at will, after the 30th June 1875.

The letters of 1873, and the documents of title deposited with them, were held to constitute a security for the general balance due from the defendants to the plaintiffs, and not only a security for advances on certain of the contracts referred to in a paragraph in the nature of a recital; for the latter was not necessarily repugnant to the wider construction, and the operative words were wide enough to apply to all the transactions between the parties.

The construction of an ambiguous stipulation in a written agreement may be governed or qualified by a recital; but, if the intention is clearly to be collected from the operative words, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

APPEAL from a decree of the High Court at Madras (21st February 1878), confirming a decree of the District Court of South Malabar (16th July 1877).

The respondents, John Gothfried Sigg and George Gothfried Volkart, trading under the name of Volkart Brothers, sued in the District Court of South Malabar, in December 1875, the appellants Pallikelagatha Marcar and Pallikelagatha Mahmad Marcar, trading under the name of P. Marcar, to recover Rupees 4,05,779. This sum consisted of Rupees 1,80,897, alleged to be due in respect of advances made by Volkart Brothers to P. Marcar on contracts for the sale of produce, supplied during a course of dealings, by the latter to the plaintiffs' agent at Cochin; of

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Rupees 2,24,882, alleged to be due on an interest account; and of interest on the latter sum from the 7th December 1875. The plaintiffs also claimed that two instruments of mortgage, dated respectively the 21st January 1873 and the 25th October in the same year, should be declared to be a valid mortgage by P. Marcar, securing to Volkart Brothers the whole balance due from the former to the latter firm. In a cross suit P. Marcar sued for delivery up of these documents, and for specific performance of an alleged agreement by Volkart Brothers to continue carrying on the transactions between them and P. Marcar.

The District Judge decreed to the plaintiffs Rupees 3,92,990 with costs, dismissing the cross suit without costs. The defendants appealed to the High Court; the plaintiffs thereupon presenting a memorandum of objections under Section 348 of the Code of Civil Procedure (1859) as to so much of the decree as rejected part of their claim. The High Court confirmed the decree of the District Judge, dismissing the appeal with costs and disallowing the objections. This appeal was then made. The facts out of which this suit arose are stated in the Judgment of their Lordships, which refers to part of the documentary evidence adduced, making such reference by the marks used to distinguish the documents in the record of the proceedings. The following are the exhibits to which reference is so made in the Judgment, no additional statement of their connection with the facts in the case being necessary :—

Exhibits I and J, letters from P. Marcar to Volkart Brothers, sent to Mr. Spitteler, agent at Cochin of the latter firm.

EXHIBIT I.

COCHIN, 21*st January* 1873.

MESSRS. VOLKART BROTHERS,
Cochin.

DEAR SIRS,

As I have been, and am now, accustomed to contract with you for the supply of country produce and other merchandize, and we are mutually, I presume, anxious to continue the relationship—and, in the course of these transactions, there is frequently a considerable amount of money outstanding to my debit in the way of advances, &c., made upon the contracts—and you very naturally would like some security,

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I agree to the following proposition which, if it meets with your approval, be good enough to countersign, and the matter will be satisfactory to both parties.

I possess various landed properties in Cochin and elsewhere, some in Jenm, some in Kánam and other titles. For convenience, I have stated them all in the list at the end of this letter. I have written, in the 9th column, the title on which each is held, and, in the 10th column, I have stated how far, if at all, I have made any charges upon them, and except, as I have stated there, they are quite free. Now I will give up to you all the available title-deeds of these properties, and have made a list of them in the 11th column, and you shall hold them as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property, as a pucka mortgagee would have; only you must agree not to sell any of it, until you have given me full twelve months' notice from the time we shall come to a settlement of accounts to pay up, or from the time demand shall have been made by you of the amount claimed by you; but, if I fail then, you may sell, at my expense, for the best price you can get, any of the properties successively, till you have satisfied my account current out of the proceeds, giving me a strict account of what you sell.

I hereby engage that I will not attempt to dispose of or pledge any of the properties in the list, without first getting a letter from you consenting to it, and, upon my payment of all balances due, you will at once return to me all the documents now deposited with you and cancel this letter.

If by any evil chance we should not be able to agree in the amount due, then, instead of going to the courts, we will each call in a friend to arbitrate, and, if necessary, they shall appoint an umpire and we will each abide by the award.

In any changes that may take place in the members constituting the firm, this agreement shall remain unaffected.

EXHIBIT J.

MESSRS. VOLKART BROTHERS,

Cochin.

DEAR SIRS,

In continuation of my letter of 21st January 1873, I beg to hand you further securities, as per schedule annexed, subject to the conditions contained in my above-mentioned letter.

COCHIN, *25th October* 1873.

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EXHIBIT S.S.S.

In consequence of your having agreed to allow the debt, which I owe you, to stand over for the present, I hereby bind myself strictly to adhere to the following conditions.

Against my contracts of Native Coffee, I will, for the future, claim advances to the extent of Rupees 15 only per cwt., the balance to be paid to me in proportion, on the delivery of coffee into your hands; from such payments, you will deduct Rupees 5 per cwt., which are to be placed to the credit of my old account, and interest will be credited to me thereon in account, as if I had paid you the respective amounts on the day on which the corresponding contracts have been signed.

I engage to repay you, by the 31st March 1874, at least Rupees 3,00,000 on account of my debt to you.

I also engage to pay you in cash, on the 30th June 1874, the interest that has accrued on my debt.

I shall not deal with any other firm, unless you give me special permission to do so.

On the other hand, I understand you to make me the following concession.

In consideration of my engagements, referred to above, I understand you will not dispose of any of the securities, which I handed over to you, until the 31st March next, provided that I faithfully carry out all my engagements towards you, during the present season, and I further understand you to promise me a further time of at least 12 months, for the repayment of the balance money, that will be due to you on the 31st March 1874.

EXHIBIT L.

Agreement, dated 2nd January 1874, referred to in paragraph 4 of the Plaint, No. 1 (i).

Whereas P. Marcar stands indebted to the said Volkart Brothers to the amount of Rupees 6,78,012-10-1 per 30th June 1873, as per account current rendered and approved of, the following conditions have been agreed upon by both parties for the re-payment by P. Marcar of the money due to Volkart Brothers.

1. The debt of P. Marcar to Volkart Brothers to be divided into two distinct parts for which separate accounts are to be kept.

2. The first account—to be styled "P. Marcar's Block Account"—shall be debited for Rupees 3,00,000, computed to be the total amount of the said P. Marcar's losses on his old transactions with Volkart Brothers. No interests are to be debited or credited on this account.

3. The second account—to be styled "P. Marcar's Interest Account"—shall be debited with Rupees 3,78,012-10-1 per 30th June 1873, being

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the balance of the amount due to Volkart Brothers by P. Marcar—interest at the rate of 9 (nine) per centum per annum to be calculated on this account on both the debit and credit side, and balance of interest to be paid in cash by the 30th June of each year. Should, however, on the 30th June 1875, Volkart Brothers feel satisfied that P. Marcar has given them every assistance to forward business, they promise to return him 3 per cent. of the 9 per cent. charged on this account, thus reducing the actual rate to 6 (six) per centum per annum for credit and debit side—the same reduction of interest to be made subsequently, until the entire settlement of this account, should P. Marcar continue to afford the same satisfaction.

4. The "Block Account," as described in para. 2, shall be liquidated by returns only on all contracts of P. Marcar with Volkart Brothers, according to the following scale:—

						RS.
On every cwt.	of coffee	contracted or	purchased		...	3 (three).
Do.	do.	of pepper	do.	do.	...	1 (one).
Do.	candy	of C. N. oil	do.	do.	..	3 (three).
Do.	do.	of fish oil	do.	do.	...	2 (two).
Do.	do.	of coprah	do.	do.	...	2 (two).
Do.	do.	of coir yarn	do.	do.	...	2 (two).

5. The returns, which P. Marcar has already made or has agreed to make on fulfilled or pending contracts respectively, amounting to Rupees 53,056-13-0, as per Memo. No. 1 annexed, are to be placed to the credit of "P. Marcar's Block Account." All other sums of money hitherto paid by the said P. Marcar in cash, goods, consignments, and by the sale of refuse cocoanut oil on and after the 1st July 1873 as per Memo. No. 2 annexed, are to be credited to P. Marcar's interest account.

6. Volkart Brothers engage to grant P. Marcar, if required by him, advances on all contracts of coffee they may enter into with him, such advances, however, not exceeding 50 (fifty) per centum of the respective contract price; the balance or balances to be paid by Volkart Brothers at such times and in such proportions as the coffee may be delivered into their premises. As regards advances on other articles but coffee, this must always be a matter of special agreement at the time of each contract, it always being understood that the aggregate amount of running advances on pending contracts shall at no time exceed Rupees 1,50,000 (one hundred and fifty thousand rupees) in all, such advances of course to be given in proportion to contracts only, and not to be considered as continuing advances.

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7. This agreement shall not be considered infringed should Volkart Brothers see fit to make advances to P. Marcar in excess of the Rupees 1,50,000 stipulated in para. 6 to facilitate business.

8. P. Marcar engages not to sell or offer any produce to any other firm without first having offered such goods, at same or lower rates, to Volkart Brothers.

9. Copies of all future contracts entered into with P. Marcar by Volkart Brothers to be given him; those of contracts Nos. 1 to 12 inclusive have already been rendered.

10. This agreement to be binding on the heirs, executors, administrators, and assigns of both the contracting parties.

11. This agreement has been made out in double, one for P. Marcar, the other for Volkart Brothers.

January 13, 14, 15, and 16.

Mr. *J. T. Benjamin*, Q.C., and Mr. *J. D. Mayne* for the Appellants.

Mr. *F. Herschell*, Q.C., Mr. *A. R. Scoble*, Q.C., and Mr. *H. Cowell* for the Respondents.

For the appellants it was contended that the respondents had not had a right to set aside the agreement of the 2nd January 1874, but had done so in violation of the contract between the parties. Payment of the debt acknowledged by the document of the above date was to be obtained by Volkart Brothers in the manner provided, or contemplated, by it. The agreement contemplated the liquidation of the advances "by returns," at all events, as far as the "block account" was concerned. And the only mode in which that agreement could be duly brought to an end, before such liquidation, was by rescission, either on mutual agreement, or on such breaches of it by one party as would justify rescission by the other. No such breaches, on P. Marcar's part, had occurred. On the other hand a considerable part of the amount due on the block account had been discharged by returns, according to the intention of the parties at the time of entering into the agreement of 2nd January 1874, to which Volkart Brothers were bound to adhere.

In reference to the mortgage by P. Marcar, it was contended that his property was not pledged to secure the whole debt upon the general account between the parties; but that the letters, forming the instruments of mortgage, limited the security to certain amounts; and that there could be no departure from

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what those letters indicated as the intention of the writer. Reference was made to *Macintyre* v. *Belcher* (1) and *Stirling* v. *Maitland* (2).

For the respondents it was argued that whether or not there had been established in evidence a non-performance of the agreement by P. Marcar, justifying rescission by Volkart Brothers, the latter had been rightly held by the Lower Courts to have been in a position entitling them to bringing the relations between themselves and P. Marcar to an end. It remained that the balance was payable. There were the concurrent findings of two Courts as to the balance due on the "block account" and also the balance on the "interest account." The letters of 21st January and 25th October 1873 formed a valid mortgage for the balance due on the general account.

Reference was made to the *Mayor of Harwich* v. *The Eastern Counties Railway Co.*

February 21.

Their Lordships took time to consider their Judgment, which was delivered by

Sir J. W. COLVILE.—The respondents (the plaintiffs in the suit out of which this appeal has arisen) are merchants, carrying on business at Winterthur, in Switzerland, under the style of Volkart Brothers. Their house had subordinate branches or agencies in India for the purposes of their trade with that country. Of these, the head or principal one was at Bombay, and under the management of a Mr. Kapp; the other was at Cochin, where the transactions in question took place, and was managed, up to some time in February 1874, by a Mr. Spitteler, and after that date by a Mr. Jung, who had previously been his assistant.

The appellants, the defendants in the suit, are native merchants at Cochin, trading under the style of P. Marcar, the second defendant being the active partner of the firm.

The history of the transactions between the plaintiffs, through their agents at Cochin, and the defendants may be conveniently divided into three periods, the first ending with the annual settlement of accounts up to the 30th of June 1872; the second beginning from that time and ending with the execution of the

(1) 32 L.J., C.P., 254. S.C. 14, Com. Bench, N.S., 654.
(2) 34 L.J., Q.B., 1.

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agreement L on the 2nd of January 1874; and the third, which comprehends the transactions under that agreement, ending with the institution of the suit on the 10th of December 1875.

The first is material only in so far as it shows what was the course of dealing between the parties whilst there was no substantial (if any) dispute between them. Their transactions were of two kinds. The first and more important class consisted of purchases, chiefly of native-grown coffee, oil, and pepper, made by the defendants from the producers and delivered to the plaintiffs' agent at Cochin for shipment to their firm in Europe. These were almost invariably made upon contracts for future delivery at a stipulated price, of which the following, made on the 23rd September 1872, may be taken as an example. The material parts of it are as follow:—

"Contract with P. Marcar, of Cochin, for 1,000 cwts. Malabar native coffee, at Rs. $30\frac{1}{2}$ per cwt., delivery on or before the end of January 1875.—I, the undersigned P. Marcar, of Cochin, agree and bind myself to deliver to Messrs. Volkart, of Cochin, on or before the end of January next, one thousand cwts. Malabar native coffee," to be packed, garbled, and delivered as therein mentioned, "at the price of thirty and a half rupees per cwt. net. . . . . On account of which agreement, I have this day received from Volkart and Brothers the sum of Rupees 50, the balance to be paid as agreed. In case of non-fulfilment of this agreement, I bind myself to pay to Messrs. Volkart Brothers, as penalty, Rupees 3 for each cwt. short delivered."

It is to be observed that the Rs. 50 mentioned in this form of contract was rather in the nature of earnest money to bind the contract than the measure of the advance made to enable the defendants to perform it. Such advances were almost invariably made, but they seem to have been made on general account, the particular amount of advance attributable to each particular contract being, apparently, settled orally under the provision expressed in the words "to be paid as agreed," and deducted from the price when that was adjusted on the delivery of the produce. That this was so appears by the receipts for advances, the adjustment of particular contracts, and the copies of "purchase accounts" set out in the record.

The other class of transactions consisted of consignments to Europe by the defendants on their own account, made through

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the firm of Volkart Brothers. There were thus cross accounts between the plaintiffs and defendants, viz., the purchase account and the consignment account, which were kept separately under these titles, and besides these there appears to have been an "interest account," the nature of which it is difficult precisely to define, but which was certainly different from the "interest account" to be spoken of hereafter. These three accounts would naturally result in a general account current between the two firms, which Mr. Jung swears was regularly kept. The date as on which these accounts were balanced, and ought to have been settled, was the 30th of June in each year. But such settlement, at all events of the general account current, does not appear to have been very regularly made, since the account K which purports to show the balance of the general account current on the 30th of June 1873, comprehends items which ought to have been included in the account for the preceding year, and was not finally adjusted until March 1874. It may, however, be collected from the purchase account A, the consignment account B, and the interest account D, that the general balance due from the defendants to the plaintiffs on the 30th of June 1872 was about Rupees 1,68,867-8-10.

The price of native coffee rose in the latter part of 1872 and 1873. On the 24th of January 1873, Mr. Spitteler, who then managed the Cochin agency, obtained from the defendants security in the shape of the letter I, and the deposit of the title deeds therein mentioned. The true construction of this letter, which is one of the principal questions in the cause, will be afterwards considered. In February 1873, the price of coffee having risen to Rupees 40 per cwt., it became manifest that the defendants could not fulfil their contracts with plaintiffs for deliveries in 1873 without heavy loss. In these circumstances, Mr. Spitteler made to them further and extraordinary advances, amounting to Rupees 5,00,000 in the whole, by payments which, in the defendants' case, are stated to have been made on the 12th, 13th, and 19th of February, and the 8th of March 1873. It became a matter of controversy in this suit what were the object, nature, and effect of this transaction. The defendants have set up that they threatened to abandon their contracts on the terms of repaying the particular advances attributable to them, and of

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paying the stipulated penalty of Rupees 3 per cwt.; that they were persuaded by Mr. Spitteler to forego this intention, and to accept the advances, on the understanding that the money was to be employed in buying coffee at the market price on account of Volkart Brothers, on whom the losses incurred in this operation were to fall. Mr. Spitteler, on the other hand, has deposed that, when the advances were made, the coffee deliverable on the contracts for 1873 had been all, or nearly all, actually or constructively delivered (an assertion hardly borne out by the terms of the contracts or other evidence in the cause), and that the advances were made in order to enable the defendants to pay for the coffee, and thus to obtain the command of the market for the following season.

The best evidence of what was understood by the parties to be the nature of the transaction between them is that afforded by their written statements made at the time. These have been admitted, without objection, on the record. Mr. Spitteler, advising his principals in Europe of these advances, when they amounted to only Rupees 3,00,000, wrote, on the 19th of February 1873, as follows :—

"Coffee. On the coast Rupees 40 to Rupees 40½ are readily paid, but most of the dealers find it already now impossible to get produce, and it is already pretty distinctly and openly said that E. Baudry & Co. have received notice from their contractor, Baboo, according to which a great part of their contracts will remain unfulfilled. The reason we can explain easily. Marcar has not only 5,000 cwts. over his contracts already had delivered to him, but his friend Ramon has still about 20,000 cwts. in his possession, which are in the first place reserved to Marcar. As he actually requires money for these payments, we have agreed with him that he should not sell for one month, without our sanction, either to natives or exporters, but should keep in his possession the whole quantity for the chance of orders. There against we advanced him three lacs, and he has to make good to us all interest, back commissions, &c., in case we should not find any employment for the remaining coffee, otherwise we shall bear these charges ourselves, but shall pay Marcar a corresponding lower rate than market rate. Through this arrangement we have enabled Marcar partly to recoup himself for the sustained loss, whereas we, on the other side, reserve ourselves a good chance to do some further considerable business this season. We have no doubt, under the exceptional circumstances, you

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will approve of our having done so, especially as we hold in our possession security for the greater part of the amount."

In the letter of the 19th July 1873, which the second defendant wrote to Mr. Solomon Volkart in the course of the subsequent negotiations, he says:—

"Last year I entered into several coffee contracts for coffee delivery, amounting to 40,000 cwts. at different rates, averaging Rupees 31-14-9 per cwt. f.o.b., and have suffered considerable loss in them. I little expected that the price of coffee would have risen so high in a few days, and that, too, at a figure which no merchants experienced at any time. My friends, as usual with them, held a large portion of coffee. I was, however, unable to arrange a fixed price, owing to their exorbitant demands, and, although aware of the failures of the Brazil and Java crop, I little anticipated that price would grow beyond 30 to 31, being the highest limit native coffee was ever raised to; and I forbode the certainty of recession. With these impressions, I entered into the contracts with your firm. The first few parcels which arrived in the market were met with ready buyers at Rupees $30\frac{1}{2}$ per cwt. for ungarbled, besides a payment of Rupees 3 per cwt. for expenses of conveyance, there being a marked increase of price daily, particulars of which were duly communicated to your Mr. Spitteler. I saw the necessity of paying for the coffee at market price to my parties in order to fulfil my contracts with you, as well as securing the remaining coffee in their hands, who would otherwise have resorted to others, thus entailing on me serious difficulties to bring them round again for future operations, with the view of covering the loss which threatened me on all sides. With these circumstances, I was compelled to receive the advances from Mr. Spitteler, who foresaw that if I were to pay penalty for short delivery, as stipulated in the agreement, there would have appeared to my favour Rupees 4,00,000, as compared with market price, against Rupees 1,21,000, being penalty at Rupees 3 per cwt., with certain and sure loss to the firm. I, however, considered my credit in your office, the position you hold in the commercial circles, and the difficulties in which you would have been involved, and taking courage in the confidence you repose in me, did all that I possibly could towards the fulfilment of my agreement, trusting entirely, as I now do firmly trust, that, with a little assistance and time from you, I should be able to make up the loss."

It is unnecessary to quote more of this letter. Its whole tone is that of a debtor admitting his liability for the advances in question, but pleading with his creditor for indulgence in consideration of the circumstances in which, and the motives for which, that liability was incurred. The account which it gives of the substance of the transactions is not inconsistent with that of Mr. Spitteler, though differing from it in some details, and particularly in the suggestion that, but for the consideration due to the plaintiffs, and for the prospect of future business, the defendants might have escaped from their contracts of 1872-73, with less loss, by paying the stipulated penalty of Rupees 3 per cwt. Looking to that letter and to the other evidence in the cause, their Lordships have no difficulty in coming to the conclusion that not only was the sum of five lakhs so advanced to the defendants as much a debt due from them to the plaintiffs as any of the ordinary advances made on the purchase account (a fact found by both the Indian Courts and now hardly disputed), but that the defendants fully recognized and admitted that liability in 1873. The first suggestion of their contention to the contrary would seem to have been made in their letter of the 26th November 1875, when the differences between them and the plaintiffs, which resulted in the institution of this suit, were at their height.

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The plaintiffs, on being advised of these exceptional advances by Mr. Spitteler's letter of the 19th February 1873, lost no time in telegraphing their surprise and dissatisfaction, and seem to have contemplated immediate proceedings for the recovery of the amount from the defendants. Thereupon ensued a long correspondence, and a negotiation, of which it is sufficient to state that it extended over many months, that it was conducted in India, on the part of the plaintiffs, not only by Mr. Spitteler, but by Mr. Kapp, the manager of the Bombay agency, and Mr. Sigg, a partner in the European house, who was sent out for that purpose, and that it ended in the execution of the agreement L on the 2nd of January 1874. In the course of this negotiation, and on the 25th of October 1873, the defendant gave to the plaintiffs the further security contained in the letter J and the schedule thereto, and various arrangements, of which it is unnecessary to say more at present, were proposed and rejected. Of the final arrangement, embodied in the document L (the construction of which will have to be hereafter more particularly considered), it is now only necessary to state that it proceeded on this basis. The balance due to the plaintiffs by the defendants was stated to have been, as on the 1st July 1873, Rupees 6,78,012-10-1, but was afterwards found to have been only Rupees 6,13,007-6-5, as shown by the account K. Of this balance, Rupees 3,00,000 were to be carried to what was styled "the block account," and the remainder to what was styled "the interest account," by which was meant an account bearing interest. "The block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, such returns to be calculated according to a stipulated scale. This arrangement was to be partly retrospective, in that a sum of Rupees 53,056-13-0 was to be carried to the credit of the "block account" as for returns on transactions between the 1st of July 1873 and the 1st of January 1874, and various sums, amounting to Rupees 1,45,357, were to be credited to the defendants on the "interest account," as due to them in respect of transactions during the same period. And, lastly, the agreement contained an express stipulation that the balance of interest to accrue due on "the interest account," which was to carry interest on both sides of the account, should be paid in cash on the 30th of June in each year.

The subsequent transactions between the European and the Native firms all proceeded on the basis of the arrangement embodied in L. It is unnecessary to examine these in detail. It is sufficient to state that during this last period of the dealings between the plaintiffs and defendants their relations seem to have been somewhat strained, but did not become actually hostile before the month of August 1875. On the 10th of that month the Cochin agency wrote a letter to the defendants, enclosing an account headed "interest account," and demanding payment of a sum of Rupees 35,119-14-9, as presently payable under the terms of letter L, for interest due on "the interest account" up to 30th June 1875, and for short proceeds. The defendants paid on account Rupees 10,000 in September, and the further sum of Rupees 583-3-0 on the 3rd of November, the latter sum being all which on their mode of stating the account they admitted to be their due. On the 10th November 1875 the plaintiffs, after giving credit for these sums, and for another small payment of

Rupees 146-3-10, and admitting some errors in their previous account, reduced the balance, of which they again demanded present payment, to Rs. 15,768-3-7.

On the same day they wrote another letter to the defendants, apparently in answer to some offer of produce, in which they said :—

"We beg to say that, as already verbally told your Mr. Marcar, we cannot entertain the idea of entering into fresh engagements with you, until such time as the balance of interest and short proceeds has been settled satisfactorily, and in accordance with the agreement of 2nd January 1874. We hereby request you peremptorily to hand over such amount, viz., Rupees 16,014-6-7, with the interest due up to date to bearer."

The difference between this sum and that demanded in the letter of the same date is the sum of Rupees 146-3-0, of which the latter admits the receipt by a cheque.

The sum to which the amount in dispute was thus reduced was made up of the sum of Rupees 12,789-1-11, which, being the difference between interest at 6 per cent. and interest at 9 per cent. upon the balance of "the interest account," the defendants claimed to be allowed under the provisions of L; and of that of Rupees 2,979-1-8, as to which, though they admitted it to be due for short proceeds, they insisted that it was not then payable, but ought to be carried to their debit in "the interest account." Further correspondence, of a more or less angry character, passed between the parties, till on the 8th of December 1875 the plaintiffs wrote to the defendants as follows :—

"In reply to your letter of the 7th instant, we beg to state that you are well aware that we consider that you have entirely broken your engagements with us for the liquidation of your block account, both in regard to the offers you have made and in carrying out your contracts, and also in regard to the returns, the benefit of which you ought to have given us. In reference to the interest account, you have refused to pay us the interest due us on the 30th June last, and you have entirely neglected to make any attempt to pay us the large balance due us on this account. Under these circumstances, we are compelled to put the case into Court, and any further discussions will be useless. We must, therefore, decline to take notice, at present, of the tissue of erroneous statements you have put forward in your last letters."

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In reply to this, the second defendant wrote on the same day a letter of remonstrance denying the imputed breaches of plaintiffs' agreement, expressing his willingness to go on under it, showing that the dispute as to the interest might be settled "by means otherwise than legal," and concluding as follows:—

"Under these circumstances, take notice that I hold you responsible to me for all damages arising from your withdrawal from a contract which up to yesterday I showed a ready disposition to carry out myself; that from this date I repudiate your further right to fall back upon that agreement; and that I shall bring such action against you for the recovery of compensation for loss sustained by your breach of contract as I may be advised to take."

The plaint was filed on the 10th of December 1875. It sought to recover the sum of Rupees 1,80,897-5-2, the admitted balance on the block account without interest; and the sum of Rupees 2,24,882-8-7 as the balance due "on the interest account" with interest on such balance "from the 7th December 1875." The balance thus claimed on "the interest account" included the Rupees 15,768-3-7, of which immediate payment had been demanded in November. The plaint also prayed for a declaration that the instruments of mortgage I and J created and were mortgages of the interest of the defendants in the properties mentioned in the schedule, and that, if necessary, an account might be taken of what was due by the defendaents to the plaintiffs on the said mortgages.

The issues finally settled in the suit were—

(1.) Whether the mortgage instruments of 21st and 25th October 1873, I and J, are valid and subsisting mortgages for the balances that may be found due by defendants to the plaintiffs, or for any part thereof.

(2.) Whether, on the 30th of June 1873, there was a balance of Rupees 6,13,097-6-5 due by defendants to plaintiffs.

(3.) Whether the defendants have committed any breach of the agreement of the 2nd January 1874, and, if not, whether the plaintiffs are entitled to sue for the balances due on the block account and the interest account.

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(4.) Whether plaintiffs are entitled to bring their suit before submitting to arbitration the dispute as to Rupees 12,789-1-11 on account of interest.

(5.) A similar issue as to the before mentioned sum of Rs. 2,979-1-8, the remainder of the sum claimed by the plaintiffs as a cash payment payable as on the 30th of June 1875.

This District Judge, Mr. Wigram, in a very careful and able judgment, disposed of these issues as follows:—

Upon the 1st, he found that, on the true construction of instruments of mortgage I and J, they and the deeds deposited with them constituted a security for the general balance due from the defendants to the plaintiffs.

Upon the 2nd, he found that that balance was on the 30th of June 1873 the sum of Rupees 6,13,007-6-5.

Upon the 3rd, he found that the agreement of the 2nd of January (L) was, upon the true construction of it, revocable at will by the plaintiffs, but that, if it were not so revocable, they had failed to prove any breach of it on the part of the defendants which justified the rescission of it.

As to the 4th and 5th issues, he found that the plaintiffs were not entitled to sue for the disputed amount of interest until that dispute had been settled by arbitration; but that there was no such objection to the claim for the Rupees 2,979-1-8, the amount, and the defendants' liability for it, in some way or another, not being in dispute.

The result of his judgment was that the plaintiffs were entitled to a decree for Rupees 3,92,990-12-10, and to a declaration that, if that amount was not paid within three months, the plaintiffs were entitled to sell the right, title, and interest of the defendants in the properties mortgaged to them under the Exhibits I and J, and a decree was made accordingly on the 16th of July 1877.

From this there was an appeal, and, so far as it related to the 4th issue, a cross appeal, to the High Court, which dismissed both appeals, and confirmed the decree of the Lower Court in its

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integrity. The judgment of the High Court appears, from the somewhat scanty note of it, to have proceeded, so far as it related to the 3rd issue, upon the supposed proof of actual breaches of the agreement L on the part of the defendants, and not upon the revocability of that agreement at the will of the plaintiffs.

In dealing with this appeal, their Lordships are relieved from any further consideration of the 2nd and the 4th issues. What has been already said sufficiently indicates their entire concurrence in the finding of the two Indian Courts upon the former. And there is now no cross appeal against the finding in favor of the defendants upon the latter.

The questions, therefore, for determination are reduced to the following :—

1*st*.—Whether the finding upon the 1st issue is correct; a question which depends upon the construction to be put on the document I, since that governs also the effect of J.

2*ndly*.—Whether the plaintiffs were entitled to rescind wholly or in part the agreement embodied in document L, without proof of an actual breach of it by the defendants sufficient to justify such rescission; and

3*rdly*.—If they were not so entitled, whether there is sufficient proof of any such breach.

4*thly*.—Whether there is error in the decree, in so far as it declares the plaintiffs at liberty to sell the mortgaged premises, if the defendants should not pay the amount decreed within three months.

The contention of the defendants is that the construction of I is to be governed by the first paragraph in it, which, speaking in the name of the second defendant, says :—

"As I have been and am now accustomed to contract with you for the supply of country produce and other merchandise, and in the course of these transactions there is frequently a considerable amount of money outstanding to my debit in the way of advances, &c., made upon the contracts, and you very naturally would like some security, I agree to the following propositions, &c."

They insist that this statement, being in the nature of a recital, limits the security to advances made upon contracts for future deliveries of produce, and consequently must exclude from it the

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advances, to the amount of five lakhs, which constitute so large a portion of the balance found due to the plaintiffs, particularly if Spitteler's statement, to the effect that when those advances were made, all, or almost all, of the defendants' contracts with the plaintiffs up to that time had been fulfilled, is to be taken to be correct.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

The distinction is recognized and the authorities on this subject collected in the case of *Walsh* v. *Trevanion* (1).

What, then, is the effect of the operative part of this instrument? It says :—

"You shall hold them (the deeds) as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property as a pukha mortgagee would have, only you must agree not to sell any of it until you have given me full twelve months' notice from *the time we shall come to a settlement of accounts to pay up*, or from the time demand shall have been made by you of the amount claimed by you; but if I fail, then you may sell, at my expense, for the best price you can get, any of the properties successively, *till you have satisfied my account current, out of the proceeds*, giving me a strict account of what you sell." And the next paragraph contains the following sentence: "And upon my payment *of all balances due*, you will at once return to me all the documents now deposited with you, and cancel this letter."

The conclusion which their Lordships draw from the above passages taken together, and examined by the light which the proved relations of the parties at the time throw upon them, is, that the security was intended to cover the general balance that might become due from the defendants to the plaintiffs upon all the accounts between them. The words "upon our contracts," which the defendants insist can only be taken to mean the particular contracts for the delivery of produce referred to in the

(1) 15 Q.B., 750.

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paragraph in the nature of a recital, do not appear to their Lordships to be necessarily repugnant to this construction. Such contracts may have been chiefly in the minds of the parties, but the words themselves are wide enough to embrace all their transactions. And what follows strongly favors the wider construction. There is to be no sale until twelve months after one of two events, viz., a settlement of accounts or a demand. The first case implies a settlement of accounts in order to ascertain the amount due. How could that be ascertained unless all the different accounts were brought into a general account current, and a balance struck thereon? Let it be supposed that "the purchase account" taken alone showed a large balance due for advances. It can hardly have been the intention of the parties that the property should be sold to pay that balance; if, on the other hand, a balance was due from the plaintiffs to the defendants on "the consignment account;" and this explains the following sentence, "if I fail, then you may sell, &c., until you have satisfied *my account current*." The "account current" would include both accounts. And this intention is made still more clear by the subsequent stipulation that the event on which the deeds shall be returned and the latter cancelled is the payment of *all* balances due. Again, let it be assumed that there was no account open between the parties except "the purchase account." The advances were entered generally to the debit of the defendants in this account, as on the dates on which they were made, in round sums. Neither this, nor any other account that has been produced showed what particular advance was made on each particular contract. The five lakhs were entered in this account in the same manner as the sums previously advanced. It can hardly have been intended that if it should prove necessary to realize the securities, the account so kept was to be analysed and recast in order to ascertain which of the sums so debited were secured, and which were due upon open account.

The learned Counsel for the defendants have relied upon their refusal to execute S. S. S., one of the abortive proposals made in the course of the negotiations for a settlement between February 1873 and January 1874. Whatever may have been the motive of the refusal (and this has not been very satisfactorily proved), parol evidence of what took place a considerable time after the

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execution of I can hardly affect the construction of that document. If it could have any such effect, the evidence of what took place during the long negotiation which ended in the execution of L, would, taken as a whole, rather lead their Lordships to the conclusion that both parties were negotiating under the belief and upon the assumption that the whole debt then due was covered by the mortgage securities.

Upon the whole, therefore, their Lordships have come to the conclusion that the Judge's finding on the first issue before him was correct, and that the whole of the before-mentioned sum of Rs. 6,13,007-0-5 was, and that the balance of it now recoverable is, secured by the mortgage securities in question.

Their Lordships have now to determine the more difficult question of the construction and effect of the document L.

The contention on the part of the plaintiffs is that it was revocable at their will, as found by the District Judge. The contention of the defendants is that, unless rescinded by mutual agreement, or upon a breach of its stipulations by one party justifying its rescission by the other, it was to subsist in full force until the liquidation under it of both the "block" and the "interest" account, or, at all events, of the block account; and further that, if in the events that have happened, the plaintiffs are entitled to sue for and recover the balance due on "the interest account," they cannot sue for or recover the balance due on "the block account," as to which they have agreed that it was to be liquidated by "returns only."

The circumstances under which the agreement was entered into have already been partially stated. That they afford no ground for the suggestion that the settlement in question proceeded upon the compromise of a doubtful claim, or of a disputed debt, is a conclusion in which their Lordships have already intimated their concurrence. On the other hand, it is clear that, although the arrangement was on the face of it in ease and for the benefit of the defendants, the plaintiffs found, or thought they found, their own advantage in it. Had they shown no forbearance, had they driven the defendants to extremity, they would probably have lost great part of the large sum then due to them, and they would certainly have lost the advantage which they expected to reap from the employment of the defendants, who were supposed to

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have acquired the command of the market, in their future operations in native produce. The agreement actually made is extremely loose. It fixes no time for its duration, or for the liquidation of the debt. It was, no doubt, purposely left vague upon this point; since one of the grounds on which the second defendant says he objected to execute S. S. S. was that it bound him to pay a certain amount by a fixed time.

The only specified date from which any inference as to the intended duration of the arrangement can be drawn is the 30th of June 1875. From that it may fairly be inferred that the parties contemplated dealing on the footing of the agreement up to that time at least. But all beyond that time is left indefinite.

The defendants, however, contend that it follows, by necessary implication from the terms of the document, that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until the whole debt, or, at all events, that portion of it which was carried to the block account, was liquidated in the manner thereby provided. The passages on which they mainly rely are—

1*st.*—The statement that "the following conditions have been agreed upon by both parties for the repayment by P. Marcar of the money due to Volkart Brothers."

2*nd.*—The provision as to the rebate of interest, which contains these words: "The same reduction of interest to be made subseqently *until the entire settlement of this account* should P. Marcar continue to afford the same satisfaction."

3*rd.*—The provision that "the block account shall be liquidated *by returns only* on all contracts," &c.

Their Lordships are clearly of opinion that the extreme contention of the defendants that the whole debt was to be repaid under the agreement, which was, therefore, to subsist until that liquidation had taken place, cannot be maintained. The "interest account" stands upon a different footing from the "block account." It was to remain as a debt carrying interest, and that interest was to be paid annually, but no precise stipulation as to the mode of liquidating the principal is to be found in the agreement, unless it is to be inferred from the 5th paragraph that, for the future as for the past, sums of money to become due to P. Marcar for cash, goods, consignments, &c., were to be carried to their credit. There was, however, no provision for the continuance of the consignment business, which would presumably be the principal source of such credits. Hence, even if the agreement was intended to subsist, and did in fact subsist, until the block account had been liquidated by the returns, there might have remained at that time a balance due on the interest account which the plaintiffs would have been entitled to sue for and recover.

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And it further appears to their Lordships that, as regards the balance due on the "interest account," the utmost that can be implied from the agreement against the plaintiffs is a covenant not to sue for it until after the 30th of June 1875.

