17

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

Privy Council ... ... C. BOULNOIS, *Middle Temple.*
High Court ... ... H. G. WEDDERBURN, *Inner Temple.*

VOL. IX.—1886.
JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council
BY THACKER, SPINK AND CO.,
5, Government Place, Calcutta;
BY R. HILL, GOVERNMENT PRESS, MADRAS;
AND AT THE BOMBAY AND ALLAHABAD GOVERNMENT BOOK DEPÔTS.

MADRAS:
PRINTED BY R. HILL, AT THE GOVERNMENT PRESS.

JUDGES OF THE HIGH COURT.

1st January—31st December 1886.

Chief Justice.

Hon'ble Sir Arthur J. H. Collins, Kt.

Puisne Judges.

Hon'ble J. Kernan.
,, T. Muttusámi Ayyar, c.i.e.
,, P. P. Hutchins.
,, F. Brandt.
,, G. A. Parker (*Offg.*).

Hon'ble P. O'Sullivan, *Advocate-General.*
,, H. H. Shephard (*Offg.*).

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

	Page
Rámalakshamma *v.* Ramanna	482
Suriya Ráu *v.* Rájá of Pittapúr	498
Vizianagaram Mahárája *v.* Suryanáráyana	307

FULL BENCH.

Christáchárlu *v.* Karibasayya	399
Kalandan *v.* Pakrichi	378
Krishna *v.* Sám	64
Lakshmi *v.* Sri Dévi	1
Ponnappa *v.* Pappuvayyangár	343
Ráman *v.* Pakrichi	385
Reference under Stamp Act, s. 46	138
Reference under Stamp Act, s. 46	140
Reference under Stamp Act, s. 46	146
Reference under Stamp Act, s. 46	358
Thammayya *v.* Venkanna	378
Vayidináda *v.* Appu	44
Védanta *v.* Kanniyappa	14
Vírarágava *v.* Ramalinga	148

ORIGINAL JURISDICTION.

Civil.

Administrator-General of Madras *v.* Anandáchári	466
Natall *v.* Natall	12

APPELLATE JURISDICTION.

Civil.

	Page
Achaya *v.* Ratnavélu	253
Adamson *v.* Arumugam	463
Aliba *v.* Nanu	218
Ambu *v.* Ráman	371
Amma *v.* Kunhunni	355
Appasámi *v.* Mánikam	103
Appasámi *v.* Rámasámi	279
Appasámi *v.* Scott	5
Ayyavayyar *v.* Shástram Ayyar	506
Brahannáyaki *v.* Krishna	92
Chandu *v.* Kombi	208
Chenchamma *v.* Subbaya	114
Erajabi *v.* Mayan	118
Gajapathi *v.* Alagia	89
Gompertz *v.* Goldingham	319
Harihara *v.* Subramanya	250
Jaganádham *v.* Ragunádha	276
Kadar *v.* Ismail	119
Kalliyani *v.* Náráyana	266
Kandunni *v.* Katiamma	251
Karuppan *v.* Ayyathorai	446
Karuthán *v.* Subramanya	203
Kelu *v.* Paidel	473
Kollu Shettati *v.* Manjaya	454
Kota, *In re*	134
Kottam Zamíndár *v.* Pittapúr Zamíndár	171
Krishna *v.* Reade	31
Krishnan *v.* Sankara Varma	441
Kristaya *v.* Kasipati	55
Kumaran *v.* Náráyanan	260
Kumarasámi *v.* Subbaraya	325
Kunhamed *v.* Chathu	437
Lakshmana *v.* Kullamma	99
Lakshmana *v.* Najimúdín	145
Logan *v.* Kunji	110
Mackenzie *v.* Thiruvengadathán	271
Madhava *v.* Náráyana	244
Mahomed Koya *v.* Kasmi	206
Narasanna *v.* Gurappa	424
Nilakandan *v.* Thandamma	460
Nizam of Hyderabad, *In re*	256
Padsha *v.* Tiruvembala	479
Palani *v.* Selambara	267
Ponnusámi *v.* Thatha	273
Rágava *v.* Rájagopál	39

	Page
Rájagopál, *In re*	447
Rámá *v.* Kunji	375
Rámachandra *v.* Krishna	495
Ráman *v.* Hassan	247
Rámasámi *v.* Kadar Bibi	492
Reade *v.* Krishna	391
Secretary of State *v.* Víra Rayan	175
Séthu *v.* Venkatarámá	112
Simson *v.* Venkatagópalam	475
Simson *v.* Vírayya	359
Sivaganga Zamíndár *v.* Lakshmana	188
Sivarámá *v.* Subramanya	57
Sivasubramanya *v.* Secretary of State for India	285
Subbaya *v.* Yellamma	130
Subbayya *v.* Chellamma	477
Subramanyan *v.* Mandayan	453
Sudindra *v.* Budan	80
Sundara *v.* Subbanna	354
Sundaram *v.* Sankara	334
Unniraman *v.* Chathan	451
Velli Periya Mira *v.* Moidin Padsha	332
Venkatagiri Rájá *v.* Pitchana	27
Venkatagiri Zamíndár *v.* Rághava	142
Venkatanáráyana *v.* Subbaráyudu	214
Venkatapathi *v.* Subramanya	457
Venkataraman *v.* Mahalingayyan	508
Venkatráyudu *v.* Nágadu	450
Venkayya *v.* Subbaráyudu	283
Vírarágava *v.* Rámudu	170

Criminal.

Aiyavu *v.* Queen-Empress	61
Gulam Muhammad Sharif-úd-daulah, *In re*	439
Kottalanada *v.* Muthaya	374
Narasimha, *In re*	201
Ootacamund Municipality *v.* O'Shaughnessy	38
Pitchi *v.* Ankappa	102
Queen-Empress *v.* Ademma	369
Queen-Empress *v.* Ahmed	448
Queen-Empress *v.* Appathorai	167
Queen-Empress *v.* Appavu	141
Queen-Empress *v.* Dorasámi	284
Queen-Empress *v.* Kethigadu	373
Queen-Empress *v.* Lakshmana	42
Queen-Empress *v.* Lingaya	258
Queen-Empress *v.* Náráyanasámi	36
Queen-Empress *v.* O'Shaughnessy	429
Queen-Empress *v.* Pillala	101

	Page
Queen-Empress *v.* Seshaya	97
Queen-Empress *v.* Subbaráyan	9
Queen-Empress *v.* Viran	224
Queen-Empress *v.* Viranna	377
Rámasami *v.* Lokanada	387
Rowthakonni, *In re*	431
Sadagopácháryár *v.* Ragaváchárvár	282
Scott *v.* Ricketts	356
Subba *v.* Queen-Empress	83

TABLE OF CASES CITED

IN THIS VOLUME.

A.

	Page
A. C. Kunhammu *v.* Gantz. I.L.R., 3 Mad., 138	141
Achaya *v.* Ratnavélu. I.L.R., 9 Mad., 253	447
Amir Hassan Khan *v.* Sheo Baksh Singh. I.L.R., 11 Cal., 6	438
Anantharama Patter *v.* Madhava Paniker. I.L.R., 3 Mad., 264	446
Annapurnábái, *In re.* I.L.R., 1 Bom., 630	449
Arumugám Pillai *v.* Vijayámmal. I.L.R., 4 Mad., 338	284
Arundádhi *v.* Natésha. I.L.R., 5 Mad., 391	81
Asansab Ravuthan *v.* Vámana Ráu. I.L.R., 2 Mad., 223	95
Askar Mea *v.* Sabdar Mea. I.L.R., 12 Cal., 137	465
Atchama *v.* Ramanadha. 4 M.I.A., 1	275

B.

Baba *v.* Timma. I.L.R., 7 Mad., 357	274
Balmakund *v.* Janki. I.L.R., 3 All., 403	33
Basappá *v.* Dundáyá. I.L.R., 2 Bom., 540	132
Basaruddin Bhuiah *v.* Baharali. I.L.R., 11 Cal., 8	465
Baskarppa *v.* The Collector of North Canara. I.L.R., 2 Bom., 550	180
Bellamy *v.* Sabine. 1 De. G. & J., 566	96
Bháskaráppá *v.* The Collector, North Kánara. I.L.R., 3 Bom., 452	293
Bilasmoni Dasi *v.* Rájá Sheopersad Singh. L.R., 9 I.A., 33 ; I.L.R., 8 Cal., 664.	313
Bisheshur *v.* Mata Gholam. 2 N.W.P., 300	470
Blake *v.* Mowatt. (Not reported)	507
Bridger's case. L.R., 9 Eq., 75	444
Brindabun Chandra Kurmokar *v.* Chundra Kurmokar. I.L.R., 12 Cal., 140	470
Brown *v.* Higgs. 8 Ves., 561, 569	327
Buddoo Mull *v.* Maharoop. 6 N.W.P., 129	8
Buroda Pershad Moostafee *v.* Gora Chund Moostafee. 12 W.R., 160	465
Burt *v.* Moore. 5 T.R., 333	305

C.

Calloor Narainsawmy, *In re.* Mayne's P.C., s. 361, notes	394
Chandika Singh *v.* Pohkar Singh. I.L.R., 2 All., 906	454
Choria Krishnan *v.* Vishnu. I.L.R., 5 Mad., 198	378
Chundee Churn Dutt *v.* Eduljee Cowasjee Bijnee. I.L.R., 8 Cal., 678	493
Chunder Nath Roy *v.* Bhoyrub Chunder Surma Roy. I.L.R., 10 Cal., 250	124

PAGE

Clark v. Elphinstone. L.R., 6 App. Cas., 164 293
Collector of Trichinopoly v. Lekkamani. L.R., 1 I.A., 283 307
Connor, *In re*. 16 Ir., C.L.R., 112 394
Curtis v. Curtis. 5 Jur., N.S., 1147 397

D.

Davani Ammál v. Ratna Chetti. I.L.R., 6 Mad., 417 .. .. .. 219, 223, 224
Davidson v. Cooper. 11 M. & W., 778 ; s.c. 13 M. & W., 343 401
Dawkins v. Antrobus. 17 Ch. D., 615 321
Dayá Anand v. Regina. 11 Bom., H.C.R., 44 227
Deendyal Lall v. Jugdeep Narain Singh. L.R., 4 I.A., 247 .. .. .. 344, 427
Dickenson v. Fletcher. L.R., 9 C.P., 5 434
Dinomoney Dabea v. Doorgapersad Mozoomdar. 12 B.L.R., 274 247
Drinkwater v. Porter. 7 C. & P., 181 294
Dubey Sahai v. Ganeshi Lál. I.L.R., 1 All., 34 451

E.

Earl of Falmouth v. Roberts. 9 M. & W., 469 404
Elizabeth Daley, *In re*. 2 F. & F., 258 394
Elkington's case. L.R., 2 Ch., 511 444
Empress v. Jogessur Mochi. I.L.R., 3 Cal., 379 448
Empress v. Kallu. I.L.R., 3 All., 233 11
Empress v. Pitambur Singh. I.L.R., 5 Cal., 566 10
Empress v. Vaimbilee. I.L.R., 5 Cal., 826 62
Empress of India v. McLeod. I.L.R., 3 All., 342 388
Empress of India v. Nilambar Babu. I.L.R., 2 All., 276 448

F.

Faez Buksh Chowdry v. Fukeeroodeen Mahomed Ahassun Chowdry. 14 M.I.A., 234 485
Fanindra Deb Raikat v. Rajeswar Das. I.L.R., 11 Cal., 463 ; L.R., 12 I. A., 72. 504
Fazal Haq v. Maha Chand. I.L.R., 1 All., 557 465
Freeth v. Burr. L.R., 9 C.P., 208 367

G.

Ganga Ram v. Chandan Singh. I.L.R., 4 All., 62 402
Gannu Lal v. Ram Sahai. I.L.R., 7 All., 179 507
Gardner v. Walsh. 24 L.J., (Q.B.), 285 ; s.c. 5 E. & B., 83 401
Girdharee Lall v. Kantoo Lall. L.R., 1 I.A., 321 344
Gogun Chunder Ghose v. Dhuronidhur Mundul. I.L.R., 7 Cal., 616 400
Goluck Chandra Mytee v. Harapriah Debi. I.L.R., 12 Cal., 559 456
Gópáláyyan v. Rághupati Ayyan. 7 M.H.C.R., 250 .. .. 45, 49
Gopal Dhanuk, *In re*. I.L.R., 7 Cal., 97 62
Gópál Kristna Sástri v. Rámayyangár. I.L.R., 4 Mad., 236 251
Gopál Narhar Safray v. Hanmant Ganesh Safray. I.L.R., 3 Bom., 273 45
Gordhan Pema v. Kasandás Balmukundás. I.L.R., 3 Bom., 179 207

PAGE

Gosling v. Veley. 12 Q.B., 407 19
Gossain Doss Koondoo v. Seroo Koomaree Debia. 19 M.R., 193 181
Gould v. Coombes. I.C.B., 543 415
Govinda Muneya Tiruyan v. Bapu. 5 M.H.C.R., 200 251
Green v. Attenborough. 3 H. & C., 368 404
Gurusámi Sastri v. Andi. 5 Rev., Reg. 140 29

H.

Hanumantamma v. Rámi Reddi. I.L.R., 4 Mad., 272 117
Hara Sundari Debi v. Kumara Dukhinessur Malia. I.L.R., 11 Cal., 250 106
Hardi Narain Sahu v. Ruder Perkash Misser. I.L.R., 10 Cal., 626 .. .. 190, 344, 427
Hari G. Joshi v. Ramachandra. 9 Bom., H.C.R., 64 9
Hawksworth v. Hawksworth. L.R., 6 Ch., 542 397
Hemnath Bose, *In re*. 1 Hyde, 111 394
Holloway v. Smith. 2 Strange, 1171 19
Holt v. Jesse. L.R., 3 Ch.D., 177 107
Howes' case. 3 E. & E., 332 394

I.

Ilahi Baksh v. Sita. I.L.R., 5 All., 462 207
Imperatrix v. Lakshman Sakhárám Váman Hári and Báláji Krishna. I.L.R., 2 Bom., 481 440
Innes v. Wylie. 1 C. & K., 263 321

J.

Janakiammal v. Vithenadien. 5 M.H.C.R., 191 207
Jaswant Singh v. Dip Singh. I.L.R., 7 All., 432 508
Jhotee Sahoo v. Omesh Chunder Sircar. I.L.R., 5 Cal., 1 451

K.

K. Venkatramanna v. K. Brammanna Sastrulu. 4 M.H.C.R., 345 500
K. I. Narainan v. K. I. Nilakandan Nambudri. I.L.R., 4 Mad., 131 207
K. J. Subburajalu v. N. Venkataraya. 2 M.H.C.R., 268 136
K. N. Booche Naidoo v. R. Lutchmeepaty Naidoo. 8 M.H.C.R., 36 207
K. T. P. Kunhali v. V. V. Kinathe. I.L.R., 3 Mad., 74 373
Kaipreta Rámen v. Makkaiyil Mutoren. 1 M.H.C.R., 359 267
Kaleshar Prasad v. Jagan Nath. I.L.R., 1 All., 650 280
Kalidas Das v. Krishan Chandra Das. 2 B.L.R., F.B., 103 65
Kally Churn Sahoo v. The Secretary of State. I.L.R., 6 Cal., 725 183
Karim Baksh v. Budha. I.L.R., 1 All., 249 465
Karuppan v. Rámasámi. I.L.R., 8 Mad., 482 106
Karuthedath Náráyanan Unni v. Kamprath Korunni Panikkar. (Not reported) .. 5
Kashi Chunder Sen, *In re*. I.L.R., 8 Cal., 271 33
Keates v. Burton. 14 Ves., 434 327
Kennedy v. Brown. 13 C.B.N.S., 677 144

PAGE

Kerutnarraen *v.* Mussummaut Bhobinesree. I. Sel. Rep., 161 166
Knight *v.* Knight. 3 Beav., 148 327
Kóndi Ménón *v.* Sránginreagatta Ahmmada. 1 M.H.C.R., 248 267
Krishna *v.* Reade. I.L.R., 9 Mad., 31 393
Krishna Ráu *v.* Pattanagiri Náyak. S.A. 98 of 1883. (Not reported) 29

L.

Lakshman Dádá Náik *v.* Rámchandra Dádá Náik. I.L.R., 5 Bom., 48 ; L.R., 7 I.A., 181 485
Lallu Bhái *v.* Naran. I.L.R., 6 Bom., 719 .. .. 219, 223
Lallu Ganesh *v.* Ranchhod Kahandás. I.L.R., 2 Bom., 641 114
Lál Singh *v.* Kunjan. I.L.R., 4 All., 387 446
Lati Kooer *v.* Sobadra Kooer. I.L.R., 3 Cal., 720 506
Lester *v.* Garland. 15 Ves., 257 132
Luckmidás Vithaldás *v.* Ebrahim Oosman. I.L.R., 2 Bom., 644 447

M.

Mackintosh *v.* Crow. I.L.R., 9 Cal., 689 278
Madar *v.* Subbaráyalu. I.L.R., 6 Mad., 88 .. .. 121, 496
Mahammad Zaki *v.* Chatku. I.L.R., 7 All., 120 .. .. 220, 223
Maharajah Koowur Baboo Nitrasur Sing *v.* Baboo Nund Loll Sing. 8 M.I.A., 220 181
Mahomed Ibrahim *v.* Morrison. I.L.R., 5 Cal., 36 183
Maidin Saibá *v.* Nágápá. I.L.R., 7 Bom., 96 247
Mano Mohun Ghose *v.* Mothura Mohun Roy. I.L.R., 7 Cal., 230 182
Manual Fruval *v.* S. Latchmidévamma. 7 M.H.C.R., 104 132
Marana Ammanna *v.* Pendyala Perubutulu. I.L.R., 3 Mad., 230 454
Master *v.* Miller. 1 Smith's L.C., 871 (Ed. VII) 401
Mayadeb Gosami, *In re.* I.L.R., 6 Cal., 762 227
Mersey Steel and Iron Company *v.* Naylor Benson and Company. L.R., 9 App. Cal., 434 368
Mina Kumari Bibee *v.* Jojat Sattani Bibee. I.L.R., 10 Cal., 220 132
Muddun Thakoor *v.* Kantoo Lall. L.R., 1 I.A., 321 .. .. 190, 344
Musammat Bhawani Kuar *v.* Gulab Rao. I.L.R., I All., 348 9
Musharraf Begam *v.* Ghalib Ali. I.L.R., 6 All., 189 456
Mussamat Harasundari Baistabi *v.* Mussamat Jayadurga Baistabi. 4 B.L.R., App. 36 34
Mussoorie Bank *v.* Raynor. I.L.K., 4 All., 500 327
Muthanna *v.* Alibeg. I.L.R., 6 Mad., 174 121
Muttayan *v.* The Zamíndár of Sivagiri. I.L.R., 6 Mad., 16 .. .. .. 344, 427
Muttayan Chetti *v.* Sivagiri Zamíndár. I.L.R., 3 Mad., 370 190
Muttu Vaduganadha Tevar *v.* Dorasingha Tevar. I.L.R., 3 Mad., 307 ; s.c. L.R., 8 I.A., 99 307

N.

N. Krishnamma *v.* N. Papa. 4 M.H.C.R., 234 284
Nallappa *v.* Ibram. I.L.R., 5 Mad., 73 121
Nangali *v.* Raman. I.L.R., 7 Mad., 226 143

PAGE

Náráyanácharya *v.* Narso Krishna. I.L.R., 1 Bom., 262 345
Narayan Mandal *v.* Beni Madbal Sircar. 4 B.L.R., (F.B.), 32 135
Nasarvánji Pestanji *v.* The Deputy Commissioner of Customs. 2 Bom., H.C.R., 75 22
Nathu Ganesh *v.* Kálidás Umed. I.L.R., 2 Bom., 365 207
Nawab Azimut Ali Khan *v.* Hurdwaree Mull. 13 M.I.A., 395 485
Nehalo *v.* Nawal. I.L.R., 1 All., 428 33

O.

Oolaty Bhoopatyrauze *v.* Vuddy Putty Gaurrauze. M.S.D., 1853, p. 91 215

P.

P. Venkatesaiya *v.* M. Venkata Chárlu. 3 M.H.C.R., 28 151
Pakhandu *v.* Manki. I.L.R., 3 All., 506 33
Pándurang Govind *v.* Balkrishna Hari. 6 Bom., H.C.R., 125 181
Paramma *v.* Rámáchandra. I.L.R., 7 Mad., 302 403
Pareshmani Dasi *v.* Dinanath Das. 1 B.L.R., A.C., 117 65
Partington *v.* The Attorney-General. L.R., 4 H.L., 122 19
Patinharipat Krishnan Unni Nambiár *v.* Chekur Manakkal Nilakandan Bhattathiripád. I.L.R., 4 Mad., 141 474
Perumál Séthuráyar *v.* M. Rámalinga Séthuráyar. 3 M.H.C.R., 77 45
Pigott's case. 11 Co., 27 417
Pitchi *v.* Ankappa. I.L.R., 9 Mad., 102 375
Ponnappa *v.* Pappuvayyangár. I.L.R., 9 Mad., 343 .. .. 275, 425
Ponnappa Piliai *v.* Pappuvayyangár. I.L.R., 4 Mad., 1 426
Ponnusámi Nádan *v.* Dorasámi Ayyan. I.L.R., 2 Mad., 209 471
Powell *v.* Divett. 15 East, 29 415
Pranjivan Govardhandas *v.* Baju. I.L.R., 4 Bom., 34 132
Prayaga Venkana *v.* Lachsmi. 2 Strange's H.L., 102 165
Proby *v.* Proby. I.L.R., 5 Cal., 357 13
Prosunno Kumari Debya *v.* Golab Chand Baboo. 14 B.L.R., 450 82
Pryer *v.* Gribble. L.R., 10 Ch. App., 534 107
Pugh *v.* Robinson. 1 T.R., 116 132

Q.

Queen *v.* Holbrook. 4 Q.B.D., 42 383
Queen *v.* Meares. 14 B.L.R., 110 256
Queen-Empress *v.* Nelai Laskar. I.L.R., 11 Cal., 410 63

R.

R. *v.* DeManneville. 5 East, 220 394
R. *v.* Inhabitants of Brampton. 10 East, 282 11
R. *v.* Manwaring. Dears & B., 132 ; s.c. 26, L.J. (M.C.), 10 11
R. *v.* St. Mary Warwick. 1 El. & Bl., 816 132
Radha Gobind Roy *v.* Inglis. Suth. P.C. cases 809 (see I.L.R., 7 Cal., 232) .. 132
Rains *v.* Buxton. 14 Ch. D., 537 183

PAGE

Rájá Venkata Rao *v.* Court of Wards. I.L.R., 2 Mad., 128; L.R., 7 I.A., 38 .. 504
Raj Koomar Singh *v.* Sahebzada Roy. I.L.R., 3 Cal., 20 465
Raj Luckhee Debia *v.* Chunder Kant Chowdhry. 14 W.R., 173 465
Rákmábái *v.* Rádhábái. 5 Bom., H.C.R., 181 79
Rámáchandra *v.* Pitchaikanni. I.L.R., 7 Mad., 434 249
Rámalakshmi Ammál *v.* Sivanantha Porumál Sóthuráyar. 14 M.I.A., 585.. .. 46
Rámáráju *v.* Arunáchala. I.L.R., 7 Mad., 248 496
Ramasámi *v.* Angappa. I.L.R., 7 Mad., 220 380
Rámasámi Iyen *v.* Bhagati. 8 Mad. Jur., 151 152
Rámasáwmy Kón *v.* Chinna Bhávani Ayyar. 3 M.H.C.R., 247 402
Rámáyya *v.* Chandra Sékara. I.L.R., 5 Mad., 257 34
Ram Ghulam *v.* Dwarka Rai. I.L.R., 7 All., 170 507
Ramphul Singh *v.* Deg Narain Singh. I.L.R., 8 Cal., 522 196
Ram Sahai *v.* The Bank of Bengal. I.L.R., 8 All., 262 506
Ratcliff's case. 3 Rep., 38, vol. 2, p. 105, of Thomas and Fraser's edition.. .. 394
Reference under Stamp Act, s. 46. I.L.R., 9 Mad., 146 146
Regina *v.* Amirtá Govindá. 10 Bom., H.C.R., 497 227
Regina *v.* Bái Ratan. 10 Bom., H.C.R., 166 229
Regina *v.* Shivyá. I.L.R., 1 Bom., 220 .. .. 227, 229
Rodger *v.* The Comptoir D'Escompte de Paris. L.R., 3 P.C., 465 507
Ruttonsey Lálji *v.* Pooribái. I.L.R., 7 Bom., 304 106

S.

Sadagópa *v.* Jamuna Bhái. I.L.R., 5 Mad., 54 462
Sadasiva Pillai *v.* Vadaganadha Pillai. 2 Strange's H.L., 109 165
Satku Valad Kadir Sausare *v.* Ibrahim Agá Valad Mirza Agá. I.L.R., 2 Bom., 457 465
Scott *v.* Stansfield. L.R., 3 Ex., 220 440
Scully *v.* Lord Dundonald. L.R., 8 Ch. D., 658 107
Shahi Ram *v.* Shib Lal. I.L.R., 7 All., 378 250
Shama Churn Bose *v.* Bhola Nath Dutt. 6 W.R., (C.R.), 9 465
Shannon, *In re.* 20 L.T., 183, 2 N.W.P., 79 .. .. 33, 394
Sheo Proshad *v.* Jung Bahadoor. I.L.R., 9 Cal., 389 345
Shib Lal *v.* Ganga Prasad. I.L.R., 6 All., 551.. .. .. 220, 223
Sinammal *v.* The Administrator-General of Madras. I.L.R., 8 Mad., 169.. .. 468
Sitárám Krishna *v.* Dáji Deváji. I.L.R., 7 Bom., 418 402
Sivaráma *v.* Rámá. I.L.R., 8 Mad., 99 438
Sobhágchand Gulabchand *v.* Bhaichand. I.L.R., 6 Bom., 193 496
Sreemanchunder Dey *v.* Gopaulchunder Chuckerbutty. 11 M.I.A., 28 485
Srinath Dutt *v.* Gopál Chundra Mittra. I.L.R., 9 Cal., 511 8
Sri Raghunadha *v.* Sri Brozo Kishoro. L.R., 3 I.A., 154; s.c. I.L.R., 1 Mad., 69. 78
Suraj Bunsi Koer *v.* Sheo Proshad Singh. L.R., 6 I.A., 88; s.c. I.L.R., 5 Cal., 148 .. .. 195, 349
Suryanna *v.* Durgi. I.L.R., 7 Mad., 258 462
Sutton *v.* Toomer. 7 B. & C., 416 415

T.

Tagore case. 9 B.L.R., 377, 397, 403 .. .. 66, 505
The Agricultural Cattle Insurance Company *v.* Fitzgerald. 16 Q.B., 432 415

PAGE

The Government of Bombay *v.* Ganga. I.L.R., 4 Bom., 330 470
The King *v.* Greenhill. 4 A. & E., 624 394
The King *v.* Hart. 10 East., 98 396
The Queen *v.* Clarke. 7 E. & B., 186 394
The Queen *v.* Howes. 30 L.J., (M.C.), 47 394
The Queen *v.* Nesbitt Perry. O.C., 103 394
The Queen *v.* Vaughan. 5 B.L.R., 418 394
Trilochun Doss *v.* Gugun Chunder Dey. 24 W.R., 413 465
Trowell *v.* Shenton. L.R., Ch. D., 318 504

U.

Umbica Prasad Tewary *v.* Ram Sahay Lall. I.L.R., 8 Cal., 893 345
Umed Dholchand *v.* Pír Saheb Jivá Miyá. I.L.R., 7 Bom., 134 281

V.

Valiappá *v.* Mahommed Khásim. I.L.R., 5 Mad., 168 403
Vasudevan *v.* Keshavan. I.L.R., 7 Mad., 309 373
Veeraperumal Pillai *v.* Narain Pillai. 1 Strange's Notes of cases, 83 163
Vencatapathy Reddy *v.* Lutchmee Ammál. 6 Mad. Jur., 215 275
Venkata *v.* Rámá. I.L.R., 8 Mad., 249 217
Venkatanarasiah *v.* Subbamma. I.L.R., 4 Mad., 178 462
Venkataram Ayyan *v.* Venkata Subramaniya Dikshatar. I.L.R., 1 Mad., 358 .. 195
Venkataswara Yettiapah Naicker *v.* Alagoo Mootoo Servagaren. 8 M.I.A., 327 .. 307
Vyakunta Bapuji *v.* Government of Bombay. 12 Bom., H.C.R., 144 180

W.

Wáman Rámchandra *v.* Dhondibá Krishnáji. I.L.R., 4 Bom., 126.. 125
Wilson *v.* Mackreth. 3 Burr., 1824 293
Withers *v.* Reynolds. 2 B. & Ad., 882 367
Wood *v.* Woad. L.R., 9 Ex., 196 321
Wright *v.* Mills. 28 L. J. Ex., 223 132

GENERAL INDEX.

PAGE

ABKARI ACT. s. 2—*Sale—Barter—Payment of wages in liquor :*

Payment of wages in liquor does not amount to a sale of liquor within the meaning of s. 2 of the Ábkári Act (Madras Act III of 1864).

Queen-Empress v. *Appavu* 141

2. ———, s. 26—**POLICE ACT, 1859,** s. 1—*Police officer—Village Police—Mohatád :*

The term "Police officer" used in s. 26 of the Ábkári Act (Madras Act III of 1864) includes a mohatád or village policeman.

Queen-Empress v. *Seshaya* 97

1842, IV :

See MADRAS BOAT RULES 431

1846, IX :

See MADRAS BOAT RULES 431

1855, XXI } 1858, XIV } 33

1859, XXIV (Madras) :

See POLICE ACT.

1860, XXVII, s. 2—*Bond given to secure debt due to estate of deceased Hindú—Suit by heir—Waiver of right to protection implied :*

R being a debtor to the estate of a deceased Hindú, executed a bond promising to pay the debt to V, the divided brother of the deceased, as his heir. A suit having been filed against V by the widow of the deceased, who claimed his estate, R offered to pay the debt to V on production of a certificate under Act XXVII of 1860, but not otherwise :—*Held*, that as R had executed a bond promising to pay the debt to V, he could not rely on the protection afforded by Act XXVII of 1860.

Kottam Zamíndár v. *Pittapúr Zamíndár* 171

,, XLV :

See PENAL CODE.

1861, IX 31

1864, II (Madras) :

See REVENUE RECOVERY ACT.

,, III (Madras) :

See ÁBKÁRI ACT.

1865, VIII (Madras) :

See RENT RECOVERY ACT.

,, X :

See SUCCESSION ACT.

,, XI :

See SMALL CAUSE COURT ACT.

1866, XXI :

See NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT.

1867, XXV : 337

PAGE

1868, I:
See GENERAL CLAUSES ACT.

1870, VII:
See COURT FEES ACT.

1871, I:
See CATTLE TRESPASS ACT.

,, III (Madras):
See TOWNS' IMPROVEMENT ACT.

,, IX:
See LIMITATION ACT.

1872, I:
See EVIDENCE ACT.

,, IX:
See CONTRACT ACT.

1873, III:
See CIVIL COURTS ACT.

1874, III:
See MARRIED WOMAN'S PROPERTY ACT.

1875, IX:
See MAJORITY ACT.

1877, I:
See SPECIFIC RELIEF ACT.

,, III:
See REGISTRATION ACT.

,, X:
See CIVIL PROCEDURE CODE.

,, XV:
See LIMITATION ACT.

1879, I:
See STAMP ACT.

,, XVIII:
See LEGAL PRACTITIONERS' ACT.

1882, II:
See TRUSTS ACT.

,, IV:
See TRANSFER OF PROPERTY ACT.

,, V (Madras):
See FOREST ACT.

,, X:
See CRIMINAL PROCEDURE CODE.

,, XIV:
See CIVIL PROCEDURE CODE.

PAGE

1884, IV (Madras):
See DISTRICT MUNICIPALITIES ACT.

1885, I (Madras) 167

ADOPTION AFTER UPANAYANAM:
See HINDÚ LAW, 1.

ADVERSE POSSESSION:
See FOREST LAND.

2. ——————
See LIMITATION ACT, 11.

3. ——————*Limitation Act, sch. II, art.* 12—*Sale of land in execution of decree—Suit by third party to recover—Burden of proof:*

In a suit to redeem certain land demised on kánam in 1850 by A to the predecessor of B, C, who was in possession of the land, was made a defendant. A proved his title to the land and possession up to 1850. C pleaded title to the land and denied that B had ever been in possession. Both pleas were found to be false. It was found however, that C had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against C (to which A was not a party) and purchased by D, who resold to C in 1879. The Lower Court held that C's possession must be taken to have been derived from B, till the contrary was proved; but that the suit was barred by art. 12 of sch. II of the Indian Limitation Act, 1877, because it had not been brought within one year from the date of the sale in 1876:—*Held*, that the suit was not barred by limitation, and that the burden of proving that his possession was not derived from B lay upon C.

Nilakandan v. *Thandamma* 460

ARMY ACT, 1881, s. 151 (3)—*Civil Procedure Code, s.* 266, *exp.* (*b*)—*Debtor subject to military law—Attachment of moiety of salary under Rs.* 20 *per mensem:*

Section 151 of the Army Act, 1881, not being affected by the provisions of s. 266 of the Code of Civil Procedure, the attachment by a Civil Court of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs. 20 is legal.

Virarágava v. *Rámudu* 170

ASSESSORS:
See CRIMINAL PROCEDURE CODE, 8.

AUDI ALTERAM PARTEM:
See CLUB.

AWARD:
See CIVIL PROCEDURE CODE, 25.

BARRISTER'S FEE—Receipt:
See STAMP ACT, 3.

BENCH OF MAGISTRATES:
See CRIMINAL PROCEDURE CODE, 3.

BURDEN OF PROOF:
See ADVERSE POSSESSION, 3.

2. ——————
See HINDÚ LAW, 10.

3. ——————*Suit by Crown for possession of land* 175

CATTLE TRESPASS ACT, ch. V—*Complaint of illegal seizure;*
See CRIMINAL PROCEDURE CODE, 7.

PAGE

2. ——————, s. 20—*Criminal Procedure Code, s. 4 (a), s. 250—Illegal seizure of Cattle under the Cattle Trespass Act, not an offence within the meaning of the Code of Criminal Procedure :*

In a case instituted upon complaint made under s. 20 of the Cattle Trespass Act, the Magistrate acquitted the accused, and being of opinion that the complaint was vexatious, directed the complainant to pay compensation to the accused as under s. 250 of the Code of Criminal Procedure :—*Held*, that the act complained of was not an offence within the meaning of the Code of Criminal Procedure, and that the order awarding compensation was illegal.

Kottalanáda v. *Muthaya* 374

CAUSE OF ACTION:

See CIVIL PROCEDURE CODE, 5.

2. ——————

See JURISDICTION, 4.

3. —————— *Suit by debtor to compel creditor to accept money due :*

A bond having been executed, whereby it was stipulated that a debt should be paid by instalments subject to the condition that if any one instalment were not paid within a certain time after it became due, the whole amount remaining due, should become payable at once, the creditor evaded the debtor's attempts to pay the instalments as they became due, and the debtor brought a suit to compel the creditor to accept an instalment due :—*Held*, that such a suit would not lie.

Kristaya v. *Kasipati* 55

CIVIL COURTS' ACT (Madras)—*Jurisdiction—Court Fees Act, s. 7, cl. 9—Ejectment—Mortgage set up by defendant exceeding limit of jurisdiction :*

In a suit brought in a District Múnsif's Court to recover several parcels of land from the defendant, plaintiff alleged that defendant held a valid mortgage of Rs. 206 on two parcels which he offered to redeem. As to the other parcels he alleged that if any charges had been created in defendant's favour over them by his predecessor in title such charges were invalid. The suit as valued by the plaintiff was within the pecuniary limit of the Múnsif's jurisdiction. Defendant pleaded that he held a mortgage for Rs. 3,000 over the land and therefore the Múnsif's Court had no jurisdiction to try the suit. The Múnsif tried the question of the validity of the defendant's mortgage and decreed possession to plaintiff on payment of Rs 906 due on account of mortgages and Rs. 1,647-11-9 on account of improvements. On appeal the District Judge held that the Múnsif had no jurisdiction, reversed the decree, and ordered the plaint to be returned to be presented in the proper Court :—*Held*, that the Múnsif's Court had jurisdiction. If a suit is brought in ejectment, and the defendant proves that he holds a mortgage, a decree for redemption cannot be made without his consent. If, in such case, defendant consents to a decree for redemption, and the amount secured by the mortgage exceeds the limit of the pecuniary jurisdiction of the Court, the Court should not proceed further, but return the plaint to be presented in a superior Court.

Chandu v. *Kombi* 208

2. ——————, s. 12 38

CIVIL PROCEDURE CODE, ss. 4, 622 332

2. ——————, ss. 5, 360, ch. XX—*Small Cause Court, Mufassal—Insolvency jurisdiction :*

Under s. 360 of the Code of Civil Procedure, the Local Government cannot invest a Mufassal Small Cause Court with the insolvency jurisdiction conferred on District Courts by ch. XX of the said Code, inasmuch as, by reason of s. 5, ch. XX does not extend to such Courts of Small Causes.

Sithu v. *Venkatarámá* 112

PAGE

3. ——————, ss. 11, 15—*Suit for Minor-Jurisdiction :*

See PARENT AND CHILD.

4. ——————, s. 30—*Suit for obstruction of highway—Special damages :*

The rule of English Law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage should be enforced in British India as a rule of "equity and good conscience." Section 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having special interests to represent the rest of the class.

Adamson v. *Arumugam* 463

5. ——————, s. 43 :

Upon a settlement of accounts between plaintiff and defendants, Rs. 3,985-6-9 was found due by the defendants, who agreed to pay the same. They gave to plaintiff an order on their agents to pay Rs. 2,500 from the profits of certain land, and promised to pay the balance within a month. Plaintiff filed two suits, one for Rs. 2,500 and the other for the balance of the debt. Defendants pleaded that both suits should be dismissed, as brought in contravention of the requirements of s. 43 of the Code of Civil Procedure. The Lower Courts held that there were two distinct causes of action, and decreed both claims :—*Held*, on second appeal, that plaintiff had only one cause of action, and that the decree in one of the suits must be reversed.

Appasámi v. *Rámasámi* 279

6. ——————, s. 43—*Lis pendens :*

N being mortgage in possession of five-eighths of a pangu (share) of certain land—security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878 K bought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N claiming possession of his two-eighths on payment of Rs. 400 and obtained a decree and possession thereof. Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883, K bought the remaining three-eighths from the mortgagor and sued N and M to recover possession thereof. M pleaded that the suit was barred by s. 43 of the Code of Civil Procedure, inasmuch as K might have recovered the five-eighths in the suit against N :—*Held*, that this plea was bad. M also pleaded that he had a valid mortgage over three-eighths :—*Held*, by Muttusámi Ayyar, J., that, if the assignment of the mortgage by N to M was a real transaction, this plea was good. Per Muttusámi Ayyar, J.—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit.

Brahamnáyaki v. *Krishna* 92

7. ——————, ss. 100, 101, 108, 540—*Appeal from* ex parte *decree :*

A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by s. 108 of the Code of Civil Procedure, can appeal from such decree under the general provisions of s. 540—*Lal Singh* v. *Kunjan* (I.L.R., 4 All., 387) dissented from.

Karuppan v. *Ayyathorai* 445

8. ——————, ss. 130, 387, 591, 622—*Interlocutory orders not subject to revision :*

Under s. 622 of the Code of Civil Procedure, interlocutory orders passed under s. 387 refusing applications for the issue of a commission to examine witnesses, or, under s. 130, directing the production of documents, cannot be revised.

Nizam of Hyderabad, In re 256

9. ——————, s. 206—*Jurisdiction of Court to amend its decree after appeal :*

Under s. 206 of the Code of Civil Procedure a Court has power to amend its decree by bringing it into conformity with the judgment after the suit decree has been confirmed on appeal.

Sundara v. *Subbanna* 354

PAGE

10. ——————, s. 230—*Limitation—Twelve years' rule—"Law in force" prior to that Code—Includes Act X of* 1877 :

In s. 230 of the Code of Civil Procedure, 1882, the words "law in force" include the Civil Procedure Code, 1877, as well as the Limitation Act then in force :—*Held*, therefore, where an application for execution of a decree of 1872 had been made and granted in January 1882, and under s. 230 of the Code of Civil Procedure, 1877, further execution became barred, before the date on which Civil Procedure Code, 1882, came into force, that no application within three years from such date could be granted under s. 230 of that Code.

Kollu Shettati v. *Manjaya* 454

11. ——————, s. 244 :

B obtained a decree on a settlement of accounts made with V as trustee of a mutt. V's title as trustee having subsequently been negatived by decree and the title of S declared, B applied to execute his decree against the property of the mutt and to have S substituted as party to the suit in place of V. The application was rejected by the Múnsif, but on appeal the District Judge made S a party and reserved for determination in execution proceedings the question whether the debt was contracted for the benefit of the mutt :—*Held*, that S was properly made a party, but that it was not open to him to raise this question in execution proceedings.

Sudindra v. *Budan* 80

12. ——————, ss. 244, 583 :

The Court has power to award to successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree.

Ayyaváyyar v. *Shástram Ayyar* 506

13. ——————, ss. 248, 295, 622—*Execution proceedings—Rateable distribution—Application for further execution—Notice :*

A, and subsequently B, obtained decree against X, in execution of which the same land was attached, and B obtained an order for rateable distribution Neither decree was satisfied. A then applied for attachment of other property and the sale was fixed for 28th September. On 26th September B filed a petition for further attachment under ss. 250, 274, and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 295, because no application for execution was pending :—*Held*, on appeal, that the petition for execution was wrongly rejected, but that the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution.