The question, then, under consideration, is reduced to the "block account," and the effect of the words "shall be liquidated by returns only," &c. Now, even as to this account, the provisions are extremely loose, and such as could not be duly worked unless the contracting parties continued to act with the highest good faith, and on a perfect understanding with each other. Nevertheless, they seem advisedly to have abstained from making express provisions either for the continuance or for the due working of the agreement, each trusting to the honor, and, probably, still more to the self-interest of the other. Such an agreement is conceivable if it was intended to endure so long only as both parties desired it to continue. But, for the effectual working of an irrevocable agreement for the liquidation of the block account in a particular way, it would be necessary to imply covenants and obligations for which the parties have failed, apparently from the difficulty of agreeing upon them, to make express provision. For example, no express provision is made as to the extent of the business to be done; the rates at which one party is to offer, and the other to accept, produce; the result upon the letter of the agreement being that, if either were disposed to act unreasonably, he would have the means of postponing the liquidation of the account indefinitely. And if the parties have thus abstained to insert express provisions for the fair and reasonable working of their supposed agreement, can the Court, which is called upon to enforce it, supply them. Their Lordships are of opinion that it cannot do so. Among the reasons

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stated by Lord Denman, C.J., in delivering the judgment of the Court in *Aspdin* v. *Austin*, (1) are the following, which appear to be particularly applicable to this case; he says:—

"Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect, and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

These considerations have led their Lordships to the conclusion that the stipulations, even as to the block account, were binding only during the continuance of the arrangement for the conduct of future business, and that, on the true construction of the agreement, either party had power, at least after the 30th June 1875, to determine it, should it be found, as undoubtedly it was found, to be working unsatisfactorily. They had in this respect the same right as parties under a contract for a partnership at will. Indeed, though they were not strictly partners, their contract was like one between persons engaged in successive joint adventures, the defendants supplying the produce at a profit to the plaintiffs, who realized a further profit on its export to Europe, and the former undertaking further that a portion of their profits should be applied in liquidation of their liability on former transactions. Their Lordships conceive that on this construction full effect can be given to all the express stipulations contained in L, and, further, that in the events which have

(1) 5 Q.B., 671.

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happened the plaintiffs have not lost their right to sue for and recover the balance due to them either on "the block" or on "the interest account." In truth, had they broken any covenant, express or implied, the remedy of the defendants would seem to have been an action for unliquidated damages, the measure of which would not necessarily be the balance due on the block account.

Their Lordships' construction of L renders it unnecessary to consider whether, assuming the agreement to be irrevocable, the plaintiffs have established a breach of it on the part of the defendants which would justify the rescission of it, a question which, regard being had to the conduct of the parties with respect to the alleged breaches, might not be free from difficulty. Upon the last point their Lordships find that there is no error in that part of the decree which empowers the plaintiffs to realise their securities in case the defendants should fail to pay the sum due within three months from the date of the decree. They are of opinion that a sufficient demand, within the meaning of the letter I, was made immediately before the institution of the suit, and was so understood by the defendants to have been made. Such seems to be the result of the letters of the 8th of December 1875. The allowance of three months for the payment of the sum decreed to be due to the plaintiffs on the mortgage securities was therefore in ease of the defendants. Their Lordships will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

Solicitors for the Appellants: Messrs. *Talbot* and *Tasker*.

Solicitors for the Respondents: Messrs. *Watkins* and *Lattey*.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1880. January 19.

SUBBAJI' RÁU AND 3 OTHERS (DEFENDANTS), PETITIONERS, *v.* SRI'NIVÁSA RÁU (PLAINTIFF) AND PULLIAH (AUCTION PURCHASER), COUNTER-PETITIONERS.*

Auction Sale—Fraud—Cancellation of Sale—Act X of 1877, *Sec.* 622.

The purchaser at a sale by public auction did, by the exercise of fraud and collusion with the agent of the execution-creditor (though without the creditor's personal knowledge), succeed in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. *Held* that the Court which ordered the sale had jurisdiction to refuse to confirm the sale on the ground of the fraud practised by the agent of the execution-creditor and the purchaser. *Held* also that the High Court had the power under Section 622 of Act X of 1877 to rescind the order made by the Court of First Instance confirming the sale.

Held by KERNAN, J., that the party defrauded ought not to be referred to bring a regular suit. The question ought to be decided at once on motion in the original cause.

Held by MUTTUSÁMI A'YYAR, J., that fraud was a valid ground of relief on petition when it related to the mode in which the auction was held and the purchaser was a party to it, but it was doubtful whether fraud was a ground of relief on petition when it was a remote cause of the sale.

SRINIVASA RAU SÁIB, judgment-creditor in Original Suit No. 303 of 1873 on the file of the Munsif's Court of Arní, applied to that Court to attach and sell the judgment-debtor's right, title and interest in three villages. The order of attachment and the proclamation of sale were duly published, the property was sold by public auction, and Pulliah became the purchaser. The defendants applied to the Munsif to set aside the sale, alleging that there was material irregularity in publishing and conducting the sale; that the property fetched Rupees 1,445 only when it was in fact worth about Rupees 20,000; and that the purchaser's (Pulliah's) friends prevented one Guruvappa Chetti from lending money to the defendants to satisfy the decree, and prevented other bidders from raising the bid. The Munsif was of opinion that there was

* Civil Miscellaneous Petition No. 174 of 1879 against the order of C. J. Plumer, dated 1st February 1879, confirming the order of the District Munsif of Arní, dated 23rd October 1878.

no material irregularity in publishing or conducting the sale, and that, though the property fetched a very low price, it was not a ground for cancelling the sale. He found that the allegation of fraud on the part of the purchaser was substantiated by the evidence adduced by the defendants. He refused, however, to cancel the sale because the Civil Procedure Code did not allow him to exercise that power when there was no material irregularity, and that the fraud practised by the purchaser was no "material irregularity under the Code." The defendants appealed to the District Judge of North Arcot, who dismissed the petition because they did not prove "any such material irregularity involving on them substantial loss in the publishing or conducting the sale." There was a second appeal to the High Court against the order of the District Judge. The ground of appeal mainly relied on was to the effect that the illegal interference of the purchaser and the plaintiff's agent with the bidders, inducing them not to bid at the sale, and other persons not to lend money to the defendants so as to enable them to pay off the debt, was such an irregularity as would vitiate the sale.

The *Advocate-General, C. Rámachandra Ráu Sáib* and *N. R. Narasimmiah* for the Petitioners.

The Court (*Kernan,* J., and *Muttusámi Ayyar,* J.) delivered the following Judgments:—

KERNAN, J.—It is proved upon the evidence that Akilandaiyar, the secretary and agent of the plaintiff in the execution (the Jaghirdár of Arní), with a view to assist Pulliah, and, in concert with him, to enable him to purchase (at less than their real value) the villages set up for sale, prevented at least one person, an intending bidder, from bidding at the sale. The person so prevented from bidding was Guruvappa Chetti. Akilandaiyar, a man of great influence in Arní, represented to the Chetti (with the object aforesaid) that if he, the Chetti, either bid against Pulliah with a view to purchase, or if he agreed to lend the defendant money to pay off the execution-creditor and thus prevent a sale, he, Guruvappa Chetti, would run the risk of incurring the displeasure of the jaghirdár, the execution-creditor, or, to use the language of the Chetti as a witness, "he would have to become the enemy of the jaghirdár." By reason of such acts of Akilandaiyar in collusion with the purchaser, the property

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put up for sale was sold to the purchaser, Pulliah, at a very low price, and the judgment-debtor's interests were sacrificed to the power and influence of Akilandaiyar, the agent of the execution-creditor.

Under these circumstances a petition was presented, before confirmation of the sale, to the Munsif of Arní (885 of 1877) to set aside the sale on the ground, amongst others, of the collusion between the purchaser and Akilandaiyar. The Munsif dismissed the application and confirmed the sale upon the ground that the Code did not allow "cancelment" of a sale except for material irregularity and consequent substantial injury, as provided by the Code.

On the facts the Munsif found thus: "It is contended by the defendants that the purchaser suborned others in bidding for the property. This statement appears to me to have been borne out by the evidence adduced by them, though I am inclined to doubt it a little seeing that the defendants themselves have signed the auction sale list of two of the three villages. Again, it strikes one that it is not possible for one party to suborn most of the bidders in a case where each party must look to his own interest. Even if it be true, I seriously doubt whether it would form a 'material irregularity' in the conduct of the sale, whereby I think the conduct of the Amin is meant to be looked to." The signature of defendant to the list was a mere formal matter required by the Amin.

An appeal (No. 321 of 1878) was presented to the District Judge, who dismissed it on the ground that the facts proved did not establish any irregularity in the conduct of the sale. He was of opinion that, on the facts in evidence, collusion between the purchaser and Akilandaiyar was proved, and that the interests of the defendants were sacrificed to the power and influence of Akilandaiyar. But he found that there was no evidence that the Amin was aware of such collusion. He also found that the sale was regularly conducted and published.

We agree that there was no material irregularity within the meaning of either the former or the present Code.

The decree was in 1873, and the proceedings in execution were begun before October 1877.

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Two questions arise, first, whether it is competent to a Civil Court, having power to issue execution on a decree, to refuse to confirm a sale in favor of a purchaser who has, by the exercise of fraud and collusion with the agent of the execution-creditor (though without the creditor's personal knowledge), succeeded in being declared such purchaser at a depreciated value? second, if so, does an appeal lie from an order of the Court executing the decree confirming the sale, or can this Court interfere with the order confirming the sale?

On the first question it must be admitted that there is no special provision in the Code enabling the Court to refuse, on the ground of fraud, to confirm the sale, such as there is in the case of material irregularity. But neither is there any provision declaring that the Court shall not have such power. Section 257 of the Code of 1859 provided, no doubt, that if no application was made to set aside the sale on the ground of irregularity, or if the application was disallowed, the Court shall confirm the sale. Can it be argued that it is only in cases of irregularity that the Court may refuse to confirm a sale? The special provision as to irregularity was necessary to give jurisdiction, as the sale, though irregular, might not be void or even voidable. But the general rule is that fraud renders any transaction voidable against a party to the fraud at the election of the party defrauded. There was therefore no necessity for any special provision in the Code. Is it to be held that the Court, though having the knowledge of the fraud and requested by the party defrauded not to confirm the sale, is still bound to do so and thus ratify the fraud?

The maxim "Frustra legis auxilium quærit qui in legem committit," (1) applies.

It has been ruled that Sections 256-7 of Act VIII of 1859 do not provide remedy in cases of fraud (2), and this is quite clear. It has been added in some of those cases that the remedy for the party defrauded is to bring a regular suit.

It is difficult to see how the defendant in this case could maintain a suit at law or equity against the purchaser if the Court, with the knowledge of the fraud and though requested

(1) 2 Hale, P.C., 386.
(2) *Umbika Churn Chuckerbutty* v. *Dwarkanath Ghose* 8 Suth. W.R., 506.

by the defendant not to confirm the sale, had done so and thus ratified and sanctioned the fraud in favor of the party guilty of it, and when the interests of third parties did not intervene.

If regard for the rights of third parties innocent of the fraud had obliged the Court to confirm the sale, the matter would be different probably.

Possibly a party might be able to maintain a suit if he did not discover the fraud until after the sale was complete, and if the matter had not theretofore been brought before the notice of the Court.

Assuming, however, that such a suit could be maintained, why should the party defrauded be put to the expense and delay of such proceeding when the facts are brought to the knowledge of the Court, and its action requested, *before* it confirms the sale? If a Court is powerless in such circumstances not only to repress the fraud, but if it is bound to ratify it, "equity and good conscience"—the leading principle of administration of the law—are violated, and the proceedings of the Court are wrested to serve the purpose of oppression and fraud.

The powerful and rich man, as in this case, could compel the weak and poor man to bring a suit (probably to be defeated in the end) to seek his rights, which ought, in all justice, to have been decided at once on motion in the original cause. It is a power inherent in all Courts to prevent its process from being abused and made use of for the purpose of fraud.

There is no reason why the same practice should not prevail in this country, to prevent fraud in cases of sale by auction under the authority of the Court, as prevails in the Courts of Equity in England and Ireland. In those Courts sales by auction under the authority of the Court require confirmation as in this country. In Courts of Common Law, sales by the Sheriff in England and Ireland in execution are not confirmed by the Court, nor is possession given by the Sheriff or by the Court. The purchaser is left to bring his ejectment. In Sugden (Ld. St. Leonards) on Vendors (referring to sales in equity) it is stated thus: "Fraud will of course be sufficient ground for opening the biddings." Therefore if the parties "agree not to bid against each other," (then other cases are referred to, all assuming that the owner of the property is not an assenting party), "in all

these cases the Court will open the biddings although the report (*i.e.*, report of the sale) has been absolutely confirmed."

I think, therefore, that the Munsif had jurisdiction to refuse to confirm the sale in this case on the ground of the fraud practised by the agent of the execution-creditor and the purchaser. He failed to exercise that jurisdiction, holding that he did not possess it.

On the second point I do not find that such an order, *i.e.*, refusing to confirm on the ground of fraud, is made specially appealable by either Civil Code, and think that the District Judge had not power to hear the appeal.

It appears to me that the principle involved in the question in this case is of much importance to assert both in the interest of suitors and of the due administration of justice. I think, therefore, it is necessary to exercise the powers of supervision vested in the Court, whether under the Act and Charter or under Section 622 of the Code, and to reverse the order of the Munsif, and to set aside the order for confirmation of the sale, and the sale itself, and to direct a resale. The costs of this appeal and the costs of the motion before the Munsif, and the costs of the resale, must be borne by Pulliah. The purchase money, after deducting the above costs, should be paid to Pulliah without interest.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. Upon the facts found it is clear that one Akilandaiyar, the agent of the execution-creditor, prevented one Guruvappa Chetti, in concert with the purchaser and with a view to favor him, from either bidding at the Court sale or lending money to the judgment-debtor to pay off the judgment debt and thereby obviating the necessity for the sale. It appears that the property placed under attachment was in consequence sold for a price less than what it might have otherwise fetched. Thus there was fraud upon the policy of the law as to sales by public auction, and there was also substantial injury sustained from such fraud; and the question for decision is whether the sale may be set aside on the ground of the fraud upon petition and otherwise than on a regular suit. It is directed by Section 286, Act X of 1877, that sales shall be made by public auction, which is in law a mode of sale to the highest bidder, neither puffers being employed

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where it is a sale without reserve nor persons willing to bid being prevented from bidding. If material irregularity is a ground for annulling a sale, I do not clearly see why fraud which shows that the sale was not a *boná fide* transaction, but a mere sham, is no ground for annulling it. Whatever doubt there may be as to fraud being a ground of relief on petition when it is a remote cause of the sale, or when the purchaser is no party to it, I think it is a valid ground of relief where it relates to the mode in which the auction is held and negatives one of the prerequisites of a *boná fide* sale by public auction authorized by Section 286 and the purchaser is a party to it.

PRIVY COUNCIL.

P.C.* 1880. Feb. 19 & 20.

GAÑESA RATNAMAIYAR AND OTHERS (DEFENDANTS) APPELLANTS, v. GOPÁLA RATNAMAIYAR AND OTHERS (PLAINTIFFS) RESPONDENTS.

[On appeal from the High Court of Judicature at Madras.]

Hindu Law of Adoption—Alleged assent by the sapinda of a person deceased, to support adoption by the widow.

The sapinda of a deceased person gave his child to the widow of the latter to be adopted in pursuance of an authority which she represented herself to have had from her husband. This natural father of the child was the eldest and managing member of a joint family consisting of himself and his three younger brothers, sons of the first cousin of the deceased. The three younger brothers disputed the validity of the adoption.

Two Courts having found against the existence of an authority to the widow given by her deceased husband, the question remained whether the manager giving his child, in the manner in which he had given it for adoption, he being a sapinda, and in a position to represent other sapindas of the deceased, was an assent by a sapinda to an adoption by a widow sufficient to support her adopting in the absence of an authority from her husband.

It was decided that under all the circumstances under which this child had been applied for by the widow and given by the father, the assent of the latter was not one which had rendered the adoption valid as against the brothers.

There was no sufficient evidence to show that the widow applied to the boy's father to give his assent as sapinda to an adoption, on the ground that she could not adopt without the sapinda's assent.

* *Present:*—Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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It was not necessary to determine whether this sapinda could alone have given a valid assent, if it had been given to the widow as one having no authority from her husband to adopt; and if it had been given without his mind's having been influenced by other and undue considerations.

CONSOLIDATED appeal from two decrees of the High Court of Madras (10th and 27th April 1877), confirming two decrees of the District Court of Trichinopoly (30th September 1876 and 11th December 1876).

The two suits, in which the decrees under appeal were made, arose out of the same facts, and both involved the question whether there had been a valid adoption of the appellant, who, being the child of the eldest of the four sons of Vembáya, deceased, first cousin of Subharáya, deceased, had been adopted to the latter by his widow. The validity of this adoption, which was said to be based on the assent of the eldest son, was contested by the rest of the sons of Vembáya.

Ratnamaiyar, grandfather of Vembáya, left two sons, Kuppáya and Anantáya, the former of whom had one son, Vembáya, and the latter, Anantáya, had two sons (by different wives), Subharáya and Nani Ammál.

Subharáya died in 1854, without issue. Nani Ammál left a daughter, Venkata Lakshmi, who was married to Sámi Aiyar, the eldest son of her father's cousin, Vembáya. In 1871 Vembáya died leaving, besides his son Sámi Aiyar of mature age, three other sons, then in their minority. Sámi Aiyar became the managing member of an undivided Hindu family, consisting of the four sons of Vembáya, of the widow of the latter and of Subharáya's widow, named Rangammál. In November 1873 Rangammál performed the ceremony of adopting as heir to her deceased husband, the appellant, Karunabdhi Ganesa Ratnamaiyar, who was second son of Sámi Aiyar by Venkata Lakshmi. Sámi Aiyar consented to give the boy for the purpose, and documents, stating that the adoption was made with a view to temporal and spiritual benefits and for the continuance of the family, were exchanged.

The eldest of the three younger brothers of Sámi Aiyar was then more than sixteen years old. In the following year, November 1874, the three brothers commenced a suit for partition of the family property, claiming three-fourths of it as their shares. They charged, amongst other acts against Sámi Aiyar, that he

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had fraudulently given his son to Rangammál to be adopted to Subharáya. In a second suit the same allegation was made, and the defence being that the adoption of Ganesa was valid, it remained the question whether he had been duly adopted.

The District Judge of Trichinopoly decreed in favor of the plaintiffs holding the adoption to be invalid. On the evidence he found that the authority to adopt asserted by Rangammál to have been given to her by Subharáya never was given. He was of opinion that the want of such an authority would have been sufficiently supplied by the assent of Sámi Aiyar if the boy could have been lawfully adopted. He held, however, that the boy, being the son of a sister's daughter, could not lawfully be adopted.

The grounds of his decision were the following:—

"The rule laid down by Manu is that a woman not within the sixth degree is eligible, but I am not aware of any text which authorises the marriage of a Brahmin with a sapinda, and I think it unnecessary to cite authorities to show that Venkata Lakshmi Ammál is her uncle's (Subharáya's) sapinda. Finding then that Subharáya could not have married the mother of the adopted boy, it follows from the judgments of the Madras High Court in *Narasammál* v. *Balaráma Charlu* (1) and in *Jivani Bhai* v. *Jivu Bhai* (2) that the adoption is prohibited, and that the prohibition is a logical deduction from the very nature of the subject to which it applies. The whole theory of adoption being the complete change of paternity, the son is to be considered as one actually begotten by the adopted father.

"There has been an attempt made to show that a custom prevails here having the force of law which legalises such marriages, but the evidence goes only so far as to show that, as a matter of fact, some Brahmins do contract such marriages. The evidence given by the experts, Annu Sastri and Appaviya Sastri, distinctly shows that, in their opinion, such marriages are a violation of the law, and I do not find anything in the case which will take it out of the concluding words of the judgment in *Jivani Bhai* v. *Jivu Bhai* (3): 'In this case it will be found to amount simply to an allegation that people do that which the law has forbidden.'

(1) 1 Mad. H. C. Reps., 420.
(2) 2 Mad. H. C. Reps., 462.
(3) 2 Mad. H. C. Reps., at p. 468.

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"I therefore find that the adoption of first defendant, Sámi Aiyar's son, is illegal, on the ground of consanguinity."

The High Court, concurring in the finding of the District Court that there had been no authority to adopt given by Subharaya to Rangammál, concluded also that the adoption of Karunabdhi was invalid, though for a different reason, viz., that the assent of the sapindas had not been effectively given. On this point the judgment of the High Court was as follows:—

"There is little, if any, satisfactory evidence to show that an authorisation was sought as from a kinsman having full power to grant or withhold permission.

"Sámi Aiyar, himself a man of mature age, had, since his father's death, managed the family property for himself and his brothers, one of whom, Ráma Ratnam, attained his majority in June 1874. We think it is shown that in the course of the year 1873, if not earlier, differences occurred between himself and the widow Lakshmi Ammál and her son Ráma Ratnam, particularly with respect to the village of Erikkolam, and a claim thereto made by this defendant. These differences, and the approach of his brother Ráma Ratnam's majority, might be supposed not unlikely to affect the secure position he had hitherto held. On the other hand the contemplated adoption by Rangammál would deprive his brothers of a great portion of the estate, to the benefit of his own infant son, during whose minority he himself would have the advantage of management.

"Bearing in mind these facts, it is important to observe the provisions of the two writings executed by Rangammál and Sámi Aiyar immediately after the adoption. It is clear that, in the preparation of these writings, and, indeed, in the whole proceedings connected with the adoption, the mover was Sámi Aiyar himself, aided by Rangammál's son-in-law, Rámasámi Aiyan, and we think it is also shown that Lakshmi Ammál and her children were not made aware of them.

"By one of these papers, dated 9th November 1873, after reciting that Rangammál had authority from her husband, as well as from the kinsmen, and that she had that day made the adoption, the widow is made to say, 'as the child is a minor, and as you are, as the managing member of the joint family, looking after the movable and immovable properties, &c., you shall, as guardian, look after all the real and personal properties until he attains proper age, and afterwards deliver the same immediately, with an account showing the incomes and expenses concerning him. Till then the registries standing in the

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name of my husband and in that of your father should not be transferred. My adopted son has nothing to do with the village of Erikkolam, in the taluk of Musiri, which you obtained, the same being the acquisition of your maternal grandfather.' The other paper signed by Sámi Aiyar states the adoption with the consent of himself and his cousins, and provides that he, as guardian, 'and according to the agreement executed by you, shall look after, as guardian, all real and personal properties also due to the share of your child, and deliver them as soon as your adopted son attains proper age.'

"The terms of these documents, taken with the previous facts, appear to us to indicate in no doubtful way that the interests of the living, and especially of Sámi Aiyar himself, rather than any spiritual benefits to the deceased, were the motives in operation. There is not a trace of the transaction being one of the kind contemplated in the passage of the recent judgment of the Privy Council (*Vellanki Venkata Krishna Rao* v. *Venkataráma Lakshmi Narsayya* (1)) which explains what kind of assent by sapindas is requisite for a valid adoption. It is there said by their Lordships, after observing that it would be very dangerous to introduce into the conduct of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, that there should be 'such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but on a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband.'

"We find in this case no reason to suppose there was any such consideration. The authority put forward is one which it is sought to use 20 years after the death of the person to be benefited thereby, the estate meanwhile having been held by Vembáya and since his death by his sons as apparent owners. If by adoption a son has come into being, it is our duty to recognize his existence, notwithstanding this devolution of the property, and the confusion that may arise from long delay on the part of the widow and reversioners. But we conceive that the Court, before establishing such an adoption, is entitled to require from those who rely upon it, clear proof, which is not found here, that it is made fairly and not from interested motives of profit. Resting on this ground our affirmance of the decree of the

(1) L. R. 4 I. A., 1 : S. C., I. L. R., 1 Mad., 174.

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District Court, we are not called upon to enter into a full consideration of the arguments and authorities relied on in support of those reasons of appeal which maintain the validity of the adoption by the defendant, Rangammál, of the son of Sámi Aiyar, notwithstanding the relationship existing between the mother of the adopted child and Subharáya, the adoptive father."

On this last point, however, the High Court recorded its reasons for differing from the District Court as follows:—

The District Judge, relying upon the rule that a man (a Brahmín) cannot adopt one whose mother he could not have lawfully married, held that the marriage of Subharáya with his sister's daughter would have been prohibited, and the adoption consequently invalid. Neither here nor in the Court below has the rule above stated been disputed. But it has been argued that by law or usage such a marriage is permitted in the part of India where this adoption took place. In our view of the law, it becomes needless to consider the evidence offered in support of the alleged usage. We may, however, observe that the evidence of the two persons called experts can in no view properly be considered in determining the question of Hindu law apart from the usage; for the Court is bound to take judicial notice of the law and to declare it without such aid. The rule of the Hindu Law, which is relied on by the Court below, is thus stated in a work of authority (West and Buhler, page 141, citing Vijnanésvara) "He should marry a girl who is non-sapinda with himself." Recognizing this rule, which has not indeed been questioned, the Court adds "I think it unnecessary to cite authorities to show that Venkata Lakshmi Ammál is her uncle's sapinda." Now it is admitted that in the Brahminical caste, to which the parties belong, a man may not adopt a boy whose mother he might not have married. The rule appears to be in respect of marriage that a man may not marry his father's or his mother's sapinda. "She who is not also of the same pindam as the mother, and who is not also of the same gotra as the father, is to be preferred among the twice-born in marriage." Menu, Ch. III, V. 5. Yâjñavalkya distinctly says, "She must not be a sapinda, nor of the same gotra." The question, therefore, is whether a man's sister's daughter is his sapinda. According to the interpretation generally received at the present day, the

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sapindas are those who are qualified by their relationship to present (or receive) the offering of the rice ball, or funeral cake. These are the father, grandfather, and so on to the 6th person above the person in question, and to the six below him, all in the direct male line of descent. Including the person in question, there are seven degrees above, and the same below. The wife, daughters and daughters' sons, and the paternal grandmother are also sapindas. The reckoning of descent for sapindaship must, as we understand, be in the direct male line, even when the person, to whom the relationship is traced, is a woman. But all sapindas belong to one and the same gotra, and a woman married by one of the approved forms now in use, such as the one used in the case of the half-sister of Subharáya, enters the gotra of her husband and ceases to be a sapinda of her father.

In our view, therefore, Venkata Lakshmi Ammál, the mother of the adopted child, was a non-sapinda, and, therefore, a person with whom Subharáya might have intermarried.

For the Appellants : Mr. *J. D. Mayne.*

For the Respondents : Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyne.*

For the appellants it was maintained that the kind of assent by sapindas to support an adoption by a widow had been misapprehended by the High Court. Provided that the assent of the sapinda had not been corruptly given—a point on which no issue had been fixed in the Court of first instance—the assent had been effectively given. Fraud apart, it mattered not if the sapinda's motives in giving his assent had regarded interests other than the spiritual benefit of the deceased, and had regarded his own interests, or his child's. Nor were the widow's motives to be considered, provided that she had obeyed the directions of the law. Setting aside, then, the question of *mala fides*, there were the following sufficient reasons for holding the adoption to be valid. That the assent was effectively given by the proper person, the manager of the joint family estate; that the adopted boy was legally suitable, he being the male sapinda nearest to the deceased, and not being disqualified by consanguinity between the latter and the boy's mother; the length of time that had elapsed, after the death of the deceased, before the adoption took place was not an insuperable objection.

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On the last of the above propositions the following authorities were referred to :—

Raje Vyankatrav Anandrav Nibalkar v. *Jayavantrav M. Ranadive* (1); Sir E. H. East's Notes, X (2); *Bhasker Bachaji* v. *Narro Ragonath* (3); and *Sri Brijbhookanjee Maharaj* v. *Sri Gokoolootsaajee Maharaj* (4).

In support of the first proposition, the extension of the widow's power in Southern India to adopt in the absence of authority given by her husband, was traced to its sources; and Strange's Hindu Law, Chapter IV, referring to the Dattaka Chandrika, Section 1, verse 32: *The Collector of Madura* v. *Muttu Ramalinga Sathupathy* (5); *Sri Raghunadha* v. *Sri Brozo Kishoro* (6); and *Raja Venllanki Venkata Krishna Rao* v. *Venkata Lakhsmi Narsayya* (7) were cited.

The widow had to consult the head of the family who was held capable, by the Hindu Law, of a thoughtfulness of which the widow herself was supposed to be incapable. And application was made to him, *not* that the assent of all the members of the family who were interested in the estate might be secured, but only that a sound discretion might be exercised. In this case the assent of the actual head of the "stirps" had been asked and obtained.

To maintain the suitableness of this boy, it was pointed out, on the question whether there was a positive prohibition by law of the adoption of a boy whose mother the adoptive father could not have married, that such a prohibition was not expressly and directly declared in the Shastras, which laid down that a Brahman might not adopt the son of a daughter, or a sister. Reference was made to Strange's Hindu Law, Chapter IV, Division 2; Dattaka Mimansa, Section II, paragraphs 28 *et seq.*; Sutherland's Synopsis, Head 2nd. If it were admitted that Venkata Lakshmi, and Subharáya, being within five degrees, were within the degrees within which marriage was forbidden, still the rule in regard to

(1) 4 Bom. H. C. Reps., A. C., 191.
(2) 2 Morley's Dig., 18.
(3) Sel. Cas. Sadr Diwani Adalat, Bom.
(4) 1 Borrodaile (Ed. of 1825), 197, 198.
(5) 12 Moo. I.A., 397.
(6) L.R., 3 I.A., 155: S. C., I.L.R., 1 Mad., 69.
(7) L.R., 4 I.A., 1: S. C., I.L.R., 1 Mad., 174.

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the adoption of the child of a female sapinda was not strictly observed, and its application to sapindas so far off from one another as those in question was most doubtful. On such a point local custom must have weight, and it permitted such adoptions.

In regard to the whole case, upon the facts, it was argued that there was no just and necessary inference of *mala fides*. Such a state of things should be affirmatively made out. On this part of the case Lord Brougham's observations in *Moti Lal Opadhiya* v. *Jagharnath Gurg* (1) were referred to.

For the respondents it was argued that on a right construction of the evidence the assent of Sámi Aiyar was given, according to the case which it was sought to establish, to an adoption purporting to be made by Rangammál in pursuance of an alleged authority from her husband, and was not given to an adoption intended to be supported by that assent itself, and the assent of the other sapindas through him. If, however, the assent of the sapindas was resorted to in order to support this adoption, then Sámi Aiyar's conduct had annulled his representative character, and had prevented his alleged assent from being an assent on the part of the family. That conduct was acquisition for himself, shown by the reservations in the documents of adoption, and by the evidence. The age of the next brother, moreover, rendered him capable of taking part in the assent had it been duly given.

On the law relating to the kind of assent required to such an adoption reference was made to the cases noted, and to the Vyavahara Mayúkha, translated by Borrodaile, Chapter IV, Section V, verse 17; Stokes' Edition, 1865, pp. 63, 64.

On the question whether Subharáya and Venkata Lakshmi were within the degrees within which affinity precluded marriage reference was made to Manu, translated by Sir William Jones, Chapter III, verse 5.

At the conclusion of the argument their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—The validity of the adoption in question in this appeal is disputed upon several grounds: first, that the widow of Subharáya had no authority from her husband to adopt; secondly, that she had not got the assent of the sapindas to the

(1) 1 Moo. I.A., 1.

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adoption; and, lastly, that Subharáya, her deceased husband, could not have married the mother of the adopted boy, that is, his half-sister's daughter, and, consequently, that the adoption of that child was invalid.

Both Courts found that the widow had no authority from her husband to adopt, and their Lordships will not disturb that finding. The first Court held that Subharáya could not legally have married his sister's daughter, but the High Court entertained a different opinion upon that point. It is unnecessary for their Lordships to express any opinion upon it, and they therefore abstain from doing so; but, at the same time, they feel bound to say that they are not satisfied with the reasons which the learned Judges of the High Court have given for holding that Subharáya could have married the mother of the boy, she being the daughter of his own half-sister.

The case turns upon the question of the assent which was given by Sámi Aiyar to the widow to adopt. Their Lordships do not consider it necessary to give any express opinion as to whether Sámi Aiyar could alone have given a valid assent if it had been given to her as a widow having no authoriry from her husband to adopt, and had been given without his mind's having been influenced by other and undue considerations, because their Lordships are of opinion that, looking to the circumstances of the case, there is no sufficient evidence to show that the widow applied to Sámi Aiyar to give his assent to an adoption to be made by her without the authority of her husband, but rather that she applied to him to give his son to be adopted by her under an authority which she had from her husband. The Judges of the High Court expressly say:

"But if we endeavour to ascertain whether Rangammál, as a widow not having authority from her husband, sought for and obtained his kinsman's authority to adopt a son to him, the evidence appears to give no certain answer. According to several of the witnesses, the widow spoke and acted as one already possessed of authority from her husband which she was about to execute, and consent was asked to its execution in favour of Karunabdhi Ganesa Ratnam Aiyar. There is little, if any, satisfactory evidence to show that an authorisation was sought as from a kinsman having full power to grant or withhold permission."

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Their Lordships are of opinion that that remark was well founded, and that there is no evidence to show that the widow applied to Sámi Aiyar to give his assent to her adopting because she could not adopt without his consent; but that the evidence shows she applied to him to give her his child in order that she might adopt him in pursuance of an authority which she had from her husband, which she represented herself to possess.

It is said that, although it is alleged in the widow's part of the agreement that she wished to adopt a son in pursuance of a permission given to her by her husband, there is no such statement as that in the agreement executed by Sámi Aiyar; but when the agreement of Sámi Aiyar is looked at, he expressly refers to the agreement which had been signed by the widow; he says, "I, as guardian, shall, according to the agreement executed by you, &c." Therefore he refers to the agreement which is said to have been executed by the widow, and adopts the statements made in it; namely, that she was proposing to adopt a son in pursuance of a permission given by her husband. The application to Sámi Aiyar was not to give his consent to an adoption which the widow could not make without the assent of the sapindas, but it was an application to give his son to be adopted in conformity with an authority which she had received from her husband.

But, independently of that, it appears that Sámi Aiyar's mind must have been influenced by the arrangement which he made with the widow. Sámi Aiyar does not give his consent to an adoption merely, but he stipulates with the widow that if she adopt he is to become the guardian of the child. He says:—

"I, as guardian, shall, according to the agreement executed by you, look after all the real and personal properties due therein to the share of your child, and deliver them as soon as your adopted son attains proper age." The widow also says:—"And whereas the said child is a minor, and you, as the managing member of the joint family, are looking after all the movable and immovable properties, &c., you, as guardian, shall look after all the real and personal properties due therein to the share of my said child until he attains proper age, and then deliver the same to him with an account of incomes and expenses."

In the absence of an adoption, Sámi Aiyar would have been entitled upon partition to only one-fourth of the property—he being a member of a joint family with his brothers,—and his brothers would have been entitled to the other three-fourths; but if a valid adoption should be effected, the adopted son of Subharáya would become entitled to half the property, viz., the half share which belonged to the deceased husband of the widow; and the brothers, instead of each being entitled to one-fourth, would be only entitled to an eighth. Sámi Aiyar himself would, of course, lose a portion of the share, which would pass to the adopted son; but then he stipulated that he should remain guardian of the adopted son, so that until he should attain his full age no partition between himself and the adopted son could have been enforced, because he was the guardian; the widow could not have asked for a partition in the name of her son, because he had stipulated that Sámi Aiyar should be his guardian. The consequence was that by the arrangement made with the widow he really got during the minority the management of, and the interest in as a member of the joint family (which, if a partition with his brothers should take place, would consist of himself and the adopted son), five-eighths of the estate. The brothers might have separated, but still the infant who was adopted could not have separated from Sámi Aiyar without bringing a suit against the latter for a partition; and to such a suit the guardianship for which Sámi Aiyar had stipulated as part of the consideration for giving his consent to the adoption would have presented exceptional obstacles.

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There is another matter by which his mind was probably influenced. It is stipulated in the deed that "my adopted son has nothing to do with the village of Erikkolam in the taluk of Musiri obtained by you, the same being the acquisition of your maternal grandfather." By reason of this stipulation the adopted son was to take no interest in that portion of the estate which was then claimed by Sámi as his separate property, but is now found to be a portion of the joint family property.

Their Lordships, looking at all the circumstances under which the assent was given, are of opinion that the assent was not one which rendered the adoption valid and binding as against the brothers; and their Lordships will therefore humbly advise Her

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Majesty that the decision of the High Court be affirmed, and that the appellants pay the costs of this appeal.

Solicitors for the Appellant: Messrs. *Gregory, Rowcliffes,* and *Rawle.*

Solicitors for the Respondents: Messrs. *Burton, Yeates,* and *Hart.*

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1880. March 24.

PERU NAYAR (DEFENDANT) APPELLANT *v.* AYYAPPAN NAYAR (PLAINTIFF) RESPONDENT.*

Anandravan—Separate maintenance.

Though the general rule is that an Anandravan cannot have separate maintenance, there are exceptions to that rule.

THIS suit was brought for maintenance due for three months from Chingom 1053 (August—September 1878). The defendant was Karanavan of the táráwád, and the plaintiff, as Anandravan, complained that the defendant refused to give him maintenance. The defendant denied the plaintiff's right to sue for separate maintenance and the ability of the táráwád property to bear the charge of separate maintenance and pleaded that plaintiff had failed to act up to the terms of a family karár.

The District Munsif rejected the suit without costs as he considered that the defendant had given cause for the plaintiff's separation from the táráwád house, while he (plaintiff) had given to the táráwád his self-acquired properties and had discharged a good part of the family debts.

The Appellate Court held that while such a suit ought not to be encouraged, a member like the plaintiff, compelled by the defendant to quit the táráwád house should have some remedy, such as might check the arbitrary exercise of control by the

* Second Appeal No. 593 of 1879 against the decree of C. Rámachandra Áyyar, Subordinate Judge of South Malabar, dated 12th July 1879, reversing the decree of the District Munsif of Kootnad, dated 19th March 1879.