Venkataraman v. *Mahalingayyan* 508

14. ——————, s. 258—*Satisfaction of decree not certified—Fraudulent execution—Charge under Penal Code*, s. 213—*Proof of payment :*

Section 258 of the Code of Civil Procedure, which provides that no payment or adjustment of a decree not certified to the Court, as in the said section provided, shall be recognized by any Court, does not debar a Criminal Court from recognizing such payment where the decree-holder is charged with fraudulently executing a satisfied decree.

Queen-Empress v. *Pillala* 101

15. ——————, s. 266, *Explanation* (*b*) :

See ARMY ACT, 1881.

16. ——————, s. 268—*Decree—Execution—Attachment—Deposit by servant of Railway company—Rights of attaching creditor :*

Where money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment creditor of such servant under s. 268 of the Code of Civil Procedure :—*Held*, that the creditor was not entitled to have his decree satisfied out of the

PAGE

deposit, but was entitled to a step order under cl. (c) of s. 268, and also to payment of the interest, if any, due by the company on such deposit to the servant.

Karuthán v. *Subramanya* 203

17. ——————, s. 283 :

See SMALL CAUSE COURT, 2.

18. ——————, s. 295 :

See SMALL CAUSE COURT, 1.

19. ——————, s. 295—*Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale—Limitation Act, sch. II, arts.* 12, 13 :

Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors. By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs, and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855 in March 1881. In May 1881 B, a puisne mortgagee, applied to the Court for payment to him of Rs. 500 of this sum, alleging that A was entitled only to Rs. 2,000 and Rs. 280 costs, but not to arrears of rent, in preference to his claim as second mortgagee. The claim of B was rejected on the 27th May 1881 and the whole amount paid out to A. In February 1882 B (who had filed suit on the 23rd March 1881) obtained a decree upon his mortgage. On the 23rd May 1884, B sued to recover Rs. 510 paid to A on account of rent on the 27th May 1881. The Lower Courts dismissed the suit on the grounds (1) that A was entitled to treat the arrears of rent as interest; (2) that the suit was barred by limitation :—*Held*, on second appeal, that B was entitled to recover the sum claimed.

Sivarámá v. *Subramanya* 57

20. ——————, ss. 315, 622 :

Where an order was passed under s. 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court :—*Held*, that under s. 622 of the Code of Civil Procedure, the High Court could set aside the order because, the judgment-debtor having been found to have a saleable interest, the Lower Court had no power to order a refund.

Kunhamed v. *Chathu* 437

21. ——————, s. 361 469

22. ——————, s. 375—*Agreement to compromise appeal—Petition to Court by both parties—Consent withdrawn before decree by one party—Remedy—Transfer of Property Act*, s. 59—*Charge on immovable property—Oral agreement as to terms of compromise of suit—Terms of compromise in dispute—Proof by affidavit and further evidence :*

The parties to an appeal, in which an issue had been remitted for trial to the Lower Court, having presented a petition to the Lower Court, stating that the suit had been compromised and the terms of the compromise, requested the Lower Court to move the Appellate Court to pass a decree in accordance with such terms. Before a decree was passed, one of the parties objected to the compromise being accepted :—*Held*, that it was open to the Court, such objection notwithstanding, to pass a decree in accordance with the agreement—*Ruttonsey Láliji* v. *Pooribai* (I.L.R., 7 Bom., 304) and *Karuppan* v. *Rámasámi* (I.L.R., 8 Mad., 482) followed; *Hara Sundari Debi* v. *Kumar Dukhinessur Malia* (I.L.R., 11 Cal., 250) observed upon. An oral agreement by the parties to a suit that a decree be passed creating a charge on immovable property above Rs. 100 in value, is not rendered inoperative by s. 59 of the Transfer of Property Act. The parties to an appeal applied to the Court to pass a decree in accordance with the terms of a compromise, and, before decree was passed, one of the parties objected to such decree being passed on the

PAGE

ground that certain conditions precedent to be performed by the other party had not been performed. The Court (this being denied by the other party) called for affidavits in proof of the terms of the agreement of compromise, and, these being found not to be sufficiently conclusive, directed the Lower Court to take evidence on the point.

Appasámi v. *Mánikam* 103

23. ——————, s. 503—*Receiver—Powers—Limitation—Cause of action :*

A zamíndárí was attached in execution of certain decrees against the zamíndár, and the plaintiff was appointed receiver with full powers, under s. 503 of the Code of Civil Procedure, to manage the zamíndárí. Before the appointment of the receiver, the zamíndárí had expended certain sums at the defendants' request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended. It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zamíndár nor property attached in execution of a decree against him :—*Held*, that the receiver could maintain the suit. It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zamíndár more than three years before the suit; and further, that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed :—*Held*, that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for.

Sundaram v. *Sankara* 334

24. ——————, ss. 506, 622—*Award—Error of procedure—Relief refused on equitable grounds :*

R. M., party to a suit, having authorised his agent to conduct the suit, the agent consented to the case being referred to arbitration by the Court. The arbitration was carried on to the knowledge and with the assent of R.M. On an application by R.M., under s. 622 of the Code of Civil Procedure, to set aside the award made by the arbitrators on the ground (1) that his pleader had not been authorised in writing, as required by s. 506 of the Code, to apply for arbitration, and (2) that he himself had not consented to the reference :—*Held*, that under the circumstances, R.M. was not entitled to relief.

Unniraman v. *Chathan* 451

25. ——————, ss. 508, 521, 522, 622—*Act VIII of* 1859, *s.* 318—*Award made after time allowed by Court, invalid,—when the time runs :*

An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May, the court refused to give judgment in accordance with it under s. 522 of the Code of Civil Procedure on the ground that it was not valid. The plaintiffs now petitioned High Court under s. 622 of the Code of Civil Procedure :—*Held*, that the award was invalid and the Court had not failed to exercise jurisdiction within the meaning of s. 622 of the Code of Civil Procedure.

Simson v. *Venkatagopálam* 475

26. ——————, ss. 562, 565, 566—*Illegal order of remand :*

A District Múnsif having taken all the evidence offered on the issues in a suit, disposed of the suit upon his finding on one of the issues without deciding the rest. On appeal the District Judge reversed the decree and remanded the suit for the trial of the issues left untried :—*Held*, that under s. 562 of the Code of Civil Procedure, the order of remand was illegal.

Amma v. *Kunhunni* 356

27. ——————, s. 582 :

See LIMITATION ACT, SCH. 11, ART. 171, A.B.C., 178 1

28. ——————, s. 583 133

PAGE

29. ——————, ss. 588, 592—*Letters Patent, s.* 15 :

Section 15 of the Letters Patent of the High Court at Madras being controlled by s. 588 of the Code of Civil Procedure, no appeal lies from the order of a single Judge of the High Court made under s. 592 of the Code of Civil Procedure rejecting an application for leave to appeal *in formâ pauperis*.

Rajagopal, In re 447

30. ——————, s. 622 375

31. ——————, s. 622—*Jurisdiction, s.* 311—*Sale set aside on account of irregularity only :*

Where a Court, professing to act under s. 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant :—*Held*, that such order was passed without jurisdiction within the meaning of s. 622 of the said Code.

Lakshmana v. *Najimúdin* 145

32. ——————, ss. 629, 632 :

See LETTERS PATENT, 2.

CLUB—*Expulsion of member by committee.* Audi alteram partem :

G, having been expelled from a club by the committee on the ground that he had published a certain pamphlet which was considered to be a libel by the committee, sued the members of the committee for damages and to have his name replaced on the list of members. It was proved that, in considering G's conduct with reference to the publication of the pamphlet, the committee took into consideration certain letters which G had written to certain members of the committee and that his expulsion was partly for printing the pamphlet and partly for writing the letters :—*Held*, that as the decision of the committee was arrived at *bonâ fide*, the Court had no right to decide whether the pamphlet was or was not a libel. *Held*, further, that as G had no opportunity for defending himself on the charge of writing the letters, his expulsion was illegal.

Gompertz v. *Goldingham* 319

COLLATERAL AGREEMENT :

See CONTRACT ACT, 1.

COMPENSATION :

See CRIMINAL PROCEDURE CODE, 2.

2. ——————— *Frivolous complaints :*

See CRIMINAL PROCEDURE CODE, s. 250.

COMPROMISE OF SUIT—*Consent withdrawn before decree :*

See CIVIL PROCEDURE CODE, 22.

CONFESSION :

See CRIMINAL PROCEDURE CODE, 5.

CONTRACT—*Breach—Rescision—Resiprocal promises—Condition precedent—Damages, Measure of :*

On 6th March 1883 V promised to sell 5,000 bags of gingelly seed at Rs. 7 As. 11 a bag to S. Two-thirds of the price was paid in advance. V agreed to deliver the 5,000 bags at the end of April and to give S notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and S promised to pay V the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract. 3,000 bags were delivered by V, but S did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May V declined to deliver these bags, on the ground that S had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and, subsequently, repaid to S the balance due to him of the money advanced. In a suit by S against V for damages for non-delivery of 2,000 bags :—*Held*, that

PAGE

V was not excused from performance of his promise by the failure of S to pay the balance due for the bags delivered, and that S was entitled to recover the difference between the market and the contract price on the day the contract was broken by V.

Simson v. *Virayya* 359

2. ————*Instalment bond—Agreement to pay enhanced rate of interest on default, enforceable:*

An agreement to pay the principal of a debt by instalments with interest, and on default of payment of each instalment to pay an enhancement rate of interest thereon from the date of default of payment, is not an agreement which should be relieved against.

Dictum of Wilson, J., in *Mackintosh* v. *Crow* (I.L.R., 9 Cal., 689) approved.

Jaganádham v. *Ragunádha* 276

CONTRACT ACT, ss. 21, 65—*Mistake of law—Agreement to secure repayment of loan, collateral, to primary obligation:*

By an agreement in writing, defendants, trustees of a temple, in consideration of an advance of money which they represented was required to pay off debts incurred for the benefit of the temple, granted to plaintiff a lease of the right to manage the temple lands, and plaintiff promised that he would repay himself out of the profits to be derived from the lands and that neither the defendants nor their family property should be made liable for the debt. In a suit by plaintiff against a tenant of the temple lands, this lease was held to be void for illegality. Defendants subsequently resumed management and plaintiff sued them to recover the money advanced by him. It was found that the agreement was entered into by both parties under a mistake as to the validity of the lease:—*Held*, that assuming s. 65 of the Contract Act was not intended to vary the rule, that a mistake of law is no ground for relieving a party from his own contract, plaintiff was nevertheless entitled to recover on the ground that the agreement which provided for repayment was collateral and had failed. An agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract.

Krishnan v. *Sankara Verma* 441

2. ————, **s. 70** 375

3. ————, **s. 74**—*Penalty:*

See CONTRACT, 2.

4. ————, **s. 264**—*Partnership—Notice of dissolution—Sleeping partner:*

A, B and C traded together in partnership as B C & Co., A being a sleeping partner. After the partnership was dissolved, B and C continued to trade together under the same name and incurred debts to the plaintiffs, who sued to recover the amounts from A, B, and C. The plaintiffs had not dealt with the old partnership nor received notice of its dissolution, and it was not alleged that they knew of A's previous connection with it:—*Held*, that the suits did not lie against A.

Rámasámi v. *Kadar Bibi* 492

COSTS—DIVORCE SUIT:

See DIVORCE.

COURT FEES ACT, s. 14, sch. I, arts. 4, 5—*Review of judgment—Stamp duty—Ninety days—Computation of time:*

In computing the period of eighty-nine days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee leviable on the plaint or memorandum of appeal (under art. 5 of sch. I of the Court Fees Act, 1870), the time during which the Court is closed for vacation cannot be excluded.

Kota, In re 134

PAGE

2. ————, **sch. II. art. 10** (*a*)—*Stamp Act, sch. I, art. 50* (*b*)—*Power to vakíl to obtain copies from Collector's office—Stamp:*

A document authorising a vakíl to apply for copies of records from the Collector's office is properly stamped with a Court-fee stamp under art. 10 (*a*) of sch. II of the Court Fees Act, 1870, and does not require to be stamped as a power-of-attorney under art. (*b*) of sch. I of the Indian Stamp Act, 1879.

Reference under Stamp Act, s. 46 146

CRIMINAL PROCEDURE CODE, ss. 4, 202, 350:

A magistrate upon complaint made having issued process and examined witnesses in support of complaint ceased to exercise jurisdiction. His successor on taking up the case referred the complaint to the police for inquiry and report, and upon receipt of the report discharged the accused:—*Held*, that this procedure was illegal. A reference under s. 202 of the Code of Criminal Procedure cannot be made after evidence has been taken for the complaint and process issued.

Sadagopácháryár v. *Ragaváchárýár* 282

2. ————, **s. 4** (*a*), **s. 250:**

See CATTLE TRESPASS ACT, 2.

3. ————, **ss. 15, 264, 407, 414**—*General Clauses Act, s.* 2 (13)—*Bench of Magistrates with second-class powers—Conviction—Appeal:*

An appeal lies under s. 407 of the Code of Criminal Procedure from a conviction by a Bench of Magistrate invested with second or third class powers.

Queen-Empress v. *Náráyanasámi* 36

4. ————, **ss. 133, 137, 140:**

A Sub-divisional Magistrate having made a conditional order, under s. 133 of the Code of Criminal Procedure, against a person to abate a nuisance or appear and show cause before a Second-class Magistrate why the order should not be enforced, the said person appeared as directed and the order was made absolute under s. 137. The Second-class Magistrate then issued a notice and order under s. 140, requiring the nuisance to be abated within a certain date. The District Magistrate having referred the case on the ground that the Second-class Magistrate had no jurisdiction to pass final orders in such cases:—*Held*, that the order was not illegal.

Narasimha, In re 201

5. ————, **ss. 164, 364, 533**—*Evidence Act, ss.* 65, 80—*Confessions—Improper examination of accused person by Magistrate—Record rejected:*

The Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative and was signed by the Magistrate only. The same Magistrate shortly afterwards, purporting to act under the Code of Criminal Procedure, before any evidence was recorded against V, examined him as to this statement which was read over and translated to him. In answer to questions, V admitted that he had made it voluntarily. This examination was recorded according to the provisions of s. 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the sessions, tried and convicted mainly on his own recorded statement and examination. The Deputy Magistrate was examined as a witness and stated that the statement recorded by him was made by V and was correctly recorded and was made voluntarily:—*Held*, that the record of the statement made by V to the Deputy Magistrate was not admissible in evidence against V. Per Parker, J.—The provisions of s. 164 of the Code of Criminal Procedure are imperative, and s. 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section. If the confessional statement of V was recorded by the Magistrate in his

PAGE

executive capacity, it was not receivable in evidence under s. 80 of the evidence Act. The action of the Magistrate in examining V as to his confessional statement before there was any legal evidence on the record against him was legal and, therefore, the record of such examination could not be used in evidence against V. Inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given.

Queen-Empress v. *Viran* 224

6. ——————, s. 197—*Sanction to prosecute Judge for words uttered on the bench:*

Where a Judge was charged with using defamatory language to a witness during the trial of a suit:—*Held*, that under s. 197 of the Code of Criminal Procedure, the complaint could not be entertained by a Magistrate without sanction.

Gulam Muhammad Sharif-úd-daulah, In re 439

7. ——————, s. 250—*Frivolous complaint—Compensation—Cattle Trespass Act, ch. V—Complaint of illegal seizure, not complaint of offence:*

The illegal seizure of cattle under colour of Cattle Trespass Act, 1871, not having been constituted an offence under that Act or otherwise, an award of compensation, under s. 250 of the Code of Criminal Procedure, to the accused on such complaint, is illegal.

Pitchi v. *Ankappa* 102

8. ——————, s. 269—*Jury wrongly treated as assessors by Judge—Unanimous opinion of Jury treated as assessors accepted as formal verdict:*

L and N were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of s. 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting L and N of dacoity, acquitted them of murder:—*Held*, that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect.

Queen-Empress v. *Lakshmana* 42

9. ——————, s. 271—*Murder—Explanation of charge essential:*

At a trial before a Sessions Court a charge was read out to the prisoner to the effect that they at a certain place on a certain date committed murder by causing the death of M, and that they had thereby committed an offence punishable under s. 302 of the Indian Penal Code and within the cognizance of the Court of Sessions. The prisoners pleaded guilty and were convicted on their plea. The charge was not explained to the prisoners. In answer to questions put by the Court, prisioners stated that they had killed M, and that they made the admissions of their own accord and not on the persuasion on any one:—*Held*, that the conviction must be quashed and a new trial ordered.

Aiyavu v. *Queen-Empress* 61

10. ——————, ss. 286, 288, 537—*Witnesses, Examination of—Irregularity:*

At a trial before a Sessions Court, the Attorney, who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented:—*Held*, that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted.

Subba v. *Queen-Empress* 83

11. ——————, s. 349:

A Second-class Magistrate having convicted a person of theft and sent him to a First-class Magistrate for enhanced punishment as an old offender under s. 349 of the Code of Criminal Procedure, the First-class Magistrate

PAGE

returned the prisoner to the Second-class Magistrate and directed that officer to commit the case to Sessions. On a reference by the Sessions Judge, the High Court, while allowing the committal to stand, directed that in all cases referred under s. 349 of the Code of Criminal Procedure, the Court to which the case is referred should dispose of the case itself and not send it back to the Court by which the reference is made for committal to Sessions.

Queen-Empress v. *Viranna* 377

12. ——————, ss. 419, 420:

See LIMITATION ACT, 5.

13. ——————, ss. 517, 520:

An order passed under s. 517 of the Code of Criminal Procedure may be revised by a Court of Appeal although no appeal has been preferred in the case in which such order was passed.

Queen-Empress v. *Ahmed* 448

14. ——————, s. 526—*District Magistrate and Civil and Sessions Judge (qud Magistrate) of Bangalore subordinate to High Court:*

The District Magistrate and the Civil and Sessions Judge of the civil and military station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of s. 506 of Code of Criminal Procedure.

Scott v. *Ricketts* 356

CUSTOM—*Special—Proof:*

See HINDÚ LAW, 1.

DAMAGES:

See CONTRACT, 1.

DECREE—*Execution—Invalid sale—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit:*

Certain land having been attached in execution of a decree by a District Court, S, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger, and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by S, set aside the order rejecting his claim. The District Court, in ignorance of the order of the High Court, having subsequently put the purchaser in possession of the land, S applied for restitution:—*Held*, that the order of the District Judge confirming the sale was passed without jurisdiction, and that the District Judge had no power to restore possession to S.

Subbaya v. *Yellamma* 130

2. ——————*Execution—Sale—Immovable property—Hypothecation bond—Interest of obligee sold—General Clauses Act*, 1868, *s.* 2 (5)—*Interest arising out of land:*

Where a judgment-debtor is entitled to a debt secured by a collateral hypothecation of land and the decree-holder attaches and sells the judgment-debtor's interest in the bond, such interest is immovable property for the purpose of attachment and sale under the Code of Civil Procedure, 1882. *Per* Turner, C.J.—*Quære*—Whether the decree-holder could not sell the debt apart from the security as movable property?

Appasámi v. *Scott* 5

DEFAMATION:

See PENAL CODE, 5.

2. ——————**BY A JUDGE:**

See CRIMINAL PROCEDURE CODE, 6.

DEPOSIT—*By servant of railway company—Attachment:*

See CIVIL PROCEDURE CODE, 16.

PAGE

DISTRICT MUNICIPALITIES ACT (MADRAS)—*Procedure to compel payment of tax—Distress :*

Under s. 103 of Act IV of 1884 (Madras), a prosecution for default of payment of tax cannot be instituted unless the tax cannot be recovered by distress and sale of moveable property of the defaulter as provided in that section.

Queen-Empress v. *O'Shaughnessy* 429

DIVORCE—*Costs of wife—Indian Succession Act*, 1865, *s.* 4—*Married Woman's Property Act*, 1874 :

A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit. *Proby* v. *Proby* (I.L.R., 5 Cal., 357) distinguished and observed upon.

Natall v. *Natall* 12

EVIDENCE :

See ADVERSE POSSESSION, 3.

EVIDENCE ACT, ss. 65, 80:

See CRIMINAL PROCEDURE CODE, 5.

EX PARTE DECREE :

See CIVIL PROCEDURE CODE, 7.

2. ——————*Limitation Act, s.* 5—*Admission of Appeal out of time—Order set aside at hearing :*

An order made *ex parte*, under s. 5 of the Indian Limitation Act, 1877, admitting an appeal after the period prescribed therefor, may be set aside on proper cause being shown by the Court which made it.

Venkatráyudu v. *Nágadu* 450

FOREST ACT, ss. 2, 43 :—*Rules* 10, 13, 23—*Logs permanently fastened to a building cease to be timber :*

The accused were convicted of removing 'timber' vested in the Forest Department, and the convicting Magistrate ordered it to be confiscated :—*Held*, that having been already permanently fastened to a building it had ceased to be timber within the meaning of s. 2 of the Forest Act, and the order for confiscation was illegal.

Queen-Empress v. *Kethigadu* 373

FOREST LAND—*Enjoyment—Adverse possession—Quasi possession—Prescription :*

In a suit by a zamíndár to recover certain forest tracts from Government, the plaintiff relied on certain accounts called Ayakut accounts as furnishing proof of the inclusion of the said tracts within the limits of his zamíndárí. The District Judge refused to accept these accounts as evidence of reputation, because no evidence was produced to show for what purpose, by whom and in what circumstances these accounts were prepared, and what guarantee existed to ensure their accuracy.—*Held*, that inasmuch as they were from time to time prepared for administrative purposes by village officers and were produced from proper custody and otherwise sufficiently proved to be genuine were admissible as evidence of reputation. No distinction can be drawn between evidence of reputation to establish and to disparage a public right. The plaintiff having proved that he and his ancestors had cut wood, pastured cattle, and gathered forest produce in certain forests for fifty years, the Lower Court held that such acts of enjoyment were only evidence of an easement and not of adverse possession :—*Held*, that these acts as they had been done under the belief and assertion that the said tracts formed portion of the zamíndárí, and that the plaintiff and his ancestors were owners of the said tracts were evidence of adverse possession. In principle, an act done is one of ownership or evidence of an easement according as the person doing it asserts general ownership or a particular right in other property. The enjoyment of any right of ownership over the soil is, *primâ facie* proof of ownership of the soil. Where therefore the Lower Court found such an enjoyment of a forest as proved title to the profits thereof and such enjoyment was accompanied with an assertion of ownership of the soil :—*Held*, that the Court was bound to find a title to the soil established. Where a tract of land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done on various portions of it, such acts may be accepted as evidence of the possession of the whole tract.

Bháskarappá v. *Collector of North Kánara* (I.L.R., 3 Bom., 452) distinguished.

Sivasubramanya v. *Secretary of State for India* 285

2. ——————**MALABAR**—*Presumption as to ownership—Rights of Crown and of occupier of waste land under Hindú law—Suit by Crown for declaration of title and possession—Plaint—Cause of action within Statutory period not alleged—Burden of proof—Limitation—Regulation II of* 1802—*Remedy suspended—Right surviving—Act XIV of* 1859—*Claim by Crown not affected—Limitation Act*, 1871—*Effect on subsisting rights—Limitation Act*, 1877, *ss.* 2-28—*Construction :*

In the district of Malabar and the tracts administered as part of it, there is no presumption that forest lands are the property of the Crown. According to the Hindú law a right to the possession of land is acquired by the first person who makes a beneficial use of the soil, the right of the Sovereign being to assess the occupier to revenue. Assuming that the Crown has the right to oust any person who, without sanction, occupies waste land which has not been appropriated for any public purpose, it cannot, by a suit brought for a declaration of title, or for ejectment, the date at which the cause of action arose not being stated in the plaint, compel a defendant to prove possession for 60 years. As a general rule, a plaintiff must not only show he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act. The probable explanation of the ruling in *Radha Gobind Roy's case* (Suth. P.C. Cases 809) is, that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession was interrupted, but that where the plaintiff can prove title only, and not possession, he must prove that the adverse possession of the defendant or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act. In a suit instituted in March 1879 by the Crown for a declaration of title to certain forest land and for possession of a portion thereof, the defendants alleged that the land has been in their possession for more than 60 years :—*Held*, that it was incumbent on the Crown, under art. 149 of sch. II of the Indian Limitation Act, 1877, to show possession of the proprietary rights claimed within 60 years, or, if the defendants proved possession, that such possession commenced or became adverse within such period. The District Court having held, that up to April 1, 1873, when the Limitation Act of 1871 came into force, the limitation for such a suit was 12 years from the time when the cause of action arose, and that the suit was barred by adverse possession for 12 years prior to April 1, 1873 :—*Held*, that even if Regulation II of 1802 applied to claims by the Crown, inasmuch as the Regulation only barred the remedy and did not extinguish the right and Act XIV of 1859 did not extend to such a claim, the right subsisted when the Limitation Act of 1871 came into operation, and as long as that Act was in force, and that the Crown, being entitled under that Act to sue within 60 years from the date of the cause of action, and under s. 28 of the Limitation Act of 1877, to sue within 2 years from the 1st of October 1877, the suit was not barred, provided it could be shown that the cause of action arose within 60 years from the date of its institution.

Secretary of State v. *Víra Rayan* 175

FRAUD—*Concealment of defect of title :*

See VENDOR AND PURCHASER.

FRAUDULENT ALTERATION OF DOCUMENT—*Effect of—English Law how far applicable in mufassal :*

In a suit brought to recover Rs. 815, principal and interest due according to the terms of a registered mortgage bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registration (1) by inserting a condition, making the whole sum payable upon default of pay-

PAGE

ment of any instalment, and (2) by doubling the rate of interest. The defendant admitted in his written statement that he had received a certain portion of the consideration for the bond from the plaintiff. At the trial the plaintiff claimed to amend the plaint and recover the first instalment according to the terms of the bond as executed by defendant :—*Held*, by the Full Bench (Kernan, Offg. C.J., Muttusámi Ayyar, Hutchins, Parker and Handley, JJ.) that the suit must be dismissed. *Per* Kernan and Muttusámi Ayyar, JJ.—The decision in *Rámasámy Kón's case* is in conformity with the law of England. *Per* Kernan, Hutchins, Parker and Handley, JJ.—The rule in *Master* v. *Miller* is in consonance with equity and good conscience and applicable to the mufassal. *Per* Muttusámi Ayyar, J.—That rule is more penal than equitable, but having been adopted by the courts since 1866 must be followed.

Christáchárlu v. *Karibasayya* 399

GENERAL CLAUSES ACT, 1868, s. 2 (5)—*Interest arising out of land :*

See DECREE, 2.

2. ——————, s. 2 (13) :

See CRIMINAL PROCEDURE CODE, 3.

HINDU LAW—*Adoption after upanáyanam of sagotra—Bráhmans—Custom proof :*

According to the custom obtaining amongst Bráhmans in Southern India, the adoption of a boy of the same gotra, after the upanáyanam ceremony has been performed, is valid.—*P. Venkatesaiya* v. *M. Venkata Charlu* (3 M.H. C.R., 28) overruled.

Vírarágava v. *Ramalinga* 148

2. ——————, *Adoption custom—Bráhmans—Adoption of daughter's and sister's sons :*

In Southern India the custom which exists among Bráhmans of adopting a sister's or daughter's son is valid.

Vayidináda v. *Appu* 44

3. ——————, *Decree against father—Sale of ancestral estate in execution of money-decree—Son's liability and rights :*

A sale of ancestral property in execution of a money-decree obtained against a Hindú father will, if the debt was neither immoral nor illegal, pass to the purchaser, the entire interest of which the father could dispose, *i.e.*, his son's as well as his own share provided the purchaser has bargained and paid for such interest. The son not being bound by the decree against his father may contest the sale by suit, but unless he proves that the debt was not such as to justify the sale, he cannot succeed. The revised ruling of the Full Bench in *Ponnappa* v. *Pappuvayyangár* (I.L.R., 9 Mad., 343) as to sales in execution of money-decrees against the Hindú father has been overruled by the decision of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*, L.R., 13 I.A., 1 ; s.c. I.L.R., 13 Cal., 21.

Narasanna v. *Gurappa* 424

4. ——————, *Gift of undivided share by a coparcener invalid :*

The rule of Hindú law which forbids voluntary alienations of the family estate by a Hindú coparcener applies as well to gifts to relatives as to gifts to strangers.

Ponnusámi v. *Thatha* 273

5. ——————, *Illatam custom—Status of son-in-law—Coparcenary Survivorship—Proof of special custom :*

Although an illatam son-in-law and a son adopted into the same family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindú coparceners having the right of survivorship.

Chenchamma v. *Subbaya* 114

PAGE

6. ——————, *Impartible zamíndári—Money decree against zamíndár—Attachment and sale of estate—Suit by son to recover after father's death—Rights of purchaser :*

In execution of a money decree obtained against the holder of an impartible zamíndári the creditor attached certain immovable property—portion of the zamíndári—which he described as the property of the debtor. This was sold by the Court and purchased by L. A suit having been brought by the son of the judgment-debtor, after his father's death to recover the property from L :—*Held*, that all that L acquired was the life-interest of the judgment-debtor in the property, and therefore the plaintiff was entitled to recover.

Sivaganga zamíndár v. *Lakshmana* 188

7. ——————, *Inheritance—A son's power to adopt—Impartible estate—Failure to prove alleged custom in a family against adoption—Invalid agreement between father and father's brother, in a joint family, contrary to rights of son already born :*

Two brothers, undivided under the Mitakshará, the family estate being an impartible zamíndári in the possession of one of them who had a son, contracted with each other that, in the event of an indefinite failure of male issue in the line of either of them, the estate should descend in the line of the brother having aurasa (self-begotten) issue, and should not be alienated from the line of the latter by adoption :—*Held*, that this contract did not bind the son not to adopt, or exclude from the inheritance a son adopted by him. Such a stipulation was contrary to the law declared in the *Tanjore* case and was ineffectual to prevent the son's exercising his right of adoption.

Suriya Ráu v. *Rájá of Pittapúr* 499

8. ——————, *Inheritance—Partition—Disqualified heirs—Birth of qualified heir :*

Under the Hindú law of inheritance which obtains in Southern India, the sons of a deaf and dumb member of an undivided Hindú family are entitled to a share of the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather. In such a case the estate vests on the death of the grandfather in the qualified heirs subject to the contingency of its being divested on the recovery of the disqualified, or the birth of a qualified heir.

Krishna v. *Sámi* 64

9. ——————, *Liability of ancestral estate for father's debt—Effect of sale in execution of mortgage decree and of money decree against the father—Transfer of Property Act, s. 85 :*

Where the property of an undivided Hindú family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the debt. It is otherwise if the decree in execution of which the sale takes place is a mere money decree. *Per* Kernan, J.—It will still be necessary in all cases where a creditor seeks in a suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit. *Girdharee Lall* v. *Kandoo Lall* (L.R., 1 I.A., 321). *Muddun Thakoor* v. *Kantoo Lall* (L.R., 1 I.A., 321). *Deendyal Lall* v. *Jugdeep Narain Sing* (L.R., 4 I.A., 247) discussed. *Harde Narain Sahu* v. *Ruder Perkash Misser* (I.L.R., 9 Cal., 626) followed. *Ponnappa Pillai* v. *Pappuvayyangár* (I.L.R., 4 Mad., 1) modified.

Ponnappa v. *Pappuvayyangár* 343

10. ——————, *Self-acquisition—Burden of proof :*

Where waste land was taken up and cultivated by the father of an undivided Hindú family and the question was whether it was family property or self-acquired :—*Held*, that the burden of proof lay on those who asserted that it was self-acquired. *Quære*—Whether, under Hindú Law, a father has power by a nuncupative will to dispose of self-acquired immovable property to the complete disinherison of a son.

Subbayya v. *Chellamma* 477

PAGE

11. ————, *Waste lands—Rights of Crown and occupier :*

See FOREST LAND, 2.

ILLATAM CUSTOM :

See HINDÚ LAW, 5.

INSOLVENCY JURISDICTION :

See CIVIL PROCEDURE CODE, 2.

INSTALMENT BOND :

See CONTRACT, 2.

JURISDICTION :

See CIVIL COURTS' ACT, 1.

See SMALL CAUSE COURT, 2.

2. ————,

See SMALL CAUSE COURT ACT, 3.

3. ————, *Act IX of* 1861—*Civil Procedure Code, ss.* 11, 15—*Parent and child —Suit for recovery of minor by parent :*

Act IX of 1861 does not debar a District Múnsif's Court from entertaining a suit by a Hindú father to recover possession of his minor son alleged to be illegally detained by the defendant.

Krishna v. *Reade* 31

4. ————, *Cause of action—Suit to set aside order of Revenue Court directing ejectment*—Res judicata :

A Revenue Court having ordered a tenant to be ejected under s.10 of the Rent Recovery Act on the ground that he had refused to accept a pattá as directed by the Court, the tenant brought a suit in the Civil Court to set aside the order of the Revenue Court :—*Held*, that the suit would not lie.

Rágava v. *Rájagopál* 39

JURY—ASSESSORS—VERDICT :

See CRIMINAL PROCEDURE CODE, 8.

KARNAM :

See REGULATION XXIX OF 1802 214

LANDLORD AND TENANT—*Improvement—Enhanced Rent :*

See RENT RECOVERY ACT.

2. ————, *Unregistered lease—Proof of tenancy ejectment—Occupancy rights :*

If a contract of lease is, for want of registration, ineffectual, the landlord is not debarred from giving other evidence of a tenancy and requiring the Court to adjudicate on his right to eject. Dictum in *Nangali* v. *Ramán* (I.L.R., 7 Mad., 226) observed upon.

Venkatagiri Zamindár v. *Rághava* 142

LEGAL PRACTITIONERS' ACT, ss. 27, 28, 30—*Suit by pleader to recover fee from client—Contract Act,* s. 70—*Civil Procedure Code,* s. 622 :

The Legal Practitioner's Act does not debar a pleader from recovering a fee from his client when no contract in writing is made. A Small Cause Court having dismissed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a suit, on the ground that such a suit would not lie, because it was based on an oral contract and such contract could not be enforced by reason of the provisions of the Legal Practitioners' Act, the High Court under s. 622 of the Code of Civil Procedure reversed the decree of the Small Cause Court.

Rámá v. *Kunji* 375

PAGE

LETTERS PATENT (MADRAS) :

See CIVIL PROCEDURE CODE, 29.

2. ————, s. 15—*Civil Procedure Code, ss.* 629, 632—*Indian Council's Act,* [illegible], s. 22 *High Court's Act,* s. 9 :

Section 15 of the Letters Patent for the High Court of Judicature at Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by s. 629 of the Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final.

Achaya v. *Ratnavélu* 253

LIMITATION :

See RENT RECOVERY ACT, 3.

2. ———— *Regulation II of* 1802—*Act XIV of* 1859—*Claim by Crown :*

See FOREST LAND, 2.

LIMITATION ACT, 1871 175

2. ————, **1877, ss. 2, 28 :**

See FOREST LAND, 2.

3. ————, **s. 5 :**

See EX PARTE ORDER.

4. ————, **s. 6 :**

See REGULATION IV OF 1816 118

5. ————, **s. 12, sch. II, art. 154**—*Criminal Procedure Code, ss.* 419, 420—*Appeal by prisoner—Limitation—Time necessary to obtain copy of judgment —Presentation of petition to officer in charge of jail :*

In computing the period of limitation prescribed for an appeal from a sentence of a Criminal Court by art. 154 of sch. II of the Indian Limitation Act, 1877, the time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded. In the case of such appeals, presentation of the petition of appeal to the officer in charge of the jail is, for the purpose of the Limitation Act, equivalent to presentation to the Court.

Queen-Empress v. *Lingaya* 258

6. ————, **s. 20**—*Part-payment of principal of debt—Endorsement of cheque by debtor :*

Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to the creditor :—*Held*, that such endorsement did not satisfy the conditions of s. 20 of the Indian Limitation Act so as to give rise to a new period of limitation from the date of such endorsement.

Mackenzie v. *Thiruvengadathán* 271

7. ————, **sch. II, art. 12 :**

See ADVERSE POSSESSION, 3.

8. ————, **sch. II, arts. 12, 13** 57

9. ————, **sch. II, arts. 12, 95 :**

See REVENUE RECOVERY ACT.

10. ————, **sch. II, arts. 132, 147**—*Hypothecation :*

In 1884 N sued A to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871 and certain immovable property was hypothecated as security for repayment of the debt :—*Held*, that the suit did not fall under art. 147 of sch. II of the Indian Limitation Act, which allows sixty years

PAGE

to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under art. 132 of the same schedule which allows twelve years to enforce a payment of money charged on immovable property.

Alibe v. *Nanu* 21

11. ——————, sch. II, art. 144—*Adverse possession—An outside person claiming an interest in an estate together with an undivided family—Inheritance to such owners:*

In a family of three undivided brothers, an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter, even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family; and the members of it would not have had a right to succeed to his fourth share, which would have descended to his own heirs; the other three-fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the deaths of his father and uncles, sole possession of the whole estate:—*Held*, that he did not take the one-fourth share above mentioned by any right of inheritance, and that, in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain from those claiming through the son, who was now dead, the one-fourth share, brought more than twelve years after possession taken by the son, by a purchase, relying on a title through the fourth co-proprietor, was barred by limitation under article 144 of the second schedule of Act XV of 1877.

Ramalakshamma v. *Ramanna* 482

12. ——————, sch. II, art. 144—*Adverse possession of limited interest in land:*

The manager of a Nambudri family in Malabar having demised certain land on kánam in 1868, was removed from his possession as manager in 1875. In 1883 his successor sued to eject the kánam-holders:—*Held*, that the suit was barred by limitation.

Madhava v. *Náráyana* 244

13. ——————, sch. II, arts. A, B, C; 178:

Per Curiam (Kernan, J. dissenting). An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under art. 171B, but under art. 178 of sch. II of the Indian Limitation Act, 1871.

Lakshmi v. *Sri Dévi* 1

LIS PENDENS:

See CIVIL PROCEDURE CODE, 6.

MADRAS BOAT RULES—*Act IV of* 1842—*Act IX of* 1846—*Jurisdiction of Magistrates—Liability of owner under rule 7—Burden of proof:*

Under Act IX of 1846, the Madras Government is authorised to make in respect of ports in the presidency such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require. Act IV of 1842, s. 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act:—*Held*, that it was competent to the Government of Madras to provide that cases cognizable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace Under rule 7 of the amended rules for the better management of boats, &c., plying for hire at the out-ports of the Madras Presidency, dated 1st October 1867, the owner of a boat is liable to fine on proof of his allowing

PAGE

his boat to ply without the requisite complement of men:—*Held*, that where it was proved that a boat was plying without its proper crew, the absence of proof by the prosecutor that the owner was aware of the fact was no bar to his conviction.

Routhakonni, *re* 431

MAJORITY ACT:

See MINOR, 1.

MALABAR LAW—*Nambudris—Inheritance—Sarvasvadhánam marriage—Rights of son:*

Among Nambudris in Malabar, the son of a daughter given in the Sarvasvadanam form of marriage does not inherit in the family of his father so long as other heirs exist.

Kumaran v. *Náráyanan* 260

2. ——————*Otti tenure—Right to make further advance—Second mortgage to stranger without notice to otti holder invalid:*

R having conveyed certain land to P on otti tenure (mortgage) in 1852 executed a deed of further charge (ottikampuram) in 1873 to P's widow, and, in 1879, conveyed the jenm (equity of redemption) to her. Between 1873 and 1879, R mortgaged the same land to A by jenm panayam deed. In a suit by A to enforce his mortgage:—*Held*, that inasmuch as R had not given notice to the otti holder, nor given her the option of making the further advance made by A, A had no claim against the land.

Ambu v. *Ráman* 371

3. ——————*Sale of tarwad property—Powers of karnavan—Assent of members of tarwad, how far necessary:*

There is no rule of Malabar law that the assent of every member of a tarwad is necessary to render valid the alienation of tarwad property.

Kalliyani v. *Náráyana* 266

4. ——————*Suit by anandravans to set aside sale in execution of decree against their kárnavan,—when maintainable:*

The plaint lands being the jenm of a devasam were sold in execution of a decree obtained by defendant No. 1 against the urálars. Plaintiffs being the anandravans of the urálars sued to set aside the sale, alleging that the debt was not contracted for devasam purposes and that the decree was collusive:—*Held*, that the decree was binding on the plaintiffs unless it had been obtained by fraud and collusion.

Kelu v. *Paidel* 473

MARRIAGE, PROOF:

See PENAL CODE, 4.

MARRIED WOMAN—*Imprisonment for debt:*

Married woman, against whom personal decrees for debt have been made, are not exempt from arrest or imprisonment in execution of such decrees under the Code of Civil Procedure.

Lakshmana v. *Kullamma* 99

MARRIED WOMAN'S PROPERTY ACT, 1874:

See DIVORCE.

MATRIMONIAL SUIT:

See DIVORCE.

MINOR—*Custody of—Guardian—Change of religion—Act IX of* [illegible], *s.* 2, *cl.* (b):

A Bráhman boy, 16 years of age, having left his father's house went to and resided in the house of a missionary, where he embraced Christianity and was baptized. In a suit by the father to recover possession of his son from the missionary:—*Held*, that the question whether the boy was a minor,

PAGE

was to be decided not according to Hindú Law, but by Act IX of 1875; (2) that the claim was not affected by s. 2, cl. (b), of that Act; (3) and that the father was entitled to a decree that his son should be delivered into his custody.

Reddy v. *Krishna* 391

2. ———

See PARENT AND CHILD.

MISCARRIAGE:

See PENAL CODE, 3.

MISTAKE IN LAW:

See CONTRACT ACT, 1.

MOHATAD:

See ÁBKÁRI ACT, 2.