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Karanavan. That while a bare pittance would discourage separate residence and maintenance, a slight charge upon the táráwád property to be made good by the Karanavan would induce him to restore the discontented Anandravan.

The decree of the Court of First Instance was reversed and the plaintiff allowed maintenance for the time claimed at the rate of Rupees 2 per mensem.

Against this decree the defendant appealed on the ground that it was a well established rule of Malabar law that an Anandravan cannot claim maintenance separate from his táráwád.

Mr. *Lascelles* for the Appellant.

P. V. Rangachariar for the Respondent.

The Court delivered the following

JUDGMENT:—We cannot say that the District Judge is wrong. Maintenance is provided by the karár. Though the general rule is that an Anandravan cannot have separate maintenance, there may be rare exceptions, and this case the Judge has found is one as the Karanavan has been the cause of quarrels which necessitated the plaintiff leaving the family house. The maintenance granted is intended to discourage such applications, viz., Rupees 2 per mensem.

We dismiss the second appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Muttusámi Áyyar.

1880. August 18.

VENKATASUBBARAMÁYYA (PLAINTIFF), APPELLANT *v.* SURAYYA (2ND DEFENDANT), RESPONDENT.*

Suit to recover office of Karnam—Limitation.

The plaintiff's adoptive father was dismissed from the office of karnam on the 4th of April 1862 and the plaintiff, was appointed in his stead on the 29th April 1865. On the 25th September 1865 the plaintiff was dismissed and the second defendant appointed. The present suit for recovery of the office and land attached was filed on 21st September 1877.

* Second Appeal No. 337 of 1880 against the decree of J. Kelsall, Acting District Judge of Godávari, dated 22nd November 1879, reversing the decree of the District Munsif's Court of Rajahmundry, dated 6th September 1878.

VENKATASUBBARAMÁYYA v. SURAYYA.

Held on the authority of *Tammirazu Rámazogi* v. *Pantina Narsiah* (1) that the suit was barred, not having been brought within six years from the 25th September 1865.

Maharana Fattehsangji Jasivatsangji v. *Dessai Kalleanraiji Hekumutraiji* (2) discussed.

THIS was a suit for the recovery of the office of karnam in a zemindárí village and of the land attached to that office. The second defendant pleaded that the suit was barred by limitation. The District Munsif holding that the suit was not barred, gave a decree in favor of the plaintiff.

On appeal the District Judge, on the authority of *Tammirazu Rámazogi* v. *Pantina Narsiah* (1) reversed the decree of the Lower Court.

The plaintiff presented a second appeal on the ground that the suit was not barred.

Mr. *Johnstone* for the Appellant

P. V. Rangacharry for the Respondent.

The facts of the case fully appear from the judgment.

JUDGMENT:—This suit was brought to recover the office of karnam of the village of Jengamareddygudiem, and for possession of the Inam lands attached to the office and for further produce.

The District Munsif decreed the office and lands to the plaintiff.

The second defendant, who was in possession, had pleaded that the suit was barred by the Act for the limitation of suits. He appealed against the decree of the District Munsif, and the District Judge, upon the authority of *Tammirazu Ramazogi* v. *Pantina Narsiah,* (1) held that the suit not having been brought within six years of the 25th September 1865 was barred by Clause 16, Schedule 1, of Act XIV of 1859. The question is whether the suit is so barred.

The facts are that the plaintiff's father was dismissed from the office of karnam on the 4th April 1862, because he was suspected of having been concerned in hushing up a murder. His adopted son, the present plaintiff, was appointed, instead of his father, on the 29th April 1865. Afterwards, the Head Assistant Collector, acting under the Court of Wards, dismissed the plaintiff from the

(1) 6 Mad. H.C. Rep., 301.
(2) L.R. 1 Ind. Ap., 34.

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office, simply because his father had been suspected of hushing up a murder. That dismissal took place on the 25th September 1865, when the defendant was appointed instead of the plaintiff, and this suit was brought within twelve, but not within six, years from that date.

Madras Regulation XXIX of 1802, Section 5, provides that (in a permanently-settled district) karnams shall not be dismissed from their offices, except by the sentence of a Court of Judicature.

In the case of *Tammirazu Rámazogi* v. *Pantina Narsiah* (1) on which the District Judge relies, it was held that the right to the land being only a secondary claim in the suit, and dependent upon the plaintiff's title to the office of karnam, the lapse of six years from the time of the alleged ouster by the defendant was fatal to the suit. We do not think that that decision has been overruled by that of the Judicial Committee of the Privy Council in *Maharana Fattehsangji Tasivatsangji* v. *Dessai Kallianraiji Hekumutraiji* (2). That decision was on appeal from a decree of the High Court at Bombay, and the Judicial Committee noticed two decisions of that Court in which it had been held, upon the authority of certain texts of Hindu law, that an hereditary office was classed as immovable property; and that, inasmuch as the term "immovable property" was not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classed as immovable, although not such in the ordinary acceptation of the word. To the application of this rule within proper limits their Lordships saw no objection. The question must, they said, in every case be whether the subject of the suit is in the nature of immovable property, or of an interest in immovable property; and if its nature and quality could only be determined by Hindu law and usage, the Hindu law might properly be invoked for that purpose.

In the case before their Lordships, however, which was a suit to recover what is known in Bombay as a toda giras haq, the question whether that was immovable property was not to be determined by Hindu law, because it was sometimes held by Muhammadans and might be held by Parsees or Christians. And

(1) 6 Mad. H.C. Rep., 301.
(2) L.R., 1 Ind. Ap., 34.

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their Lordships were of opinion that the applicability of particular sections of the general statute of limitations must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit.

We are not now concerned with the nature of a toda giras haq. The present case relates to the office of karnam, or village accountant. It is an office in no way connected with the Hindu religion or usages; and, although it has almost invariably been held by Hindus of the accountant caste, that is merely due to their aptitude for the duties. There is nothing to prevent its being held by a Christian or a Muhammadan. Therefore, we see no reason why the expression "immovable property" in the present case should be construed by the light of ancient Hindu texts. The case of *Tammirazu Ramazogi* v. *Pantina Narsiah* (1) was not noticed by the Judicial Committee in their judgment just quoted, and certainly it was not overruled. We are therefore bound to follow it. We, therefore, think that the decree of the District Judge must be affirmed and this second appeal dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P.C.* 1880. November 11.

PEDDA RA'MAPPA (DEFENDANT), *v.* BANGARI SE'SHAMMA (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Hindu law of succession to an impartible inheritance among sons of different mothers—Primogeniture.

The principles on which is founded the Judgment in *Rámalakshmi Ammál* v. *Sivanantha Perumal Ammál* (2) as to the succession to an impartible inheritance apply with equal force whether the first-born son is born of a first married wife or of a wife afterwards married.

The text of *Manu*, chap. ix, v. 125, distinctly shows that among sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother. In v. 122 of the same chapter the words "but of

(1) 6 Mad. H.C. Rep., 301.

* *Present:*—Sir J. W. COLVILE, Sir M. E. SMITH, and Sir R. P. COLLIER.

(2) 14 Moo. I.A., 570.

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a lower class," added by the gloss of *Culluca Bhatta* (1), are to be read as correctly inserted in the text.

Two wives of a *Poligár* of an impartible polliam having died before his marriage with a third and fourth wife it was contended that the third being in the position of a first married or "royal" wife, her son was entitled to succeed to his father in preference to an elder son born of the fourth. *Held* that the elder son, though born of the fourth wife, was entitled by primogeniture under the rule above referred to, and that it was, accordingly, immaterial to consider whether or not this third wife was in the position of a first married wife. What might be the effect of one wife being "of a lower class" than another was not in question.

APPEAL from a decree of the High Court of Madras (8th November 1877,) affirming a decree of the District Judge of North Arcot (29th March 1877).

The question raised by this appeal related to the right of succession as between the two surviving sons of Rámadásappa, the deceased Poligár of the Bangari Polliam in Chittúr, North Arcot, a polliam in the nature of a ráj and impartible. Rámadásappa left three sons, viz., Bangari Séshamma, his eldest, who had brought this suit and was now the respondent, born of his wife Venkatamma; and by another wife Subbamma, whom he married before Venkatamma, he left two other sons, viz., Chandrashekhara, who died before these proceedings, and Pedda Rámappa, the present appellant.

On the death of Rámadásappa in 1866 Chandrashekhara obtained possession of the polliam; and on his death, which occurred in 1876, Pedda Rámappa succeeded him. Bangari Seshamma then brought the suit which gave rise to this appeal, claiming the polliam in right of primogeniture. The defence of Pedda Rámappa was that, by the custom of the family, the sons of the "Pattabástri" or "Peddabárigu," the first or "royal" wife of Rámadásappa, were successively entitled to the polliam in preference to the elder son born of a junior wife. It was also alleged that Rámadásappa at the time of his marriage with Subbamma had promised that, according to this custom, her offspring should be his successor.

The District Judge having found, on the facts, against the alleged custom and arrangement, on which the defence rested, decreed the claim of Bangari Seshamma on the ground that, by

(1) Manava Dharma Sástra, or the Institutes of Manu, according to the gloss of Culluca Bhatta, translated by Sir William Jones.

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the general law, he was entitled as elder son. This decree, on appeal, was affirmed by the High Court.

Mr. *J. F. Leith*, Q.C., and Mr. *F. H. Bowring* appeared for the Appellant.

Mr. *J. D. Mayne* for the Respondent.

On the law relating to the order of succession among sons by different wives, the case for the appellant was argued, and reference was made to the following:—*Manu*, translated by Sir W. Jones, Chapter IX, vv. 122, 125 and 126; *Colebrooke*, Digest, Book V, Chapter I, Section II, v. 45; *Colebrooke*, Book IV, Section II, v. 51; *Raghoonath* v. *Hurrihur* (1); *Bhujangrao* v. *Malojirao* (2); *Rámalakshmi Ammál* v. *Sivanantha Perumal Sethurayar* (3); *Mayne*, Hindu Law and Usage, Section 461.

Their Lordships' Judgment was delivered by

Sir MONTAGUE E. SMITH.—This appeal arises in an action brought by Bangari Seshamma against his half-brother Pedda Ramappa, to recover possession of the important polliam of Bangari. Several points, which resulted in issues in the Courts below, have been disposed of in a manner which does not render them the subjects of appeal. The facts which relate to the question which alone has been argued before their Lordships are few. It appears that Ramadasappa was the Poligar of this polliam. It had been for several centuries in his family, had been resumed by the Government, and had been restored to him, but nothing turns on that resumption and restoration. Ramadasappa married four wives; the first two wives died, without issue, before his marriage with his third and fourth wives. The marriage with Subbamma, his third wife, and with Venkatamma, his fourth wife, took place on the same day. There is now no dispute that the marriage with Subbamma was prior in point of time. The appellant, Pedda Ramappa, is the son of the third wife; the respondent, Seshamma, is the son of the fourth wife, Venkatamma, but was born before his half-brother Ramappa. Ramappa had an elder brother of the whole blood, Chandrasekhara, also junior to Seshamma, who, upon his father's death in 1866, was put by the Government into possession of the polliam.

(1) 7 S.D.A. Rep., 126 (146).
(2) 5 Bom. H.C. Reps., A.C.J., 161.
(3) 14 Moo. I.A., 570.

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He died in the year 1876, having retained possession during his lifetime. Upon his death, Ramappa, the appellant, was put into possession, and thereupon the present action was brought by Seshamma. It is only necessary to mention Chandrasekhara in order to account for the possession between the death of Ramadasappa, the father, and the bringing of the action. It is conceded that this possession is not material to the question which arises in this case, that question being whether the respondent, who was the first-born son of Ramadasappa, though by the fourth wife, is entitled to succeed to the father's estate in preference to the appellant, who was born afterwards, his mother being the third and senior wife, and being, it was contended, in the same position as a first married wife, by reason of the two former wives having died before her marriage.

The general question as to the right of succession in the case of sons born of different wives was decided by this Committee in the case of *Rámalakshmi Ammál* v. *Sivanantha Perumal Sethurayar* (1). It was there held that the elder born son, though of the junior wife, was entitled to succeed in preference to the younger son born of the elder wife. In that case, however, the question as to the right of a son born of a first married wife did not arise, for there the mothers were both junior wives, and the first married wife was living at the time of the marriages of the two wives whose sons were disputing the inheritance. In the present case, the first two wives having died before the marriage of the third and fourth wives, it is contended that the third wife is in the position of a first or royal wife, and that her son is entitled to succeed in preference to elder-born sons of junior wives. Undoubtedly that question was left open by the decision of their Lordships in the case of Ramalakshmi Ammál. (1) In that case it had been admitted, or was supposed to have been admitted, that in the case of a royal wife the rule might be different from what it would be in the case of wives who were all junior to her. Their Lordships had not to consider that question, and did not think *it right* to prejudice the decision of it by any premature determination; in fact, the point was not argued. The High Court of Madras, from which the appeal came, and in which the admission had been made, had also declined to decide the point.

(1) 14 Moo. I.A., 570.

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Their Lordships have felt some doubt whether they are now called upon to decide this question, for in the Court below the claim of the defendant was rested not upon the general Hindu law, but upon a special family custom. The fact that his case was so rested implies an admission that he and his advisers did not consider that by the general Hindu law he was entitled to succeed. The custom was found against him, and he did not, on his appeal to the High Court, insist, as one of his grounds of appeal, that by the general law he was entitled, his grounds of appeal being directed only to the other points which had arisen in the case, and to an allegation that the custom ought to have been found in his favor. Their Lordships, however, have allowed the point to be argued, and are prepared to determine it.

The preference which has been given to the first-born son over his brothers, irrespective of the priority of the marriages of their mothers, mainly depends upon the religious rules which guide the Hindu community. It is said in the Judgment in the case of *Rámalakshmi Ammál,* (1) "One great rule of religion binding upon every Hindu is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors, and as a consequence naturally flowing from this law the first-born son is throughout the books of authority treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges." The principle deduced from the rules above mentioned, and the reasons upon which their Lordships' Judgment in the former appeal are founded, apply with equal force to the first-born son of his father, whether born of a first married wife or of a junior wife; and it certainly lies upon the appellant to show some explicit authority to establish the distinction for which he contends.

The argument at the Bar has been rested solely upon some texts in *Manu,* and those texts their Lordships think not only do not support the view contended for by the learned Counsel for the appellant, but are rather opposed to it. The material ones are few. The first to which it is necessary to refer is in Chapter 9, Section 106: "By the eldest, at the moment of his birth, the

(1) 14 Moo. I.A., 570.

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father having begotten a son discharges the debt to his own progenitors; the eldest son, therefore, ought, before partition, to manage the whole patrimony." This text simply says "by the eldest" without further description, and it states that the father having begotten him has discharged his debt to his own progenitors. Then the 107th is: "That son alone by whose birth he discharges his duty, and through whom he obtains immortality, was begotten from a sense of duty; all the rest are considered by the wise as begotten from love of pleasure." That section certainly does not help the contention on the part of the defendant, because in the present case, when Seshamma was begotten, the father had no other son, and his duty was unfulfilled. Two other sections were referred to, which are more immediately applicable to the question under discussion. The 122nd section is, "A younger son being born of a first married wife after an elder son had been born of a wife last married, *but of a lower class,* it may be a doubt in that case how the division shall be made." The words printed in italics are found in Sir William Jones' translation. The words "but of a lower class" are no doubt inserted by a commentator and are not in the original text which had come down. If the text were read without those words, undoubtedly that and the following sections, 123 and 124, would give some support to the argument of the defendant. But their Lordships think that the interpolation of the commentator cannot be disregarded. The early versions of the Laws of Manu are very ancient, and it might be doing great mischief to construe the words of the original text literally, unaided by the gloss which has been put upon them by writers and commentators of authority, whose interpretation has been received as authentic. The authority of the commentator who is responsible for the interpolated words is vouched by Sir William Jones in the preface to his translation. He says: "At length appeared *Culluca Bhatta,* who, after a painful course of study and the collation of numerous manuscripts, produced a work of which it may perhaps be said very truly that it is the shortest yet the most luminous, the least ostentatious yet the most learned, deepest yet the most agreeable, commentary ever composed on any author, ancient or modern." Sir William Jones, himself a great Oriental lawyer and scholar, says that he had almost implicitly followed the text and interpret-

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ation of *Culluca Bhatta*, and had printed his gloss in italics. It is impossible to have higher authority for an explanation of a text. Then the text as interpreted is merely this, that a younger son being born of a first married wife after an elder son had been born of a wife last married, but of a lower class, in that state of things it might be a doubt how the division should be made. Subsequent sections would seem to show that in that case *Manu* thought the son of the first married wife should have the larger share of partible property. If the interpretation is received, then the very expression "but of a lower class" leads to the implication that if the wives were of the same class the distribution would be equal; and Section 125 is to that effect :—"As between sons born of wives equal in their class and without any other distinction there can be no seniority in right of the mother, but the seniority ordained by law is according to the birth." That is a distinct text, and the effect of it would only be uncertain if Section 122 were read without the words added by the commentator. It is not contended that in the present case the wives are not of the same class; and their Lordships do not determine what would be the proper rule of succession where the wives are of a different class or caste. The question does not arise.

The only other authority which has been referred to is one which certainly does not support the defendant's case, if it does not establish that of the plaintiff. It is the case of *Rajah Rughoonath Singh* v. *Rajah Hurrihur Singh* (1). The marginal note correctly states what the case decides: "In the case of an estate in Manbhoom, in the jurisdiction of the Governor-General's agent at Hazaribaugh, it was held that the succession is vested in the eldest son of the deceased Rájah born of any of his wives in preference to the eldest son of the paát or first Ráni." It would seem that that case was decided not upon the general Hindu law, but upon the law prevailing in Manbhoom, and that there was no custom to the contrary. The Judges who formed the majority of the Court in their Judgment say, "The ordinary course of succession is certainly shown by the evidence to be that stated by the plaintiff"—that is, the order stated in the marginal note. "To establish a contrary practice so as to

(1) 7 S.D.A. Reps., 126.

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assume the force of family custom requires the strongest evidence." Therefore the ordinary course of succession in the district of Manbhoom was in accordance with what their Lordships find to be the general Hindu law.

The question really comes to this: although it was not necessary to decide in the former case before this Board what was the right of a son of a first married wife, yet the principles upon which their Lordships held that the first-born was entitled to succeed apply equally to a son of such wife and sons of other wives; and that being so, it lay upon the defendant to show some positive rule of Hindu law, supported either by ancient text or modern decision, to the contrary effect. Their Lordships think that no sufficient authority for such a rule has been produced. They would observe that the reasons on which the precedence and privileges of the first wife over her co-wives are founded are scarcely pertinent to the succession of sons to their father, which is governed by other considerations, as already explained.

The ground on which this appeal has been decided renders it, of course, immaterial to consider whether the third wife, who was not married until after the deaths of the two former wives, stood in the position of a first married wife.

On the whole, their Lordships are of opinion that the Courts below, who concurred in their Judgments, have come to a correct conclusion, and they will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss this appeal with costs.

Solicitors for the Appellant: Messrs. *Gregory, Rowcliffes* and *Rawle*.

Solicitors for the Respondent: Messrs. *Burton, Yeates*, and *Hart*.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kindersley.

1880. November 15.

THE SECRETARY OF STATE FOR INDIA AND ANOTHER (SECOND AND THIRD DEFENDANTS), APPELLANTS, *v.* ABDUL HAKKIM KHAN (PLAINTIFF), RESPONDENT.*

Endowments for religious purposes—Pensions Act of 1871.

When the object of the endowment was to provide for certain religious and pious purposes, *Held* that the provisions of the Pensions Act were not applicable to it. "Pensions and Grants" in that Act meant personal grants and not grants to endowments.

THIS was an appeal against the decree of C. J. Plumer, District Judge of North Arcot, in Original Suit No. 11 of 1878.

The village of Virthambatta was granted by the Nawáb of Arcot to the ancestors of the plaintiff for the purpose of defraying expenses connected with the maintenance of the tombs of Nawáb Kyrudín Khán and his sons, and of certain religious ceremonies to be performed at the tombs. The plaintiff's ancestors and the plaintiff continued to keep the tombs in repair and to perform the ceremonies. The third defendant (the Collector of North Arcot) represented to Government that the plaintiff did not properly conduct the services, and recommended his removal from office and the appointment of the first plaintiff in his stead. The Government made an order to that effect on 20th July 1877. The plaintiff instituted the suit for the cancelment of the order made by Government and for the establishment of his right to the management of the Inám. He alleged that Government had no power to disturb his possession and that he could not be removed from management except by a decree of the District Court under the provisions of the Religious Endowment Act (Act XX of 1863). The defendants denied the jurisdiction of the District Court to entertain the suit and

* Appeal No. 79 of 1879 against the decree of C. J. Plumer, District Judge of North Arcot, dated 27th March 1879.

contended that the matter was governed by Section 4 of the Pensions Act of 1871. The District Judge overruled the objection and cancelled the order made by Government. An appeal was made to the High Court on the grounds that the Pensions Act applied to the grant in question.

The Government Pleader (Mr. *Handley*), for the Appellants.

Mr. *J. H. S. Branson*, Mr. *Johnstone*, and *C. G. Kuppusámi Áyyar*, for the Respondent.

The Court (TURNER, C.J., and KINDERSLEY, J.) delivered the following

JUDGMENT.—So far as any evidence is available, the object of the endowment in suit was to provide for certain religious as well as pious purposes in connection with the tombs of the Nawáb Kyrudín Khán and some of his relations. We are of opinion that the provisions of the Pensions Act are not applicable to such an endowment: by "Pensions and Grants," read in connection with the rest of the Act, we understand personal grants and not grants to endowments of the nature now under consideration. Having regard to the public religious services, it was intended should be maintained thereout, the endowment appears to fall within the provisions of Act XX of 1863. We must then affirm the decree of the District Court and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

1879. March 26.

BISHOP MELLUS AND 3 OTHERS (DEFENDANTS), APPELLANTS, *v.* THE VICAR APOSTOLIC OF MALABAR AND 8 OTHERS (PLAINTIFFS), RESPONDENTS.*

Plaint, amendment of—Secondary evidence of letter after service of notice on defendant out of jurisdiction—Church property, Effect of change of form of worship by congregation on.

Section 53 of the Civil Procedure Code which provides that a plaint cannot be amended so as to convert a suit of one character into a suit of another, and inconsistent

* Appeal No. 56 of 1878 against the decree of H. Wigram, Officiating District Judge of South Malabar, dated 29th March 1878.

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character does not prevent a plaintiff, who has been ousted after suit brought for declaration of title from amending his plaint by adding a prayer for possession.

If the congregation of a church as a body cease to follow the observances of a particular form of worship and in preference for forty years follow those of a different form of worship, there would be no one left for whom and by whom the original form of worship can be continued, the objects of the original trust cease to exist, and the church funds and property become impressed with a trust for the performance of the later form of worship.

Where a defendant out of the jurisdiction of the Court was summoned to produce a letter and did not comply with the summons, but appeared by Pleader at the last moment at the hearing of the suit and service of notice on the Pleader to produce the letter would have been nugatory, secondary evidence of the contents of the letter was admitted under Section 66, proviso 6 of the Evidence Act.

THE Advocate-General (Hon. *P. O'Sullivan*), for the Appellants.

Mr. *Handley*, for the Respondents.

The facts and arguments fully appear in the judgment of the Court (INNES and MUTTUSA'MI A'YYAR, JJ.).

JUDGMENT.—The Suit 3 of 1878, in which this appeal is preferred, is substantially a reinstitution of Suit 34 of 1875, in the appeal from which (27 of 1877) the High Court reversed the decree of the District Judge in favor of plaintiffs and dismissed the suit on the ground that it was not properly framed. The present suit is no longer defective in the array of parties, and the District Judge has again passed a decree in favor of plaintiffs, to the effect that first and second plaintiffs, the Archbishops of Virapoly and Cranganore, are the sole persons entitled by their office to exercise spiritual jurisdiction in the Chittatur Church; that the third and fourth plaintiffs, Vicars respectively of the Virapoly and Cranganore parties, have been duly appointed Vicars, and fifth plaintiff Acting Vicar for third plaintiff in his absence; that plaintiffs six, seven, eight, and nine have been duly elected Wardens of the said church, and are by virtue of their office entitled to possession of the church and the property appertaining thereto; and that first and second defendants be enjoined from interfering in the spiritual affairs, and defendants three, four, and five in the temporal affairs of the said church, unless and until they submit to the spiritual jurisdiction of first and second plaintiffs; and that defendants three to five do surrender to plaintiffs six to nine the church and the property belonging thereto in their possession, and that first, third, fourth, and fifth defendants do jointly and severally pay plaintiffs' costs.

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The present appeal is preferred on six grounds:—

1st.—"That the District Judge should not have allowed a suit for a declaration of right to be converted into one for recovering possession of property.

2nd.—"That the decree is against the weight of evidence.

3rd.—"That there should have been a finding in defendants' favor on the first and second issues (as to the exclusive title of first and second plaintiffs to exercise spiritual jurisdiction in the church, and as to their being entitled to a declaration of their right), and that the finding that Bishop Mellus' authority was unauthorized is not supported by evidence.

4th.—"That the District Judge was wrong in holding that the appointment of defendants three to five as Wardens of the church was illegal and void *ab initio*.

5th.—"That the election of plaintiffs six to nine as Wardens of the church should have been held to be unlawful.

6th.—"That the third, fourth, and fifth issues should have been found in favor of defendants."

Under the former decree of the District Judge, the plaintiffs were placed in possession of the property pending the appeal to the High Court.

After the decree of the High Court in Appeal 27, possession was restored to defendants three to five. But this transfer of possession did not take place until after the presentation of the plaint in the present suit.

The plaint in the present suit stood originally without any prayer for relief in the shape of possession, and the plaint was allowed to be amended with the addition of that prayer after the transfer of possession. Several other alterations were made in the plaint to which objection was taken at the hearing of the appeal, but as the objection in the grounds of appeal is confined to the particular amendment noticed, we ought not, we think, to consider the other objections taken in regard to a matter which was so entirely within the discretion of the Court of First Instance.

The Advocate-General contended upon the proviso of Section 53 of the Civil Procedure Code that the addition of the prayer

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for relief in the shape of possession was not admissible. That proviso runs—

"Provided that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character."

In the present suit the cause of action is precisely the same as in the former suit, viz., the exercise by the defendants, as adherents of the party of Bishop Mellus, of temporal and spiritual rights in the church, and their usurpation of exclusive possession of the church.

The difference in the original prayer for relief in the present suit from the prayer in the former suit and the prayer as it at present stands is owing simply to the change of possession granted to plaintiffs under the original decree of the District Judge having made it impossible for them in the new suit to pray for possession until their dispossession under the decree of the High Court was effected subsequently to the institution of the new suit. To say after the dispossession that plaintiffs were not in a position to amend the plaint, is to say that they could not have any relief whatever, for, under the Specific Relief Act a mere declaratory decree will not be made where further relief can be had, and plaintiffs being out of possession, can only, therefore, have relief on terms of praying for possession.

It is clear too that the suit, as it at present stands, is not inconsistent with the suit as it originally stood, for both are based upon the title of plaintiffs and the absence of title in defendants to exercise spiritual and temporal authority in the church.

This ground of appeal therefore must be disallowed.

The second and third grounds of appeal call in question the decision as to the effect of the evidence upon the first issue in regard to the exclusive title of first and second plaintiffs. To dispose of this ground of appeal it becomes necessary to consider the circumstances which have led up to the suit, and the principles upon which the main questions should be decided. Upon the latter point it is sufficient to quote from what the High Court said in their judgment in the former suit, part of which runs as follows:—

"The Church of Chittatur is admitted to have been originally a Syro-Chaldean Church in subordination to the Patriarch of Babylon. There is no evidence of the date on which it became so, or up to what date it continued so. But it may be taken from what the evidence

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discloses that, for full 70 years up to 1861, the congregation professed and followed the doctrine and practice of the Roman Catholic religion whether according to the Portuguese or Carmelite ritual, or both; and, with a slight interruption in 1861 by Mar Thomas, this state of things continued till the proclamation of Mellus in 1874.

The churches on the coast were originally Syro-Chaldean, that is, the congregations professed to follow the doctrine and discipline of the Syro-Chaldean Church—not perhaps as a matter of deliberate selection, but because the Christian religion was first presented to them in that form. During a certain portion of its history, there can be no question that that church was schismatic in a doctrinal point of view, though the evidence is that now the only difference between it and the Latin Church is in the ritual and the language of the services. But though it may have been previous to the date of the foundation of the Chittatur Church (of which date there is no evidence) that the doctrine of that portion of the Syro-Chaldean Church within the Patriarchate of Babylon became the same in substance as that of the Latin Church, it may well be that in ritual and discipline there were still substantial differences which gave a preference in the eyes of the congregation of Chittatur to the Syro-Chaldean Church, and which made the Chittatur Church continue what is originally admitted to have been a Syro-Chaldean Church, though only in distinction of ritual. Or it may be that, at the date of the foundation of the Chittatur Church as a Syro-Chaldean Church there was and continued to be a great and radical difference in doctrine between the Syro-Chaldean and Latin Churches. At all events the usage of the Christian congregation in adhering to the Syro-Chaldean form of worship in whatever way it may have been differentiated from that of the Latin Church would have the effect of impressing a trust upon the funds and property of the church for the employment of them in accordance with the usage. Nevertheless, if, at a subsequent period, the congregation as a body ceased to follow the observances of that Church and in preference followed those of the Roman Catholic Church, there would be no one left for whose benefit the usage could be continued and no one to continue it. The objects of the trust would thus have ceased to exist. Now that this is what happened in the case of the congregation of the Chittatur Church must, we think, be presumed from the evidence as to the unbroken course of the profession of the Roman Catholic faith and adherence to its doctrine, discipline, and ritual for upwards of 70 years up to 1861, and after the discontinuance of the temporary interruption which occurred at that date; and as in the *Attorney-General* v. *Bruce*(1) it ought, we think, in

(1) L.R., 6 Eq., 563.

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such case to be held that the worship according to the later profession of the congregation which it continued to adhere to till recently now forms the proper object of the trust."

Of the documents F, G, and N put in in the present case, N is the same as H in the former suit. It is an agreement entered into in 1873 by the then existing two factions of the congregation of the Chittatur Church, described as that of Cranganore and that of Virapoly, to enable each party to conduct the services without inconvenience to the other. Now both these parties who represent the congregation are indisputably under the authority of Roman Catholic Bishops. But the Bishop of Cranganore, under a Concordat with the Pope, is subordinate to the King of Portugal, while the Bishop of Virapoly is directly subordinate to the See of Rome. Document F shows the appointments of Vicars of the congregation in the years 1832, 1834, 1835, 1836, 1837, and 1839 by the Roman Catholic Vicar Apostolic. G is a similar appointment in 1838 by the Gubernador of Cranganore.

At the hearing of the appeal, objection was taken by the Advocate-General to these documents on the ground that they had not been proved. But no objection appears to have been taken to them at the original hearing, nor is the reception of them in evidence made a ground of appeal. We must therefore treat them as in evidence on the record and give them due effect. Taken with document N they go to show, if unrebutted, that the congregation was Roman Catholic from 1832 to 1839, and that it was still so in 1873. This evidence is not rebutted, nor is there any trace of the existence of a Syro-Chaldean congregation in the interval between 1839 and 1873. Indeed the evidence of defendants' witnesses confines the congregation previous to the secession to Mellus to the two parties of Cranganore and Virapoly. But the evidence of plaintiffs' witnesses admits the secession of a portion of the congregation to Mar Thomas in 1861.

The evidence for plaintiffs does not go back so far as it did in the former suit. It is not apparent why the documents in the former suit, which were so readily available to prove that the Roman Catholic doctrine and discipline were followed in the church for 70 years, at least before the arrival of Mellus, were not put forward in the present suit.

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This omission may perhaps be due to the virtual admission which the District Judge speaks of in the seventh paragraph of his judgment, "that with the single temporary interruption by Mar Thomas, the delegate of the Patriarch of Babylon in 1861, the Chittatur Church has, beyond the memory of any living person, and probably since 1599 A.D., professed the Roman Catholic faith." At all events there is an unbroken usage of the congregations from 1832 to 1873 satisfactorily shown, for the secession in 1861 did not affect the usage of the great body of the congregation and was but temporary.

There is an unbroken usage therefore for 41 years, and the commencement of it not being shown, the presumption is that it was a continuance of an older usage, which may, as conjectured by the District Judge, date back to the Synod of Diamper in 1599.

It thus becomes apparent that whatever the proper object of the trust may have originally been, it has become by usage a trust for the performance of divine worship in accordance with the doctrine and discipline of the Roman Catholic Church. Document O is a receipt by Mellus acknowledging the receipt of a letter from the Patriarch of Babylon. The sixth witness for plaintiff says he believes the signature to "O" to be that of Mellus, though he cannot swear it. He was not cross-examined as to the grounds of his belief. Mellus was out of the jurisdiction, but he was summoned to produce "all letters from the Patriarch." He did not comply with the summons. It was argued that secondary evidence of the purport of the letter sent to Mellus could not be admitted without due notice having been given him to produce it. But that due service was made on Mellus is shown by the fact that at the last moment he appeared by a Pleader, and as he was out of the jurisdiction and the service of notice upon his Pleader at the last moment would have been nugatory, this was clearly a case within the provisions of clause 6 of the proviso to Section 66 of the Evidence Act, and secondary evidence was admissible. The sixth witness for plaintiff produces P which he says is a true copy of the letter from the Patriarch delivered to Mellus as per receipt O.

What is called a copy is in French, while the original O is in Arabic. He says that it was a duplicate of this in Syriac, which came after the Arabic letter that was delivered to Mellus. The

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evidence here is very defective; no attempt was made to prove what was rather suggested than asserted, that the Syriac letter was in the same terms as that in Arabic, or that the French translation P is accurate. But the witness says Bishop Mellus was re-called by the Patriarch of Babylon by a letter. "I saw that letter. It was sent through the Archbishop of Virapoly for delivery to Bishop Mellus. The letter was forwarded by the Bishop of Madras. I produce a receipt signed by Mellus acknowledging receipt of a letter from Joseph, Patriarch of Babylon.' Here is a distinct assertion that the Syriac letter was seen by the witness, and that it was a letter from the Patriarch re-calling Mellus, and that it was sent to Mellus. These statements are no doubt bald, but they were not subjected to cross-examination either as to the facts directly deposed to or as to the witness' means of knowledge, and it must be taken that they were accepted as true. It might have been shown that there were other letters from the Patriarch received by Mellus, and that the receipt O referred to some letter other than that which the witness speaks of as being a recall of Mellus by the Patriarch; but that has not been shown. The proper inference therefore is that the letter of recall has been received by Mellus, and that he no longer possesses the authority of the Patriarch as a Bishop over the congregation at Chittatur.

With Mellus' proclamation marked "I" in this suit, dated 7th February 1875, he put forward a letter purporting to come from the Pope to the Patriarch of the 20th August 1872.

There was a considerable amount of evidence in the former suit that this letter was a forgery, and the plaint in the present suit, in its tenth paragraph, distinctly charges that it was so. There is no denial of this charge in the written statement. It is left altogether unnoticed, and the letter is not as it might be relied on by Mellus to show his authority, his case now being that his authority is derived from the Patriarch alone. It has been already shown that the Patriarch, if he could give Mellus the position of Bishop over this among other congregations in Malabar, has recalled that authority, and document R is a Bull of the Pope excommunicating Mellus. It was objected by the Advocate-General that R was only put in at the last moment, but this objection was not taken at the trial, nor so far as appears

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was the admission of the document in evidence in any way opposed.

It seems abundantly clear that the performance of worship according to the doctrine and discipline of the Syro-Chaldean Church having long ceased to be the object of the trust, Mellus and those who adhere to him as representing that church have no right to the possession of the church at Chittatur, or to the exercise of spiritual functions in it as officers of the Syro-Chaldean Church.

Plaintiff has also shown that by the recall and excommunication of Mellus he has ceased to have any right to continue in the exercise of spiritual functions in the Chittatur Church as a person duly appointed under the authority of the Pope, if he ever had such authority.

The rights of the other defendants depend upon the lawfulness of the pretensions of Mellus, and have been rightly pronounced against by the District Judge.

The plaintiffs represent the Roman Catholic party in its two factions of Virapoly and Cranganore.

An objection was taken in the Court below and also in appeal to the validity of the election of the plaintiffs six to nine (the Wardens) on the score that the election of each should have been by the whole of the congregation and not two by one faction and two by the other. But on inquiry of the learned Counsel, who argued the appeal, it did not appear that there was any thing on record to show that any portion of the congregation was on the occasion of any one election prevented from voting, so that it simply comes to this—that members of either party alone recorded votes in the election of the Wardens of their party. This does not appear to constitute any violation of the custom alleged.

The appointment of the plaintiffs one to five was not called in question.

It is clear, therefore, that the plaintiffs are the proper persons to exercise the trust, and that the decision of the District Judge should be affirmed and the appeal dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

1879. November 6.

SRI'NIVA'SA A'YYANGAR (DEFENDANT), APPELLANT, *v.* RENGASA'MI A'YYANGAR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Hindú law—Sister's son, succession by.

A sister's son does not succeed as a Sapinda.

IN this case Sámi Áyyangar having died without issue in 1862, his estate was inherited by his widow and mother in succession. Upon the death of the latter the defendant, who was her grandson, being the son of Sámi's sister, was left in possession of the estate.

The plaintiffs claimed to inherit before the defendant on the ground that they were nearer heirs.

Sámi was the great-grandson of the original ancestor Virarágava through his second son Shésha, and the plaintiffs were the sons of Appana, the great-grandson of Virarágava through his eldest son Venkatésa.

The Múnsif holding that a sister's son stands in the line of heirs next after a brother's son, dismissed the suit, but this decision being reversed on appeal, and the case remanded for trial of the other issues in the suit, finally held that plaintiffs were Sapindas of Sámi and decreed in their favor.

The defendant appealed to the Subordinate Court and then to the High Court.

V. Bháshyam Áyyangar and *S. Gopalachári* for the Appellant.

M. Parthasáradi Áyyangar for Respondents.

The Court (INNES and FORBES, JJ.) delivered the following

JUDGMENT.—We reserved judgment in this case both because the question was one of Hindú law in which it was necessary to refer to the authorities, and because there was another judgment in an important case in this Court pending at the date of the

* S.A. 480 of 1878 against the decree of the Subordinate Judge of Cuddalore confirming the revised decree of the District Múnsif of Chellambaram, dated April 17, 1878.

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argument which it was thought might have a bearing upon some of the points raised by the vakíl for the appellant (the defendant) in the second appeal.

It was admitted before us as it was admitted by the defendant in his examination as a witness that the plaintiffs are related as Sapindas to the deceased Sámi Áyyangar, as heirs to whose property they claim to succeed in priority to Srínivása Áyyangar, the defendant, who is the son of the sister of the deceased.

The old argument founded on the alleged meaning of the word 'brothers' in Section 4, Chapter II of the Mitákshará was again addressed to us and the 118th and 212th slokas of the 9th Chapter of Menu were quoted in support of the view that 'brothers' includes 'sisters.'

It was urged that the decision in *Thakoorain Sahiba* v. *Mohan Lal*,(1) which was delivered by the Judicial Committee of the Privy Council in 1867, ought not to be pressed against the defendant because the case was decided without argument. That is a direct decision that a sister's son is not a Sapinda, and it is a mistake to say that the appeal as to that point was decided without argument. What was decided without argument in that case was that a sister's son could not succeed as a Bandhu. The learned Counsel who then argued the case of the appellant gave up the point of the claim to succeed as a Bandhu, but maintained the right of a sister's son to succeed as a Sapinda. After the decision in appeal to the Privy Council from the High Court of Calcutta in *Girdari Lal* v. *The Government of Bengal*,(2) which was founded in part upon the decision of a division of Bench of the High Court of Calcutta in the case of *Amrita Kumari* v. *Lakhi Narain*, a case which afterwards received a still fuller discussion before a Full Bench and is reported in 2 B.L.R.F.B., 28, the view that a sister's son could not succeed as a Bandhu could no longer be maintained, and in a case reported at Vol. VI, p. 278 of the Madras High Court Reports, it was distinctly held that a sister's son does inherit as a Bandhu in the Madras Presidency.

But the case of *Thakoorain Sahiba* v. *Mohan Lal*(1) is still an authority for the position that a sister's son does not succeed as a Sapinda, and the view taken in that case by the Judicial

(1) 11 M.I.A., 386. (2) 12 M.I.A., 448.

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Committee after argument receives support from the more recent expressions of opinion of the learned Mr. Justice Devarkanath Mitter in the cases of *Girdari Lal* v. *The Government of Bengal*(1) and *Amrita Kumari* v. *Lakhi Narain*,(2) already referred to, that though he is a Sapinda for certain special purposes, he does not succeed as a Sapinda. We must treat the question, therefore, as one which is already concluded by authority and must hold that plaintiffs are the nearer heirs according to Hindú law, and must therefore affirm the decision of the Lower Appellate Court and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Forbes.

1879. November 7.

KRISHNAMMA (PLAINTIFF), APPELLANT, *v.* ACHAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Suit for land—Order of Demarcation Officer—Grant of pattá by Collector—Limitation.

Plaintiff in 1877 claimed possession of land which had been demarcated as poramboke in 1860, and of which a pattá had been granted to defendant in 1875 by the Collector.

Held, that this suit was not governed by Article 16, Schedule II of Act IX of 1871, as it was not necessarily a suit to set aside an official act.

IN this case plaintiff sued in 1877 to establish his title to 1·82 acres of land, which fell to his share on partition with his uncle Vencata Reddi, and to recover possession thereof.

The defendant contended that the land sued for was not included in Vencata Reddi's pattá, but was classed as poramboke at the time of demarcation in 1860, and in 1875 was assigned by the Collector to the defendant.

The Collector was made second defendant in the suit.

The Múnsif decreed for the plaintiff.

The first defendant appealed.

(1) 12 M.I.A., 448. (2) 2 B.L.R.F.B., 28.

* S.A. No. 99 of 1879 against the decree of J. Kelsall, District Judge of Kistna, reversing the decree of the District Múnsif of Guntúr, dated 28th October 1878.

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The District Judge held that the suit was barred by limitation on the ground that it was virtually a suit to set aside an act of an officer of Government in his official capacity, in which case the limitation period was one year under Article 16, Schedule II of Act IX of 1871; and that even if the date of the cause of action was the date on which the poramboke survey number was assigned to defendant by the Collector, *i.e.*, 1875, the suit was barred by the same article.

Plaintiff appealed to the High Court on the ground that his suit was not barred by limitation.

The Advocate-General (Hon. *P. O'Sullivan*), for Appellant.

The Government Pleader (Mr. *Handley*), for the second Respondent.

The Court (INNES and FORBES, JJ.) delivered the following

JUDGMENT.—The ground of second appeal is that the suit is not barred.

It was a suit for the recovery of a piece of ground said to have belonged to, and formed a part of, plaintiff's holding, and to have been wrongly included by the Demarcation Officer in some poramboke ground forming a *vagu* or channel which was afterwards allotted to defendant.

The District Múnsif held that the plaintiff had established his claim.

On appeal by defendant the District Judge dismissed the suit as barred by Article 16, Schedule II of the Limitation Act of 1871, as it was not instituted within one year of the date of the official act of the Demarcation Officer, who marked off the land in 1860, and as, even if the starting-point for the period of limitation be the date of the act of the Collector in assigning to defendant the poramboke in which the piece of ground claimed is said to be included, that date is still more than one year prior to that of the suit.

We think the decision is wrong. The suit is not necessarily a suit to set aside an official act, but one to recover immovable property, and the plaintiff has therefore only to show that he has had possession within twelve years prior to the date of suit. *Raj Bahadoor Singh* v. *Achambit Lal*.(1) It is not shown that the demarcation interfered with his possession so as to give rise to

(1) L.R., 6 I.A., 110.

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a cause of action in 1860, nor is plaintiff found to have been dispossessed at any date prior to that at which the Collector formally assigned the ground in question with other ground to defendant, and the date of the assignment by the Collector is far within twelve years of the date of suit.

We must hold, therefore, that the suit is not barred, and must reverse the decree and remand the appeal suit to the District Court for a decision on the merits.

The costs of this appeal will be costs in the cause.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kindersley.

1880. February 9.

VALIYA KE'SAVA VÁDHYAR AND OTHERS (PLAINTIFFS), APPELLANTS, v. SUPPANNAIR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Under valuation of the relief sought, Section 10 of Act VII of 1870—Section 54, Clause (a) of Act X of 1877.

Section 54 of Act X of 1877, which directs that a plaint *shall be rejected* in certain cases, applies only to the initial stages of a suit before a plaint has been registered, whereas the application of Section 10 of the Court Fees' Act, which directs that a suit shall be dismissed in a certain case, is not susceptible of restriction to any particular stage.

THIS was a second appeal against the decree of V. P. D. Rozario, Subordinate Judge of North Malabar, in Appeal No. 270 of 1878, confirming the decree of the District Munsif of Kadri, in Original Suit No. 568 of 1877.

The plaintiffs sought to recover from the defendants possession of certain parcels of land with the buildings standing thereon. They stated that the value of the property was Rs. 133-5-5 only. The defendants in their written statement denied the correctness of the valuation. The Múnsif appointed a commissioner to ascertain the value. It was found that the property was worth more than the sum stated in the plaint. The Múnsif ordered the plaintiffs to pay additional Court Fee and allowed them a certain

* Second Appeal 329 of 1879 against the decree of V. P. D. Rozario, Subordinate Judge of North Malabar, dated 19th December 1879, confirming the decree of the District Múnsif of Kadri, dated 4th March 1878.

VALIYA KE'SAVA VÁDHYAR v. SUPPANNAIR.

time for that purpose. The amount was not paid within the time and the suit was dismissed. The plaintiffs unsuccessfully appealed to the Subordinate Judge, and made a second appeal to the High Court.

The Advocate-General (Hon. *P. O'Sullivan*), for the Appellants.

Mr. *Michell*, for the Respondents.

The Court (INNES and KINDERSLEY, JJ.) delivered the following

JUDGMENT.—At the hearing of this appeal the Advocate-General did not rely upon the grounds of appeal contained in the memorandum of the appeal, but contended that in place of dismissing the suit under Section 10 of the Court Fees' Act, the Courts below ought to have followed the provisions of Section 54 of the Code of Civil Procedure, Clause *a*.

Section 54 applies only to the initial stages of a suit before a plaint has been registered, whereas the application of Section 10 of the Court Fees' Act is not susceptible of restriction to any particular stage. The investigation contemplated by Section 9 upon which Section 10 is dependent is to be set on foot if the Court sees reason to think there has been a wrong estimate of the value of the object-matter of the suit referred to in those sections. As such an error might be detected by the Court at any stage of the proceedings, the language is large enough to admit of the application of its provisions to any stage at which the discovery is made. No doubt the provisions of Section 54 (*a*) of the Civil Procedure Code relating to what is to be done in the initial stage of a suit and before registration are in conflict with the provisions of Section 10 of the Court Fees' Act in its application to those earlier proceedings, and as the Civil Procedure Code is the later enactment, it necessarily in so far implied by repeals the provisions of Section 10 of the Court Fees' Act. But in the suit out of which this appeal arises the proceedings had passed the initial stage and Section 54 of the Civil Procedure Code was no longer applicable. The Court, we think, rightly applied the provisions of the Court Fees' Act and dismissed the suit on the non-payment of the required additional stamp fee.

This provision need entail no hardship, as the Court, before dismissing the suit, is bound to fix a period within which the fee might be paid and the provision was conformed to in the present case.

The appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kernan.

1880. April 15. ILLOOR KRISTNIAH (PLAINTIFF), APPELLANT, *v.* 1. THE GREAT INDIAN PENINSULAR RAILWAY COMPANY: 2. THE MADRAS RAILWAY COMPANY (DEFENDANTS), RESPONDENTS.*

Liability of Railway Company—Valuable article not declared—Act XVIII of 1854, *Section* 10—*Act III of* 1865, *Section* 3.

A Railway Company is not liable for non-delivery of articles specified in Section 10, Act XVIII of 1854, the value of which has neither been declared nor insured.

The protection conferred by that section extends till such time as the consignee takes delivery, and does not terminate on the arrival of the article at its destination.

IN this case the plaintiff sued the defendant Companies for damages, being the value of a parcel of silk which was delivered to the G.I.P. Company at Bombay to be delivered at Adóni on the Madras Railway Company's line in August 1878.

The defendants pleaded that the contents of the parcel had not been declared to be silk at Bombay: that silk comes under the schedule of articles referred to in Act III of 1865, Section 3, or Section 10 of Act XVIII of 1854, and that the parcel ought to have been insured according to the provisions of those Acts and in compliance with the public notice of the G.I.P. Railway Company posted up at the Bombay Station where the parcel was delivered by the plaintiff's agent to the servants of the G.I.P. Railway Company.

The Múnsif found that the plaintiff's agent had not declared the value of the parcel or insured it, and that the parcel had probably been misappropriated by the Railway servants at Adóni.

On appeal by plaintiff these findings were confirmed except the last, the District Judge remarking that there was no evidence of the fate of the parcel beyond that it had been placed on the platform at the Raichore Station.

* S.A. 71 of 1880 from the decree of J. H. Nelson, Acting District Judge of Bellary, confirming the decree of the District Múnsif of Adóni, dated October 22, 1879.

ILLOOR KRISTNIAH *v.* THE G.I.P. RAILWAY COMPANY.

As to the question whether the defendants were exempted from liability owing to the plaintiff's failure to declare the value of the parcel and insure the judgment of the Múnsif (confirmed by the District Judge) was as follows:—

"The most important issue in this case is the fourth, viz., whether the defendants are responsible for the parcel owing to the failure of the plaintiff to insure it under the law in force. The important sections in Act XVIII of 1854 in relation to the liability of Railway Companies for goods delivered to them for conveyance are Sections 9, 10, 11. Of these, Section 9 relieves Companies of liability in respect of loss or injury to passengers' luggage, *in any case,* unless it shall have been booked and separately paid for; and Section 10 relieves Companies of responsibility *in any case* for loss or injury to gold, silver, raw silk, silk, and other articles of great value particularly enumerated in the section, unless the value and nature of such goods has been declared by the sender, and an increased charge for their safe conveyance accepted by a specially authorized person on behalf of the Company; Section 3, Act III of 1865, confirms the above. These two sections are in favor of the Railway Companies. Section 11 of Act XVIII of 1854 has a different aspect. In *Surutram Bhaya* v. *The Great Indian Peninsula Railway Company* recently referred by the Court of Small Causes,(1) it was said that the 11th section, taken in the aggregate, appears to mean that a Railway Company shall be responsible for the loss or injury caused by gross negligence or misconduct of their agents or servants, *except* in cases otherwise specially provided for by the Act, *e.g.*, such cases as are mentioned in Sections 9 and 10, notwithstanding any public notice given or private contract made by such Companies to the contrary. (See *Kuverji Tulsidas* v. *The Great Indian Peninsula Railway Company*).(2) The price of the silk said to have been purchased by the plaintiff's agent and 11th witness at Bombay is shown to be Rs. 625-0-6. The travelling and telegram expenses are not proved. I accordingly decide the 4th and 5th issues in favor of the defendants. The defendants have, however, failed to produce the delivery book alluded to by

(1) I.L.R., 3 Bom., 96. (2) I.L.R., 3 Bom., 104.

ILLOOR KRISTNIAH v. THE G.I.P. RAILWAY COMPANY.

the plaintiff's 1st witness Mr. D'Cruiz. I therefore dismiss the plaintiff's claim assessing each party to bear his own costs."

The plaintiff appealed to the High Court.

V. Bháshyam Áyyangar, for Appellant; Mr. *Johnstone*, for first Respondent; Messrs. *Barclay* and *Morgan*, for both Respondents.

The Court (INNES and KERNAN, JJ.) delivered the following

JUDGMENT.—We entirely agree with the decisions of the Court of First Instance and the Lower Appellate Court.

It is contended here that the protection from liability conferred on the Railway Company by Section 10, Act XVIII of 1854 in cases in which the value of such property is not declared and the higher charge paid ceases on arrival of the parcel at the place of its destination, and that a higher liability attaches between the arrival of the article and its delivery. We think the protection in such a case would extend to the period at which the consignee takes delivery.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kernan.

1880. July 22.

VENKATARATNAMMA (PLAINTIFF), APPELLANT, *v.* RÁMÁNUJA-SA'MI, A MINOR (BY HIS FATHER AND GUARDIAN), AND 2 OTHERS (DEFENDANTS), RESPONDENTS.*

Women—Office of Karnam.

Women are incapacitated from holding the office of Karnam.
Alymalammál v. *Venkataramáyyan*(1) followed.

THE plaintiff, appellant, as heiress of her deceased adopted son, brought this suit to establish her right to the office of karnam of five villages attached to the second and third respondents' zamindári, to which office the first respondent, the natural brother of the deceased, had been appointed on the death of the former karnam (plaintiff's adopted son). The first respondent denied plaintiff's right to succeed on the ground of her incapacity to hold the office of karnam, she being a female. The District Múnsif dismissed the suit on that ground and the plaintiff appealed. The Acting Subordinate Judge in his judgment said, "the first defendant is not only a natural brother of the deceased, but is also one of the sapindas of the deceased and a descendant of mirásidárs of this same karnamship. The plaintiff being a female is apparently unfit to hold the office of karnam. The District Múnsif therefore is right in construing the provisions of Section 7, Regulation XXIX of 1802." He dismissed the appeal without costs.

* Second Appeal No. 248 of 1880 against the decree of the Subordinate Court of Cocanada, dated 16th December 1879, confirming the decree of the District Múnsif of Peddapuram, dated 26th September 1879.

(1) S.D.A. Decisions (Madras), 1844, p. 85.

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The plaintiff preferred a second appeal on the grounds that the Subordinate Judge was wrong in deciding that the first respondent was heir in preference to appellant, the adoptive mother of the deceased, and in deciding that the appellant was unfit to hold the office of karnam by reason of her sex, she being competent to perform the duties by proxy. Appellant further contended that the provisions of Regulation XXIX of 1802 had been misconstrued.

C. Rathnavélu Mudaliar, for the Appellant.

M. Parthasáradi Áyyangár, for the first Respondent.

The Court (TURNER, C.J., and KERNAN, J.) delivered the following

JUDGMENT.—In *Alymalammál* v. *Venkataramáyyan*(1) it has been held that women are not entitled to succeed to the office of karnam, though they have been, and sometimes are, allowed to fill the office nominally. Their sex has been regarded as incapacitating them from the office. We are not prepared to reverse a ruling so long regarded as authoritative and so obviously reasonable and expedient on public grounds.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) S.D.A. Decisions (Madras), 1844, p. 85.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Áyyar.

1880. August 9.

SRI RÁJA SETRUCHERLA RÁMABHADRA RÁJU BAHÁDUR (SECOND DEFENDANT), APPELLANT, *v.* SRI RÁJA VAIRICHERLA SURIANARÁYANARÁJU BAHÁDUR (PLAINTIFF), RESPONDENT.*

Mortgage for a term—Redemption claimed before expiry of term—Intention of parties.

When the continuance of the enjoyment of property mortgaged for a prescribed period forms a material part of the contract, the mortgagee cannot be deprived of his right to enjoyment on the mere ground that the contract is one of mortgage.

The creation of a term is not conclusive evidence that redemption should not take place before the end of the term. But, where there was no agreement for payment of interest at an annual rate, but a lump sum equal to the principal was to be accepted as interest for the term and a small balance of rent was to be paid at the end of the term when the land was returned, and, taking the net annual usufruct at a fixed sum, a term of years was created, during which the debt and interest were to be liquidated by that usufruct, the risk of seasons and payment of quit-rent falling on the mortgagee;

Held that the basis of the contract was the enjoyment of the property by the mortgagee for the term fixed.

The Advocate-General (Hon. *P. O'Sullivan*), for Appellant.

C. Arunachella Sástri, for Respondent.

The facts and argument sufficiently appear in the judgment of the Court (TURNER, C.J., and MUTTUSÁMI ÁYYAR, J.)

JUDGMENT.—On 12th July 1869 Dolaya borrowed from the respondent Rs. 120, and to secure the repayment of this sum executed an instrument, whereby it was agreed that the respondent should take possession of the land in suit and hold it for a term of 19 years at a yearly rent of Rs. 13; that this rent, as it fell due, should be applied to the liquidation of the principal sum of Rs. 120, and a like sum of Rs. 120 which it was arranged should be taken for interest, and that on the expiry of the term of 19 years the respondent should pay the mortgagor Rs. 7, the estimated balance of the rent after satisfying Rs. 240, the mortgage debt and interest, and should return the mortgage instrument and re-deliver possession of the land to the mortgagor. It was also agreed that the respondent should pay the quit-rent due to the Government up to the end of the term.

* Second Appeal No. 146 of 1879 against the decree of the Subordinate Judge of Chicacole confirming the decree of the District Múnsif of Párvatipur, dated 23rd November 1878.

SRI RÁJA SETRUCHERLA RÁMABHADRA RÁJU BAHÁDUR *v.* SRI RÁJA VAIRICHERLA SURIANARÁYANARÁJU BAHÁDUR.

On the 15th November 1875 the heir of Dolaya sold the land to the appellant, who subsequently tendered to the respondent the amount he calculated to be due in respect of principal and interest up to the date of tender, and on the refusal of the respondent to receive and deliver possession of the land ousted the respondent.

The respondent then instituted two suits to recover possession. The appellant resisted the claim on the ground that he was entitled to redeem the mortgage at any time on repayment of the amount due for principal and interest up to the date of redemption. The Court of First Instance decreed the claim. The Lower Appellate Court has found that it was the intention of the parties to the instrument of 12th July 1869 that the land should continue in the occupation of the respondent for the full term of 19 years, and that the mortgagor should not redeem the land nor discharge the debt until the expiry of the term.

In this Court the learned Advocate-General, who appeared for the appellant, renewed the contention that his client was entitled to redeem before the expiry of the term, and in support of his contention he relied on *Mashook Amin Suzzada* v. *Maren Reddy*.(1)

There can exist no doubt that the parties to a contract of mortgage are entitled to enter into any agreement which is not forbidden by law. They may agree that the payment of the debt and the right to redeem shall be deferred to a future date; they may also agree, as in this case they have apparently agreed, that the mortgagee shall look for the payment of the principal money and interest only to a rent with which he is himself to be charged for the use and occupation of the mortgaged property. This being so, it is the duty of the Court, as was observed in *Dorappa* v. *Kundukuri Mallikarjunudu*(2) "to act on the sensible rule applicable to the case of other contracts that the intention of the

(1) 8 M.H.C.R., 31. (2) 3 M.H.C.R., 366.

SRI RÁJA SETRUCHERLA RÁMABHADRA RÁJU BAHÁDUR v. SRI RÁJA VAIRICHERLA SURIANARÁYANARÁJU BAHÁDUR.

parties is to be ascertained from the terms of their agreement and given effect to."

It was not disputed by the learned Advocate-General that the rule above mentioned was to be applied to contracts of mortgage, but he contended that, in contracts of mortgage, it should be assumed the mortgagor was at liberty to redeem at any time, unless a contrary intention was expressed. Where a day is fixed for the payment of a debt and nothing more appears, the presumption is that the date is fixed for the convenience of the debtor and that he may repay the debt at an earlier period, and in like manner, where the mortgage is created as a mere security for the sole purpose of ensuring the payment of the debt at a certain date, we are not prepared to say that the debtor may not discharge the debt and put an end to the security at an earlier date, but where the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract, it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract was one of mortgage. Where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, but the creation of a term is by no means conclusive on this point. It may be apparent from the express terms of other conditions of the contract or by implication that the parties intended that redemption should be allowed at an earlier period as, for instance, when the debt had been discharged in a manner contemplated by the parties and the purpose for which the term had been created thus satisfied, and this is apparently the ground on which the decision in *Dorappa* v. *Kundukuri Mallikarjunudu*(1) proceeded. In each case then the Court must look to the language of the contract to ascertain whether the parties intended that redemption should take place only at the end of the term, or at any earlier period, at the option of the mortgagor.

The Lower Appellate Court has found that in this case the parties intended that the mortgagee should remain in possession until the end of the term, and we are not prepared to hold that in coming to that conclusion it has misconstrued the contract. Not

(1) 3 M.H.C.R., 367.

SRI RÁJA SETRUCHERLA RÁMABHADRA RÁJU BAHÁDUR v. SRI RÁJA VAIRICHERLA SURIANARÁYANARÁJU BAHÁDUR.

only is a term created, but it is apparent that the parties contemplated the discharge of the debt and interest in the manner expressed in the deed, and in no other manner.

There is no agreement for the payment of interest at an annual rate, but the parties have agreed that for the term a lump sum equal to the principal shall be accepted as interest, and that a small balance of rent shall then be paid, thus contemplating and providing for a settlement at the end of the term. Taking that net annual usufruct at a fixed sum, a term of years is created, during which the debt and interest are to be liquidated by that usufruct, the risk of seasons and the payment of quit-rent being undertaken by the mortgagee. Hence it is only reasonable to conclude that the basis of the contract was the enjoyment of the mortgaged property by the mortgagee for the period stipulated.

The decrees of the Court below are confirmed and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Muttusámi Áyyar.

KANDASA'MI, A MINOR, BY HIS MOTHER AND GUARDIAN DORAI AMMA'L (PLAINTIFF), APPELLANT, *v.* DORAISA'MI A'YYAR AND OTHERS, MINORS, BY THEIR MOTHER AND GUARDIAN VEMBU AMMA'L (DEFENDANTS), RESPONDENTS.* 1880. August 16.

Hindú father, power of, to alter status *of family—Partition by, of family property, binding on sons, irrespective of consent, if* boná fide *and according to law.*

A partition made by the father is binding on the sons not only in respect of the father's share, but also of their own shares, provided that it is made subject to the restrictions mentioned in the Hindú law. It becomes obligatory by the will of the father as regulated and restrained by the law, irrespective of the consent of the sons.

When a father having five sons—three by one wife and two by another—executed in his last illness a document, whereby, after retaining a small portion for himself, he directed that the family property should be divided into three-fifths and two-fifths shares, with the manifest intention that from the date of the execution of the document it should operate as a severance, (1) of the interest of his sons by one wife from that of his sons by the other, and (2) of the interest of all his sons from his

* R.A. No. 111 of 1879 against the decree of F. Brandt, District Judge of Trichinopoly, dated 4th April 1879.

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own during his life but neither the guardian of the infant sons nor the eldest son, who was of age, were parties to the instrument:

Held, that this was not a will but a partition; that it was competent to the father thus to alter the *status* of his sons; that the question was whether the transaction was *boná fide* and in conformity with Hindú law, and not one of contract, as in the case of a partition between brothers.

T. Ráma Ráu, for the Appellant.

Mr. *Norton* and *R. Sadagopa Chári*, for second and third Respondents.

The facts and argument in the case sufficiently appear in the judgment of the Court (KINDERSLEY, J., and MUTTUSA'MI ÁYYAR, J.) which was delivered by

MUTTUSA'MI ÁYYAR, J.—This appeal arises from a suit instituted by one Dorai Ammál to recover for her son, the minor plaintiff, the landed property specified in exhibit D as allotted to his share, and to that of his uterine brother Subbaráyasámi, since deceased. Admittedly the property in litigation is ancestral; and at the date of his death Subbusámi had five sons, the minor plaintiff, and one Subbaráyasámi, since deceased, by his second wife Dorai Ammál, and the first three defendants by his senior wife Vembu Ammál. On the 30th June 1878 Subbusámi was seriously ill, and, in consequence, he made the *parikat* (deed of partition) D, as stated by himself in that document. By this instrument he constituted his second wife the guardian of his two minor sons, the present plaintiff and Subbaráyasámi; and his eldest son, the first defendant, as the guardian of the second and third defendants in this suit. He next reserved for his own subsistence 17·24 acres of land as particularized in the document, and directed that the rest of the landed property, consisting of 97 acres and houses and house-sites, should be divided into three-fifths and two-fifths shares, as specified in the instrument. He next divided the movable property, consisting of bonds, moneys due on pledge of jewels, and paddy in his house, among his sons in the same proportion, and provided for a similar division, a year after his death, of the land reserved for his subsistence, less 2·95 acres bestowed in gift upon his daughter's son, and for the payment, in like shares, of his funeral expenses, including those of his first annual ceremony. Though the first defendant was evidently regarded by his father as a major, yet neither he nor Dorai Ammál was required to sign the document. Whatever doubt there may exist as to the effect to

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be given to it, there can be none as to the father's intention, viz., that it should operate from the date of its execution as a severance, first of the interest of his sons by the second wife in ancestral property from that of his sons by the first wife, and of the interest of all his sons therein from his own during his life. He caused the instrument to be attested by no less than twelve persons and to be registered; the Sub-Registrar calling at his house for the purpose of registering it. On the 7th July 1878 Subbusámi died, and during this interval no objection was apparently taken to the document D either by his first wife or by the first defendant, though it is reasonable to presume from the publicity attending its execution and registration that its existence was known to them both. It must also be observed, on the other hand, that the arrangement indicated in the instrument D was not carried out by Subbusámi during his life, either in part or in whole; and although an attempt was made for the plaintiff to show that a division of movable property and of documents was actually made on the 30th June 1878, I have no hesitation in expressing my concurrence in the opinion of the District Judge that the oral evidence bearing on this point is untrustworthy. On the 22nd July 1878 the first defendant executed the document A, acknowledging payment of plaintiff's share of Subbusámi's funeral expenses, and the receipt of movable property delivered to him for his and his younger brother's shares in accordance with the provisions of the instrument D.

Now, if the execution of the document be *boná fide*, it proves that the instrument D has been ratified by the first defendant, and acted upon in part between the 30th June and 22nd July 1878.

On the 9th August 1878 plaintiff's younger brother, then an infant of five or six months old, died, and upon the first defendant refusing after this event to register the receipt, its registration was enforced by judicial process in November 1878. It was alleged for the minor plaintiff that by virtue of the partition-deed D, he and his deceased brother Subbaráyasámi ceased to be co-parceners of the first three defendants; that on the death of Subbaráyasámi his undivided share lapsed to the plaintiff in preference to his divided brothers; that the first defendant confirmed and admitted the document D; that it had been acted upon in so far as it related to the division of movable property

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and to the payment of Subbusámi's funeral expenses; and that, after the death of Subbaráyasámi, the first defendant repudiated the exhibit D, and, in collusion with the other defendants, who are his father's tenants, refused to make over to the minor plaintiff the two-fifths share allotted to him and his deceased co-parcener.

The first defendant allowed the trial to proceed *ex parte;* and the first wife, who was made a party at her own instance, contended as the guardian of the second and third defendants that they were no parties to the instrument D; that it was not competent to their father to have executed it; that the income allotted to their share was smaller than that allotted to the plaintiff's share; that exhibit D was neither ratified nor acted upon in part; and that, owing to the plaintiff's minority, this suit was not at all maintainable. When examined as a witness for the plaintiff, the first defendant admitted the receipt exhibit A, and the payment made to him on account of his father's funeral expenses, but denied that he was of age either at the date of the partition or of the suit, and that the movable property was ever divided as stated in the receipt; adding that his own mother knew nothing of what he did, and that he allowed the trial to proceed *ex parte* at the instance of his stepmother, who promised to "settle some points" for him if he kept quiet. The main contention in the Court below was whether document D could take effect as a partition-deed so as to make the sons of the first and second wives of Subbusámi divided brothers as between themselves.

The District Judge, Mr. Brandt, held that Subbusámi was not competent to execute it; that it was in substance a testamentary disposition; that as such, it could not take effect as against the property in dispute; that though as a partition-deed it could operate to make the father a divided member from his, sons, it could not render the sons divided members as between themselves; that the execution of exhibit D was neither *boná fide* nor beneficial to the minor sons; that no division of movable property took place as alleged for the plaintiff; that though he was inclined to think that the first defendant was still a minor, his age was not material, and that he executed the receipt exhibit A under some inducement held out to him by his stepmother. In this view the District Judge dismissed the suit with costs.

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The main question for decision in this appeal is whether exhibit D is valid, and whether it could operate as a partition-deed not only as between the father and his sons, but also as between the sons by his first and second wives, whose respective shares were thereby separated and ascertained. Assuming that the father executed the document D *boná fide* and in accordance with the Hindú law, I see no reason to think that it could not alter the *status* of the sons. According to the Hindú law it is competent to a father to make a partition during his life, and the partition so made by him binds his sons, not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him, though subject to certain restrictions imposed in the interest of his family. In cases like this the question is, not whether such partition is a contract like a partition made among brothers after their father's decease, but whether it is a legal transaction concluded in conformity to the Hindú law.

In Chapter I, Section II, Vol. 2, the author of the Mitákshará says: When a father wishes to make a partition, he may, at his pleasure, separate his children from himself, whether one, two, or more sons. In commenting on this passage Bálambatta says: "He may make them distinct and several by giving to them shares of the inheritance." It appears from paragraph 6 that he may do so both with respect to property acquired by himself and property inherited by him; that in the one case the distribution may be unequal, while in the other it should be equal, subject in ancient times to be rendered unequal by means of a deduction in favor of senior sons as directed by the law. In paragraph 14 its legal effect is determined: "When the distribution of more or less among sons separated by an unequal partition is legal or such as is ordained by law, then the division made by the father is completely made, and cannot be set aside. Else it fails though made by the father." It is again observed that it is a power regulated by law, and must be exercised *boná fide* in accordance with it. Nárada is cited in the same paragraph as observing that a father who is afflicted with disease or influenced by wrath, whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate. Thus, according to the Mitákshará, the father has a power to

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will of the adults alone, the co-heirs being under an obligation to preserve the share which belongs to a minor, or an absent co-parcener, with its accumulations, and the minor or absentee being at liberty to set aside, if either unfair or fraudulent, when he attains his age or returns from abroad. Hence it was held in *Nallapa Reddi* v. *Ballammál*(1) that a partition might take place as regards a minor's share during minority. Though in that case the minor was represented at the partition by his mother, such representation is not necessary to its validity, though it is often cogent evidence to show that it was fair and *boná fide*.

A partition may be partial either as regards the persons who seek to divide or as regards the property to be divided, but whether it is partial in either sense or complete depends rather on the contents than on the nature of the partition-deed. No doubt it is a general rule that even when it purports to separate one co-parcener and to leave the others in co-parcenery, the arrangement must be the concurrent act of all in respect to the property allotted to the co-parcener who desires to separate. But this rule is subject, as shown above, to two exceptions: first, the case of a minor or absentee from necessity; and secondly, that a partition made by the father who possesses, subject to certain restraints, a power to distribute the heritage among his sons, whether adults or minors. The real question, therefore, in the case before us is whether the partition evidenced by document D was fair and *boná fide*. Another question is whether exhibit D is, in substance, as observed by the District Judge, a testamentary disposition. Document D purports to be a deed of partition; it reserves a share to the father and says: "There shall hereafter exist between you (sons of the first wife on one side and those of the second on the other) only a connexion of friendship, and no connexion whatever in respect of property." Hence the document is both in form and substance a deed of partition, intended to take effect by virtue of the power vesting in him as a father to distribute the property among himself and his sons. No doubt the instrument was executed by the father in his last illness, seven days before his death, when he might have had reason to think that he might die; but in the absence of a rule of law

(1) 2 M.H.C.R., 182.

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that agreements for partition made during the last illness of a co-parcener are invalid, it is a reason rather for examining whether the arrangement is fair and impartial than for setting it aside at once. He might have hoped to recover, though his illness might have led him to think that a partition was necessary for the peace of his family and to prevent his two wives from quarrelling with one another, and thereby injuring the interest of his sons, four of whom were minors. I am therefore of opinion that the document D cannot bear the construction that it was intended to operate as a will. I may add that this power was in ancient times intended to be exercised, according to the texts, when the father's connexion with the family as its head was about to cease. Accordingly Hárita says: "A father during his life distributing his property may retire to the forest, or enter into the order suitable to an aged man, or he may remain at home, having distributed small allotments and keeping a greater portion" (Dáyabága, Chapter II, 57). In Dáyarahasiya the order suitable to an aged man is explained as follows: "If the period of becoming an anchorite be arrived, let him become an anchorite. If the period for the order suitable to old age or that of a resigned recluse is come, let him make his resignation. If neither of these be the case, the author declares he may remain, having distributed allotments, having given them to his sons or other descendants." Thus it will be seen that this power was intended to be exercised when he was about to sever his connexion with the family as its head either by becoming a religious anchorite or a resigned recluse. Who else could be better entrusted with this power than a father, who from his position would be best able to decide whether it was to the interest of his sons that they should live in union or apart from one another, and as a general rule to make an impartial distribution? Lest this power might be abused, the law insisted upon the distribution being equal, subject to certain recognized exceptions. As a will was unknown to Hindú law, a partition-deed was the form in which this power was ordinarily exercised until lately. The District Judge was probably influenced by a remark of West and Bühler that a partition made by the father cannot effect a separation among his sons individually independently of their own desire (W. and B., 301). They refer to a passage in the Commentary by Bálam-

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batta on the Mitákshará (W. and B., 301) and to the remarks of Jaganáda on text 430 (Higg. Edition, Colebrook's Digest, Vol. II, 554). In Mitákshará, Chapter I, Section II, Vignyanésvarayogi observes, "When a father wishes to make a partition, let him separate *from himself* whether one or two or more sons," and the expression "from himself" is construed by Bálambatta as fixing a limit to the separation, and as affirming by implication the general principle that a co-parcener becomes separate only by his own choice. But in paragraphs 3 to 12 the Mitákshará speaks of distribution both of ancestral property and property acquired by the father; and in paragraphs 13 and 14 the partition made by the father, whether equal or unequal, is said to be binding, not because the sons are parties to it, but because the distribution by the father, whether equal or unequal, is impartial and is made as directed by the law. Again, in paragraphs 20 and 21, Section I, Chapter II, of the Smriti Chandrika, which is a work of special authority in Southern India, the distribution is expressly stated to be of the sons' shares as between themselves and to be independent of their consent. Upon the texts of authority in this part of India this power of distribution is an exception in the case of a partition made by the father, and an incident, not of ownership, but of paternal power, though that power must be exercised without partiality and within the limits fixed by the law. As to the text 430 cited in Colebrook's Digest, it relates to re-union, and in it Vrihaspati says: "He is re-united who, having made a partition, lives again, through affection, with joint property in the same house with his father, his brother, or his paternal uncle." In his remarks on this text Jaganáda says that after partition, it may be annulled and a re-union is possible and legal, and that where among four brothers two are separated and two remain undivided, but the effects are distributed by arithmetical computation—for instance, when 10 rupees out of 20 rupees have been allotted to two brothers and 5 rupees to each of the other two, there can be no re-union in the case of the former since there was no partition between them, and an arithmetical computation of their shares was not an act of partition between them, but a means of ascertaining the shares to be allotted to the latter two who have separated. Though he speaks of a partition by common consent of all the brothers, he is referring to the general rule and not

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negativing the case of a distribution by the father as an exception. It seems to me therefore that West and Bühler are not warranted in regarding the distribution made by a father as a mere incident of ownership, and not as an incident also of paternal power. As no re-union is alleged in the case before us, the real question, as already observed, is whether the distribution in the circumstances in which it was made in this case was *boná fide* and legal.