MORTGAGE—*Lease to mortgagor, arrears of rent—Sale—Claim by puisne mortgagee:*

See CIVIL PROCEDURE CODE, 19.

2. ———**OF SEVEN PARCELS OF LAND**—*Sale of equity of redemption of two parcels—Second mortgage of six parcels and redemption of one by mortgagor—Transfer of Property Act, s. 60—Redemption by purchaser of two parcels on payment of proportionate amount of debt decreed:*

In 1873 R mortgaged to S seven parcels of land (items 1—7) for Rs. 300. In 1880, M purchased R's rights in items 1 and 2. In 1881 R redeemed item 5 on payment of Rs. 30 and executed a second mortgage of the rest to S for Rs. 200:—*Held*, that M was entitled to redeem items 1 and 2 on payment of a proportionate amount of the first mortgage debt.

Subramanyan v. *Mandayan* 453

MUHTARAFA—*Trade-tax, zamíndár's right to collect—Regulation XXV of 1802, s. 4—Regulation XXV of 1832:*

The right of collecting the muhtarafa or trade-tax from artisans in his zamíndárí has not been delegated by Government to the zamíndár of Karvaitnagar and cannot be legally exercised by his assignees. *Quære*: Whether it was competent for Government to delegate the collection of the muhtarafa to the zamíndárs for their own use.

Védanta v. *Kanniyappa* 14

NATIVE CHRISTIAN—*Hindú Law—Marriage—Consummation—Succession Act, 1865:*

According to Hindú Law, a marriage between Bráhmans is binding, although the consummation ceremony or consummation never takes place. If a Hindú becomes a convert to Christianity and dies intestate, succession to his estate is governed by the Indian Succession Act, 1865. A.K., a Bráhman, went through a Hindú marriage ceremony with S, a Bráhman girl of eight years of age, in 1850. The marriage was never consummated nor was the consummation ceremony performed. In 1851, A.K. was converted to Christianity. S refused to live with him, because he was an outcaste, and in 1857 S renounced all claims on him or his estate. In 1858, A.K., went through a Christian form of marriage with M. In 1881, A. K. died intestate, and possession was taken of his estate by the Administrator-General. S claimed the estate from the Administrator-General. Her suit was dismissed on the ground that A.K. having died an outcaste and degraded, and his degradation [illegible]toned for under Hindú Law, no right of inheritance remained to [illegible] Before judgment was delivered S died and the suit abated. In a suit filed by the Administrator-General to have the estate administered by the Court, the claimants were (1) the father of A.K., (2) the brother of A.K., undivided from his father, and (3) the executor of M:—*Held*, that S was the wife of A.K. when he went through the form of marriage with M, and

PAGE

that, but for the fact that S had relinquished her rights, S would have been entitled on the death of A.K. to such portion of his estate as the law assigned to her as his widow:—*Held*, also, that under s. 35 of the Indian Succession Act, 1865, the father of A.K. was entitled to the whole of the estate.

Administrator-General of Madras v. *Anandachari* 466

2. ———

See MINOR, 1.

NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT:

See NATIVE CHRISTIAN.

OBSTRUCTION OF HIGHWAY:

See CIVIL PROCEDURE CODE, 4.

PARENT AND CHILD—*Act I of 1861—Civil Procedure Code, ss. 11, 15—Suit for recovery of minor:*

See JURISDICTION, 3.

PARTNERSHIP:

See CONTRACT ACT, 4.

PAUPER APPEAL:

See CIVIL PROCEDURE CODE, 29.

PENAL CODE, s. 75—*Trial of prisoner of offence under ch. XII or XVII after previous conviction:*

If a prisoner is to be tried for an offence punishable under s. 75 of the Indian Penal Code, a separate charge under that section must be framed and recorded.

Queen-Empress v. *Dorasámi* 284

2. ———, **s. 210:**

See CIVIL PROCEDURE CODE, 14 101

3. ———, **s. 312**—*Miscarriage—With child—Stage of pregnancy immaterial:*

A woman is with child within the meaning of s. 312 of the Indian Penal Code as soon as she is pregnant:—*Held*, therefore, where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month and that there was nothing which could be called even a rudimentary fœtus or child, that the acquittal was bad in law.

Queen-Empress v. *Ademma* 369

4. ———, **s. 498**—*Marriage—Proof:*

S and G having been convicted of enticing away the wife of the complainant, the conviction was quashed on appeal, on the ground that strict proof of marriage being necessary for a conviction under s. 498 of the Indian Penal Code, the evidence adduced (viz., of the complainant, the woman, and her mother, who swore to the fact of the marriage) was not sufficient to enable the Court to form an opinion whether the marriage took place as a fact, and if it did take place, whether it was according to law. The accused did not cross-examine the witnesses as to the fact or validity of the marriage or otherwise impugn it:—*Held*, that the marriage was sufficiently proved—*Empress* v. *Pitambur Singh* (I.L.R., 5 Cal., 566) discussed.

Queen-Empress v. *Subbaráyan* 9

5. ———, **s. 500**—*Defamation—Newspaper libel—Act XX[illegible] 1867, ss. 5, 7—Burden of proof—Statutes—38 Geo. III, c. 78, s. 14—6 [illegible] 96, s. 7:*

On the prosecution of the editor of a newspaper for [illegible]on under s. 500 of the Indian Penal Code by publishing a libel in his [illegible]an attested copy of a declaration made by the editor under s. 5 of Act XXV of 1886 to the effect that he was the printer and publisher of the newspaper, was produced in evidence by the complainant. The editor having been convicted

PAGE

by the Magistrate the Sessions Court on appeal quashed the conviction on the ground that there was no evidence that the editor was the w[illegible] of the libel or permitted its publication:—*Held*, that in the absence [illegible]roof to the contrary, the declaration was *primâ facie* proof of pu[illegible]n by the [illegible]—*Held*, also, that it would be a sufficient answer to [illegible]rge if the [illegible]proved that the libel was published in his absence [illegible] without his [illegible]ledge and that he had in good faith entrusted the temporary management of the newspaper during his absence to a competent person.

Rámasámi v. *Lokanáda* 387

6. ——————, ss. 500, 504:

See DEFAMATION BY A JUDGE.

POLICE ACT, 1859, s. 1:

See ÁRKÁRI ACT, 2.

2. ——————, s. 48 (5)—*Act I of* 1885—(*Madras*)—*Dung-heap kept in a town, no offence:*

By cl. 5 of s. 48 of Act XXIV of 1859 (Madras), as amended by Act I of 1885 (Madras), any person, who within the limits of a town "throws or lays down any dirt, filth, rubbish or any stones or building materials; or who constructs a cow-shed or stable within the bounds of any thoroughfare; or who causes any offensive matter to run from any dung-heap into the street" is punishable. A was convicted and fined for having kept a manure-heap in a town but not in a street:—*Held*, that the conviction was bad.

Queen-Empress v. *Appathoray* 167

PRESCRIPTION:

See FOREST LAND.

PRESUMPTION AS TO OWNERSHIP:

See FOREST LANDS, 2.

RECEIPT—*Barrister's fee:*

See STAMP ACT, 3.

REGISTRATION ACT, s. 48—*Constructive possession in pursuance of oral agreement to sell land:*

Where a vendor in pursuance of an oral agreement to sell certain land directed the tenants of the land to pay, and the tenants agreed to pay, rent to the purchaser:—*Held*, that such possession was given to the purchaser as would satisfy the condition of s. 48 of the Indian Registration Act and enable him to resist the claim of subsequent registered purchaser.

Palani v. *Selambara* 267

2. ——————, s. 50—*Conflict between an unregistered hypothecation bond and subsequently registered conveyance—Notice—Decree on hypothecation bond:*

Land was hypothecated to plaintiff by an unregistered bond, dated 29th May 1878, and afterwards sold to the defendant by a registered conveyance, dated 29th June 1879, which recited the previous hypothecation. In a suit brought by the plaintiff to enforce his charge:—*Held*, that there was no conflict between the instruments, and the hypothecation bond was enforceable though unregistered.

Rámachandra v. *Krishna* 495

3. ——————, s. 50—*Registered purchaser—Notice of prior contract to sell:*

The word[illegible]rmer part of this section" used in the second paragraph of s. 50 of th[illegible]ation Act, 1877, refer to the whole preceding portion of the section:—[illegible]erefore, that a registered purchaser of land, who bought with notice [illegible] prior unregistered contract by his vendor to convey to the plaintiff, could not resist a suit for specific performance on the plea of registration.

Kadar v. *Ismail* 119

PAGE

REGULATION 180[illegible]I 175

2. ——————[illegible]**XXV, s. 3**—*Inám—Grant by zamíndár—Tenancy not determinable at w[illegible]rantor's successor—Admission:*

Regulati[illegible]V of 1802, s. 3, imposes restrictions on alienations [illegible] secure the interests of the public revenue, and under it the zamíndár [illegible] power to disturb grants otherwise valid made by his predecessor, or ti[illegible] ináms acquired by prescription. An inám, existing under grant made in 1811, became in 1863 the subject of arrangement between the zamíndár, who had succeeded the grantor in the zamíndári, and the inámdárs. This resulted in what was either a confirmation of the original grant on terms more favourable to the zamíndár, or a new grant of an estate in all respects, save as to the rent, similar to the previously existing estate, which was a tenancy in perpetuity. To a suit brought by certain mortgagees against the inámdárs, to enforce mortgage rights existing since 1842, the defence was made that possession taken of the inám lands by the Collector in 1845 had determined the original inam rights therein, as well as the lien of the mortgagees. The present zamíndár, son and successor of the grantor of 1863, now claiming that he had determined the tenancy by a notice to quit:—*Held*, that the above did not operate as any estoppel as between the plaintiff and the inámdárs, the zamíndár not having been a party to the suit, but was only an admission, and not conclusive:—*Held*, also, that the tenancy was not determinable by such notice.

Vizianagaram Mahárájá v. *Suryanáráyana* 307

3. ——————, **XXV, s. 4.**

See MUHTARAFA.

4. ——————, **XXIX**—*Karnam—Incapacity of next heir—Minority—Appointment by landholder of successor without proof before Zila Court of incapacity of heir:*

A karnam in a zamíndári village having died leaving a minor son, the landholder appointed the brother of the late karnam to the office. In a suit brought by the son, after attaining majority, to establish his right to the office and to recover its emoluments:—*Held*, that under the provisions of Regulation XXIX of 1802, he was not entitled to recover. Section 7 of the Regulation provides that in filling the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders, except in cases of incapacity on proof of which before the Judge of the zila the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies:—*Held*, that were the incapacity arose from minority about which there was no dispute an appointment by a landholder made without proof before the Court of the incapacity of the heir was vaild.

Venkatanáráyana v. *Subbaráyudu* 214

5. ——————, **XXIX, s. 7:**

The office of karnam in a zamíndári village having been held by three brothers jointly in hereditary rights, the zamíndár on the death of one brother did not fill up the vacancy considering that the work could be well conducted by the two survivors. On the death of the survivors their sons succeeded to the office. The zamíndár subsequently desiring to reappoint a third karnam nominated an outsider to the joint tenancy of the office:—*Held*, that as there were heirs of the last holders in existence, the appointment was invalid.

Venkayya v. *Subbarayudu* 283

6. ——————, **IV OF 1816, s. 5**—*Village Munsif-[illegible]isdiction—Limitation of suits—Limitation Act*, 1877, *s.* 5:

Section 5 of Regulation IV of 1816, which prohibits [illegible]sifs from trying any suit cognizable by them, unless (*inter alia*) the [illegible] action has arisen within twelve years previous to the institution of such suit, does not exclude such suits from the operation of the Indian Limitation Act, 1877.

Erajabi v. *Mayan* 118

PAGE

7. ——————, ss. 29, 35—*Remedy confined to parties to suit :*

The remedies provided by s. 35 of Regulation IV of 1816 [illegible]t Village Múnsifs are confined to persons who are parties to suit bef[illegible]h Village [illegible]:

R[illegible]. Pakrichi 385

8. ——————, s. 30—*Personal property only liable to attachment in execution of Village Múnsif's decree :*

Under Regulation IV of 1816 the decrees of Village Múnsifs cannot be executed against other than personal property. Such decrees can be executed by a transferee of the decree and against the representative of a deceased judgment-debtor.

Kalandan v. *Pakrichi* 378

9. —————— 1822, IX, s. 5—*Sale of land to recover fine imposed by Collector—Title of purchaser :*

A sale of land under the provisions of s. 5 of Regulation IX of 1822 does not convey to the purchaser a title free from prior incumbrances.

Raman v. *Hassen* 247

10. —————— 1832, XXV :

See MUHTARAFA.

RENT RECOVERY ACT, s. 11, cls. I, III, IV—*Improvements effected by tenant—Enhancement of rent—Sanction of Collector :*

The sanction of the Collector required by the proviso to cl. iv., s. 11 of the Rent Recovery Act as a condition precedent to the enhancement of rent when the landlord has improved the land or has had to pay additional assessment to Government, is not requisite when, improvements having been made by the tenant, the landlord seeks to enhance the rent. *Per* Muttusámi Ayyar, J : The proviso to cl. iv., of s. 11 of the Rent Recovery Act implies that when the tenant has improved the land at his own expense the landlord is not entitled on that ground to enhance the rent. *Semble* : cl. 1 of s. 11, which provides that all contracts for rent, express or implied, shall be enforced, cannot be so applied as to deprive a tenant of the benefit of improvements made at his own expense. *Per* Hutchins, J : When improvements have been made by the tenant, the proper rate of rent has to be determined with reference to the several provisions of s. 11, quite irrespective of the improvements.

Venkatagiri Rája v. *Pitchana* 27

2. ——————, ss. 35, 76—*Civil Procedure Code, ss.* 4, 622 :

A sale of the tenants' interest in certain land having taken place under ss. 39 and 40, of the Rent Recovery Act, the Deputy Collector refused to issue a sale certificate to the purchaser on the ground that the sale had been irregularly conducted :—*Held*, that under s. 35 of the Rent Recovery Act the purchaser was entitled to a sale certificate :—*Held*, further, that the High Court had no power to review the proceedings of the Deputy Collector under s. 622 of the Code of Civil Procedure.

Velli Periya Mira v. *Moidin Padsha* 332

3. ——————, ss. 39, 41, 43, 44—*Delivery of possession—Appeal—Limitation :*

A obt[illegible]rrant ejecting B for arrears of rent under s. 41 of the Rent Recover[illegible] appealed within fifteen days, but A was put into possession on I[illegible]1882, B's appeal came on for hearing and was dismissed on 30th June [illegible]. B instituted this suit to recover possession of the land on 28th July 1883 :—*Held*, that B's suit was not time-barred under s. 44 of the Rent Recovery Act.

Padsha v. *Tiruvembala* 479

PAGE

ES JUDICATA [illegible] 39

——————

In 1883 [illegible]iff sued to recover certain land from the defendant on a de-mise of 18[illegible]ch he alleged was a renewal of a prior demise of 183[illegible] suit was dis[illegible]ed on the ground that the demise of 1856 was not [illegible] Plaintiff then sued to recover the same land on the demise of 1835 [illegible] title :—*Held*, that the decree in the former suit was no bar to this suit.

Kandunni v. *Katiamma* 251

REVENUE RECOVERY ACT (MADRAS), s. 59—*Limitation Act, sch. II, arts.* 12, 95—*Suit to set aside fraudulent revenue sale—Limitation :*

Suit to set aside a sale of land, sold as if for arrears of revenue under Act II of 1864 (Madras), on the ground of fraud, and to recover possession of the land from the purchaser who was alleged to be party to the fraud :—*Held*, that the suit was governed by art. 95 of sch. II of the Indian Limitation Act, 1877. Article 12 of that schedule, which prescribes a period of one year for suits to set aside sales for arrears of revenue, is intended to protect *bonâ fide* purchasers only.

Venkatapathi v. *Subramanya* 457

REVIEW OF JUDGMENT :

See COURT FEES ACT, 1.

SANCTION TO PROSECUTE :

See CRIMINAL PROCEDURE CODE, 6.

SARVASVADHANAM MARRIAGE :

See MALABAR LAW, 1.

SMALL CAUSE COURT—*Act XI of* 1865—*Jurisdiction—Civil Procedure Code, s.* 295—*Suit for refund of assets paid in execution of decree :*

A suit under s. 295 of the Code of Civil Procedure to compel refund of assets paid in execution of a decree to a person not entitled thereto is cognizable by a Court of Small Causes constituted under Act XI of 1865. *Shahi Ram* v. *Shib Lal* (I.L.R., 7 All., 378) dissented from.

Harihara v. *Subramanya* 250

——————*Jurisdiction—Suit to declare movable property not liable to attachment—Civil Procedure Code, s.* 283 :

Certain movable property having been attached in execution of a Small Cause decree passed by the Court of a Subordinate Judge, a claim thereto was preferred by M and rejected. M then brought a suit in the District Múnsif's Court for a declaration that the property was his and was not liable to be sold in execution. The suit was dismissed on the ground that it was cognizable by a Court of Small Cause :—*Held*, that M was not bound to sue for recovery of the property and that the suit was not cognizable by a Small Cause Court constituted under Act XI of 1865.

Mahomed Koya v. *Kasmi* 206

——————*Jurisdiction—Suit to recover municipal tax :*

A suit to recover a municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865.

Logan v. *Kunji* 110

SPECIFIC RELIEF ACT, 1877, s. 27 :

See REGISTRATION ACT, 3.

STAMP ACT, sch. I, art. 50 (b) :

See COURT FEES ACT, 2.

PAGE

2. ——— sch. I, art. 50, cl. (b)—*Court Fees Act, sch. II, art. 10*[illegible]—*Vakalatnáma—Power-of-attorney :*

A document was given to P by thirty-six persons jointly i[illegible]ted in a c[illegible]um of money authorizing him to appear before a ce[illegible]icer and [illegible]yment thereof :—*Held*, that the document was a po[illegible] attorney, [illegible] consequently the proper stamp duty was one rupee, le[illegible]able under [illegible]ian Stamp Act, 1879, sch. I, art. 50 (*b*).

Reference under Stamp Act, s. 46 358

3. ———, s. 3 (17), sch. II, 15 (b)—*Receipt—Consideration—Barrister's fee, Honorarium not merces :*

A receipt given by a Barrister for a fee is exempted from stamp duty by art. 15 (b) of sch. II of the Indian Stamp Act, 1879.

Reference under Stamp Act, s. 46 140

4. ———, s. 67 :

The second clause of *s.* 67 of the Indian Stamp Act, 1879, is not controlled by the first clause of the section, which refers only to bills of exchange and promissory notes, but applies to all cases in which a document is executed with intent to defraud the Government of stamp duty.

Reference under Stamp Act, s. 46 138

STATUTES :

38 Geo. III, c. 78, s. 14 387
6 & 7 Vict. c. 96, s. 7 387
23 & 24 Vict. c. 151, s. 22 434
24 & 25 Vict. c. 67, s. 22 (Indian Council's Act) 254
24 & 25 Vict. c. 104, s. 9 (High Court's Act) 254
34 & 35 Vict. c. 62, s. 3 256
44 & 45 Vict. c. 58, s. 151 (3) : *See* Army Act, 1881.

SUCCESSION ACT, s. 4 :

See DIVORCE.

2. ———, ss. 35, 331 :

See NATIVE CHRISTIAN.

TAX—*Suit to recover :*

See SMALL CAUSE COURT ACT, 1865, 3.

TOWNS' IMPROVEMENT ACT :

See DISTRICT MUNICIPALITIES ACT.

2. ———, ss. 62, 169—*Profession tax—Non-payment of—Offence—Nature of—Prosecution—Limitation :*

A complaint having been laid (on the 26th March 1885), under s. 62 of Act III of 1871 (Madras) against O for having exercised his profession for more than two months in the official year 1884-85 in a municipality without paying the tax in respect thereof, the Magistrate dismissed the complaint, on the ground that the prosecution was barred by s. 169 of the Act, inasmuch as five months had elapsed since the last payment in respect of the tax became due :—*Held*, that the complaint if laid within three months from the close of the [illegible] year, or, if O ceased to exercise his profession before the close of th[illegible]ear, within three months from such date, was not barred by s. 169[illegible]

Ootacamund [illegible]ity v. O'Shaughnessy 38

TRADE-TAX :

See MUHTARAFA.

PAGE

TRANSFER OF PR[illegible]ERTY ACT :

See MORTGAG[illegible]

2. ———, s. 2, cl. a ; s. 53 :

See REGISTRA[illegible]ACT, 3.

3. ———, s. 59 :

See CIVIL PROCEDURE CODE, 22.

4. ———, s. 85 351

TRUST—*Uncertainty :*

See WILL.

TRUSTS ACT, 1882, s. 91 :

See REGISTRATION ACT, 3.

VENDOR AND PURCHASER—*Fraudulent concealment by vendor of defect of title—Damages :*

In 1881 a Hindú executed a sale-deed of a house in the mufassal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Múnsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree, holding that, as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks :—*Held*, that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages.

Gajapathi v. Alagia 89

VILLAGE MUNSIF :

See REGULATION IV OF 1816 118

VILLAGE POLICE :

See ÁBKARI ACT, 2.