Before expressing an opinion on this question, it is desirable to ascertain whether the income of the property allotted for the share of the plaintiff and his brother Subbaráyasámi is larger than that of the lands allotted for the shares of the first three defendants. We shall therefore refer the following issue for trial upon the evidence already recorded and upon such further evidence as the parties may adduce, whether the property allotted for the shares of the plaintiff and Subbaráyasámi yields a larger income in proportion to the shares than that of the lands allotted for the shares of the defendants.

The District Judge is requested to return his finding in the above issue, together with the evidence, to this Court within two months from the date of receiving this order, when ten days will be allowed for filing objections.

KINDERSLEY, J.—I concur in this Judgment.

NOTE.—Upon the return of the findings of the District Judge on the issues sent down, the High Court, finding the partition unequal and invalid, directed that the plaintiff should be put into possession of one-fourth share of the lands sued for (instead of two-fifths originally claimed), as being his share under the general Hindú law, in order to prevent further litigation; and after ascertaining by a further inquiry the amount of mesne profits due to the plaintiff, ordered each party to bear their own costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

1880. Sept. 30.

VARANAKOT NARA'YANAN NAMBÚRI (PLAINTIFF), APPELLANT, *v.* VARANAKOT NARA'YANAN NAMBÚRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Res judicata—Decree against Karnavan binding on the tarwad—Civil Procedure Code, Section 13, Explanation 5; Section 30.

A decree against a Karnavan of a Malabar tarwad, as such, is binding upon the members of that tarwad, though not parties to the suit, in the absence of fraud or collusion.

A Karnavan is not a mere trustee, nor do the rules of Courts of Equity as to the necessity of making cestui que trusts parties to suits against trustees by strangers, apply to the case of a Karnavan and the members of the tarwad.

Explanation 5 of Section 13, Civil Procedure Code, is not limited to the case of a suit under Section 30.

The members of a tarwad claim under a Karnavan, suing as such, within the meaning of Explanation 5 of Section 13.

Status of Karnavan discussed.

THE plaintiff and defendants 1 and 3–12 were members of a Malabar tarwad.

This suit was brought to set aside the decree in Appeal No. 2 of 1875, in the District Court of North Malabar, confirmed in Special Appeal No. 538, and for a declaration that certain lands were the jenm (absolute property) of the plaintiff's illam (family house).

The first defendant was the senior male of plaintiff's illam, and as such was a party to the above suit, in which it had been declared that he (first defendant) had only a kánom right over the very same lands as were the subject-matter of the present suit.

The plaintiff's allegation was that the above suit had not been conducted by the first defendant *boná fide*, but that he had been guilty of fraud and collusion, and, in consequence, the decrees were not binding upon plaintiff or the family property.

* S.A. 262 of 1880 from the decree of J. W. Reid, District Judge of North Malabar, reversing the decree of the District Múnsif of Kavai, dated 20th November 1879.

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The first defendant denied that he had been guilty of any fraud, but supported the plaintiff in claiming the land as the jenm of their illam.

The second defendant (plaintiff in the former suit) alleged that this suit was the result of collusion between plaintiff and first defendant; that the first defendant had acted *boná fide* in the conduct of the former suit; that the decree was therefore binding on plaintiff; and that the land was not plaintiff's jenm.

Defendants 4, 5, 7 to 12 supported the allegations of defendant 2.

Defendants 3 and 6 were *ex parte*.

The Múnsif found that the first defendant had been guilty of misconduct, set aside the decree in question, and declared the lands to be the jenm of plaintiff's illam, remarking as follows:—"If the first defendant, the admitted head of the family of plaintiff, had conducted the former suits in good faith, the decrees therein passed must be held as binding upon the plaintiff; but as it is found that he was guilty of gross negligence and imprudence in conducting them, it will not be just to hold that the plaintiff is bound by the decrees therein passed."

Defendants 4, 5, 7–12 appealed.

The District Judge reversed the Múnsif's decree on the ground that there was not sufficient evidence of fraud or collusion to justify re-opening the matters settled in the Special Appeal decree in the former suit.

A. Rámachandráyyar, for Appellant.

Mr. *Shephard,* for Respondent.

In second appeal the chief objection taken was that the plaintiff was not a party to the former suits, and was not thereby estopped from seeking to set aside the decrees.

The Court (KERNAN and FORBES, JJ.) delivered the following

JUDGMENT.—The question for decision on this second appeal is whether the plaintiff, a member of a Malabar tarwad, is bound by a decree (in Suit 2 of 1875) against the Karnavan of the tarwad (declaring that certain land is not the jenm of the tarwad, but is held by the Karnavan on kánom). The Karnavan above was defendant in the Suit 2 of 1875 (affirmed on appeal in Suit 538 of 1876).

The second respondent in this appeal was plaintiff in that suit, and alleged that the lands were his jenm, and that the defendant, VARANAKOT NARÁYANAN NAMBÚRI v. VARANAKOT NARÁYANAN NAMBÚRI.

the Karnavan (first respondent in this appeal), only held the lands on kánom right, and on this point a distinct issue was raised and decided in that suit. In this suit the plaintiff alleged that the Karnavan acted fraudulently and collusively with the plaintiff in No. 2 of 1875, and that the decree was the result of fraud and collusion.

This allegation is negatived by the finding of the Lower Appellate Court, and, for the purpose of this appeal, it must be taken that the Karnavan acted *boná fide* in defending that suit.

The appellant further alleged in this suit that the lands are the jenm of his tarwad, and are not the jenm of the second respondent. The second respondent relies on Section 13, Civil Procedure Code, and pleads that the decree in Suit No. 2 of 1875 binds the plaintiff as a member of the tarwad of which first respondent is the Karnavan. Apart from the question of fraud, the question at issue in this suit is directly and substantially the same as in Suit No. 2 of 1875.

The parties are not the same, inasmuch as plaintiff and the defendants 3 to 12 inclusive, who are members of plaintiff's tarwad, were not parties to No. 2 of 1875. But the second defendant contends that the plaintiff and the other members of the tarwad claim under the Karnavan, and that under Explanation 5 of Section 13 the first respondent litigated (with second respondent in No. 2 of 1875) *boná fide* in respect of a right claimed in common for himself and all the members of his tarwad, including plaintiff.

It is admitted for appellant, and it is quite clear, that the Karnavan of a tarwad is not a mere trustee.

The position of a Karnavan and his rights and obligations have been the subject of various decisions which will be found at Norton, 210 to 212. Under Malabar law, the eldest male member of the tarwad is the Karnavan. In him is vested actually (though in theory in the females) all the property, movable and immovable, belonging to the tarwad. It is his right and duty to manage alone the property of the tarwad, to take care of it, to invest it in his own name (if it be movable) either on loans on kánom or other security, or by purchasing in his own name lands, and to receive the rents of lands. He can also grant the land on kánom by his own act or on otti mortgage. He is not accountable to any member of the tarwad in respect of the income of it,

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nor can a suit be maintained for an account of the tarwad property in the absence of fraud on his part. He is entitled in his own name to sue for the purpose of recovering or protecting property of the tarwad in his own name. None of his acts in relation to the above matters can be legally questioned by the tarwad if he has acted *boná fide*. If any of his acts have been done *malâ fide* they can be questioned by the members of the tarwad, and he may be removed for *mala fides* in his acts, or for incompetency to manage and other causes. He is interested in the property of the tarwad, as a member of it, to the same extent as each of the other members. All the members, including the Karnavan, are entitled to maintenance out of the tarwad property. His management may not be as prudent or beneficial as that of another manager would be, but, unless he acts *malâ fide*, or with recklessness or utter incompetency, he cannot be removed from such management.

Almost the only restraint on him in such management is that he cannot alienate the lands of the tarwad except with the assent of the senior Anandravan, or, in certain circumstances, of others of the Anandravans.

In theory, no doubt, property is, according to Malabar usage and law, derived through and from the female members, and, in this view, all the rest of the tarwad claim under them. But in practice the property is acquired and possessed by, and in the name of, the Karnavan for the time being by his own independent act. All the other members claim through him and are bound by his acts (save as to alienations as above explained). This suit is a recognition by the plaintiff that he claims under the first defendant, as plaintiff rests his case on the ground of the fraud and collusion of first defendant. If he did not claim under the first defendant, there would be no occasion to allege fraud, or to seek to set aside the decree in No. 2 of 1875. It may be said that, although the tarwad claim *through* the Karnavan in the same manner as cestui que trusts claim through a trustee, yet that they do not claim under him. An instance where the tarwad claim under a Karnavan, is when he has acquired property as his own acquisition, and not with the assistance of the tarwad property, which acquisition descends to the tarwad. However, the suggested analogy between a trustee and a Karnavan is not correct, VARANAKOT NARÁYANAN NAMBÚRI v. VARANAKOT NARÁYANAN NAMBÚRI.

inasmuch as a mere trustee has no personal interest in the estate, whereas the Karnavan has such interest. The rules of English Courts of Equity in equity cases, as to the necessity for cestui que trusts being parties to suits by or against trustees by and against strangers to the trust, do not apply. In Suit No. 2 of 1875 he defended not only on his own behalf, but on behalf of the rest of the members of the tarwad, who were therefore (within Explanation 5 to Section 13) deemed to claim *under* him. Explanation 5 is not limited in its language to a suit under Section 30, which authorizes a suit or defence by one or more parties on behalf of numerous other parties having the same interest in a suit. In such suits the party suing or defending must have permission of the Court to sue or defend, and must in the plaint or defence purport to sue or defend expressly on behalf of himself and the others, and notice is required to be given to those interested who are not parties to the suit. Such suits may embrace claims or rights of a public nature, whereas Explanation 5 is confined to *private* rights. Again, Section 30 contemplates the case of parties too numerous to be conveniently made parties to the suit. There is no limit fixed certainly to the number by Section 30; each case must depend partly upon whether the Court considers that the number interested is too great to be conveniently made parties—having regard, amongst other circumstances, to the delay in the disposal of the suit owing to absence of such interested parties, or possibly to the death of some of them, and the necessity of bringing their representatives before the Court. In such cases each of the parties interested, although claiming the same interests, for example, as creditor of a deceased person or of a company, may have a separate interest, viz., in the debt due to him in which the other parties are not interested. But Section 30, though it may apply to the case of a Karnavan suing or defending his own joint interest with, and inseparable from, the rest of the tarwad, when the members may in an unusual case happen to be very numerous, is not applicable in ordinary cases where the members are not numerous, being in this case only 12. The members of the tarwad in their normal state live in one or more family house or houses (according to their number) within a very limited circle, though some may probably be temporarily absent. When a tarwad contains more members than one house will conveniently

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suit, then by consent of all they divide into separate houses, and separate property is allotted to each house called (amongst Bráhman members) *illam.*

In Suit 2 of 1875 the first defendant was sued as Karnavan, and defended on the ground that the land was the jenm of his illam or tarwad. He was not sued in his individual capacity, and the kánom, under which it was decided he held the lands, was granted to a former Karnavan and came by descent to be managed by him. It appears to us that appellant claims within the meaning of Section 13 under the first respondent, and that the matter directly and substantially in issue in this suit was directly in issue in Suit No. 2 of 1875 between the second respondent and the first respondent, and that plaintiff's claim in this suit is barred by Section 13.

Independent of the above views, we may point out that the appellant was well aware of the Suit No. 2 of 1875, and assisted the first respondent therein, as found by the Lower Appellate Court, to defend the suit. It was open to him to apply in that suit to be made a defendant as being interested in the matter, but he did not do so. The fourth, fifth and seventh to twelfth respondents, who are members of the appellant's illam, do not support him; they assist the second respondent. The third and sixth respondents took no part in the suit and were *ex parte.*

We dismiss the appeal with costs.

PRIVY COUNCIL.

VENKATA RÁMA RAO (PLAINTIFF), v. VENKATA SURIYA RÁO AND ANOTHER (DEFENDANTS).

P.C.* 1880. November 16.

[On appeal from the High Court of Judicature at Madras.]

Strídhanam—Testamentary power of widow.

The testamentary power of a Hindú female over her strídhanam being commensurate with her power of disposition over it in her lifetime, and both being absolute, no distinction can be taken as regards a widow's power of disposition by will

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* *Present:*—Sir J. W. COLVILE, Sir B. PEACOCK, Sir M. E. SMITH, and Sir R. P. COLLIER.

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over immovables in the purchase of which she has invested money given to her by her husband. Such estate is subject to the disposition which the general law gives her the power to make of her strídhanam.

A widow who received presents of movable property from her husband from time to time during their married life, after his death purchased immovable estate, partly out of such property and partly with money the proceeds of jewellery forming part of her strídhanam.

Held that she could dispose of such immovable estate as her strídhanam.

APPEAL from a decree of the High Court of Madras (10th August 1877), affirming a decree of the Judge of the Godávari District (19th September 1876).

The suit out of which this appeal arose was brought by the Zamindár of Pithapúr, the appellant, to recover a one-half share of the mutta of Viráveram from his cousins, the respondents, on the ground that at the death of his grandmother Bhávayammál he became joint heir with them of the property in dispute. The defendants claimed to be exclusively entitled to the mutta under the will of Bhávayammál.

The Court of First Instance, finding that the will had been made as alleged, and that the estate had been purchased out of what formed, in the Court's opinion, the strídhanam of Bhávayammál, decreed in favor of the defendants. This decree was maintained by the High Court on appeal.

The facts of the case are fully stated in the Judgments of the Judges of the High Court upon that appeal, which is reported in I.L.R., 1 Mad., 281. The question whether the mutta was such property as Bhávayammál might dispose of by will, so as to exclude the claim of the plaintiff, having been decided in the affirmative by the High Court, was again raised on this appeal.

Mr. *J. D. Mayne* appeared for the Appellant.

Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyne*, for the Respondents.

Reference was made to *Luchmunchunder Geer Gossian* v. *Kalicharn Singh*.(1)

Their Lordships, without calling upon the Counsel for the respondents, delivered the following Judgment:—

Sir JAMES W. COLVILE.—Their Lordships are of opinion that no ground has been made for reversing the Judgments of the Indian Courts in this case. The point, as ultimately stated,

(1) 19 Weekly Reporter, 295.

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is of the narrowest description. It is admitted that upon the facts, as found by the Court, it can no longer be disputed that this mutta, Viráveram, was purchased by Bhávayammál, the grandmother of the appellant and the respondents, out of her strídhanam. Again, the testamentary power of a Hindú female over such strídhanam is admitted by Mr. *Mayne* to be commensurate with her power of disposition in her lifetime, both being absolute. So far the case would have been governed by the decision of this Board, which is reported in the 19th volume of the "Weekly Reporter," page 295, but for the subtle distinction which has been raised. It is suggested that where the funds are shown to have come wholly or in part from the husband, and to have been afterwards invested in land by his widow, the same law which governs in the devolution of immovable estate derived from the husband is to govern that acquisition; but their Lordships cannot find any trace of authority to support such a distinction. It is clearly the law that from the time the funds were given to the widow by the husband they became her strídhanam, and that she had full power of disposition over them. Years after the death of the husband she chooses to invest them in land. Can it be contended with any plausibility that that was land which was derived from the husband? Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindú female over her strídhanam.

They must, therefore, humbly advise Her Majesty to affirm the Judgments of the Courts below, and to dismiss this appeal with costs.

Solicitors for the Appellant, Messrs. *Cobbold* and *Woolley*.

Solicitors for the Respondents, Messrs. *Burton, Yeates* and *Hart*.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Forbes.

1880. December 13.

PONNUSA'MI PILLAI (PETITIONER), *v.* PACHAI (COUNTER-PETITIONER).*

Regulation IV of 1816, *Section* 29, *Zillah Judge.*

A Subordinate Judge has no jurisdiction to hear and determine petitions under Section 29, Regulation IV of 1816. The jurisdiction created by that regulation being peculiar can only be exercised by the District Judge as representative of th Zillah Judge.

M. Parthasárádi Áyyangar for the Petitioner.

P. V. Runga Ohari for the Counter-Petitioner.

The facts and argument sufficiently appear in the Judgment of the Court (KINDERSLEY and FORBES, JJ.).

JUDGMENT.—In this case a suit had been decided by a Village Múnsif under Regulation IV of 1816. The person against whom the suit was decided presented a petition to the Subordinate Court charging the Village Múnsif under Section 29 of the same Regulation with corruption. The Subordinate Judge found that the Village Múnsif had been guilty of the grossest misconduct. He therefore set aside the decree, and charged the Village Múnsif with costs.

A petition has been presented to this Court on behalf of the Village Múnsif objecting, among other things, that the Subordinate Court had no jurisdiction to deal with the case.

We think that this objection is well founded. Under Regulation IV of 1816, Section 29, there is no appeal against the decision of a Village Múnsif, but either party may present a petition to the *Zillah* Judge charging the Múnsif with corruption, or gross partiality. The Zillah Judge is now represented by the District Judge; and the jurisdiction being a peculiar one created by the express terms of the Regulation, we do not think that it can

* C.M.P. 343 of 1880 against the order of the Subordinate Judge of Cuddalore, dated May 13, 1879.

properly be exercised by the Subordinate Court. We, therefore, resolve to quash the proceedings of the Subordinate Court and to refer the petition to the District Judge for disposal.

No costs will be allowed in this Court.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Forbes.

1880. December 15.

KANDASA'MI PILLAI (SECOND DEFENDANT), APPELLANT, *v.* MOIDIN SAIB (PLAINTIFF), RESPONDENT.*

Foreign Judgment, suit on—Decree enforced sub-modo.

The plaintiff obtained a judgment in a French Court against the father (now deceased) of the defendant.

Plaintiff sued defendant on that judgment as representative of his father in the French Court. The defendant pleaded that the bond on which that judgment was obtained was not genuine. Judgment was given for the plaintiff in the French Court with costs. The plaintiff brought the present suit on that judgment. The Lower Appellate Court decreed for the plaintiff against the defendant, personally, for the full amount of the decree in the French Court and interest.

Held that the defendant was bound by the judgment in the French Court against him as representative of his father and personally bound to pay all costs awarded against him: but that, in giving effect to the French judgment, it was to be executed according to the rules of the Civil Procedure Code, which, in the absence of proof of assets received by a representative of a deceased, only gives a decree against the defendant as representative to be levied from the assets of the deceased.

THIS suit was brought upon a judgment of the French Appellate Court at Pondicherry, delivered on the 20th November 1875 in favor of the plaintiff.

The defendants denied that they were bound by the foreign judgment: the Lower Appellate Court having held that they were so bound, the defendants preferred a second appeal.

A. Rámachandra Áyyar for the Appellant.

T. Ráma Ráu for the Respondent.

* Second Appeal No. 210 of 1880 against the decree of R. Vassudéva Ráu, Subordinate Judge of Negapatam, dated 8th December 1879, reversing the decree of the Court of the District Munsif of Tranquebar, dated 24th November 1877.

KANDASÁMI PILLAI v. MOIDIN SAIB.

The facts are sufficiently set forth in the Judgment of the Court (KERNAN and FORBES, JJ.).

JUDGMENT.—The plaintiff obtained a judgment in a French Court against the father, now deceased, of the defendant.

The plaintiff sued the defendant on that judgment as representative of his father in the French Court.

The defendant pleaded that the bond on which that judgment was obtained was not genuine. Judgment was given for the plaintiff in the French Court with costs. The plaintiff sues on that judgment.

There was a decree in the Lower Appellate Court for the plaintiff against the defendant, personally, for the full amount of the decree in the French Court and interest, amounting in all to Rs. 1,775-2-9.

The defendant appeals on the ground that the judgment in the French Court does not bind him; at all events that, as he did not execute the bond, and as there was no allegation in the French Court or in this suit that he got assets of his father sufficient to pay the bond, there should not be a personal decree against him, but only a decree against him as representative of his father to be levied from the assets of the deceased. We hold that the defendant is bound by the judgment in the French Court against him as representative of his father, and that he is personally bound to pay the costs awarded against him in that suit; and we also hold that the decree of the Lower Appellate Court is right in making a decree against the defendant personally for those costs, and also for all the costs of this suit, as he contested plaintiff's right throughout. But we are of opinion that in giving effect to the French judgment, it is to be executed according to the rules and procedure of this Court, which, in the absence of proof of assets received by a representative of a deceased, only gives a decree against the defendant as representative to be levied from the assets of the deceased. We direct that a decree be made accordingly. Each party to abide his own costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Kindersley.

1877. March 21.

RATNAM AND THREE OTHERS (PLAINTIFFS), APPELLANTS, *v.* GOVINDARÁJULU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindú Law—Mortgage incurred to pay off prior mortgage and improve family house binding on sons.

Where a mortgagee of a house, the ancestral property of a Hindú family, advanced money on the representation that it was required to complete improvements in the family house and to pay a mortgage debt carrying a higher rate of interest which had been contracted to make those improvements,

Held that the sons of the mortgagor were bound by the mortgage.

In the case of improvements of the family property made by the managing member of a Hindú family where the sum spent was large, but the discretion of the managing member was exercised *bonâ fide* and for the benefit of the estate, and the family had this benefit, such discretion should not be narrowly scrutinised.

Saravana Tévan v. *Muttayi Ammál*(1) and *Hanumanpersaud Panday* v. *Mussumat Munraj Koonweree*(2) discussed and followed.

THE question in this case was whether a mortgage debt of 1,800 rupees, contracted by the first defendant, father of the plaintiffs, with the second defendant to pay off a prior mortgage debt of 1,500 rupees at a higher rate of interest, and to complete improvements which were being made on the family house, was binding upon the plaintiffs.

The suit was dismissed by Holloway, J.

The plaintiffs appealed.

Anandacharlu and *Kamásam* for the Appellants contended—

1. That the strict Hindú law, as contained in the Mitáksharâ, is that an alienation by the managing member is justified only by a pressing necessity.
2. That this rule has been, for obvious reasons, extended by the Privy Council so as to cover alienations for the benefit of the joint estate.
3. That the present case did not fall within that rule as it was clear that the rents after the improvement, viz., Rs. 17, were not enough to cover the interest on the sum borrowed.

* Appeal No. 18 of 1876 from the decree of Holloway, J., dated 4th April 1876.

(1) 6 M.H.C.R., 371. (2) 6 M.I.A., 393.

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4. That there was no other property belonging to the joint estate from which a repayment of the loan could be reasonably expected.
5. That the creditor who wished to be protected on the ground of *bona fides* must make inquiries on these points.
6. That if the creditor in this case had made these plain inquiries, it is quite clear he would have seen that there was no reasonable chance of the loan being repaid, and the effect of the improvement would be the loss to the family of the estate altogether.
7. That the not making of these inquiries puts the creditor out of the category of *boná fide* creditors, and
8. That it was not for the benefit of the estate to pull down a house worth a few hundred rupees and build in its place a palace worth a few thousands.

Mr. *O'Sullivan* for the Respondent.

The Court (KERNAN, J., and KINDERSLEY, J.) delivered the following Judgments:—

KERNAN, J.—At the hearing of the appeal it was admitted by Mr. *Anandacharlu* for appellants, that the fourth plaintiff was not born until after the mortgage was executed to the second defendant, and the plaint does not seek relief on his behalf against the mortgage. Mr. *Anandacharlu* relied on the rule of Hindú law that the manager of an undivided Hindú family cannot mortgage or sell ancestral estate except for a pressing family necessity, and referred to the Mitákshará. He contended that the evidence did not prove that Rs. 1,500 or Rs. 1,800 was applied in enlarging or improving the house, but even if such was the effect of the evidence, the enlargement of the house was not a family necessity, and submitted that the effect might be that the improvements might be more costly than the value of the houses, and could not therefore be held to be within the rule of a family necessity.

There is no doubt that a large sum of money was spent in enlarging the house both on the ground-floor, in building additions and in adding an upper story, and that the house is now unquestionably much larger, very nearly double as large as before, and of much greater value than before the improvements, that the ancestral estate is largely benefited by the additions, repairs and improvements. The plaintiff will have the benefit of them what-

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ever they are. P. Parthasáradi Mudali, who resided next door and knew what the improvements and additions were, says that they cost Rs. 1,700 and upwards. This is a general statement, no doubt without details; but he must have known in or about the cost, and he lent Rs. 1,500 on the security of the house. He was apparently disinterested and he was not contradicted by the first defendant. The first defendant says, no doubt, that he applied 500 of the 1,500 to pay a loan got in 1867, with which and more money he entered into partnership in trade with Rámachandra Náick, and Rámachandra Náick proves the loan of Rs. 800.

The first defendant, I must think, is in collusion with his son and could, no doubt, if it suited him, have proved that the improvements and repairs did not cost Rs. 1,700 as alleged by P. Parthasáradi Mudali. If it was of importance to determine how much actually was spent on the house on improvements and repairs, I am not prepared to say that there was not Rs. 1,500 or Rs. 1,700 so spent. Whatever money was laid out was not applied to ornamental or unproductive improvements but to substantial material additions, which increased the value of the estate. It could scarcely be contended that it was a matter of family necessity to build the additions and improvements to the house, as distinguished from necessary repairs. But the first defendant is the managing member of the undivided family, and, in exercise of his discretion and for the benefit of the family, he made these additions and improvements; and upon the evidence I think that his discretion was prudently exercised, and that he acted in so doing in good faith, certainly as regards the family. The interest, 15 per cent. per annum, was 3 per cent. per annum higher than the ordinary rate and the sum spent was large; but where the discretion of the managing member is exercised *boná fide* and for the benefit of the estate and the family have the benefit, I do not think that such discretion should be narrowly scrutinised. In *Saravana Tévan* v. *Muttáyi Ammál*(1) Sir C. Scotland, at page 379, says:—

"It is the firmly-settled rule of law resting upon the authority of the Mitákshará and repeated Judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the shares of the minor co-parceners in immovable ancestral property except for

(1) 6 M.H.C.R., 371.

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the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be *for the benefit of the joint estate*."

In *Hanoomanpersaud Panday* v. *Mussumat Munraj Koonweree*,(1) at page 423 of the judgment, referring to the power of the manager for an infant heir to charge an estate not his own it is said, "It can only be exercised rightly in a case of need or for the benefit of the estate."

It does not appear clearly in the evidence that all the improvements and additions were made after the 1,500 were borrowed, but the evidence of Parthasáradi is that "In January I advanced the money and then the upstair was built." "It was in January 1871—at that time he had this house and was building at the back—he had to put up the verandah as he told me." The evidence of the second defendant is, "I lent Rs. 1,800 on this house—first defendant applied to me. He was building a portion of the upper story and a third division. Improvements were made to the house. The addition had been made with my money. At that time the additions were being made—3 rooms and a hall were built." The first defendant says he paid one Rágavalu 700 out of the 1,500 rupees, but, as already observed, does not say how much was spent on the house or contradict Parthasáradi Mudali as to the cost of Rs. 1,700. His wife says that money was raised by pledge of jewels, but the first defendant does not say so, and she does not appear to have known of the mortgage of the house. The evidence of the bricklayers as to the time when the buildings were finished is very uncertain.

If the Rs. 1,500 were spent on the house, I am of opinion it was for the benefit of the estate to grant that mortgage of January 1871, and that plaintiffs 1, 2, and 3 should be bound thereby. If portion of that Rs. 1,500 to the extent of Rs. 700 was not so spent on the house, it would be a question whether the mortgagor *boná fide* inquired into the necessity for the loan to that extent as to which there is no evidence. But however invalid the mortgage might possibly be to that extent, if the question, now, was between Parthasáradi Mudali and the plaintiffs, the question in this case is very different. No doubt it is not enough for the second defendant to

(1) 6 M.I.A., 393.

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say that he advanced money wherewith the prior mortgage for 1,500 was paid off, and to assert that the mortgage of March 9, 1871, is, therefore, necessarily binding on plaintiffs to that extent, even though the prior mortgage might not so bind them. See *Saravána Tévan* v. *Muttáyi Ammál*.(1)

The second defendant alleges that he made all due and necessary inquiries to ascertain that the first defendant was entitled to grant a valid mortgage, although it does not, on the evidence, appear whether he was or was not aware that the sons of the first defendant had any interest in the house; the presumption, I think, is that he was aware of the fact.

In *Hanoomanpersaud Panday* v. *Mussumat Munraj Koonweree*(2) referring to the onus of proof on the lender or purchaser from a manager, it is said—

"Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But if they think he does so inquire and acts honestly the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and he is not bound to see to the application of the purchase-money.' 'Their Lordships do not think that a *boná fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.'"

In *Saravána Tévan* v. *Muttáyi Ammál*,(1) Sir C. Scotland, referring to the *onus* of proof, and to *Hanoomanpersaud Panday* v. *Mussumat Munraj Koonweree*(2) says that one of the positions established by that judgment is—

"'That where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it had not been advanced for the purpose of discharging an antecedent charge on the property, or an old debt incurred by an ancestor, the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration-money, must be established by positive proof. But that where the consideration-money has been advanced, in good faith, for the purpose of discharging an antecedent charge on the property, or an unsecured debt of an ancestor, it is enough for the vendee or mortgagee to establish a *primá facie* case as

(1) 6 M.H.C.R., 371. (2) 6 M.I.A., 393.

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to the charge having been made, or the debt incurred for a proper purpose, by presumptive proof; that is by proof of the existence of such a charge or debt; of its having appeared on reasonable inquiry to be an unquestioned burden on the property, or liability from which it was prudent to relieve the family, and of the advance having been made in good faith for its discharge.' 'Following these rules, I think that between a *boná fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there is this distinction to be observed that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to prove more than the Court below decided to be necessary. He must give proof not only of the consideration for the sale or mortgage having been *boná fide* advanced in discharge of an antecedent debt, but also of an inquiry productive of results which warranted his reasonably believing that such debt was a family obligation, and the sale or mortgage a prudent arrangement for its discharge.'" See *Girdari Lal* v. *Kantoo Lal*.(1)

In this case the second defendant was applied to for the advance by the first defendant, and was informed by him that the money was required to pay off the existing mortgage for Rs. 1,500 and some interest, and further that the Rs. 1,500 had been borrowed to improve the house. The second defendant saw that additions and improvements and repairs were made, and in the course of being made. He describes the size and condition of the original house and the altered size and condition. He believed the statement of the first defendant that the money had been borrowed for the purpose of the improvements; there is no evidence that he was informed by the first defendant or got any information which would lead him to believe that any part of the Rs. 1,500 had been borrowed to pay off any individual or personal debt of the first defendant, or that the money had been so applied; he was informed by the first defendant that Rs. 300 more were required to finish the work which he said was then incomplete. He saw that the loan at 12 per cent. would be a saving or benefit to some extent to the first defendant. The representations of the first defendant may not have been correct as to all the 1,500 having been borrowed to improve the house, but if so, the second defendant was deceived by the first defendant. The circumstances of the case are peculiar and it is not easy to see

(1) L.R., 1 I.A., 322.

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what further enquiry second defendant should or could have made unless he called for the books of account or vouchers of the first defendant to show the application of the Rs. 1,500, which probably no lender who saw the improvements and additions already made, and in progress, would call for. I have no doubt that the second defendant acted in good faith in agreeing to make and in afterwards making the advance, and I think that under the circumstances he acted with due caution, and that therefore the mortgage is binding on the plaintiffs.

The last point to which it is necessary to refer is one that arises from the fact that the plaintiffs, the co-parceners with the first defendant, are his sons. It is this, whether the mortgage by the first defendant, plaintiff's father, for a debt, though not incurred for a family necessity or for the benefit of the family or in the reasonable and prudent management of the estate, yet which was not incurred for any immoral purpose, is not good against the plaintiff. The case cited by Mr. *O'Sullivan* of *Girdari Lal* v. *Kantoo Lal*(1) appears to go the whole length of that proposition. It was a case from Bengal and governed by the Mithila law; but the Court in giving judgment expressly decided that the law is the same under the Mitákshará. See *Naráyana Chárya* v. *Narso Krishna*.(2)

It is not alleged that any portion of the debts for which either the mortgage for Rs. 1,500 or 1,800 was contracted was incurred for any immoral purpose. However it is not necessary to dispose of the case on the ground there taken as we are agreed that the appeal should be dismissed for the reasons before stated. It is to be observed that *Saravána Tévan* v. *Muttáyi Ammál*(3) was not referred to in *Girdari Lal* v. *Kantoo Lal*, though the alienations made by the father to pay debts of his contracted for his own purposes, but not illegal or immoral, were set aside at the suit of the sons on the ground that the debts were not contracted for family necessity.

We dismiss the appeal with costs.

KINDERSLEY, J.—The question is whether the debt was incurred for such family purposes as would make it binding on the plaintiffs, who were minors. The second defendant lent to the father and manager of the family the sum of Rs. 1,800 on the mortgage of the family house. This was mainly to pay off a previous

(1) L.R., 1 I.A., 322. (2) I.L.R., 1 Bom., 262.
(3) 6 M.H.C.R., 371.

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mortgage for Rs. 1,500 which bore a higher rate of interest, and that previous loan had been contracted partly to pay an old trading debt but principally to meet the expense of adding to and improving the family house. The liability of the minors for the old trading debt was not seriously questioned. The family have the benefit of the additions to and improvement of the house, which enable them to take in additional lodgers, and the bulk of the money appears to have been advanced *boná fide* to pay for such additions and improvements. I am therefore of opinion that the mortgage is binding on the plaintiffs and that the appeal ought to be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1878. November 27.

ABDULLA RAWUTAN (DEFENDANT), APPELLANT; PAKKERI MOHOMED RAWUTAN (DEFENDANT), APPELLANT; MADARSAH RAWUTAN (DEFENDANT), APPELLANT, v. SUBBARA'YYAR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Tenancy from year to year—Notice to quit—Objection first taken in second appeal.

An agreement to pay rent in the ordinary form of muchalká given by tenants from year to year already in possession is not a lease.

A tenancy from fasli to fasli is not a tenancy at will, but a tenancy from year to year. In the absence of custom to the contrary, no tenant from year to year in this country can be ejected without being served at a reasonable time beforehand with a notice to quit at the period of the year at which the tenancy commenced.

Notice to quit is a necessary part of plaintiff's title to eject, and when the issues raised the question of plaintiff's right to eject, and no proof was given of notice by plaintiff, but no objection was taken to the want of notice by the defendant until second appeal:

Held, that it was competent to the Court to entertain the objection in second appeal, but that the plaintiff should have liberty to meet the objection upon the trial of an issue referred to the Lower Court upon that point.

THE plaintiffs in these cases, as trustees of a pagoda, sued the defendants, their tenants, for recovery of rent and to eject them from their land.

* Special Appeals 468, 469, 470 against the decrees of the Subordinate Judge of Negapatam, confirming the decrees of the District Múnsif of Tranquebar, dated 8th April 1878.

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It was admitted that all the defendants had been in possession for many years and paid rent (swámibogam) to the pagoda.

The defendant Abdulla pleaded that he had a right of permanent occupancy, had improved the land, and was not liable to be ejected. These pleas were not proved, and it was found that he had executed an agreement on the 11th December 1874 to pay rent within the 25th December 1875.

The defendants Pakkeri and Madarsah set up the same defence as the defendant Abdulla and failed to establish it. The Múnsif found that all three were liable to ejectment at will, and this decision was confirmed on appeal.

One of the grounds of second appeal was that the defendants were not liable to ejectment at will owing to their long holding of the lands in dispute. No objection was taken to want of notice till the hearing.

Rámachandra Ráu Sahib for the Appellants.

V. Bháshyam Áyyangar for first Respondent.

A. Rámachandráyyar for second Respondent.

The Judgment of the Court (KERNAN, J., and MUTTUSA'MI ÁYYAR, J.) was delivered by

KERNAN, J.—In these three cases the Judgment we are about to pronounce applies to a state of facts common to each of them, and the decision applies equally to each case.

In each case the plaintiffs are the same, viz., the trustees of the temple Sri Varattéswara Swámi in Tanjore, and the defendants in each case are separate and different persons, tenants of the temple lands.

The action in each case is brought, first, to recover possession of the holding of each tenant; and second, to recover rent due to the temple. The defendants have severally pleaded a right of permanent occupancy upon payment of the rent properly payable to the plaintiffs. Upon this question the findings of the Lower Courts have been against the defendants. But such findings appear to us to have been premature and unnecessary to be determined, as such question could not be properly the subject of enquiry unless the *primâ facie* title of the plaintiff to maintain ejectment and dispossess the defendant was made out. There is no question made as to the title of the plaintiffs to the land and to the rent payable by the defendants, the tenants, but

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the question is whether the plaintiffs, upon the case made by them, are entitled to maintain the ejectment without giving reasonable notice to quit to the defendants.

Case 468.—As to the defendant in 468. Plaintiffs' case is that the defendant, a tenant for previous years, executed a document on the 11th December 1874, agreeing to pay rent within the 15th of December 1875, and that he carried away the produce of Báva and Uva without paying rent. The action 468 was brought on the 11th December 1876.

Case 469.—As to the defendant in 469. Plaintiffs alleged that his defendant, also a tenant for previous years, was asked in Fasli 1284 to execute a lease agreeing to pay paddy, the same as other Purakudis, and refused to do so, but agreed to pay Purakudi várum; and though he executed on the 15th December 1874 an account settlement for kar paddy obtained in the fasli, still that defendant carried away the produce, and when asked in April and May 1875 to deliver possession he did not do so, but cultivated for the Fasli 1286, and carried away the whole produce.

Case 470.—As to the defendants in this case. Plaintiffs' case is that they were for some years, previous to Fasli 1274, tenants paying ayen and swámibogam, which they failed to pay for Fasli 1284, and that they did not deliver possession of the lands, though notice was served on them on the 25th June 1875.

This notice was, I believe, a notice to deliver *immediate* possession, or at the end of the fasli ending 12th July, only three weeks after notice.

The defendants in the Cases 469, 470 are, as the plaintiffs allege, only tenants from fasli to fasli. The defendant in 468, plaintiffs allege, is tenant under a lease of 1874—15th December to 15th December 1875—but it is clear on the document A that it was not a lease, nor for one year certain, ending 15th December 1875. The document is the ordinary form of muchalká given by tenants from year to year already in possession.

In all three cases the tenants admittedly had occupied for many years previous to 1874. They are therefore (even on plaintiffs' view of the facts) all tenants from year to year. As tenants from year to year they cannot be turned out of possession without being served with notice to quit, requiring them to quit and deliver possession at the period of the year at which their tenancy

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commenced, which notice should be so served a reasonable time before the period at which they are required to quit and deliver up possession.

No custom has been alleged entitling a landlord in India to dispossess a tenant from year to year, from fasli to fasli, without a previous notice to quit. There is no reason why notice in this country should not be required as in England and Ireland.

In the case of *Right* v. *Darby*,(1) Lord Mansfield says in reference to such tenancy: "But then it is necessary, for the sake of convenience, that if either party should be inclined to change his mind, he should give the other half-a-year's notice before the expiration of the next or any following year." Convenience, which was the foundation of the rule requiring notice in England (from the time of Henry VIII) to terminate a tenancy from year to year, equally applies to landlords and tenants in India.

There are special provisions in the Madras Act VIII of 1865, conferring on landlords a summary power of ejectment by proceeding before the Collector, which provisions do not apply to a regular suit. As observed by Sir C. Scotland in 6 Madras, p. 170, "the duration of the tenancy is still a matter left for determination in a regular suit by the application of the general law to the agreement of the parties in each case, subject to the restriction in Section 44 of that Act requiring a suit after summary eviction to be brought within one month from the time of eviction." Act VIII of 1865 in Section 12 provides that tenants may relinquish their lands at the end of the revenue year by a writing to be signed by them in the presence of witnesses. Whether any notice of such intention may be required, it is not now necessary to consider; but the provision giving the right to the tenant assumes that without it the tenant could not relinquish a tenancy lasting from fasli to fasli, except after a reasonable notice or other mode of terminating the tenancy.

From this provision it is not a strained inference to draw, that the law required notice on the part of a landlord to terminate the tenancy on his part. The rule has been adopted in Calcutta. See I.L.R., 2 Calcutta, p. 146, and the cases there cited.

(1) 1 T.R., 159.

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It was said by Mr. *Bháshyam Áyyangar* that the case in 2nd Calcutta, page 146, turned upon the Bengal Act VIII of 1869, but on reference to the case, we find that such is not the case.

What is reasonable notice is a question the answer to which must depend upon the time which should be allowed for the convenient removal and procuring of another farm, possibly, by the tenant on the one hand, and for the landlord on the other hand to procure another suitable tenant. It is not necessary that we should decide that question. Probably the rule in England, viz., six months, will be adopted whenever the question shall be considered.

In the cases before us, 468, 469, no notice to quit was given, and in 470 the notice given was on the 25th June, for immediate possession, or possession at the end of the fasli, 12th July, which we hold was not reasonable.

It was contended before us that on second appeal it was not competent for an appellant to ground his appeal on the absence of notice to quit, or on the necessity for such notice, as it was not raised in the Court below, and to which the other side might have given an answer in fact. A passage in 3 Moore's Indian Appeals was referred to at page 242: "It is a safe maxim for a Court of Appeal to be governed by, that an objection which if taken might have been cured, and which was not taken in the Court below, shall not be taken in the Court of Appeal." The objection there was the want of proper parties to the suit.

The case in 14 Moore's Indian Appeals, page 194, was also cited, containing this passage: "The objection, as taken below, necessarily assumes the plaintiff to be claiming as heir to the son; and to urge, on the hearing of the appeal for the first time, that the real title of heirship must be derived from the mother and not from the son was to start a new ground of objection to title which the plaintiff had no opportunity of meeting below." (See cases 2 B.L.R., Appendix 239; 5 B.L.R., Appendix 44; 6 B.L.R., Appendix 356.)

It was, no doubt, part of the necessary proof of plaintiff's title to eject defendant that he should prove notice to quit, and the issue in each case put the plaintiff to prove his right to eject. But the defendants did not in the written statements or in their defence, in either of the Lower Courts, raise this question of notice to quit. The plaintiff, if he desires it, must have an opportunity

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of meeting the defence of absence of proof by plaintiff of notice, if he suggests any answer in fact.

The following issues we propose to be tried in each case:—

(1) Whether plaintiff gave any, and what notice, and when, to the defendant to quit before the commencement of this suit, with liberty to the parties to give any additional evidence.

(2) According to the custom of the country, what period of notice is usual to terminate a tenancy from year to year?

It is necessary for us now to say that in the Courts below the tenancies of the defendants were considered to be at will, the Courts apparently not distinguishing a tenancy at will from a tenancy from year to year; such tenancies are essentially different. A tenancy at will is a holding by a tenant entirely dependent on the will of the landlord, capable of being terminated at any time by the will and demand of the landlord without any previous notice, and for the refusal to deliver up possession ejectment may be at once brought.

A tenancy from year to year is a holding under contract, express or implied, that the tenant may hold, until the end of any year entered on, unless the tenancy shall be determined either by agreement of both parties or by reasonable notice to quit by either party, terminating at the same period of the year at which the tenancy was commenced.

The issues directed have of course only reference to the ejectment, as there is no defence to the claim for rent.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Forbes.

1879. May 5.

SADAYA PILLAI (PLAINTIFF), APPELLANT, v. CHINNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Act VIII, 1859, Section 2—Res judicata.

Act VIII of 1859, Section 2, does not require a plaintiff at once to assert all his titles to property or to be thereafter estopped from advancing them.

The maxim *Nemo bis vexari debet in eadem causâ* cannot apply where the right on which the second suit is brought is not the same as that asserted in the former suit.

THIS was a suit to establish plaintiff's title to 5-14 acres of land; to have first defendant's name removed from the pattá granted by the Revenue authorities; and to have a pattá issued in plaintiff's name alone.

The plaintiff alleged that the first three defendants were the sons of his uncle Paradásia Pillai by his concubine the fourth defendant; that he and his uncle were undivided in interest, and lived together till the death of the latter in 1852, when a partition of the property was made between plaintiff and defendants; that this partition was finally carried out in 1864, since when defendants had been in separate possession of their share of the land; that the Sub-Collector ordered the first defendant's name to be substituted for that of Paradásia Pillai as joint pattádár with plaintiff, which led to a civil suit in 1872.

Plaintiff in that suit, as the undivided nephew of Paradásia, sued first defendant, alleging that the latter was not the son of Paradásia, and had no claim to the land in dispute; but at the hearing the Court allowed plaintiff to put in a petition with certain documents, which wholly altered the nature of the claim, for plaintiff now admitting that first defendant was the son of

* S.A. 568 of 1878 against the decree of the Subordinate Judge at Cuddalore reversing the decree of the District Múnsif of Chidambaram, dated 18th March 1878.

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Paradásia, claimed under a partition-deed executed after Paradásia's death.

Judgment was given for plaintiff, but on appeal in 1875 the suit was dismissed, the Court remarking that plaintiff's right to assert his claim under the partition-deed was not affected by this decree.

This suit was brought in 1875, and the question was whether plaintiff's claim was barred by Section 2 of Act VIII of 1859. (The Sub-Collector was made a party to the suit.)

The Múnsif found in plaintiff's favor on the ground that there had been no final decision either granting or withholding the plaintiff's prayer (*Saikappa Chetti* v. *Ráni Kolandapuri Nachiár*),(1) and because, in dismissing the suit, the Appellate Court 'allowed the option to plaintiff of maintaining a separate suit.'

On appeal the Subordinate Judge dismissed the suit, holding that the plaintiff was bound to bring forward his whole cause of action, and, if he failed upon one title, could not bring another suit upon another of a wholly different character; and that it was very doubtful whether an Appellate Court could permit the withdrawal of a suit already heard and determined by a Court of First Instance, but that in this case the order of the District Court had no such meaning.

The plaintiff appealed on the grounds that the suit was not barred, and that he was allowed under Section 97, Act VIII, 1859, to withdraw his former suit with permission to bring a fresh one.

T. Ráma Ráu for Appellant.

C. Rámachandra Ráu Sahib for Respondent.

The Court (TURNER, C.J., and FORBES, J.) delivered the following

JUDGMENT:—The plaintiff, appellant, instituted this suit to obtain a declaration that he is solely entitled to the land described in the plaint, without participation on the part of the defendants Chinni, Sinnan and Virappen; and that, being so entitled, the pattá for the land, which has been issued in his name and in the name of the defendant Chinni, ought to be cancelled and a pattá issued in his name solely.

(1) 3 M.H.C.R., 84.

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The plaintiff averred that he lived in commensality and as a member of a joint family with his uncle, one Paradásia Pillai, up to the time of his uncle's death, which occurred 25 years ago; that the property in suit was at that time joint property, and the pattá was in his name and in the name of his uncle Paradásia Pillai; that the defendant Thyli was the concubine of his uncle Paradásia Pillai, to whom she had borne three sons, the defendants Chinni, Sinnan and Virappen; that subsequently to the death of Paradásia Pillai he had come to an agreement with the defendant Chinni, and the defendant Thyli as the *de facto* guardian of her sons Sinnan and Virappen, who were at the time minors, whereby they accepted as their share of the joint property three-sixteenth cawni of land and some buffaloes, and it was arranged they should reside in the plaintiff's house until he built a house for them on the land assigned to them; that on 23rd December 1864 the defendants Chinni, Sinnan and Virappen took from him Rs. 10-8 in lieu of the house he was bound to erect and executed an acquittance, and that they have since retained sole possession of the land assigned to them, and he has held sole possession of the land mentioned in the plaint; that the Sub-Collector nevertheless issued a pattá for the land mentioned in the plaint, in which the defendant Chinni is included as co-occupier of the land.

In a former suit instituted by the plaintiff in 1872 he claimed the same relief as he now seeks, but on different averments. While asserting, as he now asserts, that the property in suit was the joint property of himself and his uncle Paradásia Pillai, he then averred that the defendant Chinni was not the son of his uncle and had no claim on the property. In the course of the proceedings in that suit the plaintiff produced the documents on which he now relies to prove a partition subsequently to his uncle's death, and endeavoured to obtain from the Court a decree on the strength of that partition; but it was ruled that in that suit his claim must stand or fall on the case originally set up by him, and that if he derived any title from the alleged partition, he might assert it in another suit. It being found that Chinni was the son of Paradásia Pillai, the suit was dismissed.

To the present claim the defendants plead among other pleas that the plaintiff is estopped from maintaining this suit by the provisions of Section 2, Act VIII of 1859. This is clearly not so,

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because the claim he now advances has not been determined in any previous proceedings. He claimed the same property it is true, but he based his claim on inheritance—succession by survivorship to the interest of his united uncle; that claim was inquired into and determined. He now sues on the title created by the agreement made between him and the defendants through their guardian subsequently to the death of Paradásia Pillai. This claim has not been heard and determined; the provisions of Section 2, Act VIII of 1859, do not therefore apply to it. Nor is there anything in that Act which required a plaintiff at once to assert all his titles to property or to be thereafter estopped from advancing them. The only ground on which objection could be taken to a second claim under the circumstances is the rule of law *Nemo debet bis vexari pro eâdem causâ*, but that rule cannot apply where the right on which the suit is brought is not the same as that asserted in the former suit. *Munshee Buzloor Raheem* v. *Shamsoomjee Begum*,(1) and *Ráo Kurun Sing* v. *Nawab Mahomed Fyz Ali Khan*.(2)

The further question arises whether the plaintiff can claim the relief awarded to him by the Court of First Instance. As his title is impugned by the defendants, it is not obvious why he should not obtain a declaratory decree. It is true this Court cannot go on to give him other relief than an injunction restraining the defendants from interfering with his possession, and that it cannot direct the issue of a Revenue pattá (in making which direction the Múnsif exceeded his powers), but it can make a declaration of the plaintiff's right, and this declaration the plaintiff can carry to the Collector, who will grant him a pattá.

The plaintiff must of course establish that his suit is brought within the time limited for suits for such a declaration, and that on the merits he is entitled to relief.

The decree of the Lower Appellate Court is set aside and the case remanded to that Court for trial. The costs of this appeal will abide and follow the result.

(1) 11 M.I.A., 551. (2) 14 M.I.A., 187.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.

1879. August 28.

VASUDE'VA SHANBOG AND ANOTHER (PLAINTIFFS), APPELLANTS, *v.* NARAINA PAI (FIRST DEFENDANT), RESPONDENT.*

Indian Oaths Act, 1873, *Section* 11.

The mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other is in itself no adjustment of the suit.

If the matter stated in the agreement is sufficient as the grounds of a decision, a judgment may be passed, for then it would be conclusive evidence under the Oaths Act.

The difference between Regulation III of 1802, Section 6, and the Indian Oaths Act, 1873, Section 11, discussed.

C. *Rámachandra Ráu Sahib* for Appellants.

Mr. *Tarrant* for Respondent.

The facts and arguments in this case sufficiently appear in the following Judgments:—

MUTTUSÁMI ÁYYAR, J.—This was a suit to set aside a usufructuary mortgage for Rupees 2,000, which was executed on the 24th January 1865 by the plaintiffs' father in favor of the first defendant's younger brother, since deceased. In Case 28 of 1872 the first defendant sued the first plaintiff and his mother for possession under the mortgage, together with mesne profits, in the Court of the District Múnsif of Múlki. The contention for the present first plaintiff then was that the mortgage was created by his father without any family necessity, and that it was binding neither upon his share nor upon that of his younger brother, the second plaintiff, in the family property under mortgage. While this suit was pending the property mentioned in the plaint was attached and sold in execution of the decree passed against the plaintiffs' father in Suit 301 of 1849; and the second defendant, third defendant's brother, became its purchaser, and was in consequence made a party to Suit 28 of 1872. The purchaser admitted the mortgage-debt, and agreed to its liquidation from the sale-proceeds, while the mortgagee admitted that his time having expired, he was content to get back his money with mesne profits. Thereupon the District Múnsif heard the evidence and found that the mortgage debt was a family debt, but held that, in the circumstances already mentioned, the first defendant was not at liberty to claim possession, and in this view dismissed the suit for possession, adding, however, that he might sue the purchaser for the amount of the mortgage with mesne profits, and that the purchase-money, less the decree-debt, should be held in deposit. The present suit was then instituted by the plaintiffs on the ground that the mortgage was a transaction not binding upon them, and, pending its decision, the District Múnsif directed, at the instance of the first defendant, that the amount held in deposit be paid to him. This defendant contended that the debt was incurred for a proper family purpose, and referred to the suit before the District Múnsif of Múlki. As to the sale of the equity of redemption, the Court of First Instance held that the decree which led up to it was passed for a debt incurred by plaintiffs' father before they were born, and that it was binding upon them. To this part of the decision the plaintiffs have apparently submitted and preferred no appeal against it, and it requires no further notice. As regards the mortgage, however, the plaintiffs and the first defendant agreed that if the former should swear before the idol at Dharmastálam, according to custom, and repeat thrice that their father did not spend the money borrowed for performing the Upanáyanam ceremony of the second plaintiff, for paying the judgment-debts of Annappaiya, Manganadaiya and Naranapai of Mangalore, for maintaining his family and for making certain ornaments, the first defendant was to pay back two-thirds of the amount paid him in satisfaction of the mortgage, and that, if they should fail to do so, their suit was to stand dismissed with costs. A commission was issued, the plaintiffs swore in accordance with the agreement, and the Subordinate Judge passed a judgment in their favor for two-thirds of the amount paid out to the first defendant. On appeal the District Judge reversed this decision, observing that the question now at issue was decided in the first defendant's favor in Suit 28 of 1872; that the mere fact of the plaintiffs having taken an oath as to matters of which they had no

* S. A. 15 of 1879 against the decree of J. W. Best, District Judge of South Canara, modifying the decree of the Subordinate Judge, dated 22nd August 1878.

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personal knowledge cannot entitle them to a decree; and that moreover a decree for money could not be given in this suit. It is argued on second appeal that the District Judge was not at liberty to re-open and enter on the merits of the case after its disposal under the provisions of the Oaths Act, X of 1873. The agreement on record is in the form in which such agreement was usually recorded when Section 3, Regulation III of 1802 was in force. It is to be observed that by this Regulation the decision of a suit by the oath of one of the parties was expressly recognized if the other party consented to that mode of decision. In their proceedings of the 14th December 1816 the late Sudder Court deprecated the principle of the Regulation, and ruled that, according to its true construction, a Court cannot decide a suit simply upon the oath of one party, even though the other consented to that mode of decision. In Clause 3, Section 14, Regulation IV, and in Section 27, Regulation VI of 1816, however, the Legislature recognized the principle; and in their Circular Order dated the 20th August 1835, the late Sudder Court referred to this recognition, and ruled that a suit may be decided by the oath of one of the parties with the consent of the other. Again, in their proceedings dated the 3rd July 1849, the Court observed that the Regulation was only permissive, and that it was not imperative upon a Court to decide a suit upon oath, even though both parties should consent to such mode of arbitration. Further, in S. A. 14 of 1850 the Sudder Court held that the non-observance by a party of an agreement to settle a dispute by oath is not alone sufficient for deciding against him. Thus, when the Code of Civil Procedure was about to be enacted, it was perfectly legitimate to decide a suit by the special oath of one of the parties if the other party consented to that mode of decision, and if the agreement between them was duly observed; but if the agreement was broken, it was no proper ground of adverse decision, though, if there was a conflict of testimony, it might serve as corroborative evidence and turn the balance against the party breaking the agreement. When the Code of Civil Procedure was passed this mode of adjustment was ignored, and the language of Section 98, which dealt with the adjustment of suits, referred, as observed by the High Court in *K. A. Haji* v. *P. M. Ramen Numbiar*,(1) "to an agreement upon some terms respecting the subject matter of the suit which are capable of being embodied in a decree whereby the suit would be disposed of, and not to an agreement that, if the party should do certain things, a decree should be passed in his favor, and, if he failed to do those things, then in favor of the other, so that what decree should be passed would depend upon the result of an enquiry whether, subsequent to the agreement, certain acts had or had not been performed." After the Code of Civil Procedure became law, the Regulation of 1802 was repealed by Act X of 1861; and, alluding to this fact, the High Court ruled in their proceedings of the 3rd March 1868 (4 M.H.C.R., Appendix III) that the sections relating to the settlement of suits by oath, when the parties mutually consent to that mode of settlement, being repealed, the Courts no longer possess the power of following that procedure, though there is nothing to prevent the Courts, if they have the means, from facilitating a settlement of this nature by the parties by satisfying themselves that the necessary conditions are fulfilled. The proper procedure under this proviso was to examine the parties concerned after the oath is taken, to see that if the consent, originally expressed conditionally, was still adhered to, and then to pass a judgment by consent; but if the consent was then withdrawn, the Courts had no alternative, as held in *K. A. Haji* v. *P. M. Ramen Nambiar*,(1) but to dispose of the case in the regular way. In this state of the law the Oaths Act was passed, and came into force on the 1st May 1873. Like the old law, it recognized the agreement of one of the parties to a judicial proceeding to be bound by the oath of the other. But when the agreement was observed and the oaths taken, it was a mode of adjustment under the Regulation, while it is only conclusive evidence of the matter stated therein under the Act. In the one case it was in itself a ground of decision, while in the other it is conclusive evidence of certain fact or facts, so that how far they might sustain a particular decision against the party bound by the oath would depend on the legal consequence of such fact or facts in relation to the relief prayed for. The difference between the two enactments is not, as is commonly supposed, only verbal,

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for the Regulation adopted the usage which survived in the country—the settlement of suits by trial by ordeal, which formed part of the ancient Hindú law of procedure; while the Act, by requiring that the oath agreed to be taken shall be repugnant neither to justice nor to decency, nor purport to affect any third person, and making the oath a kind of special sanction, under which the evidence of a party or witness may be made conclusive by consent, divested it of its character as an arbitrary and at times objectionable mode of settlement, and at the same time utilized its effect upon the conscience of a party or a witness, in the interests of justice, by constituting the agreement when it is observed into pre-appointed and irrebuttable evidence by consent.

If the foregoing statement of the law on the subject and the changes in the old law which have led to it is correct, I may take the following propositions as established :—

I. The mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other is in itself no adjustment of the suit.

II. If the party to be bound by the oath adheres after the oath is taken to the mode of disposal mentioned in the agreement, then it is an adjustment, and a judgment by consent may be recorded, for the consent then would be unqualified and embody certain terms relating to the object matter of the suit and capable of being at once embodied in a decision.

III. If the matter stated in the agreement is sufficient as the ground of a decision, a judgment may be passed, for then it would be conclusive evidence under the Oaths Act.

As to the mode in which the Subordinate Judge has dealt with this particular suit, the agreement was taken in the form in which it was usual to take it under the old law, and it not only recites the matter to be repeated upon oath, but also mentions the modes of disposal when the agreement as to the oath is observed and when it is broken. The record does not show that the first defendant was examined after the oath was taken, and that he expressed a fresh consent to the modes of disposal mentioned in the agreement, and I think, therefore, that the Judgment cannot

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be sustained as a judgment by consent. Again, the matter stated in the agreement has reference to the application of the loan. It may well be that the loan in dispute was not applied in the manner stated in the agreement, and still the money was advanced in the belief that it would be so applied; and unless the creditor's *bona fides* as well as the beneficial application of the money lent are negatived, a decision adverse to the creditor cannot be upheld. In no possible view of the case therefore can the Judgment of the Court of First Instance stand.

As to the Judgment in Suit 28 of 1872, it is not clear from the record whether the second plaintiff was a party to that suit. I am therefore of opinion that the Judgments of the Courts below should be reversed, and that the suit should be remanded for disposal on the merits.

KERNAN, J.—I agree in the Judgment of Mr. Justice Muttusámi Áyyar that the decision in *K. A. Haji* v. *M. P. Ramen Nambiar*(1) applies, and that the Sub-Judge ought to have proceeded to hear the case. Under the Oaths Act it may be that the facts stated in the oath are to be taken as conclusive evidence, but still the case should not have been decided on the consent.

As to the Judgment of the Lower Appellate Court, I think that as the question of *res judicata* was not raised before the Sub Judge, the Lower Appellate Court should not have decided the suit on that ground. The plaintiff had not an opportunity of considering this question, as it was not raised in the Court of First Instance. Possibly he might show that the point was not decided, but at all events I think that he is right in saying that as the question was not in any way put in issue below, the Judgment in appeal should not be founded on that ground. I think we should reverse the decrees of both the Courts and remit the case for trial to the Court of First Instance, the parties to have the usual right of appeal. The costs of this appeal and of the two trials must be provided for in the revised decree.

(1) 4 M.H.C.R., 422.

FULL BENCH.

Before Mr. Justice Innes, Mr. Justice Kernan, and Mr. Justice Muttusámi Áyyar.

1879. October 2.

G. E. BRANSON (PLAINTIFF), APPELLANT, *v.* THE MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS (DEFENDANTS), RESPONDENTS.*

Municipal Act No. V of 1878—*Case referred under Section* 192—*Right of Municipal Commissioners to levy water-tax—Condition precedent—Independent power.*

The Madras Municipal Act is not a "private" Act.

When a public body is entrusted by the Legislature with the duty of making public improvements and powers are entrusted to it for such purpose, those powers will not be subject to a restrictive construction, though they interfere with private rights.

A Statute is not to be construed like a Contract. The power to impose a tax is not contractual and needs no correlative right.

An equitable construction is not permissible in a taxing statute when it is possible to adhere to the words of the statute.

B resided within the City of Madras and occupied premises within a division or district of the city in which no water had been introduced by the Municipal Commissioners.

The Commissioners levied a water-tax on B in respect of his premises. B appealed under Section 189 to the President and two Commissioners, who decided that he was liable to pay the tax.

On a case stated to the High Court it was

Held by INNES, J., and MUTTUSÁMI ÁYYAR, J. (KERNAN, J., dissenting), that upon the true construction of the Act (V of 1878) the right of the Commissioners to levy the water-tax was independent of the duty imposed upon the Commissioners to supply water.

THIS was a case stated under Section 192 of Madras Act V of 1878 by the Presidency Magistrates for the Town of Madras, Egmore Division.

Mr. *Johnstone* for the Appellant.

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Norton* for the Respondents.

The Court (INNES, KERNAN, and MUTTUSÁMI ÁYYAR, JJ.) delivered the following Judgments.

KERNAN, J.—The facts of the case are as follow:—

* Case stated under Section 192 of Madras Act V of 1878 by the Presidency Magistrates for the Town of Madras, Egmore Division. Calendar No. 8,869 of 1879.

"Mr. G. E. Branson resides within the City of Madras. He occupies the premises No. 22, Poonamallee Road, Chetput, within the division or district of the city in which no water has been introduced by the Municipal Commissioners. The said premises themselves are situated at a distance of 1,600 yards from the nearest stand-pipe, fountain, reservoir or pump, so that Mr. G. E. Branson derives practically no benefit from the water-works, for the maintenance, extension, and repair of which water-tax now objected to has been imposed."

The questions referred are—

"1. Are the premises No. 22, Poonamallee Road, Chetput, liable for the water-tax demanded for the current year 1879?"

"2. Is it essential that stand-pipes, fountains, reservoirs or pumps should be so placed that there is one at a distance not exceeding 150 yards from the said premises, before the Municipal Commissioners can legally levy the water-rate?"

The answer to these questions depends on what is the true construction of Madras Act V of 1878 as to the supply of water for domestic use.

The substance of the case on each side is as follows:—

The appellant contends that the Commissioners cannot legally assess, or at all events levy water-rate on a house, unless and until they are, as a condition precedent, in a position to supply water for domestic use (on payment of the tax) to the tax-payer from a pipe at a distance not exceeding 150 yards from the house.

The Commissioners contend that no such condition precedent is imposed by the Act, and the power to assess and levy is uncontrolled by any obligation to supply water to a water-rate payer at the time he pays his tax. They maintain that the power to assess and levy is an independent power given for the purpose of enabling them to maintain and to extend the works necessary to be constructed, and that they are entitled to assess and levy if they have water in any part of the city, however distant, when the tax-payer may procure it by sending for it.

Before considering the clauses of the Act it will be convenient to refer to some general rules relating to the construction of statutes. In 1st Ld. Coke's Institutes, p. 181, it is said, "The natural and genuine way of constructing a statute is to construe one part by another part of the same statute, for this best expresseth the meaning of the makers, and such construction is '*ex visceribus actus.*'"

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When words in a statute are express, plain, and clear, the words ought to be understood according to their genuine and natural signification and import; unless by such exposition a contradiction or inconsistency would arise in the statute by reason of some subsequent clause, whence it might be inferred that the intent of the Parliament was otherwise.

Tasker, 233. Hobart, 95—97.

"Such construction ought to be put upon a statute as may best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice*," Plowden, 467; Advice, 468.

11th Coke's Reports, 73b.

The intention of the makers of a statute is sometimes to be collected from the cause or necessity of making a statute, at other times from circumstances; whenever this can be discovered it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the statute.

Stradling v. *Morgan*—Plowden, p. 205-6.

A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter. Plowden, 366.

A thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the statute.

Eyston v. *Studd*—Plowden, 464, 465. Quaint good old Law.

In some cases the letter of an Act of Parliament is restrained by an equitable construction, in others it is enlarged; in others the construction is contrary to the letter. Plowden, 465.

No statute should be construed in such manner as to be inconsistent or against reason. 1 Institute, 97.

If the meaning of a statute be doubtful, the consequences are to be considered, but when the meaning is plain no consequences are to be regarded. See Dwarris on Statutes.

It is now necessary to consider the provisions of Act V of 1878. This Act transferred all the property of the former Commissioners to the present Commissioners. One of the leading objects of Act V is to provide a supply of pure water for *domestic use*; water not required for *domestic use* does not hold any prominence in the Act. It is provided for merely as an adjunct to the main object. Section 211 enacts :—

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1st. Commissioners *shall* provide supply of drinking water.

2nd. For that purpose shall cause pipes to be laid, and other works to be made, necessary to the supply of wholesome water in the public streets.

3rd. Shall erect stand-pipes, reservoirs, fountains, pumps for gratuitous use of inhabitants for *domestic* purposes.

4th. Stand-pipes, &c. shall be so placed that there shall be one at a distance not exceeding 150 yards from any house in any public street. (Appellant's house is admittedly in a public street.)

5th. It shall be the duty of Commissioners to provide that such supply shall be continuous, and that water supplied may be at all times pure and fit for human consumption.

So much for Section 211. It is imperative.

The works contemplated by Section 211 are part of the permanent works (amongst various others) to provide for the construction of which the Municipality are, by Part 5 of the Act, Sections 208 to 210 (similar to Section 28 of Act IX of 1867), authorized to raise loans on the security of their taxes and tolls and payments collected under the Act.

Part 4, Section 100, mentions the taxes, tolls and payments, and water-rates are of course included.

The Commissioners contend, and rightly, that until water-tax is capable of being levied it cannot form the subject of a security on which to raise money. But the Commissioners may, Section 101, raise money on all or any one of the taxes or tolls. It will be seen that except the water-tax (for water for domestic use) under Act V of 1878, each of the other taxes or tolls was capable of being levied through the city immediately after the passing of the Act. The Commissioners therefore might have raised funds from that source.

Even as regards the water-tax, it was capable of immediate imposition wherever the water was in fact supplied.

As regards all other taxes or tolls, except water-tax, the party paying the same was not then immediately entitled to get from the Commissioners anything except a receipt. As to water-tax, however, Section 141 gives the right to water for domestic use on payment of the tax.

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The water-tax, when legally assessed and leviable, could be made security for a past or future loan raised for water-purposes. The power to construct water-works, and the means of raising money for that purpose, are the same in this Act and in Act IX of 1867, and there is no doubt that under Act IX the water-tax could not be levied till the works were made. Therefore there is no force in this objection of the Commissioners. It was not necessary therefore for the Commissioners, in order to raise money to construct these water-works, that water-rates should be assessed throughout the whole city.

The Legislature having thus commanded that the water shall be supplied and pipes laid in all public streets, and other works made for the purpose of such supply, and assuming the Commissioners would do so, having provided means of borrowing money for such purpose, the Act V of 1878 enables the Commissioners to assess and levy a tax for the *maintenance* of the works. The Commissioners justify the tax on those who could get water, on the ground that the works are to be constructed partly out of the tax. This seems to me wrong. Section 139 enacts:—

"To enable the Commissioners to provide for the maintenance, repairs, extension, improvement, and other incidental expenses of water-works heretofore provided or hereafter to be provided, together with *interest* on any loan heretofore contracted for the construction of such works, or which may be hereafter specially contracted for the purposes aforesaid, the Commissioners *may* impose an annual tax upon all houses, buildings and lands, except those exempted under section one hundred and nineteen, and as hereinafter provided, at such rate, not exceeding 4 per centum upon the annual value thereof, as appears to the Commissioners sufficient for the purpose.

"Provided that the Governor in Council may, from time to time by notification in the *Fort Saint George Gazette*, exempt any division or part of a division from the payment of the water-tax, and may also from time to time remove such exemption."

This section plainly contemplates that *works have been made*, and provides a fund *not* for constructing works, but for "*maintenance, repairs, extension, improvements, and other incidental expenses*," and for interest on money borrowed before the Act or after the Act to make the works. The tax so raised and money borrowed for construction are *not* to be applied to general purposes of the Commissioners as the other tolls, but are to be

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applied to water-purposes only, Section 150. No doubt Section 139 does not necessarily intend that all works shall be made before water-tax is assessed and levied. But the object of the section is for maintenance, repairs, &c. of works already made, and it contemplates the work being made with money borrowed. If the works are not made, are the Commissioners entitled to levy tax? The introduction of "extension" in that section does not appear to me to have been in order to authorize the Commissioners to construct the works out of taxes to be levied before the works are made. I refer to this subject hereafter.

Section 140 provides that such tax shall be assessed and payable in the manner and at the same time as the tax on houses and lands. I will notice this section further down.

The construction of the works and their maintenance being provided for, the Act qualifies the right of taxation by providing a special right for tax-payers, viz., Section 141 provides that every person paying such tax shall be entitled to have, "free of further charge in respect thereof, a supply of water from the pipes of the Commissioners for the domestic use of himself and his household." (Section 142: The tax-payer is to pay for the works to connect the pipes with his house.) Section 147: Commissioners may enter building supplied, to inspect, and if precluded may stop supply. Section 148: Penalty for waste. Section 149: If tax not paid may stop the water. Section 141: This is the section which, with Section 211, is mainly relied on by the appellant. Looking to the language of this section *per se*, it seems clearly to give a right to supply on payment. That section does *not* say that the party paying is not to have the water until the Commissioners are ready, or that he must wait for any further time. It is the peculiarity of the Act as regards water-tax, that the party paying it is to be entitled not merely to receipt, as in respect of the other taxes, but "the party paying is entitled to have a supply of water for the domestic use of the household." There is no subsequent section qualifying Section 141, or inconsistent with it, or indicating any intent that the language in it should not be understood in its natural meaning. Can this provision of the Act be complied with unless the Commissioners, at the time they assess a house or demand water-tax on a house, are in a condition to supply water for domestic use to the party

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assessed or called on to pay such tax? Can it be complied with if the Commissioners may say to the tax-payer, "You are entitled now to the water; I will not or cannot give it, and cannot tell whether you will ever get it: Yet you must pay the tax even though you may to-morrow get judgment against me for not delivering the water?" This is no fanciful view. It is the very result that the construction contended for by the Commissioners must of necessity lead to upon the admitted facts. Being unable to see how full effect can be otherwise given to Section 141, it appears to me to be necessary to hold that the Act in Section 141 intended that, as regards houses, the Commissioners should, as a condition precedent to assessing or demanding payment of water-tax on any house, be in a position to supply water for domestic purposes to such houses according to the provisions of the Act.

It is now necessary to examine the prior and other sections of the Act, and the arguments on behalf of the Commissioners, to see whether, when they are considered with Section 141, the plain meaning of the language and intent of that section is qualified, or whether Section 141 must not be held to qualify the prior sections.

It is contended that the literal terms of the Act must be taken as the guide; and that as Section 100 gave the power to levy the water-tax amongst others, and as Section 139 gave powers to impose a tax not exceeding 4 per cent. on houses without referring to Section 141, therefore Section 100 and Section 139 are to be read literally and separately from Section 141, and be held to give an independent power, while, on the other hand, the right under Section 141 is also independent.

Section 140 was referred to on behalf of the Commissioners, providing that water-tax shall be assessed and be payable in the same manner, at the same times, and shall be subject to the same condition as the tax on houses, buildings, and lands. It has been argued that the intention of the Legislature by these sections—139, 140—was to make the water-tax payable the same as the other taxes, immediately and without reference to supply.

These views and arguments are based, not on a consideration of the sections of the Act one with another, with a view to gather the intent of the Legislature from the whole Act. They exclude Section 141 from consideration with Sections 139, 140. (As to

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Section 100, it only creates the power and this is not disputed.) I have already referred to the rule which requires that the intention of the Legislature in respect to any particular subject must be gathered from the whole Act, and that the literal language must yield to the clear intention. Now Section 141, it is needless to say, is part of the very same subject, as regards water-tax for domestic purposes, as Sections 139 and 140. The object of this investigation is to see what the Legislature intended by the Act. To exclude from such consideration Section 141, bearing on the very same subject as Sections 139, 140, would never lead to a right conclusion, but would seem to me entirely to mislead. Section 141 is an illustration of one of the rules above referred to, viz., that "from a subsequent clause in an Act it may be inferred that the intention of the Legislature was that a *prior* clause inconsistent with it should not be understood in its unqualified literal significance." Reading therefore Section 141 with Sections 139, 140, these two latter sections (which are framed, giving positive and unqualified powers) cannot stand literally with Section 141 if the construction of the Commissioners is adopted. There is repugnancy and inconsistency between them, viz., under the Commissioners' view the rate may be assessed and must be paid even though the Commissioners cannot supply water according to the provision of the Act, whereas, under Section 141, the party paying the tax is entitled on payment to get such supply. I have above referred to the rule that no statute should be construed so as to be inconsistent or against reason, and also to the rule in *Eyston* v. *Studd* (Plowden 461—466) that "a thing which is within the letter of the statute is not within the statute unless it be within the intention of it," and to the rule that "an exception is put by equity to the generality of the test for reasonable cause." Therefore, although Sections 139, 140 may, within the language of them, sanction the power of assessment and levy of the rate, without reference to ability to supply water, yet such unqualified power is not within the statute, as it is not within the intention of the statute, under Section 141. If the Commissioners could recover the tax on the house, without any condition to supply water for the domestic use of the tax-payer in his paying it, the result would be to disappoint the clear provision of Section 141. It is plain, therefore,

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that a construction of the Act must be sought, which will not create such inconsistency and repugnance, and which will give reasonable effect to the language used and fulfil the plain intent of the Legislature. The right to have a supply for "domestic use" is by the Act treated as very valuable. It is a right and advantage given by Section 141, only to the water tax-payer. Those who do not pay tax are not entitled to it, though they may get water by contract. It is limited to domestic use. It is an exceptional right. However, if the effect of considering Section 141 with Sections 139 and 140 is left in doubt as to the intent of the Legislature, then the consequence of a construction such as contended for by the Commissioners is to be considered as a mode of arriving at the intention of the Legislature according to a rule above referred to. Now one consequence (beyond the loss of water to the rate-payer) will be that, in order to compel the Commissioners to do this duty and supply him (according to the Act) with water, the rate-payer will be driven to an action against the Commissioners. No reason is suggested why this should be so. As his right must be admitted, Section 141, why drive him to an action? There would be nothing to be decided except the amount of compensation. The result would be to compel the Commissioners by legal process to do a duty which they admitted, but wrongly refused to perform, although power is given to them to do so. Such unnecessary proceedings will lead to wasteful loss to both parties, and litigation which it is impossible to suppose that the Legislature could have intended. Such litigation and loss will be of serious consequence, especially if the fact be (which was alleged in argument and not denied on the part of the Commissioners) that water-rate has been demanded from very many inhabitants situated as Mr. Branson is, and to whom the Commissioners are not in a condition to supply water, either gratuitously or for payment. If Mr. Branson should recover in his action (which appears *primâ facie* clear under Section 141), is it to be supposed that the Commissioners will be allowed to persist in this breach of duty without being restrained by injunction from a continuance of it? *vide* Section 433. It was contended that the Legislature intended that the only remedy of the rate-payer was an action, with power to bring repeated actions on breach of duty by the Commissioners, and

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that the reasonable construction of the appellant, which would render an action unnecessary, was not intended, although it will effectuate the leading object of supplying water for domestic use. The principle "*Interest Reipublicæ ut sit finis litium*" is one which the Commissioners give the Legislature no credit for. The argument for the Commissioners is that the Legislature looked forward to, on the one hand, an assertion of a right to tax without ability to perform duty and deliver water, and on the other side an obligation on the rate-payer to pay tax, although he cannot get the water he is entitled to. It is said by the Commissioners that the breach of duty by them can only be compensated for by repeated actions against the Commissioners, and may continue until at some undefined time, if ever, the Commissioners may be enabled to deliver the water, or until an order is made in action under Section 433. Is this reasonable? Could it have been intended? A reasonable order *primâ facie* under Section 433 would be an order to supply the water, or, in default thereof, that the Commissioners should be restrained from levying tax for the future, and for a refund of the tax already paid. If such should be the result, would it not prove that the appellant's construction of the Act is the reasonable and true construction, as it would (in the end), at the termination of the litigation, place the Commissioners in the very position which the appellant contends for.