WASTE LAND—*Hindú Law—Rights of Crown and Occupier :*

See FOREST LANDS, 2.

WILL—*Construction—Trust—Uncertainty :*

A Hindú by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions :—"You should give my brothers, their wives and children, according to your wishes" :—*Held*, that no trust was created by these words.

Kumarasámi v. Subbaraya .. .. [illegible]

WITNESS—*Examination—Irregularity :*

See CRIMINAL PROCEDURE CODE, 10.

THE

INDIAN LAW REPORTS.

Madras Series.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1885.
April 24.
May 2.

LAKSHMI (DEFENDANT No. 6), APPELLANT,

and

SRI DÉVI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 582—Limitation Act, sch. II, arts. 171 A, B, C; 178—Period for bringing in representative of deceased respondent.

Per Curiam, (Kernan, J., dissenting).

An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under art. 171B, but under art. 178 of sch. II of the Indian Limitation Act, 1871.

THIS was an appeal against an order of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 92 of 1884.

Lakshmi, the appellant in the Subordinate Court, was defendant No. 6 in the suit, against whom a decree for rent and possession of land had been passed.

The respondents to the appeal were the plaintiff, Mahadévi, and the other defendants in the suit.

Pending the appeal Mahadévi died, and an application was made six months after the date of her death by Lakshmi, under ss. 368 and 582 of the Code of Civil Procedure, to make Dévi, her representative, a party to the appeal. Sri Dévi was placed on the record as respondent No. 1.

* Appeal against Order 129 of 1884

LAKSHMI v. SRI DÉVI.

Sri Dévi, on the hearing of the appeal, objected that it was barred by limitation as against her, inasmuch as the application to make her a respondent was not made within sixty days from the death of Mahadévi.

This plea was allowed and the appeal was ordered to abate.

Lakshmi appealed to the High Court.

The question was referred to a Full Bench for decision.

Srínivása Ráu for appellant.

Respondents were not represented.

The following judgments were delivered by the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins, and Brandt, JJ.) :—

HUTCHINS, J.—The question before us is whether an application by an appellant to have the representative of a deceased respondent made a respondent falls under art. 171B of the Limitation Act, or under the general article for all applications not otherwise provided for.

In its terms, art. 171B refers only to the representatives of deceased defendants, but it is contended that a defendant includes a respondent, and s. 582 of the Code is relied on. This section runs as follows :—"The Appellate Court shall have . . . the same powers . . . as are conferred by this Code on Courts of original jurisdiction in respect of suits instituted under chap. V"—the paragraph ended here in the Code of 1877, but now goes on—"and in chap. XXI, so far as may be, the words 'plaintiff,' 'defendant' and 'suit' shall be held to include an appellant, a respondent and an appeal, respectively, in proceedings arising out of the death, marriage or insolvency of parties to an appeal." The argument is that since a defendant in s. 368, which is part of chap. XXI, is to be held to include a respondent, the article in the Limitation Act, which deals with applications under s. 368 to bring in the representative of a deceased defendant, must be held to provide for similar applications in regard to deceased respondents.

On the other hand, it is contended that the provisions of Limitation Acts are always construed most strictly, that the effect of s. 582 is to regulate only the procedure in appeal where a party has died but not the limitation, that except in a question of procedure a defendant does not include a respondent.

It will be observed that three things are spoken of in s.

582—a plaintiff, a defendant and an appeal. A suit cannot include an appeal in respect of limitation, for the Limitation Act deals with suits and appeals in distinct schedules. A plaintiff cannot have been intended to include an appellant with regard to limitation, for, if it did, the Legislature would not have spoken of a plaintiff or appellant in the art. 171, almost immediately preceding that now in question. Why then should a defendant be held to include a respondent?

It has already been mentioned that s. 582 has been altered and enlarged, and art. 171B is itself a new provision. It is therefore desirable to examine the course of legislation in view to elucidate the intention of the Legislature.

The Limitation Act now in force was passed in 1877 in close connection with the Code of that year. In that Code, as already noticed, the first paragraph of s. 582 terminated at the words "chap. V." In the Limitation Act, there was nothing corresponding with arts. 171A, 171B or 171C, and art. 171 spoke of a deceased plaintiff only, not of a plaintiff or appellant.

The words "or appellant" were introduced into art. 171 by the Amendment Act XII of 1879, and the same Act added the supplementary arts. 171 A, B and C in the very same form in which they still stand, except in one particular, not now material. And this same Amendment Act also modified s. 582 of the Code by adding, after the words, Chap. V, "and in ss. 363 and 365 the word plaintiff shall be held to include an appellant."

This seems to negative a possible suggestion that the words "or appellant" were added to art. 171 out of excessive caution. Very slight caution would have shown that, if it was still doubtful after the amendment of s. 582 whether a plaintiff included an appellant in regard to limitation in art. 171, a defendant could not possibly include a respondent in arts. 171 A, B and C, since the s. 582 had not been amended with regard to defendants. Under the law, as it stood after the Amendment Act, there could, I think, be no doubt that art. 171B did not apply to deceased respondents.

Then, in 1882, there was a further amendment of s. 582, and it now stands as set out in the beginning of this judgment. It is possible that the Legislature intended to make a corresponding change in the limitation, but they have not done so, and an appellant is, in my opinion, entitled to take advantage of the oversight.

LAKSHMI v. SRI DÊVI.

It has been suggested that the appellant in this case is a defendant seeking to bring in the representative of the plaintiff (respondent), and that he is governed by art. 171A, but this is an application under s. 368 and not one under s. 366, to which alone art. 171A would apply.

BRANDT, J.—I agree. I should have been glad, if I could, to have held that it was open to take it to be a case of defective description rather than a case in which respondents were intentionally omitted, or through oversight not provided for, but the arguments stated by my learned colleague leave us no option, I think, and art.171B must be held not to apply to the case of a deceased respondent.

The order of the Subordinate Judge must be set aside and the appellant's application must be disposed of on the merits, but I would not allow costs as it was an open question.

MUTTUSÂMI AYYAR, J.—I agree with Mr. Justice Hutchins for the following reasons:—First, his conclusion is in accordance with the view on which the learned Chief Justice and myself decided several cases; secondly, the Limitation Act must be construed in cases of doubt so as to preserve the remedy; thirdly, the case before us is not one of real omission, for it is conceded that, if it is not governed by art. 171B, it must be governed by art. 178; fourthly, according to the language used in the Limitation Act, and to the course of legislation, there is neither ambiguity nor inaccurate description as pointed out by our learned colleague, and, in such a case, it is not permitted to us to vary the construction on the ground that, in our opinion, there is an over sight on the part of the Legislature.

TURNER, C.J.—I am of opinion that the absence of the term respondent was inadvertent, but I do not see how we can so construe the article as to hold that it applies to respondents. The Limitation Act draws a distinction, as Mr. Justice Hutchins has pointed out, between suits and appeals and between plaintiffs and appellants, and while I should have been prepared to hold that we might have got over the use of the term defendant only in the description of the application as a matter of imperfect description, we cannot so deal with the date from which the limitation is to run. I, therefore, assent to the proposed order.

KERNAN, J.—I am still of the same opinion as I expressed in Second Appeal 242 of 1880, *Karuthedath Narayanan Unni v. Kamprath Korunni Panikkar*,(1) that is, that where a deceased respondent was plaintiff on the original record, the terms of arts. 171 and 171B apply to her. As plaintiff she came under art. 171; she was still plaintiff, though respondent in the appeal. The arts. 171, 171A, and 171B of the Limitation Act ought to be construed with the sections of the Civil Procedure Code therein referred to and with s. 582 of the Code. By so doing "defendant" includes "respondent." No reason is suggested why the legislature should omit to provide for the case of a deceased respondent.

LAKSHMI v. SRI DÊVI.

The intention of the legislature was clearly to provide in the Limitation Act for all the cases referred to in the section of the Code to which reference is made by arts. 171, 171A, and 171B.

NOTE.—*See Narain Das* v. *Lajja Ram*, I.L.R, 7 All., 693.
Soshi Bushan Chand v. *Grish Chunder*, I.L.R., 11, Cal. 694.

APPELLATE CIVIL.

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

APPASÂMI (PETITIONER), APPELLANT,

and

SCOTT (RESPONDENT), RESPONDENT.*

1884. November 14. 1885. April 25, 28.

Civil Procedure Code—Decree—Execution—Sale—Immovable property—Hypothecation bond—Interest of obligee sold—General Clauses Act, 1868, *s.* 2 (5)—*Interest arising out of land.*

Where a judgment-debtor is entitled to a debt secured by a collateral hypothecation of land and the decree-holder attaches and sells the judgment-debtor's interest in the bond, such interest is immovable property for the purpose of attachment and sale under the Code of Civil Procedure, 1882.

Per Turner, C.J.—*Quære*—Whether the decree-holder could not sell the debt apart from the security as movable property?

THIS was an appeal from the order of C. Purushotam Ayyar, Subordinate Judge of Madura, West, dated 13th February 1883, in execution of the decree in suit 56 of 1881.

The facts necessary, for the purpose of this report, appear from the judgments of the Court (Turner, C.J., Kernan and Hutchins, JJ.).

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(1) Not reported.

* Appeal against Order 41 of 1883.

APPASÁMI v. SCOTT.

Rámachandra Ráu Saheb for appellant.

Respondent was not represented.

TURNER, C.J.—The zamíndár of Sivaganga had executed a bond to Venkatasámi Náyudu for Rs. 3,00,000 and hypothecated as collateral security the zamíndárí.

Venkatasámi Náyudu died leaving three sons. In original suit 56 of 1881, Varadaya, on the 2nd December 1881, obtained a decree against Appasámi, one of the sons of Venkatasámi. This decree Varadaya transferred to Scott on 4th July 1882. On 10th August 1882, Scott attached the debt in the manner prescribed by the Code for the attachment of debts. The Subordinate Judge at first declined to order a sale, but in October 1882 the judgment-debtor presented a petition No. 500 of 1882, consenting to a sale. The Court, thereupon, ordered a proclamation of sale to issue, but the sale was postponed as the judgment-debtor expressed his intention to present an application to be declared an insolvent and he was granted time to the 26th December 1882 to enable him to do so. No application having been made by him, Scott on the 18th January presented an application No. 25 of 1883, praying for the issue of an order for sale and obtained an order, in pursuance of which, on 26th January 1883, a proclamation of sale was issued in the following terms:—

"It is notified that, on a petition presented for execution of the decree in the said suit, the following movable property of the defendant has been attached; unless the undermentioned amount is sooner paid into Court or the decree is otherwise satisfied, the said property will be sold by public auction . . . . on 13th February 1883. In so doing, the right of the defendant as hereinbelow set forth will be sold."

The amount to be collected was then stated and the property was described as follows:—"One-third share due to this defendant in the three lakhs of rupees due under a bond executed for Rs. 3,00,000 on the 12th September 1878 by Dorasinga Tevar, *alias* Gauri Vallabha Tevar, zamíndár of Sivaganga in favor of Venkatasámi Náyudu, defendant's father." On the 10th February the judgment-debtor again applied for a postponement of the sale on the ground that a suit had been instituted on the bond, and that the debt was included in his insolvent application. He did not then take any objection that proper notice of the sale had not

APPASÁMI v. SCOTT.

been given. His application was refused for the reasons stated in the Subordinate Judge's order on the 13th February.

On the 13th February the sale commenced; the judgment-debtor asked that the sale might be kept open for seven days and the Subordinate Judge allowed it to be kept open to, and to be closed on, the 14th February. On the 14th February it was accordingly concluded. On the 14th February when the sale was proceeding, the judgment-debtor applied to the Court either to postpone the sale or to observe the rules relating to the sale of immovable property. The Subordinate Judge observed that the objection was then taken for the first time, that it was taken in the absence of the decree-holder, and that what was being sold was the judgment-debtor's one-third share in a debt, which was attached under s. 268 of the Civil Procedure Code, and that the debt was movable property.

It is contended on appeal that the proclamation should have been made in the manner directed for the sale of immovable property. Where the judgment-debtor is entitled to a debt secured by a collateral hypothecation of land and the decree-holder desires to make the debt available for the satisfaction of his decree, I hesitate to say that he may not effectually do so by attaching and bringing the debt to sale in the manner in which other debts are attached and brought to sale. Of course if he desires to bring to sale the security, he must, I allow, proceed to bring it to sale as immovable property. In this case it appears to me the judgment-debtor is entitled to contend that all he desired to sell and all that has been sold is movable property; but there are cases in which the security may be worthless. I am, however, persuaded that the sale of a debt apart from the security which may alone give it value, is contrary to the policy of the law in this country, which aims to secure the judgment-debtor from loss on the occasion of an auction sale in execution of decree, and I therefore cannot regret that my learned colleagues have come to a contrary conclusion. Had I been able to agree with them on the first point, I should have considered that, inasmuch as a sale has taken place, further inquiry was necessary to prove substantial injury. The security may be worthless. It is notorious that the zamíndárí has been attached in execution of a number of decrees passed on mortgages, and that after fruitless postponements to enable the judgment-debtor to obtain a loan from Government or elsewhere, proceedings are now being taken to bring it to sale.

APPASÁMI v. SCOTT.

But, as the sale has been for other reasons declared invalid, it is unnecessary that I should express a decided opinion.

HUTCHINS, J. (KERNAN, J., concurring).—In this case the Subordinate Judge of Madura ordered the sale of the appellant's one-third interest in a bond, upon a proclamation of sale which treated such interest as movable property, and gave only fifteen days' notice. The only question raised for our determination is whether the appellant's interest in the bond was movable or immovable property. The Code of Civil Procedure does not define immovable property and consequently the definition to be considered is that contained in the General Clauses Act, which declares that "Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

The bond is one for three lakhs of rupees charged on the zamíndárí of Sivaganga.

Regarded as a debt, it is undoubtedly movable property, but seeing that the debt is made a charge on land we cannot say that it is not a "benefit to arise out of land," and we are constrained to hold that it is immovable property. It is the appellant's interest in the bond, including the immovable security, which was ordered to be put in auction and not a mere interest in the debt. We do not understand that the Subordinate Judge, by his order of the 14th February, denied that he was selling the security as well as the debt, and, even if he had so expressed himself, anything that he may have said without the knowledge of the decree-holder and intending purchasers could not have affected the question. It is not, therefore, necessary to consider whether we could have interfered if the debt alone had been ordered to be sold, but, if the application had been to sell the debt apart from the security, we think that the debtor might reasonably have objected and that upon his objection the Court might reasonably and ought to have refused to sever the debt from its security.

Our decision is in strict accord with that of the High Court of Calcutta in *Srinath Dutt* v. *Gopal Chundra Mittra*(1), and also with that of the High Court of Allahabad in *Buddoo Mull* v. *Maharoop*.(2) It has also been held, both in Bombay and Allahabad, that decrees for money charged on land are themselves

(1) I.L.R., 9 Cal., 511. (2) 6 N.W.P., 129.

immovable property—*Musammat Bhawani Kuar* v. *Gulab Rae*(1) and *Hari G. Joshi* v. *Rámchandra*.(2)

If, however, this had been the only ground for setting aside the order for sale, and consequently the sale, we should have felt bound to remit for inquiry the issue whether the irregularity had caused substantial injury. The appeal has come before us as against the order for sale because the Subordinate Judge has treated the property as movable, and it is for that reason only that we have admitted it. The more correct course would have been for the appellant to have moved the Subordinate Judge to set aside the sale and to have appealed against his refusal. He is not entitled to have the sale cancelled for a mere irregularity unless he is able to show that substantial loss has resulted.

But there is another ground on which, as held by the District Judge, the sale to, and purchase by, the respondent are absolutely bad. The respondent is a pleader practising in the District Court and his purchase is opposed to s. 136 of the Transfer of Property Act.

We set aside the order directing the sale to proceed and declare the sale null and void. We make no order as to costs as the appellant did not take the first objection, upon which he has now succeeded, in the Court below, although he threw every obstacle he could think of in the way of the decree-holder, and because he has not applied, as he should have done, to the Subordinate Judge to set aside the sale.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

QUEEN-EMPRESS

against

SUBBARÁYAN AND ANOTHER.*

1885. August 25.

Penal Code, s. 498—Marriage—Proof.

S and G having been convicted of enticing away the wife of the complainant, the conviction was quashed on appeal, on the ground that strict proof of marriage being necessary for a conviction under s. 498 of the Indian Penal Code, the evidence

(1) I.L.R., 1 All., 348. (2) 9 Bo.H.C.R., 64.

* Criminal Revision Case 289 of 1885.

QUEEN EMPRESS v. SUBBARÁYAN.

adduced (viz., of the complainant, the woman, and her mother, who swore to the fact of the marriage) was not sufficient to enable the Court to form an opinion whether the marriage took place as a fact, and if it did take place, whether it was according to law. The accused did not cross-examine the witnesses as to the fact or validity of the marriage or otherwise impugn it:

Held, that the marriage was sufficiently proved—*Empress* v. *Pitambur Singh* (I.L.R., 5 Cal., 566) discussed.

THIS was a case referred to the High Court by G. A. Parker, Sessions Judge of Tanjore, on the 16th June 1885.

The facts of the case appear from the judgment of the High Court (Muttusámi Ayyar and Hutchins, JJ.).

Counsel were not instructed.

HUTCHINS, J.—The charge in this case was of an offence punishable under s. 498 of the Indian Penal Code, viz., enticing away a married woman. The Second-class Magistrate convicted, but the Head Assistant Magistrate (Manavédan Rájá) on appeal has reversed the conviction on the ground that "the Bengal High Court have ruled that strict proof of marriage is necessary for convictions under ss. 497 and 498," and that, in view of that ruling, the evidence adduced was not "sufficient to enable the Lower Court to form an opinion whether the alleged marriage actually took place, or, if it did take place, whether it was according to law."

The authority referred to appears to be the *Empress* v. *Pitambur Singh*.(1) In delivering the judgment of the Full Bench in that case the Chief Justice observed: "The marriage of the woman is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (s. 50) seem to point out very plainly that, where the marriage is an ingredient in the offence, the fact of the marriage must be proved in the regular way."

We of course agree both that the fact of the marriage must be proved, and that it must be proved in the ordinary way, *i.e.*, by other and more reliable evidence than that of the mere "opinion—*expressed by conduct*—of a person who, as a member of the family or otherwise, has special means of knowledge." It is such an opinion which s. 50 of the Evidence Act makes admissible evidence of a relationship, such as marriage, except in certain cases of which one is a prosecution under s. 498 of the Indian

(1) I.L.R., 5 Cal., 566.

QUEEN EMPRESS v. SUBBARÁYAN.

Penal Code. That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge. The Calcutta case has been followed by Straight, J., in *Empress* v. *Kallu*,(1) but if the learned Judges meant to decide that a husband or wife is precluded from proving his or her marriage, we must, with great deference to their opinion, express our dissent.

In the English Courts a marriage is usually proved by the production of the parish or other register, or a certified extract therefrom; but, if celebrated abroad, it may be proved by any person who was present at it, though circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. "Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it—see *R.* v. *Inhabitants of Brampton*,(2) so as to throw on the defendant the onus of impugning its validity" (Archbold, p. 925, Bigamy). And even a marriage in England may be proved by any person who was actually present and saw the ceremony performed: it is not necessary to prove its registration or the license or publication of the banns (*Ibid.*, quoting *R.* v. *Allison*,(3) *R.* v. *Manwaring*.(4)

In this country there is no statutory marriage law for natives, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong. In the case before us the parties to the marriage are Maravas—a class not over-exact or nice as to religious observances or ceremonies. The wife, as witness No. 1, deposed: "The complainant is my married husband only" (the Tamil word rendered 'only' implies he is just my *married* husband and nothing more or less): it was four years ago that the marriage was performed; upon my attaining

(1) I.L.R., 3 All., 233.
(2) 10 East, 282.
(3) R. & R., 109.
(4) Dears & B., 132, s.c. 26, L.J. (M.C.), 10.

QUEEN EMPRESS v. SUBBARÁYAN.

puberty, we cohabited." Similarly the husband said: "I married Veláyi five years ago: she is 18, the *nuptial ceremony* was performed soon after the (first ceremony of) marriage (or betrothal)." Witness No. 4 is the mother of the wife Veláyi. She swore that she had her daughter married to the prosecutor. None of these witnesses were cross-examined as to the factum or validity of the marriage, and the accused persons in no way impugned its validity.

We entertain no doubt that the marriage has been sufficiently established. We accordingly set aside the first-class Magistrate's judgment of acquittal and direct him to restore the appeal to his file and pass fresh orders upon it.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1885. Sept. 22.

NATALL

v.

NATALL.*

Divorce suit—Costs of wife—Indian Succession Act, 1865, *s.* 4—*Married Woman's Property Act*, 1874.

A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit.

Proby v. *Proby* (I.L.R., 5 Cal., 357) distinguished and observed upon.

THE facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (HANDLEY, J.).

Mr. *Branson* for plaintiff.

Biligiri Ayyangár (Solicitor) for defendant.