The use of the words "extension of works" in Section 139 has given rise to argument that the Legislature intended the construction of works to be paid for out of rates, and that this could not be done unless the rates were paid to enable the works to be constructed and extended. It was agreed that extension meant construction, and that the water-rate was applicable not only for maintenance, but for the construction of, and to extend, the works to any distance required. Now the source from which Part 5 of the Act contemplates that the works should be paid, is by raising money on rates when assessed, and other property of the Commissioners. Although some portion of the 4 per cent. mentioned in Section 139 might be applied towards extension of the works, still there is very much doubt, on reading Section 139, what was the real object and intention of inserting

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"extension" in that section. The word is found amongst the words "maintenance," "repairs," "improvements," and "other incidental expenses," and the question is, Does it mean anything more than some "extension" of the same nature as "improvements" and other incidental expenses? But assuming that "extension" referred to some permanent works, the word would get its full meaning by holding that the rate 4 per cent., if more than sufficient to pay for maintenance, &c. of the works, might be, with other funds, applied to the extension of the water-works—see Section 150. However this may be, this word extension in Section 139 is, with the rest of that section, subject to the clear qualifying effect already explained of Section 141. Section 140 is subject also to the qualifying effect of Section 141. If that Section 140 is read without reference to Section 141, which cannot be legally done as already explained, no doubt it would bear the construction that as the other taxes on houses were capable of being levied from property (subject thereto) at once after the passing of Act V, uncontrolled by any condition, so should the water-tax on houses be assessed and levied at once. But Section 140 may very reasonably bear this construction, viz., that for convenience sake the water-tax on houses, when it legally may be assessed and levied, shall be assessed and levied in the same manner, and at the times, and subject to the same conditions, as the tax on houses, &c. The object was apparently that all legal taxes payable for water-rates on houses should be assessed and levied in the same manner, and at the same time, as other taxes payable out of houses. Reading Section 140 with the subsequent Section 141, this is apparently the true and reasonable construction. The proviso in Section 139 appears to me to have no bearing on the case. It reserves a power to Government to exempt, at their own discretion, any division or part of one from water-tax. Why this was done we have no concern with. It may be that a barrack or other public building might be erected which Government would wish to exempt. But whatever the reason was, it seems to me not material.

I have come to a conclusion on the part of the Commissioners which appears very strange. The Commissioners contend that Section 141 does not confer an absolute right on the tax-payer to a supply of water for domestic use, but that it confers only a qualified right, that is, a right to supply, if the Commissioners happen to be in a position to supply. However, Section 211 obliges the Commissioners to supply water in the public streets, and gives them means to do so, and requires a continuous supply to be kept up. There is nothing in the terms of Section 141 or in any other section, nor is there any intention manifested anywhere in the Act, so to qualify Section 141. The right to water is under that section an absolute right on payment of the tax.

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It was argued that, taking Sections 139 and 140 of Act V and considering them with the fact that Sections 204, 205 of the Act IX of 1867 are repealed and not re-enacted, the true construction of Act V is, that the Commissioners are at liberty to assess and levy the water-tax (on houses), though they are not in a position to supply water for domestic use when the tax is paid, and though they may not be in such position to do so for an indefinite period, if ever.

It is necessary to contrast the provisions of those statutes when they differ in matters material to this point in this case.

The Act IX of 1867, Section 203, provided, "The Commissioners may cause to be laid down in each street, lane, and thoroughfare of the town, or in any division or portion thereof, sufficient main and pipes for the supply of water in such street, lane, and thoroughfare, and may also erect in every such street, lane, and thoroughfare, sufficient and convenient stand-pipes for the gratuitous use of the rate-payers. The said stand-pipes shall be so placed that there shall not be a greater interval than one hundred yards between any such stand-pipes, and such stand-pipes shall at all times be kept charged with water." Section 204 provided "When the Commissioners shall have carried out a system for the supply of water to the town, or to any division or portion thereof, including mains and stand-pipes, and *such system* shall, in the judgment of the Commissioners, be complete, the Commissioners shall, with the sanction of the Government, declare in the Gazette that the supply is complete within the town, or in such division or portion thereof."

Section 205 provided that after such notification, it should be lawful to assess a rate within such district.

Section 206 is substantially the same as Section 141 of Act V.

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It is contended that the omission to re-enact Section 205 amounted to a declaration in Act V that the condition precedent created by the former Act was not intended to apply to this Act. But this argument ignores the existence of Section 141, which appears to be evidence that Act V intended the just principle established by Act IX to be continued in Act V, and that Act V is founded on that basis. Looking to the provisions of Act V, I am unable to see the force of this argument for the following reasons :—

1*st.*—That the language used in the Act V of 1878 is abundantly clear to create such a condition—*see* Section 141.

2*nd.*—The scheme or plan in the former Act, as regards supply of water and as regards the manner of opening of works, and for Government supervision, is quite different from the scheme or plan in Act V of 1878.

The change in this scheme is quite sufficient to account for the repeal of Section 205 of the Act of 1867, and for its non-re-enactment in this Act V of 1878.

The former Act, Section 203, provided that the Commissioners *may* cause to be laid down in each street, &c. mains and pipes for the supply of water, and may erect stand-pipes, &c. for the gratuitous use of rate-payers.

In Act V of 1878, Section 211 : The Commissioners *shall* provide and *shall* cause pipes to be laid down, and *shall* erect stand-pipes, &c.

Now here is a remarkable difference. The former Act inaugurated a new system of water by pressure, and left a discretion to the Commissioners. The present Act V of 1878 takes up the tried system of ten years with full knowledge of the resources of the Municipality, leaves no discretion to the Commissioners, and is *compulsory* in insisting on giving the inhabitants, *as of right*, the advantages which they had before only at the discretion of the Commissioners ; but Act V gives no greater powers of taxation under Act IX of 1867 as far as I can see.

Again Section 204 of the former Act provides: When the Commissioners shall have carried out a system of supply of water to the town, or to any division or portion thereof, including mains and pipes, and if such system shall, in the judgment of the Commissioners, be complete, they shall, with the sanction of Government, declare by notification in the Gazette that the supply is complete within the town, division or portion.

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Section 205, after notification lawful to assess. The effect of the provision was that the Commissioners could not assess for tax, except either in large divisions or in some portion, and not until the completion in such division, or portions of it, and until the Government sanctioned the notification in the Gazette that the supply was complete. Act V contains no such provision for supervision or for opening in divisions. The Commissioners, whenever legally in a condition to assess and levy, may do so. They are not limited to a division, or any particular portion of a division. They are not delayed by waiting for a general sanction to a notification that the supply is complete. The effect of the plan in Act V is to save time and enable the Commissioners to open up very limited areas even street by street. The supervision of Government was adopted in the Act of 1867, manifestly as a check over the Commissioners, to oblige them (if they did exercise their discretionary power of laying pipes) to have the work completely done before assessment was made. Unless such supervision existed to coerce the Commissioners, it is not clear under the Act of 1867 that they could be obliged to finish any of the works completely, as the Act was permissive only, not obligatory on the Commissioners. But the Act V having left no discretion to the Commissioners, but being mandatory and capable of being enforced by Section 433 or otherwise against the Commissioners, and the Commissioners having had ten years' experience of Municipal resources and of the working of the water-tax, it seems to have been thought unnecessary to continue such supervision. Accordingly the provisions 203-4-5, as to opening in division the water-supply, and for Government supervision, and for taxation after Government sanction that supply was complete, had become apparently unnecessary, and they were not re-enacted.

It has been suggested that the reason for the omission in Act V of 1878 of the former provision 205, was to enable the Commissioners to tax the whole area of the city at once for water, and to raise funds for the construction of the works, even though the result would be that numbers of people occupying houses should be obliged to pay rates and get no water in return for

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long periods. If such was ever the intention, there is not a notice of it to be found either by way of recital; and on the true construction of the Act, such intention is not consistent with Part 5, which provides for raising funds for construction of works, or with Section 141.

The Magistrate referred to a principle of construction, viz., that the law previous to the passing of an Act is to be regarded to see what the mischief was that was to be remedied. This is a correct principle, but it has been misapplied. There is no evidence whatever in the Act that the obligation to pay for water only after it could be supplied was a mischief. The Magistrate says so, but he appears to have acted on mere unwarranted assumption. No legal evidence was alleged in argument before us to have any existence from which such alleged mischief could be inferred or made out. The Act must be construed by what is in it, in words or intention, and not from outside matters. If it recited that there was a mischief * to be remedied or a particular state of the law to be changed, these or such like would be a guide to follow. We have only the two statutes and the changes of plan from the former to the latter to consider. The change of plan in the latter Act is quite enough to account for the omission of Sections 203, 204, and 205. The obligation of duty in the Act V of 1878 is substituted for the Government supervision in Act IX of 1867. The former Act pointed out to the Commissioners a course they could not mistake, and were not allowed to depart from. Section 141 of Act V of 1878 seems to show no intention of departure from such course. It is almost in terms the same as Section 206 of the former Act. Section 206 pre-supposed the water complete for delivery at time of payment. Why should not the same language in this Act get the same construction as in the former? Certainly the former Act dealt with the matter in express terms free from doubt by Sections 204 and 205. Is it not reasonable, however, that the same language used in Act V, Section 141, was intended to apply to a state of circumstances similar to those in the former Act? The nature of the object dealt with in each section is the same, and the object of domestic supply is the same in each. Act V

* See 3, T. R., p. 365, of an instance of recital of mischief.

3, Rep. 7, for instance of mischief proved though not recited.

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found the principle existing, viz., that capability to supply should precede taxation. Section 141 is evidence that the intention of the Legislature in this respect is unchanged. That section was advisedly retained, it plainly appears, from the slight variation between the language of it and of Section 206 of the Act of 1867. The construction of the Commissioners works inequality, viz., persons taxed under the former Act could not be taxed till water could be supplied—whereas, under Act V of 1878, it is contended that the tax may be enforced though water cannot be supplied. No reason for such change is to be found in the Act. The intention, Section 141, is otherwise.

Section 141 is express and clear, and we are not at liberty to detract from its force and effect by speculating why the Legislature did not re-enact a former provision, which, if re-enacted, could not have made the intent and meaning of Section 141 clearer than it is at present. I am of opinion that the contention by the Commissioners is not sound on this part of the case. I think that the construction they seek to put on Act V of 1878 as regards their duties in respect to supply of water for domestic use to a party paying water-tax is opposed to the plain reasonable intent of the Act, and is contrary to the true construction of it. Their construction would disappoint Section 141 and would lead to injurious consequences not contemplated by the Act, not intended by it, and not necessary to effectuate justice. In contrast to such construction, by adopting the construction contended for by the appellant as regards water for domestic use, full effect is given to all the language of the Act, and no word of it is left without its reasonable and due effect. Sections 139, 140, and 141 may be read together and will not produce inconsistency, and the plain and manifest intention of the Legislature will be carried out and simple justice done according to reason and discretion.

The question which remains is the second, viz., is it necessary that the stand-pipes, fountains for reservoirs or pumps should be placed so that there is one at a distance not exceeding 150 yards from the premises before the Commissioners can legally levy the water-rate?

This question may require some modification in order to have the real point decided. The true question seems to be, whether

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it is essential that the pipe, from which the party paying the tax is entitled to have his supply of water for domestic use, should be so placed that it should be at a distance not exceeding 150 yards from the premises before the Commissioners can legally levy the water-rate.

(The pipe for supply of water may not be a stand-pipe, fountain, reservoir or pump.)

The Act V of 1878 does not in express terms say within what distance such pipes (from which supply is to be taken by the party paying tax) are to be placed from the premises. But it is quite clear that the intention of the Act is that the pipes should be placed within a reasonable distance from the premises.

Under Section 142 the tax-payer entitled under Section 141 is to bear the expense of the works necessary to bring the water from the pipes of the Commissioners to the house where it is to be used for the domestic use of himself and his household. A water-tax payer is not bound to take such supply, but the advantage of such supply for domestic use is considered by the Act to be, and is in fact so very great, that the tax-payer, if he will have the advantage, is entitled to it; but he must pay for works necessary to bring it in, as he and his household alone have this great advantage. This advantage of absolute right to supply under Section 141 is not given by the Act to those who do not pay water-tax. It is a special advantage over and beyond the gratuitous supply. It is the only advantage which the water-tax payer has over those who do not pay. The President may, under Section 142, give the water to a non-tax-payer, but he is not of right entitled to it.

For the Commissioners it was contended that the pipes may be at any distance (even further off than in this case, which is 1,600 yards, or very near a mile), and that the Commissioners were only bound to have water in some pipes from which the tax-payer could either lay on pipes to the house assessed, or that he might send and get the water by any means from any pipes of the Commissioners wherever they might be. If this argument prevailed, a person at the outward boundary of the city might be obliged to send for water daily for his domestic use to an unlimited distance, or, as in the present case, so far as nearly one mile, or he would be at the very serious expense of paying the

President for the laying a communication pipe to his house for such distance. Would such a privilege be an advantage? Clearly not. It seems to me that such an argument not only tends to an unreasonable conclusion, but that the provision of the Act tends to a different conclusion at once reasonable and certain. The Act does not leave us without guide as to the question What is a reasonable distance? Section 211 obliges the Commissioners to cause such pipes to be laid, and tanks, &c. to be made, as are necessary for the supply of water *in the public streets*. It is one of the objects of Section 211 to have pipes laid in the public streets, that is, in all public streets, and along the whole of each street, if there are houses along its whole length, though at considerable intervals.

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The language used—in the public streets—cannot be satisfied by placing a pipe only at one point, say at one end, or in the middle of a street. This is also clear from the provision in Section 211 as to the maximum distance from any house required for gratuitous supply of water.

This being so, the pipe in the public street (which the Commissioners under Section 211 must lay) in which the house to be assessed is situate, is *primâ facie* the pipe from which the water is to be supplied for domestic use to such house on payment of the rate.

Again, Section 211 requires that stand-pipes, &c., shall be erected for the gratuitous use of the inhabitants, for domestic purposes, at a distance not greater than 150 yards from any house in a public street; so that the tax-payer entitled to the gratuitous use of water is entitled to have it at a distance not exceeding 150 yards. As such water gratuitously supplied, whether in a stand-pipe, or in a reservoir or pump, &c., must be supplied from a pipe, it follows that, according to the intention of the Act, it will be no inconvenience to the Commissioners to supply, at the point not exceeding 150 yards from the house assessed, the water to the tax-payer who pays for that supply from the pipe laid in the street in which he lives. It may be said that many houses are more than 150 yards from the street in which they are treated as living, and that, if the water is to be brought within 150 yards of such houses, branch-pipes must be laid at the expense

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of the Commissioners to within 150 yards of such houses. This may be so, but Section 211 seems to be quite distinct on that subject as regards stand-pipes for gratuitous supply to a house, and as this is so, we cannot give the Act construction contrary to its plain language and intent. It is clear that the distance for "stand-pipes, &c.," was fixed with deliberate purpose, and apparently upon a calculation that such distance would bring within it all houses deemed to be in streets, though in fact they are not so, but are enclosed in compounds which abut on such streets. The distance in Act V is 150 yards, while the distance in the former Act was 100 yards. No doubt the distance applies to parallel lines along the street, as well as to lines at angles to streets. Houses situate on the latter lines appear to be entitled also to the benefit of the gratuitous supply, and this appears reasonable, the object of the Act being to provide water particularly for domestic use of all. The Act is quite clear as regards gratuitous supply, and as the water-supply to be assessed on a house, building, or land supplied, may be derived from the stand-pipe or pump (though probably not from a reservoir), it would appear reasonable to hold that the water-supply to be paid for should be taken from the same point or distance of "the stand-pipe, &c." If it is argued that the Commissioners may supply the water for gratuitous use by a "tank, reservoir, or pump," still pipes must be used to lead the water to such "tank," &c., and therefore such pipe could be used for supply to the tax-payer.

The Act does not appear to intend that water within the city may be conducted in open channels. Section 212 only refers to supply channels to the city. If some clearly-defined maximum distance of the Commissioners' pipes from the house assessed is not, upon the fair constructions and intention of the Act, to be made out and laid down, then the question would be left open in each case, What is a reasonable distance? This would lead to uncertainty, disputes and litigation; whereas, by adopting what appears to be the intention of the Act—especially from analogy to the "gratuitous" supply—all uncertainty and inconvenience is obviated. I am of opinion, for all these reasons, that the intention of the Act is that the pipe for the supply of water to be paid for should not be at a greater distance than 150 yards from the premises, before the Commissioners can legally levy the water-

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rate on such premises. I would therefore answer the second question, modified as above proposed, in the affirmative.

MUTTUSÁMI AYYAR, J.—This is a case referred for our opinion under Section 192 of Act V of 1878. As to the facts there is no dispute. Mr. G. E. Branson resides within the City of Madras, and occupies the house No. 22, Poonamallee Road, Chetput, within a division or district of the city in which no water has been introduced by the Municipal Commissioners. The said house is situated at a distance of 1,600 yards from the nearest stand-pipe, fountain, reservoir, or pump, so that Mr. Branson derives practically no benefit from the water-works of the Municipality. The questions submitted for our decision are, whether the house in question is liable for the water-tax demanded for the current year 1879, and whether it is essential that stand-pipes, reservoirs, fountains, or pumps should be so placed that there is one at a distance not exceeding 150 yards from the house before the Municipal Commissioners can legally levy the water-rate.

Section 139 declares that the Municipal Commissioners may *impose a water-tax* on all houses, buildings, and lands in the city, unless they are exempted under any of the provisions of the Act. Under Section 140 the tax is to be assessed and payable in the same manner, at the same time, and subject to the same conditions, as the tax on houses, buildings and lands. It specially exempts any house the annual value of which is less than 24 rupees, if it is the sole property of the owner liable to be taxed under this section. Section 141 says that every person paying the tax shall be entitled to have, free of further charge, a supply of water from the pipes of the Commissioners for the domestic use of himself and his household. Section 143 specifies what are not to be regarded as domestic purposes within the meaning of the Act. Section 142 declares that any house-owner is liable to pay for communication pipes conducting water into his house from the pipes of the Commissioners, if he should desire to have them; and Section 144 enacts that he is liable to pay for water required for other than domestic purposes.

By Section 139 the Municipal Commissioners are empowered to levy the water-tax, to provide for the maintenance, repairs, extension, improvement, and other incidental expenses of water-works heretofore provided, or hereafter to be provided, together with

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interest on any loan heretofore contracted for the construction of such works, or which may be hereafter specially contracted for the purpose aforesaid. By the proviso of that section the Governor in Council is authorized from time to time to exempt any division or part of a division from the payment of the water-tax. Section 195 provides that no suit shall be maintained, except in the cases mentioned in Section 205, to recover money paid in respect of any tax assessed or levied under this Act, or to recover money or damages by reason of any tax levied under this Act, provided that the provisions of the Act relating to the assessment and levy of taxes are substantially complied with.

The foregoing sections are inserted in Part 4 of the Act which deals with taxes, tolls, and payments for occupation of lands. It is also necessary to notice specially two more sections, Section 211 in Part 6, which deals with various matters relating to general conservancy, and Section 433 in Part 9 that relates to general provisions for carrying out the purposes of the Act. Section 211 says that the Commissioners shall provide a supply of drinking water within the city, and shall, for that purpose, cause such pipes to be laid as are necessary for the supply of wholesome water in the public streets of the city, and shall erect in such streets convenient stand-pipes for the gratuitous use of the inhabitants of the city for domestic purposes. It adds that such stand-pipes shall be so placed that there shall be one at a distance not exceeding 150 yards from any house in any public street. Section 433 enacts that any person aggrieved by the failure of the Commissioners to carry out any work or perform any duty which they are bound to carry out or perform under this Act, may bring an action against the Commissioners, and if the Court finds that such work or duty is incumbent on the Commissioners under this Act, it may direct the immediate performance of such duty, or the execution of such work, or make such other order as to the Court may seem fit. The question for decision is, whether, if these sections are read together, Mr. Branson's house is liable for the water-tax, and whether the existence of a stand-pipe at the distance of 150 yards is a condition precedent to the levy of such tax.

I may refer to a few remarks made by Lord Cairns in the House of Lords in connection with fiscal legislation. In expressing

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an opinion on a special case stated by the Court of the Exchequer Chamber in *Partington* v. *The Attorney-General*,(1) in which one of the questions submitted for decision was whether a double stamp duty was payable upon two administrations taken out in England in respect of the same property to be distributed in America, His Lordship observed: "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." It may be that the purpose of the Act before us is municipal, but it is still a taxing Act, and legislation may be purely fiscal for a municipal purpose, as is indeed the case with the other taxes.

Section 139 renders all buildings in the city liable to a water-tax unless they are exempted, and Mr. Branson's house is in the city; while the proviso which enables the Government to exempt it is only permissive. Section 140 directs the water-tax to be assessed, subject to the same conditions as the house-tax, but Mr. Branson owns a house and it is occupied, and of more than rupees 24 annual value, and liable for the house-tax, and therefore for the water-tax within the meaning of this section. Section 195 takes away the right to sue for a refund, in whole or in part, or for damages, if the tax is imposed in conformity to the provisions of the Act and its legal effect is, as ruled by this Court with reference to the Municipalities in the mofussil in *Kamayya* v. *Leman*,(2) that if the tax has a legal basis, if the procedure prescribed for its imposition is complied with, and if the appeal allowed by the Act fails, the assessment is final, and its validity cannot be disputed in a civil suit. So far the provisions of the

(1) L.R., 4 H.L., 100. (2) I.L.R., 2 Mad., 37.

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Act are purely fiscal, and Sections 142 and 144 being only permissive, the substantial question is, What is the legal effect of Section 141. It says that the person paying the tax shall be entitled to have, free of further charge in respect thereof, a supply of water from the pipes of the Commissioners for the domestic use of himself and his household. Here two questions arise, viz., whether any special benefit is conceded to the tax-payer as such, and whether any and what particular pipes of the Commissioners are contemplated by the Legislature.

On comparing Section 141 with Section 211, I think that no special advantage is created by it for the tax-payer, beyond that general benefit which all inhabitants of the city are to have, whether they pay the water-tax or not, as an incident of the duty imposed in their behalf upon the Commissioners. The non-tax-payer as well as the tax-payer is to have a supply of water for domestic purposes, while the use of the words "pipes" in Section 141, and "stand-pipes" in Section 211, and "of his household" in Section 141, does not seem to make a substantial difference, since the majority of tax-payers are not in a position to order communication-pipes, and must have stand-pipes provided for their use, and since every one of the tax-payer's household is also an inhabitant of the city for the time being. The succeeding sections impose additional charges on the tax-payer, and it seems to me, therefore, that Section 141 anticipates a claim which the tax-payer may set up to a supply of water at his house or for purposes other than domestic, on the supposition that the tax paid by him is a price for as much water as he may requre, and declares substantially that his right is nothing more than that general benefit accessible to the citizens in general, and not any special benefit or advantage prescribed as a consideration correlated to the payment of the tax. The section is inserted, as it seems to me, more as introductory to, and explanatory of, the sections which make him pay for communication-pipes and for a supply of water required for agricultural or other purposes, than as imposing a limit to the jurisdiction of the Commissioners. I read the words 'entitled' and 'pipes of the Commissioners' as negativing substantially any particular benefit to the tax-payer as a consideration for the tax paid by him, such as a supply of water at his house or for agricultural or other than domestic purposes, and on this ground I think that they do not limit the jurisdiction to levy a water-tax.

This view seems to be confirmed by Section 139 being applicable to *lands*, whether there are any buildings on them or not. If Sections 141 and 142 create together a condition precedent and limit the jurisdiction of the Commissioners in the case of house-owners only, we shall have to hold that the jurisdiction is limited as to some property, and not as to the rest; and that if the power to impose the tax and the duty to supply water are concurrent rights, they are concurrent only in part. It is further supported by the former Act, in which Section 203 directed that stand-pipes should be erected for the gratuitous use of rate-payers, and Section 206, which is the same as Section 141 in the present Act, was introduced to limit the first section and negative any special benefit unless a further payment was made, lest the connection which existed between the two sections by reason of Sections 204 and 205 may create a doubt as to the condition precedent. Section 211, which is enacted in lieu of Section 203, seems to have been severed from the taxing provisions, and inserted in the part relating to general conservancy, with the expression "inhabitants of the city" substituted for "rate-payers," so as to make the severance the more marked.

Again, as to the second question, What particular pipes are intended by the Legislature? it would not be necessary to specify the distance from the house taxed for the purpose of Section 141, in the view I take, the object being to negative a right to a gratuitous supply at that house as a consideration for the tax. If it is necessary to place a construction so as to specify any particular pipes on the ground that a special convenience is given in Section 142 in the form of communication-pipes on further payment, I must say that the pipes intended are those at the distance of 150 yards from any house in any public street, which do either exist or may be brought into existence under the coercive process provided by Section 433. In its ordinary sense the phrase 'pipes of the Commissioners' would mean pipes *belonging* to the Commissioners. The learned Advocate-General, when pressed with the question what particular pipes are referred to, says pipes situated anywhere in the city, whatever may be their distance. This contention is certainly unsatisfactory, for it would be unreasonable

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to be told that the Legislature spoke of a supply of water required for the ordinary purposes of life as a supply to be had from anywhere, or from a distance of several miles. It is contended for Mr. Branson, on the other hand, that the pipes contemplated must be within a reasonable distance, and that the minimum distance of 150 yards, mentioned in Section 211 as necessary for the public health, is the reasonable distance contemplated by the Legislature. I concede that if Section 141 is intended to limit the jurisdiction of the Municipal Commissioners by creating a special advantage as a consideration for the tax, as contradistinguished from that general benefit common to all, this contention would perhaps be admissible; but in the present case it first assumes, and, I think, without adequate authority, that the Legislature intended to create a special benefit for the tax-payer, and next that the Legislature inadvertently omitted to specify the distance when it was necessary to specify it, and then proceeds, by way of removing a supposed ambiguity, to introduce into the section words which we do not find in it, and thereby to insert in the Act a condition precedent as to distance which existed in the former Act and which the Legislature intentionally omitted in the present Act. Even assuming that there is an ambiguity, and that the words, if taken in their ordinary import, lead to an unreasonable result, the proper mode of ascertaining their true meaning, it seems to me, consists in referring to the intention of the Legislature and determining the meaning as that to which it points.

The former Act, though repealed, is *in pari materiâ* for the purpose of construing the present Act, and ascertaining the inconvenience sought to be remedied, and the remedy provided for that purpose, *ex parte Copeland.*(1) By the former Act the Commissioners may lay pipes in every street, but by the present Act they shall do so in every public street. Compare Section 203 of the former Act with Section 211 of the present Act. The legal effect of this change is, what may or may not be done before, *must* be done now. The obvious inference is that the completion of water-works was delayed indefinitely by being left optional with the Commissioners, and that it was thought necessary to expedite such completion and to confer a great

(1) 2 DeG. M. & G., 914.

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public benefit by making it a matter of public duty. In order that this duty may receive prompt attention, and the public may be in a position to realize the benefit, a power to enforce its performance is given to every citizen, so that a suit for that purpose may be brought on any day by any inhabitant of the city, whether he pays the water-tax or not. After doing this for public good, the Legislature proceed to give the Commissioners certain powers or facilities to enable them to perform this duty with success. By Sections 204 and 205 of the former Act it was necessary to acquire jurisdiction to impose a water-tax that there should be a complete system of water-works in every district of the city; that, as it is completed in each district, there should be a notification in the Gazette; and that then, and not until then, the Commissioners should begin to impose a water-tax upon the houses in that district in which there was a complete system of water-works, *including the stand-pipes mentioned* in Section 203. These sections are omitted altogether, and Section 139 is substituted for them. This substitutes general taxation in the city for taxation in sections or by districts, and lest this facility may be harshly used against the tax-payers, makes the jurisdiction permissive, and further empowers the Governor in Council to exempt any division or a part of a division from the payment of the water-tax. The second facility provided consists in the omission of the sections which rendered the existence of a complete system of water-works a condition precedent, and in substituting the power given by Section 139 to raise the water-tax for the prospective extension of water-works. In order that the citizen may not be prejudiced by the loss of the sections relating to the condition precedent and the protection secured by them, the Legislature gave him a right of action instead to enforce the completion of water-works as provided in Section 433. Thus it seems clear to me that the inconvenience sought to be remedied was the impediment that existed to the completion of a great improvement of the city in respect of water-supply in consequence of the sections which related to the condition precedent and sectional taxation, and the remedy provided consists in substituting, under what the Legislature considered a sufficient safeguard, general for divisional taxation, and creating a power in the tax-payers to sue for the extension of water-works to 150 yards from any house in any

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public street, in lieu of the protection incidental to the sections which formerly made such extension a condition precedent. Now, the construction contended for on the part of Mr. Branson has not only the effect of restoring the inconvenience sought to be remedied, but leads to what I regard as the anomalous result of leaving the Municipality liable to be sued by everybody for the completion of water-works, and taking away from it the facilities provided for that purpose by the Legislature. It does not seem to me unreasonable to give the Commissioners the facility, and then to enforce performance of their duty, instead of denying them the facility and yet insisting upon their fulfilling the public duty. I think that when the intention of the Legislature is manifest, our construction ought to be such as will reasonably and fairly execute that intention. This principle was acted upon by Lord Mansfield in *Crepps* v. *Durden*.(1)

It is said that by making it obligatory on the Municipal Commissioners to lay water-pipes in every public street, and to erect stand-pipes within 150 yards of any house in any public street, that the Legislature thought that the Municipality had or could raise the funds necessary for doing so; but it is to be observed that what the Legislature really expected was that, with the additional powers given by the Act, the Commissioners would be able to extend the system of water-works throughout the city. It is next urged that Section 211 should be read as part of the taxing provisions and the intention of the Legislature thereby ascertained; but the objection I see to doing so consists in the section being severed by the Legislature from those provisions among which the corresponding section in the former Act was inserted, and in its being inserted in the part which relates to general conservancy, and which deals with matters that concern the general public and do not relate specially to tax-payers or to taxes. This severance, when taken together with the omission of the word "rate-payers" used in the former Act and the substitution of the words "inhabitants of the city," shows that the severance was intentional. Though it is *in pari materiâ* with the taxing provisions in the sense that both relate to water-supply, still Section 211 has nothing to do either with the jurisdiction to impose the

(1) Cowp. 640, cited in 4 A. & E. 322, Fisher's Dig., p. 8264.

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tax, or with any special advantage claimed by the tax-payer. Furthermore, I do not see, if it is read together with Section 141, why we should not also read Section 433 with them as to the remedy available for the non-extension of water-works. We have to look at the Act to ascertain not only what benefit was intended to be conferred, but also by what mode that benefit was designed to be secured. In *Doe d. Bishop of Rochester* v. *Bridges*(1) Lord Tenterden, C.J., said, while delivering the judgment of the Court:—

"Where an Act creates an obligation and enforces the performance in a special manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance ordained, the common law may in general find a mode suited to the particular nature of the case."

I should not here omit to mention several cases decided under Statute of Sewers in England, which may at first sight seem to favor the contention for Mr. Branson, and why I do not consider them as applicable to the case before us. In *Masters* v. *Scroggs*(2) Lord Ellenborough said: "It ought to appear that the party (taxed) receives, or is likely to receive, a benefit." In *Soady* v. *Wilson*(3) Lord Denman said: "It (the Act) rests on the principle that every one who receives a benefit from the works of the Commissioners, may be assessed at the rates they impose. The benefit is not required to be immediate, for the cases cited do not say anything about the nature or the amount of benefit. Possibly that benefit may be extremely small, or of high value. The case stated does not say that the amount of rate does not bear a just proportion to the extent of benefit. This may possibly be immaterial, for, if the Commissioners have jurisdiction, the Courts will not enquire whether they had correctly exercised their judgment in an action of trespass for levying the rate. But the jurisdiction results from some benefit being derived, and as the case states that some benefit was derived, we think ourselves bound to say that the defendant had authority to levy the rate." I may also refer to *Dore* v. *Gray*(4) and *Stafford* v.

(1) 1 B. & Ad., 859.
(2) 3 M. & S., 447.
(3) 3 Ad. & E., 268.
(4) 2 T.R., 358.

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Hamston(1) and to the opinion of Justice Buller and Chief Justice Dallas. These cases are authorities as to the amount or kind of benefit which may be necessary where property is liable to be taxed only in case it receives *some* benefit; but under the statute in England, as under the former Act, the Commissioners were bound first to complete the drains and other works and then to begin to levy the rate, but on those houses only which received some benefit, either small or considerable, mediate or immediate. They are not therefore in point under the present Act, in which the sections relating to the condition precedent are not inserted, and the receipt of some benefit is not made a condition precedent or declared to be the cause of jurisdiction.

It is asked, If actions are to be brought against the Municipal Commissioners, how many are to be brought? The answer to this question must depend upon the amount of caution which the Municipal Commissioners use in exercising their jurisdiction. It was, I think, to provide against any indiscretion or harshness in this direction that the Legislature introduced, in the present Act, the proviso of Section 139, which enables the Government to exempt any division, or part of it, from liability to pay the water-tax. It may be that in some cases the remedy is inconvenient, but it is to be observed that where a statute creates a right and provides at the same time a remedy, that remedy and no other is available, and I doubt whether we have power to provide a different remedy because the former is an inconvenient remedy. Again, if the number of actions which may be brought is a reason for our construing Section 141 as creating a condition precedent, I would ask whether the same inconvenience does not exist under this Act if the Municipal Commissioners fail to provide a sufficient system of drainage throughout the city, or if the public roads in the city are not maintained and kept in good order.

Another contention is, that since the tax-payer has as citizen a right to compel the Commissioners to provide water-works within the distance mentioned in Section 211, this right is in the case of house-owners, who may order communication-pipes, &c., concurrent with the Commissioners' jurisdiction to levy the water-tax. I know of no authority for construing a statute as if

(1) 2 B. & B., 691.; s.c., 5 Moore, 608 (Fisher's Dig., 7802).

it was a contract. The one pre-supposes mutual rights as correlated to one another, while the power to impose a tax is not contractual and needs no correlative right. I do not deny that taxing Acts may confer general or special benefits, but in construing them we must be guided by the language both as to what are, or what are not, conditions precedent, and as to what remedies are available for the withholding of the benefit contemplated by the Legislature. In the case of a contract the reciprocal relation between rights and duty, in the sense that they either exist together or neither could exist at all, is an implied condition and a matter of legal inference, while in the case of a taxing Act it must be the result of a statutory direction.

Another objection is, that Acts which interfere with private rights should be construed strictly and equitably so as to favor the tax-payer. As to the equitable construction I feel bound by the remarks of Lord Cairns already mentioned, and as to the other suggestion I have only to repeat what was laid down by the House of Lords in *Galloway* v. *The Mayor and Commonalty of London*,(1) (where one of the grievances was that more land than was strictly required for the formation of a new street was taken up), viz., where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in the city, and powers are entrusted to it for such a purpose, those powers will not be subject to a strict and restrictive construction. I may also add that Lord Cranworth held, in the case mentioned above, that the statute passed for the improvement of the city of London is a public and not a private Act of Parliament, and that the distinction consisted in personal or public benefit being the object of the Legislature. For these reasons I think that the view taken by the Magistrates is correct, and that Mr. Branson's house is liable for the water-tax; and that if no water-pipes have already been provided by the Municipal Commissioners as directed in Section 211, his remedy lies in a suit to compel the Commissioners to provide them.

INNES, J.—The Municipal Commissioners levied a water-tax on Mr. Branson, the appellant, in respect of his premises No. 22, Poonamallee Road, Chetput.

(1) L.R., 1 H.L., 34.

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Mr. Branson appealed to the President against the levy of the tax, but the President, sitting with two Commissioners, under Section 189 of the Act, decided that he was liable.

He then appealed to the Town Magistrates. They are also of opinion that he is liable, but under Section 192 have stated a case which they have referred for our decision.

No water has been introduced by the Commissioners into the division in which Mr. Branson resides, and his premises are at a distance of 1,600 yards from the nearest stand-pipe.

The questions referred to us are—

(1) Are the premises No. 22, Poonamallee Road, liable for the water-tax demanded for the current year 1879?

(2) Is it essential that stand-pipes, fountains, reservoirs, or pumps, should be so placed that there is one at a distance not exceeding 150 yards from the said premises, before the Municipal Commissioners can legally levy the water-rate?

The answer to these questions depends upon what construction is to be given to the Municipal Act of 1878.

It was urged upon us that the Act is a private Act, and that such Acts are always to be construed strictly against the corporation or company to whom powers are given to interfere with the liberty or other rights of the subject, and that it was necessary, therefore, in construing this Act, to give it such an interpretation as will restrain the Commissioners strictly within the powers intended to be conferred upon them. I do not agree that an Act of this nature, whereby large powers and duties (which would otherwise be exercisable by the Government itself) are devolved upon a corporation for a great public though local purpose, is a private Act. That term is only applicable to enactments conferring powers upon private associations for purposes which, so far as the associations are concerned, are of a purely private character, although great public advantage may also result from their labors. Where powers are conferred by the Legislature upon a corporation for a great public purpose, the Courts will not look so jealously upon the exercise of the powers conferred as they will do on the exercise of similar powers under a private Act. The reasons for this distinction are well set out in *Galloway* v.

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Lord Mayor and Corporation of London,(1) and as nothing turns upon them in the present case, they need not be more particularly referred to.

The general rule of construction is, if possible, to arrive at the intention of the Legislature from the language of the Act. Where that is doubtful, and where the enactment is, as in the present case, the most recent of a series of enactments, the enactments which it supersedes should also be considered with it, as the alterations made will generally throw light upon the intention of the Legislature.

I think the Magistrates are right, and that the tax is leviable although the appellant has not that access to the water to which by the Act he is declared entitled.

If his house is in a public street, he is entitled to have a stand-pipe accessible in the public street at a distance of 150 yards from his house, from which he may take water for domestic purposes, Sections 211 and 141. "In or near the street" was defined in the former Act to designate any place within the town, and "town" was defined to mean the whole of Madras within the local limits of the original jurisdiction of the High Court, so that any place was in the street. That definition, if it was intended to be a definition, is left out of the present Act, and it is left doubtful what houses are in public streets. Street itself, as defined, includes only the roadway *plus* the ground (not being private property) between it and the wall of any house adjacent to it. It does not of course include what is private property, so that houses standing in the premises appertaining to them at some distance from the road cannot, strictly speaking, be said to be in the street. If they are not included, however, in the street, it is not possible to draw a line of distinction in this respect between houses with a very small interval of intervening premises between them and the street, and houses such as many of those at the Adyar with several hundred yards intervening. They would all have to be classed as not in the street, and this would be so prejudicial to the most valuable of the house properties in Madras, which would thus lose all the advantage of the water scheme in respect to street supply, that I think houses in the street must

(1) L.R., 1 H.L., 34.

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mean both houses which stand adjoining the street, and houses the premises of which adjoin the street.

The appellant is thus entitled to water within 150 yards distance of his premises, and it is admitted that he cannot get the water within 1,600 yards of them.

Does it follow from any expressions in the Act that he cannot be taxed because he has not got what he is entitled to in respect of payment of that tax? It is quite conceivable, and not repugnant to the principles of legislation, that the duties should be independent—his duty that of paying the tax, the Commissioners' duty that of supplying water—and that the fulfilment of the one duty should not be a condition precedent to the fulfilment of the other, but that each should have attached to it the means of enforcing it.

I find in the old Act that the accessibility of the water in any division was in express terms made a condition precedent to the assessment of the tax in that division. I find also that in the old Act there were no provisions for compelling the Commissioners to fulfil neglected duties. In the new Act I find that the section in the old Act which prohibited the assessment of the tax in any division until the water-supply was ready in that division is omitted, while there are new provisions for compelling the fulfilment by the Commissioners of duties neglected by them.

The great feature of the present Act in respect of the water-supply is, that those to benefit from it are not merely the rate-payers but the entire public. The non-rate-payers are put on a footing with the rate-payers in almost every particular. The fund is not to provide merely a *quid pro quo* for the rate-payers, but is to be employed for the extension of the works for the benefit of the public in every part of Madras. Under the old Act the rate-payers alone had the right to claim that the stand-pipes be within a certain distance of their houses, for they alone had the right to use them. They alone had the right to water for domestic purposes—they alone could demand a supply of water to their houses through communication-pipes.

All this is now changed. The stand-pipes are available for the gratuitous use of the inhabitants for domestic purposes. They are to be at a distance of not more than 150 yards from all houses standing in the public streets, whether they be the houses

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of the rate-payers or not. All house-owners, whether rate-payers or not, can have communication-pipes laid on to their houses on payment of the charges.

The non-rate-payer's privileges are enlarged, while the rate-payer is left with certainly no higher right than he had before.

The old Act required the assessment of the tax, division by division, as the completion of the water-supply proceeded. The new Act, Section 139, authorizes the Commissioners to impose it at once upon all houses, buildings, and lands, except such as are exempted under the other provisions of the Act.

Under the new Act the incidence of the tax does not fall so low as it did under the old Act. Houses or land, being the owners' sole property, under 24 rupees annual value, are now exempted, whereas the former Act reached property of 14 rupees annual value. It must be assumed that past experience has shown that property of an annual value higher than that now exempted from liability can bear the tax. The present incidence of the tax therefore can hardly have been regarded as tentative or as likely to require revision or relaxation. I cannot think, therefore, that the proviso to Section 139, authorizing the Governor in Council to exempt any division or part of a division, can have any reference to anticipated complaints of the harshness of the incidence of taxation upon small properties.

Every division, too, and every part of a division, to use the words of the proviso, has within it houses of very different values, and it would be impossible to fix upon any division or part of a division in which house-property is of so even a value that it could claim exemption *en bloc*, on the ground of the tax pressing too hardly upon its poor inhabitants.

Yet the proviso seems to anticipate objections of a general character being made to the imposition of the tax—objections common throughout a division or a part of a division, which would warrant a corresponding exemption.

If, as it is contended, the intention were that the rate-payers were to be supplied with water readily accessible to the house before the tax was assessed, the object of this proviso is unintelligible, as there would be nothing for it to operate upon. No one could complain who was not taxed, and all who were taxed would have received a supply of water, and would have no

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ground for complaint. What possible room, therefore, could there be for the exercise of this power of exemption?

On the other hand the proviso is perfectly intelligible if the Legislature, intending that the Commissioners should have the discretion given them in the early part of the section (139) to impose the tax upon all houses, buildings, and lands throughout Madras, and foreseeing the difficulties in the way of completing the supply to all parts of Madras, thought it necessary to provide for cases in which the Commissioners, in the unwise exercise of this discretion, extended the assessment of the tax to parts of Madras where, by reason of great distance of the taxed property from the stand-pipes, imperfect supply of water or other causes, the tax might come to be regarded as harsh or oppressive.

The powers of borrowing given to the Commissioners by the new Act were conferred also by the old Act, and do not seem to me to lessen in any respect their pre-existing difficulties.

I find therefore an omission from this Act of a provision in the former Act which restricted the assessment to divisions in which the water-supply was complete, and the insertion of a new provision authorizing the assessment of houses, buildings, and lands in every part of Madras. I find the rate-payer left still with the same rights as before to water for domestic purposes from the pipes of the Commissioners, and special provisions introduced into the new Act for enforcing those rights. I find also a new power conferred on the Governor in Council of exempting a division or portion of a division. These changes, it appears to me for the reasons already given, are quite inconsistent with the contention that the Commissioners are still bound to refrain from assessing the tax until they are ready to deliver the water.

The case in Ellis and Blackburn, vol. 8, p. 212, to which Mr. *Johnstone* referred us, is a case in which the local vestry were specially authorized by the statute under which they were acting, to so levy the tax as to exempt such portions of the parish as were not to benefit or would only benefit partially by the improvement contemplated.

The case has no bearing upon the present question, which arises out of an enactment in which there is no such power of exemption conferred on those whose duty it is to enforce it.

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It appears to me that full effect may be given to Section 141, and an effect not inconsistent with the other provisions of the Act, if it be construed as declaring the rate-payer's right and the Commissioners' correlative duty, the performance of which the rate-payer has the means of enforcing, and not as importing that the water must be rendered accessible before the liability for the tax can be imposed.

I answer the first question therefore in the affirmative. It is not necessary to answer the second, and I think that properly speaking the only question which the Magistrates were empowered to refer in this case was the liability of Mr. Branson to the tax.

It is to be regretted that there is a conflict of opinion, but, after a careful consideration of Mr. Justice Kernan's construction of the Act, I am reluctantly compelled to dissent from his view.

The majority of the Court being of opinion that the decision of the Magistrates is right, this opinion will be communicated to them, and, under Section 193, they will dispose of the costs.

Attorneys for the Appellant, Messrs. *Branson* and *Branson*.

Attorneys for the Respondents, Messrs. *Barclay* and *Morgan*.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Áyyar.

SABÁPATI CHETTI (PLAINTIFF), APPELLANT, *v.* CHEDUMBARA CHETTI (DEFENDANT), RESPONDENT.*

1879. December 8.

Limitation Act, Section 2—Bond of 1869 payable on demand.

Where a suit was brought upon a registered bond dated 1869, payable on demand, and demand was made in September 1876:

Held, that the period of limitation was in effect curtailed by Act XV of 1877, and that the plaintiff was entitled to two years from 1st October 1877 under the provisions of Section 2, although under Act XIV of 1859 (in force when the bond was executed) the limitation period was six years from the date of the bond.

THIS suit was brought on 14th August 1878 to recover Rupees 6,164 from defendant upon a registered bond dated 27th May

* R.A. 24 of 1879 from the decree of the Subordinate Judge of Cuddalore, dated 16th November 1878.

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1869, payable on demand, and to obtain an order for the sale of the property hypothecated as security for payment.

The Subordinate Judge held that the personal remedy was barred by limitation on the ground that plaintiff had only six years from the time of the loan to bring his suit, and gave a decree against the property hypothecated.

Plaintiff appealed against this decree so far as it negatived his right to a decree against the defendant's person.

Parthasáradi Ayyangár and *Kristnasámi Chetti* for the Appellant.

A. Rámachandráyyar for the Respondent.

The Court (TURNER, C.J., and MUTTUSÁMI ÁYYAR, J.) delivered the following Judgments:—

TURNER, C.J.—On the 14th August 1878 the appellant instituted this suit to recover from the respondent Rupees 6,164, principal and interest due on a bond dated the 27th May 1869, and to obtain an order for the sale of property hypothecated to secure the satisfaction of the bond debt.

The amount secured by the bond was therein declared to be payable on demand.

The respondent pleaded that the claim for a personal decree was barred by limitation, and that the contract was void for want of consideration.

The Court of First Instance allowed the plea of limitation, but found that consideration had been paid, and therefore decreed the relief claimed only to the extent of ordering the sale of the hypothecated property.

The plaintiff has appealed against so much of the decree as disallowed the personal remedy, and the issue to be tried is whether he is debarred of that remedy by the law of limitation.

Act XIV of 1859 was in force when the bond was made, and inasmuch as the bond was registered, the period of limitation prescribed by that Act was six years, calculated according to the decisions passed on the Act, from the date of the bond.

By Act IX of 1871, Section 2, Act XIV of 1859 was repealed, and although it was declared that the repeal would not operate on suits instituted before the 1st April 1873, it was not declared that suits instituted after that date should be governed by any other law of limitation than was thereby enacted, notwithstanding

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the period of limitation under Act XIV of 1859 might have commenced to run before that Act was repealed.

In suits brought on instruments payable on demand, Act IX of 1871 prescribed that the period of limitation should be computed from the date of the demand. In effect it extended the time within which suits might be brought on such instruments.

By Act XV of 1877 it was enacted that the period of limitation should be calculated from the date of the instrument; consequently this suit would be barred unless it falls within the scope of Section 2 of the Act. That section provided that any suit (other than a suit to which Article 146, Schedule II, applied) for which the period of limitation prescribed by Act XV of 1877 was shorter than the period of limitation prescribed by the Act of 1871, might be brought within two years after 1st October 1877, on which day the Act of 1877 came into force.

In one sense the period of limitation prescribed by the Act of 1877 is not shorter than the period prescribed by the Act of 1871; but to adopt this construction would, in such cases as that now before the Court, work obvious hardship.

The period of limitation prescribed by Act XIV of 1859 had not expired when the Act of 1871 came into force. Assuming that the law of 1871 remained in force, the plaintiff might have postponed suing until September 1882, or six years from the date when the first demand was made. There are no doubt cases in which the demand was made only a day or two before the Act of 1877 was passed. In these cases, as well as in the case before the Court, the Act of 1877 in effect prescribed a shorter period of limitation than obtained under the Act of 1871.

The intention of the second section of the Act of 1877 was obviously to give to persons possessing rights of action at the time the Act of 1877 came into operation, for a limited period, the benefit of the provisions of the former law. The Court gives effect to that intention by adopting such a construction of the term 'shorter period' as will include cases in which a later starting-point is provided for the calculation of the period, as well as cases in which the period itself is curtailed. This construction has been adopted by the Court in Second Appeal 504 of 1878, and I am of opinion it should prevail. I would reverse so much of the decree of the Court of First Instance as dismissed the claim for

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relief against the defendant personally, and would decree also that portion of the relief asked with costs.

MUTTUSÁMI ÁYYAR, J.—I concur. Although in Referred Case 2 of 1878 I adopted the narrower construction, I am satisfied, on further consideration, that the true construction to be placed on Section 2, Act XV of 1877, is that which is suggested by my Lord the Chief Justice.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusámi Áyyar.

1879. December 8.

NALLATAMBI MUDALIAR (PLAINTIFF), APPELLANT, v. PONNUSA'MI PILLAI (DEFENDANT), RESPONDENT.*

Foreign judgment, Suit on—Objection to jurisdiction, Estoppel—Not examinable for irregular procedure, or because remedy was barred by Law of Limitation of proper forum.

Where a defendant sued in a foreign tribunal takes no exception to the jurisdiction, he cannot question the jurisdiction afterwards, inasmuch as he has led the plaintiff to believe that the proceedings are allowed by him to be effectual and encouraged the plaintiff to proceed in them instead of withdrawing from them and instituting proceedings elsewhere.

Irregularity of procedure on the part of a foreign tribunal which ordinarily proceeds in accordance with recognised principles of judicial investigation is not a sufficient ground for refusing to give effect to its judgment.

Where limitation bars the remedy, but does not destroy the right, the judgment of a foreign tribunal is not open to the objection that the suit (on a contract) was barred by the Law of Limitation applicable in the country where the contract was made.

THE facts and arguments in this case sufficiently appear in the Judgment of the Court (TURNER, C.J., and MUTTUSA'MI ÁYYAR, J.).

T. Ráma Ráu for Appellant.

Mr. *N. Subramániam* for Respondent.

JUDGMENT:—The Respondent and his father, who were British subjects, residing and domiciled in British India, executed, in favor of the Appellant, a bond covenanting to repay a loan of Rs. 4,000. The bond hypothecated immovable property in British India and was not registered.

* Second Appeal No. 407 of 1878 against the decree of O. B. Irvine, District Judge of South Arcot, reversing the decree of the Small Cause Court, dated March 16th, 1878.

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In December 1870 the Appellant brought a suit on the covenant in the bond in the Court of First Instance at Pondicherry, and, on the 24th April 1871, obtained a decree *ex parte*.

He then sued the Respondent in the Subordinate Judge's Court at Cuddalore on the foreign judgment, but, on the 14th December 1872, this suit was dismissed on the ground that the Respondent had had no notice of the proceedings in the French Court.

On the 14th December 1872 the Respondent applied to the French Court to declare its judgment ineffectual on the grounds that no execution had been obtained within six months from the date of the decree, that the bond was null and void under the law of British India for want of registration, and that a suit thereon was by the same law barred, in that more than three years had elapsed from the date of the bond before suit was brought.

The Respondent subsequently withdrew his demand that the decree should be declared ineffectual for default of execution, and, on the 19th March 1874, the Court of First Instance at Pondicherry, having allowed the Respondent to argue the other objections he had taken to the *ex parte* decree, held that the bond having been, as it appeared to the Court, executed in French territory, the registration law of British India did not apply, and that the suit in the French Court was governed by the French and not by the British Indian law of limitation. It therefore affirmed on the merits the *ex parte* judgment it had previously passed.

The Respondent carried the decree on appeal to the French Court of Appeal. He urged that the bond was made in British territory, and prayed that an inquiry might be directed as to this allegation; and he contended that having been executed in British territory by a British subject on a British Indian stamp and in conformity with the law of British India, and hypothecating immovable property in British India, it was governed by the law of that country.

The French Court of Appeal on November 10th, 1874, apparently, without admitting further evidence, found that the bond was made in French territory, and affirmed the decree of the Court of First Instance.

On the 9th November 1876 the Appellant instituted in the Subordinate Judge's Court at Cuddalore the suit now before us

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on appeal claiming to recover the amount decreed by the French Courts.

The Subordinate Judge held that evidence could not be admitted to show that the French Court had come to a wrong conclusion as to the place where the contract was made, and that on the plea of limitation the French Court was right in applying its own *lex fori*. He therefore decreed the claim.

The Lower Appellate Court agreed with the Court of First Instance that the British Indian Courts could not refuse effect to the foreign judgment merely on the ground that the foreign Court had determined the place at which the contract was made upon a consideration of probabilities and not upon direct evidence, but it held that, whether the contract was made in British Indian territory or not, the French Courts had no jurisdiction, the bond having been made by a British subject, domiciled in British India, on a stamp of British India and hypothecating property in British India.

The Appellant preferred a Second Appeal to this Court. It was represented on the part of the Respondent, and the representation was apparently borne out by the judgment of the Court of First Instance that the Respondent had pleaded in the French Courts want of jurisdiction. An issue was therefore directed to try whether the bond was executed in French or in British territory; and it has been found that the bond was executed in British India.

Since the return of the finding, a careful translation has been made of the proceedings in the French Courts, and it is apparent that the Respondent did not object to the competency of the French Courts to entertain a suit brought on the bond, but pleaded that, inasmuch as the bond was executed in British India, the French Courts were bound to apply the law of British India in respect of registration and limitation.

The Respondent contests the right of the Appellant to maintain suit on the judgments of the French Courts on the ground, among others, that he was, at the time the contract was made and at the time suit was brought in the French Court, a subject of British India and residing in British India, and was therefore not subject to the jurisdiction of the French Courts, nor did he owe permanent or temporary allegiance to France.

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The 14th article of the *Code Civil* permits a French citizen to cite before a French Court a foreigner, even though not resident in French territory, to enforce a contract whether made in French or in foreign territory.

The Municipal Law of France has force only within its own territory. A judgment passed under that law can be enforced in British Courts only in virtue of principles of international law which have extra-territorial operation.

British Courts then are not bound to enforce in all cases judgments passed by French tribunals against foreigners on contracts made out of French territory.

The principles on which foreign judgments are enforced in English Courts as stated by Parke B. in *Russell* v. *Smyth*(1) and repeated by him in *Williams* v. *Jones*(2) are declared by Blackburn, J., in *Schibsby* v. *Westenholz*(3) as follows: "the judgment of a Court of competent jurisdiction over the defendant imposes on him a duty or obligation to pay the sum for which the judgment is given which the Courts in this country are bound to enforce," but "anything which negatives that duty or forms a legal excuse for not performing it is a defence to the action."

The same principles have been adopted by the Courts of British India, and have been substantially recognised by the Legislature.

It will be noticed that it is an indispensable condition that the foreign Court should have jurisdiction over the defendant.

It has jurisdiction over the defendant if he was, at the time suit was commenced, a subject of the foreign country, or if he was at that time domiciled or temporarily resident therein; and in respect of an obligation contracted in a foreign country, it would possibly be held that the Courts of that country have jurisdiction over a foreigner though he may not be domiciled and may have left the country before suit brought; and in respect of the transactions of a Joint Stock Company formed for the purpose of carrying on business in a foreign country, the Courts of that country may, under certain circumstances, have jurisdiction over a member of the Company, though he may never have resided therein nor owe

(1) 9 M. & W., 810.
(2) 13 M. & W., 683; S.C. 14 L.J. Ex., 145.
(3) L.R. 6, Q.B., 159.

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allegiance thereto. We can find no principle for holding that the mere possession of property in the foreign country would, by reason of the protection enjoyed, confer on the Courts of that country jurisdiction over a foreigner, neither domiciled nor resident therein, in respect of matters unconnected with the property. But a foreigner, although he may not owe allegiance to a country or be under the jurisdiction of its Courts, may nevertheless equitably estop himself from pleading that the Courts of that country had not jurisdiction over him.

In suing as a plaintiff in the Court of a country to which he owes no allegiance, he has voluntarily submitted to its jurisdiction, and he cannot afterwards object to the validity of the judgment of the Court on the ground that it had no jurisdiction over him.

In *Schibsby* v. *Westenholz* the Court refrained from expressing an opinion as to the effect of the appearance of a defendant where it is so far voluntary that he appears only for the purpose of endeavouring to save some property which may be in the hands of the foreign tribunal.

Reference was at the same time made to *De Cosse Brissac* v. *Rathbone*(1) as an authority that, where the defendant voluntarily appears and takes the chance of a judgment in his favor, he is bound. We have referred to the judgment in that case, and it appears that the defendants had property within the jurisdiction of the foreign Court, and alleged they appeared solely to save it from seizure. Nevertheless the Court held, as settled by authority, that they could not be allowed to show the judgment of the foreign Court was erroneous in fact and in law on the merits, nor that they had discovered fresh evidence, nor that the foreign Court had admitted evidence which would not have been received in the Courts of England.

In *Kandoth Mammi* v. *Neelancherayil Abdu Kalandan*(2) the plaintiff had obtained a decree against the defendants in a French Court and sought to enforce it by a suit on the judgment in the Court of North Malabar.

It was found that the defendants were, and had always been, residents in British territory, that the bond was made in British

(1) 30 L.J. Ex., 238; S.C. 6 H. & N., 301.
(2) 8 M.H.C.R., 14.

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territory, that the obligee, though described in the bond as residing in French territory, had a residence in British as well as in French territory, and that the bond stipulated the defendants should take the money to the obligee and pay him; that the defendants appeared in the French Court and defended the suit and raised no objection to the jurisdiction. It was held that, having taken the chance of obtaining a judgment in their favor which would, if obtained, have relieved them from all liability, they were afterwards equitably estopped from denying the jurisdiction.

In the case before us the Respondent took no objection to the jurisdiction of the French Court, and, therefore, on the point we are now considering, we must hold his objection unsustainable unless we are prepared to dissent from the ruling last cited. In our judgment that ruling is based on sound principles of equity. By appearing in the foreign Court and taking no exception to its jurisdiction, the defendant, for the time, puts himself under the jurisdiction of the Court; he has led the plaintiff to believe that the proceedings are allowed by him to be effectual, and encouraged the plaintiff to proceed in them instead of withdrawing from them and instituting proceedings elsewhere.

It is, therefore, in our opinion, a legitimate application of the principles recognised in our Courts to hold that a defendant who has, under the circumstances, submitted to the jurisdiction, cannot afterwards question it.

Assuming, however, that the French Courts had jurisdiction over the parties, it is next objected that they had not jurisdiction over the subject-matter; but, in this case, the subject-matter is a personal obligation. The Appellant sought to enforce the covenant and asked no relief against the hypothecated property. Inasmuch as we hold that the Respondent cannot plead the French Courts had no jurisdiction over him when he appeared to the proceedings in those Courts, it follows that the plea, that they had not jurisdiction over the subject-matter because the contract was made in foreign territory, cannot be allowed.

Again it is urged that the French judgments cannot be enforced because the Courts did not admit evidence to show where the contract was made, and came to a wrong decision on this question of fact.

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It is true the French Court of First Instance considered the issue immaterial, and that although the French Appellate Court held it material, its judgment appears to proceed rather on inference than on direct evidence; it is also true the Respondent applied for an enquiry and offered to produce such evidence, but there is nothing to show whether his request was granted, or refused, or withdrawn.

It is not, in our judgment, a sufficient ground for impugning the judgment of a foreign Court, which ordinarily proceeds in accordance with the recognised principles of judicial investigation to show that in the particular instance its procedure may have been irregular. The Respondent, had he considered he was aggrieved by that procedure, might have applied to the French Appellate Court for review on that ground. We may assume that the procedure was regular, but, if there was irregularity, we could not hold it a sufficient ground for refusing respect to the judgment.

Lastly, it is urged that the right to sue on the obligation on which the French judgment proceeded had become barred in British India by the law of limitation before proceedings were taken in the French Court.

It is no doubt a highly equitable doctrine that a contract should, in all its incidents, be governed by the law of the country where it is made; but, where limitation is merely prohibitive of the remedy and not destructive of the right, the judgment of a foreign Court is not open to objection on the ground that a suit on the contract would be barred by the law of limitation applicable in the country in which the contract was made. It is unnecessary for us to consider whether the judgment of a foreign Court would be enforced if it was based on a right which had become extinct under a law of limitation in the country in which the contract was made and the party sought to be charged therewith had remained subject to that law.

We must, therefore, allow the appeal, and, reversing the decree of the Lower Appellate Court, restore the decree of the Court of First Instance with costs.

APPELLATE CIVIL.

PARRY AND CO. (DEFENDANTS), APPELLANTS, *v.* APPASÁMI PILLAI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1880. November 17.

Foreign judgment, suit on—Appeal to foreign appellate tribunal against decision of foreign tribunal whose jurisdiction was objected to—Involuntary submission to jurisdiction, effect of—Limitation Act, Section 14—Defect of jurisdiction, meaning of.

If a party sued in a foreign tribunal, which has no jurisdiction except by virtue of its own peculiar laws, protests against the assumption of jurisdiction by that tribunal, but defends the suit to escape the inconvenience of being made liable to arrest and attachment of property in foreign territory, and appeals from the adverse decision of such tribunal to a foreign appellate tribunal without repeating his objection to the jurisdiction, his submission to the jurisdiction is not voluntary, and the judgment of the foreign tribunal does not constitute a valid cause of action in a Court of British India.

The provision of the Indian Limitation Act, 1877, Section 14, which excepts such time as is spent in litigating in a Court of defective jurisdiction in favor of a plaintiff does not apply where the plaintiff brought his suit in a foreign Court which, according to its own laws, had ample jurisdiction, but according to the law of British India had no jurisdiction whatever.

THIS was an appeal from a decree of the High Court on its Original Side. The facts of the case are fully set out in the following Judgment of *Muttusámi Ayyar*, J., who tried the case :—

"This is a suit to recover the price of indigo sold and delivered by the first and second plaintiffs to the defendants on the 5th and 6th February 1875, and the payment of which was decreed by the Tribunal of First Instance at *Pondicherry* on the 13th November 1875. The ground of action as set forth in the amended plaint is, first, the judgment of the foreign Court; and, secondly, the alleged sale and delivery of indigo. The defendants contend that the *French* Court is not a Court of competent jurisdiction, that, though they bought the indigo, it was not from the plaintiffs, and that the second count is barred by the *Act of Limitation.*

* Appeal No. 10 of 1880 from a decree of the High Court in Original Suit No. 479 of 1878, dated 24th February 1880.

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"I do not think that the action can be sustained on the foreign judgment for the Tribunal at *Pondicherry* is not a Court of competent jurisdiction and, as stated by Baron *Parke* in *Russell* v. *Smith*,(1) a foreign judgment is enforced because the decree of a Court of competent jurisdiction over the defendant imposes on him an obligation to pay the sum for which judgment is given.

"The defendants are merchants residing and carrying on business at *Madras*, and the Court at *Pondicherry* is not their *forum domicilii*. On plaintiffs' own showing the indigo was sold and its price was to have been paid at *Cuddalore*, which is thus both the seat of the obligation and the place of its performance. Adopting *Savigny's* theory of voluntary submission and the presumption recognized in *Lloyd* v. *Guibert*,(2) viz., that the *locus contractus* is also the *locus solutionis* in the absence of an express agreement, I fail to find a special *forum* at *Pondicherry*. Again, it is not even alleged that the defendants ever resided in *French* territory, or in any other manner enjoyed or enjoy the protection of the law of *France*. In *Schibsby* v. *Westenholz*,(3) *Blackburn*, J., observes that jurisdiction may be presumed on the ground of temporary allegiance—1st, if the defendants had been at the time of judgment subjects of the country whose judgment is sought to be enforced; 2ndly, if the defendants had been at the time when the suit was commenced resident in the country so as to have the benefit of its laws protecting them; 3rdly, if at the time when the obligation was contracted the defendants were within the foreign country. *Copin* v. *Adamson*(4) in which the defendant was a member of a joint stock company established and protected by the law of the foreign country, and the obligation sought to be enforced arose out of the business carried on under such protection, is an addition to the cases mentioned by *Blackburn*, J. I can find no place in this category for the case before me, and I conclude, therefore, that the Tribunal of First Instance at *Pondicherry* is not a Court having jurisdiction either over the defendants or over the object-matter of the suit. It is then urged that the Court at *Pondicherry* relied on clause 14 of the *French Civil Code* under which any foreigner may be sued before the Courts

(1) 9 M. & W., 810. (2) 35 L.J.Q.B. 74. s.c. 6 B. & S., p. 100. (3) L.R. 6 Q.B. 159. s.c. 40, L.J.Q.B., 73. (4) L.R. 9 Ex., 345.

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of *France* for obligations contracted by him with the *French* either in the *French* or *British* territory. There can be no doubt that the *French* judgment is in conformity to the law of *France*, and that it may have force in *French* territory, but it is to be observed that, as stated by *Blackburn*, J., in the case already cited, the *French Republic* cannot make laws to bind the whole world. I may add that the test of jurisdiction is not the law of *France* which is only territorial in its operation, but some recognized principle of international law which has extra territorial operation. Another matter which remains to be considered is whether *bona fides* requires that the defendants should be estopped from pleading now to the jurisdiction of the *French* Court by reason of their conduct in connection with the proceedings at *Pondicherry*. It is admitted that the defendants appeared before the Tribunal of First Instance at *Pondicherry*; that they first denied its jurisdiction; that, when their plea as to jurisdiction was disallowed, they went into the merits of the case; that, after they failed in the Court of First Instance, they preferred an appeal, and that, in doing so, they did not again raise the question of jurisdiction. Upon these facts it is argued for the plaintiffs that the defendants took the chance of a judgment in their favor, and that, having elected to do so, they are bound by the judgment, though it is adverse to them. But it must be remembered that the *French* Tribunal was not a Court of their choice as observed by Baron *Parke* in *General Steam Navigation Company* v. *Guillon*;(1) that there was no submission to jurisdiction as in *Kandoth Mammi's* case;(2) and that there was nothing in their conduct calculated to deceive the plaintiffs into a belief that the objection to jurisdiction was not intended to be insisted upon. I do not think that the defendants ought to suffer either because they appeared before the Court at *Pondicherry* or because they did not withdraw from it directly after their objection to jurisdiction was overruled. There is no breach of faith with the plaintiffs, and if the defendants went into the merits and failed to press the question of jurisdiction or appeal, they did so probably to prevent their arrest in execution whenever they should visit *Pondicherry*, and that after they knew what the *Civil Code of France* was, they believed

(1) 11 M. & W., 877. (2) 8 M.H.C.R., 14.

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that the objection to jurisdiction could not be successfully maintained in appeal. In the case of *Schibsby* and *Westenholz, Blackburn*, J., remarked that appearance in a foreign Court to save some property which a defendant may happen to possess is no bar to pleading to jurisdiction, and I think it makes no difference in principle that the defendant appears to prevent his arrest in execution whenever by accident or on business he should chance to visit the foreign territory. The true test seems to be something in the conduct of the defendant which amounts to a voluntary submission to jurisdiction and which might amount to a breach of faith if the defendants were allowed to question the jurisdiction of the foreign Court. I am therefore of opinion that the judgment of the Courts at *Pondicherry* in this case is not binding on the defendants.

"The next question for decision is whether the claim, as based on the original cause of action, is barred. The indigo was to have been paid for in February 1875, while the suit was instituted on the 10th December 1878. It is clear that the claim would be barred if the time during which the plaintiffs were occupied in prosecuting it at *Pondicherry* were not deducted. It is also admitted that it would not be barred if the deduction might be made. I see nothing in the language of Section 14, Act XV of 1877, which renders it inapplicable to proceedings instituted in a foreign Court, while this suit seems to be within its reason. The learned Advocate-General relies on the expressions, "in a Court of First Instance or in a Court of Appeal," but they do not, in my opinion, necessarily exclude the Tribunal of First Instance in a foreign territory. The plaintiffs first instituted the suit at *Pondicherry* in the belief that a judgment valid under the *French Civil Code* would be valid in *British India*, and, it has now failed for want of jurisdiction in so far as that judgment is inoperative outside the *French* territory. Though I find no decided case which is on all fours with this, pre-requisites of the indulgence conceded by the section exist in it and the section seems to apply alike to foreigners and *British* subjects who may sue in our Courts."

His Lordship then proceeded to consider the question whether the indigo was sold by the plaintiffs to the defendants.

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Upon the evidence His Lordship found for plaintiffs and entered judgment for the amount claimed, Rupees 8,809, but disallowed their claim for interest.

The defendants appealed on the ground that the suit was barred by limitation, and the plaintiffs objected to the decree so far as it disallowed their claim for interest, and contended that the foreign judgment was binding on the plaintiffs.

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Shephard* for the Appellants.

Mr. *Spring Branson* for the Respondents.

The Court (*Turner*, C.J., and *Forbes*, J.) delivered the following

JUDGMENT:—The respondents alleged in their plaint that they had sold and delivered to the appellants at *Cuddalore* in *South Arcot* on 5th and 6th February 1875 indigo for the sum of Rupees 8,809, and that on the 13th November 1876 they had recovered judgment for that amount in the Tribunal of First Instance of *Pondicherry* with interest at 9 per cent. and costs; that the appellants had failed to procure the reversal of the decree on appeal; that the debt and decree were unsatisfied, and in respect of them they claimed to recover Rupees 12,228-1-8 and future interest at 9 per cent. on the principal sum due. We have to consider whether the respondents are entitled to recover this amount either in virtue of the decree they have obtained or of the contract.

Under the *Civil Code* the *French* Courts are empowered to entertain suits brought by *French* subjects on contracts made and to be performed outside *French* territory, although the party against whom relief is sought owes no allegiance to *France* and is not resident in *French* territory either when the contract is made or the cause of action arises or the proceedings are instituted.

In *Nullathumby Mudelliar* v. *Ponnusámi Pillai*(1) this Court considered the question whether it was the duty of *British* Courts to enforce a judgment obtained under such circumstances, and in accordance with the ruling in *Kandoth Mammi's* case(2) held that it should be enforced if the defendant had voluntarily sub-

(1) I.L.R., 2 Mad., 400. (2) 8 M.H.C.R., 14.

mitted to the jurisdiction of the *French* Court and had taken the chance of a verdict in his favor. The grounds on which those decisions proceeded were that the defendant, by appearing in the foreign Court and taking no objection to its jurisdiction, had for the time put himself under the jurisdiction of the Court and had led the plaintiff to believe that the proceedings were allowed by him to be effectual, and encouraged the plaintiff to proceed on them instead of withdrawing from them and instituting proceedings elsewhere.

In the case now before the Court the appellants appeared in the *French* Court and protested against the jurisdiction, and, when their protest was overruled, defended the suit on the merits. The decision being adverse to them, they instituted and prosecuted an appeal, and on appeal did not renew their protest. Under the circumstances, the learned Judge by whom this suit was tried held that the appellants did not voluntarily submit to the jurisdiction of the *French* Courts, and that this Court ought not to enforce the judgment. In this ruling we concur. The tribunal was not the Court of the appellants' choice; by their protest they warned the respondents that they would not allow that the proceedings were everywhere effectual. To escape the inconveniences which would attend a judgment against them if at any time they or their property might be found in *French* territory, they defended the suit and sought a reversal of the decision. It would have been idle to repeat an objection which they were aware the *French* Courts would not entertain, but there is nothing to show they abandoned their right to insist on it should the necessity for doing so arise elsewhere. For the reasons we have stated we consider the case before us is distinguishable from the cases above cited, and hold that the claim on the judgment of the *French* Court has properly been dismissed.

It is admitted that the claim on the contract is barred by limitation unless the respondents are entitled to the benefit of the provisions of Section 14 of the *Limitation Act*.

We desire to be understood as expressing no opinion whether under any circumstances those provisions allow the deduction of the period occupied by litigation in foreign Courts, for on another ground we hold them inapplicable in this case.

The *French* Courts were not, from defect of jurisdiction or otherwise, unable to entertain the claim. In the proper exercise of a jurisdiction conferred on them by the law of *France*, they have entertained the claim and passed decrees which are effectual in *French* territory. The respondents elected the *forum*, and although under the circumstances the *British* Courts may refuse to enforce the decree they have obtained, this circumstance does not bring the case within the provisions of Section 14 of the *Limitation Act*. The claim on the contract is then barred by limitation.

As the respondents cannot rely on the decree of the *French* Court, and have by lapse of time lost their right to sue on the contract, we must reverse the decree of the Lower Court and dismiss the suit, but, under the circumstances, without costs.

Attorneys for the Appellants, Messrs. *Tasker* and *Wilson*.

Attorneys for the Respondents, Messrs. *Branson* and *Branson*.

END OF VOL. II.