JUDGMENT.—Application by petitioner (the wife) for an order that her costs up to date be taxed and paid by respondent, and that her costs up to, and of, and incidental to, the hearing may be taxed *de die in diem*, and that respondent be ordered to pay into Court a sufficient sum to cover such costs, out of which sum the costs when so taxed *de die in diem* be paid to petitioner.

I think petitioner is entitled to the order prayed for. I took time to consider this matter because I thought at first there was some difference in principle between giving this relief to a woman

* Matrimonial suit No. 2 of 1885.

NATALL v. NATALL.

seeking a divorce, and doing so in the case where the woman is the defending party. Upon consideration I see there is no reason for any such distinction. The English Divorce Courts have always given it in both cases, and the reason, viz., that otherwise the wife will, as a rule, be unable to continue the proceedings, applies equally to both cases. The rules passed by the Courts for divorce and matrimonial causes in England under the English Divorce Act provide for the taxation of costs of a wife, who is petitioner or respondent, before the hearing as a matter of course, and for the registrar's ordering the husband to pay or give security for the costs of, and incidental to the hearing. The decision of the Calcutta High Court in *Proby* v. *Proby*,(1) quoted by the respondent's attorney, does not lay down that in no case can the Indian Divorce Courts properly give such relief to the wife, but only that the main reason for the practice of the English Courts having been removed by the Indian Succession Act, which makes the wife's property independent of her husband, the relief will not be granted by the Indian Courts unless special circumstances are shown calling for it. With great deference to the learned Judges who decided that case, it seems to me that they have over-estimated the effect of the Indian Succession Act upon the status of the wife as entitling her to this relief. If she has property, that property of course will be available for her costs, and in that case the Courts here would probably refuse to make any order that the husband pay her costs until the suit has been decided, as is done by the English Courts when the wife has separate property. But when the wife has no property, the same reason for the practice requiring her husband to provide for her costs, viz., her inability otherwise to continue the proceedings, still remains. That inability is principally caused by her disability to contract, which is untouched by the Indian Succession Act, and is only removed by the Married Woman's Property Act, 1874, so far as relates to her separate property. It is not clear that the Courts here will, in a suit by her Solicitor against the husband after she has been unsuccessful, give a decree against the husband for her costs, and she will therefore find it very difficult to induce any respectable practitioner to undertake her case. She is not certainly, unless she has property, in a position to meet her husband on equal terms, and is therefore

(1) I.L.R., 5 Cal., 357.

NATALL v. NATALL.

likely to be at a disadvantage, and this inequality between the contending parties is, as I understand it, the reason for the practice in question. In the present case it is alleged by the petitioner, and not denied, that she has no property, and I consider therefore that she is entitled to have some provision made for her costs. The order will be that petitioner's costs up to and including taxation and including the costs of this application be taxed as between attorney and client, and that respondent do pay the amount of such costs when so taxed to petitioner or her Solicitor, and further that the respondent do pay into Court the sum of Rs. 200 to meet the costs of the petitioner of and incidental to the hearing, and that such costs be taxed *de die in diem*, and when so taxed be paid to petitioner or her Solicitor out of such sum to be paid into Court by the respondent as aforesaid.

Solicitor for plaintiff: *P. B. Gordon.*

Solicitor for defendant: *Biligiri Ayyangár.*

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1885. April 24.

VÉDANTA AND OTHERS (PLAINTIFFS), APPELLANTS,

and

KANNIYAPPA AND OTHERS (DEFENDANTS IN THE SEVERAL CASES), RESPONDENTS.*

Muhtarafa—Trade-tax, Zamíndár's right to collect—Regulation XXV of 1802, *s.* 4—*Regulation XXV of* 1832.

The right of collecting the muhtarafa or trade-tax from artisans in his zamíndárí has not been delegated by Government to the zamíndár of Karvaitnagar and cannot be legally exercised by his assignees.

Quære: Whether it was competent for Government to delegate the collection of the muhtarafa to zamíndárs for their own use.

APPEALS from the decrees of D. Buick, District Judge of North Arcot, reversing the decrees of C. Ranga Ráu, District Múnsif of Tirupati, in suits Nos. 725—734 of 1881.

* Second Appeals 587—596 of 1883.

VÉDANTA v. KANNIYAPPA.

These cases were referred to a Full Bench by Turner, C.J., and Muttusámi Ayyar, J., in November 1883, and were adjourned from time to time to enable the zamíndár of Karvaitnagar and the Government of Madras to apply, if they should think fit, to be made parties, so that the question at issue might be finally decided. Neither the zamíndár nor the Government were made parties.

The facts and arguments appear from the judgment of the Court (TURNER, C.J., KERNAN, MUTTUSÁMI AYYAR, HUTCHINS, and BRANDT, JJ.).

Hon. *Rámá Ráu* for appellants.

Mr. *Branson* for respondents.

JUDGMENT.—The appellants (Vedantácháryalu and four others) are inamdárs of Yekambara-kuppam, a village in the zamíndárí of Karvaitnagar: they brought this suit to recover from the respondents (Kanniyappa Mudali and nine others), weavers, the muhtarafa tax claimed as due on their looms for Faslis 1285 to 1290 (1875-76 to 1880-81).

The respondents, in their written statements, pleaded that the appellants were not entitled to collect the tax from them; that the suit was barred by limitation; and that they had not held the number of looms on which the tax was assessed.

The Court of first instance held that the appellants were entitled to collect the tax, inasmuch as they were inamdárs under the zamíndár, and the tax had been always collected in the village; and held the suit was not barred by limitation because, although the appellants had not enforced their right of collecting the tax for twelve years prior to suit, this inaction was due to an order of the Collector, who had prohibited its collection.

On appeal, the District Judge adverted to the judgment of this Court in Special Appeal 747 of 1873,(1) wherein two learned Judges (Innes and Holloway, JJ.) had held the zamíndár entitled to collect the muhtarafa tax, the Chief Justice, Sir Walter Morgan, dissenting; and by reason of this dissent the District Judge appears to have considered himself at liberty to regard the question as still an open one. We may observe that the judgment of this Court by a majority is binding on the Courts until it is overruled by the Court itself: at the same time it is quite within the

(1) Not reported.

VÉDANTA v. KANNIYAPPA.

province of a Judge who sees reason to doubt the propriety of a judgment of this Court, while accepting and applying it, to indicate the grounds on which, if the matter were *res integra*, he would have formed a different opinion.

The Judge rightly apprehends the nature of the tax or toll which the appellants assert their right to levy; it was a tax on artificers, in this case weavers, which under native rule was collected on behalf of the sovereign power, although, where the revenues of a district were farmed by a zamíndár, it was collected by him.

The Judge doubted the opinion expressed by Mr. Justice Innes that the right to collect the muhtarafa tax was enjoyed by the zamíndár as a common-law right: he held that if it was legal, it was legal by virtue of the delegated authority of the State, such delegation being manifested by the omission in the sanad to prohibit the collection of this tax. He, however, points out that under the Regulation XXV of 1802 the Government was entitled at any time to exercise its discretion and to withdraw from its deputy, the zamíndár, the privilege of collecting the tax, and that it was competent to it to do so by a mere order of Government, without resorting to legislation: he then goes on to inquire whether, although the Government has not finally and definitely issued such an order, the privilege has been cancelled by the Legislature in any other way. The Judge observes that the muhtarafa tax was collected, as sanctioned by law and custom, up to 1832: he regards the effect of Regulation V of that year as abrogating the authority derived from custom and substituting an authority derived from legislation; the sanction of custom, he says, was superseded by the sanction of the Legislature.

Act XVIII of 1861, the first License Tax Act, repealed Regulation V of 1832, and the Judge considers its effect was to abolish the muhtarafa tax wherever it was collected in the provinces directly administered by the Government of India, and that it could have had no other effect in the zamíndáris; and whereas Act II of 1862 simply repealed Act XVIII of 1861, without reviving Regulation V of 1832, the Judge considers that the right to collect the muhtarafa tax was not revived in the Karvaitnagar zamíndári any more than it was in any raiyatwári district in the Presidency: he admits that the repeal of Act XVIII of 1861 may have had the effect of reviving the common-law liability of

VÉDANTA v. KANNIYAPPA.

subjects to pay the tax to the Government, and of reviving in the Government the common-law right of imposing it; but he considers that to entitle the zamíndár to collect it there must have been a fresh delegation of authority, and that an order of the Government, dated 26th November 1865, did not amount to such a delegation: the portion of the order quoted by the District Judge (paragraph 26) is in the following terms: "It appears to Government that they are not called upon to insist on the resumption of this item of revenue from the zamíndárs of Venkatagiri, Karvaitnagar or Kálastri, and the Collectors will accordingly understand that the prohibition against their collecting muhtarafa according to custom is withdrawn so far as Government are concerned: the zamíndárs will be responsible for keeping within the law." But whether or not this order operated as a delegation, the Judge considers that since 1862 there had been at best nothing but a liability at common-law on the part of the raiyats of the zamíndári to pay the muhtarafa tax, and he expresses his belief that the British Government has never revived a fiscal liability, which has been in abeyance for the shortest period, without having recourse to the Legislature: in the result he holds that in the absence of any such legislation the common-law right, which was abrogated by Act XVIII of 1861, has not been revived.

Again, adverting to the fact that the sanad of the zamíndár of Karvaitnagar, while it expressly prohibited the collection of the other sources of revenue mentioned in s. 4 of Regulation XXV of 1802, omitted mention of the muhtarafa (which the Judge considers tantamount to an exclusion of the prohibition), and adverting also to the s. 3 of the Regulation above quoted, which declares that "Sanads and kabuliats are to contain the conditions and articles of tenure on which the lands should be held," and required the Courts "In all cases of disputed assessment to give judgment in conformity with the conditions in the particular case," the Judge considers that, so long as the muhtarafa tax continued a legal exaction, and the Government had abstained from exercising its power to abolish it, the zamíndár enjoyed the right to levy it; but that in 1861 the Legislature interposed and deprived him of that right.

On these grounds, the Judge reversed the decrees of the Court of first instance and dismissed the suits; but he also expresses a doubt whether it is competent to the zamíndár to delegate the

VÉDANTA v. KANNIYAPPA.

power of collection to others, as to the plaintiffs in this suit, inámdárs, and holds that no more than three years' arrears of taxes could in any case have been decreed.

We must recognize the care and ability with which the Judge, Mr. Buick, has dealt with the very difficult question on which he felt it his duty to enter.

The Hon. Mr. *Rámá Ráu* for the appellants naturally relied upon the previous ruling of this Court, and supported the reasons recorded by the learned Judges who in the appeals of 1873 upheld the legality of the collection of the tax; and it is not without protracted and anxious consideration that we arrive at a different conclusion.

Mr. *Branson* in a very exhaustive address supported the decree of the Lower Appellate Court, as well on the grounds mentioned by the District Judge as on other grounds which we proceed to consider.

His argument, which he supported by copious references to authorities, was as follows. He relied on the decision of the Sadr Court in Case No. 6 of 1807 (M.S.D., vol. I, page 9); in that case the Rájá of Vizianagaram sued the Collector to recover 50,000 rupees as compensation for the loss sustained by him in consequence of his having been prevented by an order of that officer from collecting muhtarafa tax. The Sadr Court held that not only was the zamíndár not entitled to levy the tax, but that, in conformity with the conditions of his tenure, the privilege in question was held entirely at the discretion of Government, expressly to his exclusion; that the custom owed its existence to the arbitrary will of the zamíndár at a time when the Government did not exercise its right of restraint over him, and that "It was evident from the very nature of the tax that the custom of collecting it could not have been continued (continuous), but that its regular realization had been prevented by frequent interruptions; that it had not been acquiesced in by the parties from whom it was taken, but had been the subject of contention and dispute as well on account of its unreasonableness in itself and in its consequences as on account of its variableness and uncertainty;" that "The custom was therefore wanting in all the requisites necessary to make a custom good, and on this ground alone might have been relieved against, apart from a distinct reservation" in the Regulation "which showed that the intention of Government

VÉDANTA v. KANNIYAPPA.

was expressly to protect the subject against the imposition of any tax not originating from the land, the propriety of which had not been previously investigated and discussed." The learned Counsel also called our attention to passages in the Fifth Report, vol. 2, pp. 10, 54, 76, 162 and 356, which supported the opinion of the Sadr Court as to the origin and nature of the tax, and as to the reasons which induced the Government to prohibit by legislation its collection by subjects and to retain it under its immediate management.

It was further contended that, assuming that the muhtarafa was such a tax as could legally be collected by Government, when the Government converted its tax-gatherers into landowners, it expressly, by s. 4 of Regulation XXV of 1802, deprived itself of the power of conferring on them the right to collect it. Adverting to the sanad, it was contended that, even if the Government had the power to delegate the right of collection, the omission of reference to the muhtarafa could not be construed as an authority to collect it; that no pecuniary burden can be imposed upon the subject except upon clear and distinct legal authority established by those who seek to impose it; and that the Courts must always lean against a construction which imposes a burden on the subject. He cited in support of his arguments *Gosling* v. *Veley*,(1) *Partington* v. *The Attorney-General*,(2) and *Holloway* v. *Smith*.(3)

The right of the sovereign power to collect taxes on trades and professions is of extreme antiquity in India. In the Code ascribed to Manu an enumeration of the king's duties is followed by an enumeration of the revenues he is entitled to collect: among these we find taxes on goods, on income, and on labour—ch. VII, ss. 127, 130, 132, 137 and 138. There can be little doubt that these taxes were collected under Hindú sovereigns, though not perhaps continuously or universally; the Muhammadans availed themselves of the system of revenue they found established, and their collectors or farmers exacted dues which had long been customary, or revived dues which, though obsolete, were not unwarranted by Hindú law.

It will be seen, however, that these dues were not exigible by the owners of land as such, but by the sovereign. The zamíndáris

(1) 12 Q.B., 407. (2) L.R., 4 H.L., 122. (3) 2 Strange, 1171.

VÉDANTA v. KANNIYAPPA.

of Southern India are, it may be admitted, in some cases held by families who enjoyed at one time more or less completely the rights of sovereignty; in other instances the present zamíndárs represent military commanders on whom jágírs were conferred: again in other instances collectors or farmers of revenue have been recognized as zamíndárs. But whatever the origin of their title, there can be no question that the Government intended to treat the zamíndárs with whom it effected a permanent settlement of the land revenue as landed proprietors, and to ignore any rights which conflicted with its own sovereignty, except in rare instances, in which it still conceded to a royal house, by express treaty or other engagement, some of its ancient privileges.

Such a large proportion of the Crown revenues of India was derived from the land, directly or indirectly, that it was difficult for the early British administrators to separate with precision the revenue which could conveniently be collected by the Crown from that the collection of which could more conveniently be left to those subjects who had exercised the functions of collection under native rule. There were, however, some sources of revenue which could, it seemed, be collected directly, and which it was considered desirable to retain under the immediate management of the administration. The double functions of the East India Company rendered its servants particularly jealous of all taxes "Which might clog the beneficial operations of commerce," nor were they without solicitude for the comforts of the people at large.

The Committee in the Fifth Report observe "That under the head of 'Sáyar' revenue was included a variety of taxes, indefinite in their amount and vexatious in their nature, called motarfa; these consisted in imposts on houses, on the implements of agriculture, on looms, on merchants, on artificers and on other professions and castes" (vol. 2, p. 10): and it appears that it was considered that Government had fixed the assessment on each zamíndárí exclusively of these items, except in a few instances, where these taxes were included among the assets on which the assessment was calculated (*ibid*, p. 54).

Madras Regulation XXV of 1802 was enacted to carry out the policy we have indicated. The primary object was to settle in perpetuity the land revenue, but the Regulation went on to deal with the other sources of revenue which, though arising in some cases indirectly from land, Government had before resolved to

VÉDANTA v. KANNIYAPPA.

keep entirely under its own control. The fourth section of Regulation XXV of 1802 is as follows:—

"The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included according to the custom and practice of the country under the several heads of salt and saltpetre, of the sáyar or duties by sea or land, of the abkári or tax on the sale of spirituous liquors and intoxicating drugs, of the excise on articles of consumption, of all taxes personal and professional, as well as those derived from markets, fairs, or bázárs, of lákhiráj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit-rents, the permanent assessment of the land tax shall be made exclusively of the said articles now recited."

Two questions are raised on the construction of this section: firstly, whether the Government, in declaring that it had reserved to itself the entire exercise of its discretion to continue or abolish temporarily or permanently the "articles of revenue" mentioned in the section, intended to declare that it reserved the right as a right to be exercised by itself, or whether it reserved the right as a right it might concede to or withdraw from those with whom the permanent settlement was made; and secondly, whether if the settlement officers disobeyed the injunction and included these articles of revenue in the land assessment, the landowner with whom the settlement was made thereby acquired a legal title to collect them.

It is desirable to consider what the Government was engaged in doing. It was dealing with its revenues. It had theretofore farmed them in block for a term of years. It now determined to make in perpetuity a farm of the revenue arising from land. To enable it to do so the Regulation XXV of 1802 was passed.

Except where it had granted its revenues for an unexpired term or in perpetuity, it was clearly open to the Executive Government to deal with them as it pleased; and it was competent to the Legislature to authorize the Executive Government to resume even the revenues which had been granted for an unexpired term or in perpetuity. Of course justice suggests that in such cases compensation should be paid, but the omission to provide for compensation would not affect the operation of an enactment abrogating, or authorizing the Government to abrogate, the rights

VÉDANTA v. KANNIYAPPA.

of private persons—*Nasarvánji Pestanji* v. *The Deputy Commissioner of Customs*.(1)

Looking to the legislation which had taken place in Bengal, there are strong grounds for concluding that the Government of Madras intended to reserve the right to continue the collection of the articles of revenue other than the land revenue as a right to be exercised by itself.

On 11th June 1790 the Governor-General had published a rule that in Bengal no landowner or other person of whatever description should be allowed thereafter to collect any tax or duty of any denomination, but that all taxes and duties should thereafter be levied on the part of Government by officers duly appointed for that purpose. On 11th July 1790 the Governor-General announced that the privilege of imposing and collecting internal duties had been resumed from the landholders and taken exclusively into the hands of Government for the purpose of reforming abuses in these collections, and thereby affording benefit to the commerce of the country as well as general ease to its inhabitants. These rules were incorporated in Regulation XXVII of 1793. In the Proclamation of the permanent settlement in Bengal, Behar and Orissa, which was enacted in Regulation I of 1793, the Governor-General, adverting to the resumption of the "sáyar" under the rules mentioned, declared that, if he should thereafter think it proper to re-establish the "sáyar" collections or any other internal duties, and to appoint officers on the part of Government to collect them, no proprietor of land would be entitled to any participation, or be entitled to make any claims for remission of settlement on that account—Bengal Regulation I of 1793, s. 8.

Similarly, on re-enacting the rules for the decennial settlement of the public revenue payable from the lands of the zamíndárs and others in Bengal, Behar and Orissa, it was enacted that the assessment should be fixed "exclusive and independent of all duties, taxes and other collections known under the general denomination of 'sáyar.'"—Bengal Regulation VIII of 1793, s. 33.

In 1789, in contemplation of the introduction of a permanent settlement in the province of Benares, the Resident arranged that the "article," spirituous liquors, and the tax upon shopkeepers,

(1) 2 Bo.H.C.R., 75.

VÉDANTA v. KANNIYAPPA.

dealers and weavers, should be separated from the collections of the renters, and realized by the ámils of the respective districts—Bengal Regulation II of 1795, s. 13—and took engagements from the renters stipulating *inter alia* that they should not levy or receive any of the articles of the abolished 'sáyar'—*ibid*, s. 14. These arrangements were made under order of the Governor-General dated 26th December 1787, and by Bengal Regulation XXVII of 1795, s. 5. Referring to those orders, the Governor-General made a declaration reserving the right to re-impose the 'sáyar' and collect it for the Government in the province of Benares similar to that which he had made on the introduction of the permanent settlement in Bengal.

In like manner it was ordered that engagements for the land revenue in the Ceded Provinces should be exclusive of 'sáyar' duties—Bengal Regulation XXVII of 1803, s. 53, cl. 13—and the Governor-General declared the reservation by the Government of its right to re-impose them in those districts and to appoint officers on behalf of Government to collect them for its own exclusive benefit—Bengal Regulation XXV of 1803, s. 35. To the same effect are the provisions of Bengal Regulation IX of 1805, s. 25, which was passed for the settlement of the conquered provinces.

Looking then to the legislation in Bengal which preceded, was contemporaneous with, or immediately followed the legislation in Madras respecting the introduction in this Presidency of a permanent settlement of the land revenue, there are at least strong grounds for believing that the provision we are considering was intended to declare that the Madras Government had resolved to retain the right to impose or discontinue the collection of the articles of revenue which it excepted from the permanent settlement of the land revenue, and that it contemplated their collection, when imposed, for its own exclusive benefit and through its own officers.

It is true that neither the declaration nor the Regulation in terms prohibited the collection of the 'sáyar' by the landholders, but the Government was at the time re-arranging the collection of its revenues with them, and it was sufficient that the Regulation should declare that the settlement it then effected had relation only to the land revenue, and that it should enjoin the settlement officers to exclude the other articles of revenue from the assessment of that revenue.

VÉDANTA v. KANNIYAPPA.

Indeed, as has been well observed by Mr. Justice Brandt, inasmuch as the Government expressly declared that the continuance or withdrawal of the tax was left to its discretion, the tax could hardly have, with any propriety, been made the subject of a permanent assessment; there was no provision that the peshkash should be increased or diminished according as the collection of the 'sáyar' was permitted or prohibited; indeed such a provision would have been hardly compatible with a permanent settlement; and this is a strong argument that it was not the intention of the Government that its collection should be left to the zamindárs. It is at least clear that it was the intention of the Government of Madras to adopt the policy that had been pursued by the Government of Bengal, and to separate the other articles of revenue from the land revenue; such a separation does not necessitate the conclusion that it was the intention of the Government that the collection of the 'sáyar' should be retained in its own hands, but it makes it highly probable that this was the intention of the Government.

The provisions of Regulation V of 1832 point to the same conclusion. That enactment recites that, whereas persons exercising certain arts, trades and professions were by the law and custom of the country liable to the muhtarafa tax, and that doubts had arisen whether certain persons liable to the tax who had up to that time or for some period not been charged with it, might not plead that fact *in bar to the right of the Government to levy it*, it was declared that the tax was payable by all persons who exercised professions which by the custom of the country rendered them liable to the tax, and that they could not plead its discontinuance in bar of the collection; and it was directed that the collection should be made in the same manner as the collection of the land revenue, and that the Collector should have power to employ the same coercive processes for its recovery as he had for the collection of land revenue. It will be observed that the right to collect the tax is described as inherent only in the Government, that the processes authorized for its collection are only such as are authorized for the collection of land revenue, and that the Collector is the only person who is empowered to employ them.

But, assuming that it was competent to the Government to commit the collection of this branch of the revenue to the zamindárs and for their own benefit—and we need not hold that it was

VÉDANTA v. KANNIYAPPA.

not competent to the Government to do so—the question is, did the Government delegate the right of collecting it to the zamindár of Karvaitnagar?

The Regulation XXV of 1802 was passed in July 1802. The sanad was issued to the zamindár in August 1802, and the zamindár must rely on the Regulation as giving him a title to that permanency of assessment which it may be assumed he would be reluctant to abandon. It has not been argued in this Court that the zamindár had a right to collect the tax independently of his sanad.

If that argument had been advanced, it appears a sufficient answer to it that the Government was re-arranging its fiscal relations with the zamindár, and that we must look to that document only to ascertain whether it made a composition with him in respect of all sources of revenue or only in respect of some.

It cannot be denied that in sanads issued in virtue of the Permanent Settlement Regulation the Government dealt ordinarily only with the land revenue.

The insertion in sanads issued by the Government of Madras of a clause repeating the declaration contained in the Regulation as to the exclusion of items of revenue other than the land revenue was surplusage. The Regulation declared that the assessment was to be confined exclusively to the land revenue. Had the clause been omitted, it could not have been contended that the zamindár was entitled to collect revenue other than the land revenue, because of its omission. The Regulation declared the law in terms which are unambiguous. The omission of any mention of the muhtarafa in the sanad granted to the zamindár of Karvaitnagar may or may not have been intentional. There is nothing to show that was so. But, however this may be, the Legislature had declared that the assessment should not include the muhtarafa, and if the Government had power and intended to sanction the continuance of, or to authorize the collection of, the tax by the zamindár, it should have done so as a separate arrangement and in express terms.

It could not have been the intention of the Government that the collection of the tax should be partial; that only persons resident in certain areas should be subject to it. It was a tax payable to the State, and, if justly leviable at all, was to be levied from all persons under liability to pay it in all parts of the terri-

VÉDANTA v. KANNIYAPPA.

tory, and this is recognised in Regulation V of 1832 and is implied in the declaration in Regulation XXV of 1802. It may be admitted that up to that time its collection might not have been universal, but if it had been the intention of the Government that the collection of the tax should be sanctioned in particular places only, the persons liable to the tax were entitled to clear notice of the intention of the Government that it should be so collected.

It must then be held that the tax was not, because it could not legally have been dealt with as, a recognised source of income to the zamíndár in the future, when fixing the peshkash payable under the sanad of permanent settlement; and that the sanad confers on the zamíndár no right to collect the tax.

But if the Government was still at liberty to depute to the zamíndár the collection of the tax, it remains to be considered whether by any subsequent order it has done so, and here again we must observe the well known rules of law on which the learned counsel has insisted, and hold the persons from whom the tax is claimed liable only if the right has been granted to the zamíndár in express terms. The proceedings of the Board of Revenue of the 8th July 1816, to which reference is made in the judgment of Innes, J., in S.A. 747 of 1873, do not appear to us to have any direct bearing upon the question immediately before us, and, even if they were in terms sufficient to do so, could convey no sanction.

The order of the Government of 25th November 1865, No. 2906, Revenue Department, certainly has not the effect of a sanction. It is desirable to quote other passages from that order in addition to that given in the judgment of the District Court.

After giving a summary of the history of this and three other zamíndáris and of certain official correspondence connected therewith, it is observed in paragraph 15 that "What may be the legal rights of the zamíndárs in the matter of muhtarafa in the present condition of the law on the subject, is a question on which the Government is not competent to pass an authoritative decision."

In paragraph 17 it is said: "If under the present condition of the law the demand on the part of the zamíndárs is not legal, it will be for their sub-tenants to resist it. The question may then be judicially considered and authoritatively decided."

The Government may have deemed it unnecessary to "insist on the resumption" of a right which it had not deputed, but they warned the zamíndárs that the legality of the collection of this tax

VÉDANTA v. KANNIYAPPA.

by them was more than doubtful, and that if they determined to collect it, they must beware that they should do nothing which they were not legally entitled to do, and were careful to express that the prohibition against the collection of the tax by the zamíndárs named was withdrawn only "so far as Government are concerned."

The notification published by the Collector of North Arcot in the District Gazette of the 21st April 1866, purporting to set forth briefly the intention of the order of Government quoted, was worded in terms which went beyond the spirit and intention of that order, and cannot have the effect which in argument it was sought to attach to it.

It has not been shown how the amount of the peshkash was settled in the case of the Karvaitnagar zamíndárí. It is stated, and probably correctly, that the zamíndárí was held under an obligation to supply troops and that the peshkash was not fixed in reference to the former assets of the estate, but to the assumed cost of the performance of the service attached to the tenure. It may be said that thus indirectly all items of revenue were taken into account in fixing the assessment; and if the result of our decision be to deprive the zamíndár of a source of income on which his peshkash was, though indirectly, calculated, that may give him an equitable ground to ask compensation from the Government, but it cannot justify the Court in imposing a burden on the weavers in the zamíndárí which is not shown to be legally binding on them.

In the result the appeals must be dismissed with costs.

APPELLATE—CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

VENKATAGIRI RÁJÁ (PLAINTIFF), APPELLANT,
and
PITCHANA (DEFENDANT), RESPONDENT.*

Rent Recovery Act, s. 11, cls. i. iii. iv—Improvements effected by tenant—Enhancement of rent—Sanction of Collector.

The sanction of the Collector required by the proviso to cl. iv., s. 11 of the Rent Recovery Act as a condition precedent to the enhancement of rent when the landlord has improved the land or has had to pay additional assessment to Govern-

* Second Appeals 697—707 of 1884.

VENKATAGIRI RÁJÁ v. PITCHANA.

ment, is not requisite when, improvements having been made by the tenant, the landlord seeks to enhance the rent.

Per Muttusámi Ayyar, J: The proviso to cl. iv. of s. 11 of the Rent Recovery Act implies that when the tenant has improved the land at his own expense, the landlord is not entitled on that ground to enhance the rent.

Semble: Clause 1 of s. 11, which provides that all contracts for rent, expressed or implied, shall be enforced, cannot be so applied as to deprive a tenant of the benefit of improvements made at his own expense.

Per Hutchins, J: When improvements have been made by the tenant, the proper rate of rent has to be determined with reference to the several provisions of s. 11 quite irrespective of the improvements.

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, modifying the decree of W. J. Tate, Sub-Collector of Nellore, in summary suit No. 22 of 1881, brought under Madras Act VIII of 1865 by the Rájá of Venkatagiri to compel defendant to accept a pattá for fasli 1291 (1881).

The defendant objected to the pattá on the ground, *inter alia*, that it contained a clause providing for an increased rate of rent if the tenant dug a well without the sanction of the zamíndár. It was admitted that the defendant had dug a well in the famine year (1877) to save his crops, and had been using this well ever since, thereby converting his "dry" land into "garden" land. The Sub-Collector held that the plaintiff could not enhance the rate without the sanction of the Collector. On appeal the District Court confirmed this finding on the ground that cl. iii of s. 11, of the Rent Recovery Act, seemed to show that a landlord was not allowed to share in any increase of the value of the produce or of the productive power of the land brought about by the tenant's agency.

Against this decision, the plaintiff appealed.

Hon. *Rámá Ráu* for appellant.

Kristnasámi Chettiyár for respondent.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following judgments:—

HUTCHINS, J.—The argument before us has been confined to the 10th issue and the 4th clause in the pattá. The 4th clause runs thus:—"If you dig a well without having made an agreement with the zamíndár and raise garden crops thereunder, you must pay either the crop sist according to the custom, or the babatvári sist of the village, whichever may happen to be higher." In the body of the pattá, upon lands on which a well has been dug and garden crop raised, the zamíndár has not charged either the crop

sist or the babatvári sist, but double the highest garden assessment, and the appeal petition urged that the latter is the proper rate; but it has been stated in the argument that this was a mistake, and only the alternative rate stipulated for in the 4th clause is now demanded.

The 10th issue was whether the enhanced rate of Rupees 24 is legal, the Collector's sanction not having been obtained to the enhancement. Rupees 24 is double the highest garden rate, but, as already stated, this is no longer demanded. The Collector's sanction has nothing to do with the matter. Where improvements have been made by the landlord or Government, such sanction is a condition precedent to enhancement, but where improvements have been made by the tenant, the Collector has no power either to give or refuse a right to enhance. The proper rate of rent for the land has to be determined with reference to the several provisions of section 11, quite irrespective of the improvements. If authority is needed for this principle, it has been so held expressly in *Krishna Ráu* v. *Pattanagiri Náyak*.(1)

The 4th clause in this pattá seems to have been framed with reference to Mr. Justice Kindersley's remark in *Gurusámi Sástri* v. *Andi* (2) that if a tenant wishes to secure the benefit of his improvements he should protect himself from enhancement by a contract with his landlord. But in that particular case the landlord had for some years charged a lower rent than he was entitled to demand. All that was decided was, that his right to go back to the proper rate was not taken away, in the absence of a contract, by the fact that the increased productiveness of the soil and its ability to bear the higher assessment were due to improvements effected by the tenant.

It follows that at least part of the clause is bad and has been rightly expunged, viz., so much as sets out that, if the tenant digs a well, his rent will be subject to a variation. It only remains to consider whether any part of the rest of the clause can stand, *i.e.*, whether the tenant would be liable to pay a different rate if he raised a garden crop and whether the proper rate for such garden crops has been allowed by the Courts below.

It is possible to conceive a case in which the land had not been classified as wet, dry or garden, but the rate of rent varied with

(1) S. A. 98 of 1883 (not reported). (2) 5 Rev. Reg. 140.

VENKATAGIRI RÁJÁ v. PITCHANA.

the crop. It is believed that in certain zamíndáris the faisal accounts were prepared on this principle, and in such a case it might reasonably be contended that the tenant was bound to pay garden assessment for a garden crop, whether he was enabled to raise such crop by digging a well at his own expense or not. But no such case has been established by this appellant.

The only evidence which he adduced is his dittam account of 1869-70. The Sub-Collector has shown that no clause corresponding with that now in question is to be found in the pattás of that year; but, even if there had been such a clause, it could not bind the tenant for other years. It could only bind him as a contract, and no contract for other years could be implied from his omission to dispute the clause in a year in which he might not have contemplated digging any well.

From 1870-80 the whole village was let on izára to the raiyats, or some of them, collectively. The present dispute relates to the year 1881-82. It was during the izára, at the time of the famine of 1877-78, that the wells in question were dug. In paragraph 20 of his judgment, the Sub-Collector has shown that, according to the evidence, before the digging of these wells the lands were dry and bore the assessment corresponding to the highest dry rate of the village, namely, 8 rupees per gorru. It is this rate which had been allowed by the District Judge, except as to certain lands which he finds had paid the mamúl garden rate of 12 rupees before the wells were dug. Those lands, according to his judgment, will continue to pay the same rate. This second appeal fails: it must be dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The Collector's sanction is certainly not necessary in this case. It is not urged by either party that the landlord has dug the well at his own expense, or that he has to pay any additional assessment to Government. The proviso to clause iv, section 11, implies, however, that when the tenant improves the land at his own expense, the landlord is not entitled to enhance the assessment on that ground. The real question then is whether it is not inconsistent with such implied intention on the part of the Legislature to permit the landlord to levy a garden rate in the cases before us. It is of course open to the landlord to revert to the faisal rate where there has been no subsequent special contract to the contrary and where a lower rate has been levied provisionally as a matter

VENKATAGIRI RÁJÁ v. PITCHANA.

of indulgence to the raiyat. Nor is the tenant entitled to claim a reduction of assessment in the case of lands watered by wells constructed at his own expense prior to the date of Act VIII of 1865. I do not think that section 11, clause 1, can be so applied as to deprive the tenant of the benefit of the improvement made at his own expense.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

KRISHNA (PLAINTIFF), APPELLANT,

and

READE (DEFENDANT), RESPONDENT.*

1885. February 12. March 19.

Act IX of 1861—Civil Procedure Code, ss. 11, 15—Parent and child—Suit for recovery of minor by parent—Jurisdiction.

Act IX of 1861 does not debar a District Múnsif's Court from entertaining a suit by a Hindú father to recover possession of his minor son alleged to be illegally detained by the defendant.

THIS was an appeal against the decree of J. Hope, District Judge of South Arcot, reversing the decree of C. Suri Ayyar, District Múnsif of Cuddalore, in suit 21 of 1884.

The plaintiff, Krishnáchári, a Bráhman, sued the defendant, Miss F. M. Reade, a Christian Missionary, to recover possession of the person of his son Subba Ráu, alleged to be a minor, and for Rs. 100 damages, being the cost to be incurred in taking his son to Raméswaram to perform expiatory ceremonies before he could be received into the family. The suit was valued at Rs. 100.

The defendant pleaded that the suit was only cognizable by the District Court, that Subba Ráu was not a minor, that he had attained full discretion and was at liberty to choose his own religion, that he was not illegally detained by defendant, but resided in her house voluntarily, that he had been baptized at his own request in public and without any pressure on the part of defendant. It was contended for the defendant that, under s. 1 of Act IX of 1861, the District Court only had jurisdiction. The Múnsif held that the Act did not make it compulsory to file a regular suit for the custody of a minor in the principal civil

* Second Appeal 968 of 1884.

KRISHNA v. READE.

court of original jurisdiction in the district; found that the boy was fifteen years old; and held that, under Hindú law, the plaintiff was entitled to the custody of his son during minority whatever his religion might be. As the boy admittedly resided in the defendant's house against the father's wish, the Múnsif held that this amounted to illegal detention. The claim for damages was disallowed and delivery of Subba Ráu to the plaintiff was decreed.

At the final hearing, a further objection was taken by the defendant that the amount at which the plaintiff valued the claim for Subba Ráu was not stated in the plaint, and therefore it was impossible to determine whether the court had jurisdiction or not.

The Múnsif overruled this objection on the ground that the plaintiff having paid a further court-fee stamp of Rs. 10 for the value of his claim for the recovery of the boy, the value of the suit should be taken to be about Rs. 130.

He held that the boy had no market value and that the court-fee payable should be computed according to the amount at which the relief sought was stated in the plaint. On appeal, the District Judge reversed the Múnsif's decree. His judgment was as follows:—

"I am of opinion that it was not within the competence of the District Múnsif to pass the decree appealed against. Act IX of 1861 is a special enactment governing all suits relating to the custody and guardianship of minors. It prescribes the course to be followed by any relative or friend of a minor who may desire to prefer any claim in respect of the custody and guardianship of such minor. There is nothing in the Act to show that it was intended to provide a summary remedy, which, it is at the option of the claimant to seek instead of having recourse to a regular suit. It is the law provided for dealing with claims relating to the custody and guardianship of minors, and those who prefer such claims must follow the procedure laid down in that Act.

"It is, therefore, unnecessary in disposing of this appeal to go into the merits of the case. I find the Lower Court had no jurisdiction to decree the delivery of the so-called minor to the plaintiff and so far the decree must be reversed with costs."

The plaintiff appealed on the following grounds:—

(1) The District Múnsif has jurisdiction to entertain the suit.

(2) Act IX of 1861 is only permissive and is no bar to the present suit.

Hon. *Rámá Ráu* for appellant.

This was a suit for damages and for custody of the minor. Two questions arise—

(1) Is the plaintiff bound to proceed under Act IX of 1861?

(2) Ought the plaint to be returned?

The Act is only permissive—see the preamble and s. 1.

A summary remedy is provided. The word used is 'may'—ss. 4, 5, 6. There is also a common law remedy. *In re Kashi Chunder Sen*,(1) and the cases there cited—*Balmakund* v. *Janki*,(2) *Nehalo* v. *Nawal*,(3) *Pakhandu* v. *Manki* (4). There is nothing to take away the right of the Court to entertain this suit. The Civil Procedure Code only excepts suits barred by some express provision of law, see ss. 11 and 15.

Mr. Wedderburn for respondent.

If the District Judge is right, the plaint ought not to be returned, (1) because this objection is not taken in the grounds of appeal, (2) because Subba Ráu has left the defendant's house. The District Court certainly has jurisdiction—Civil Courts' Act, 1873, s. 12. In Act XXI of 1855 and Act XIV of 1858, it is only the District Court which has got jurisdiction with regard to the custody of the minors referred to therein. There might be great inconvenience if a Múnsif's Court entertained a suit for the custody of the minor for whom the District Judge had appointed a guardian.

Múnsifs' Courts were not originally invested with any such jurisdiction—Regulation VI of 1816.

In *Shannon's case* (5) Act IX of 1861 is said to have amended the procedure in hearing suits relating to the custody of minors. There is nothing summary in this procedure.

The Civil Procedure Code is to be followed. Orders are appealable.

A concurrent jurisdiction in the Múnsif could hardly have been contemplated.

(1) I.L.R., 8 Cal., 271.
(2) I.L.R., 3 All., 403.
(3) I.L.R., 1 All., 428.
(4) I.L.R., 3 All., 506.
(5) 2 N.W.P., 81.

KRISHNÁ v. READE.

In *Mussamat Harasundari Baistabi* v. *Mussamat Jayadurga Baistabi* (1), it was held that the Múnsif's Court had no jurisdiction. A suit for winding up a partnership under s. 265 of the Indian Contract Act may be brought in the District Court. The plaintiff may apply if he likes to the District Court, but to no other Court —*Rámáyya* v. *Chandra Sékara* (2).

Judgment was reserved.

On the 19th March the Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT.—A Hindú, the father of a male minor, is the natural guardian of such minor, and is *primâ facie* entitled to its custody and guardianship.

This right is certainly one of a civil nature, and there is, it appears to us, nothing exceptional in a suit brought by a Hindú father for the custody and possession of a minor son, alleged to be wrongfully detained and withheld from him, though it is open to the defendant in such a suit to show special circumstances having regard to which a Court would refuse to make a decree or order for removal of the minor from his care and custody.

The plaintiff in the case before us does not ask to be appointed guardian, but asks for a finding that the detention of the minor by the defendant is illegal as against him, the parent, and as such the legal guardian of the minor, and for relief or reliefs to which he may or may not be entitled on such finding.

The Courts of District Múnsifs in this Presidency, though not specially invested under the Regulations and Acts passed prior to Act VIII of 1859 with power to try such a suit as the present, were under that Act, and under Act X of 1877, and are under the present Code of Civil Procedure invested with power to take cognizance (within the limits of their pecuniary jurisdiction) of all suits of a civil nature excepting suits of which their cognizance was or is barred by any enactment for the time being in force.

It is not contended that the jurisdiction of the District Múnsif in respect of a suit like that before us is barred by any enactment subsequent to Act VIII of 1859, unless it be by Act IX of 1861.

The question then is whether such jurisdiction is barred by that Act or not.

(1) 4 B.L.R., App. 36. (2) I.L.R., 5 Mad., 257.

KRISHNÁ v. READE.

The Act appears to us to be an enabling Act only, and not to deprive any Court of any jurisdiction or powers which it before possessed. "It does not," as was held by the High Court, N. W. P., "alter jurisdiction nor transfer from one tribunal to another powers previously belonging to the former."—*in re Shannon*.(1) It relates to procedure only, as appears from the preamble. It confers on District Courts and on District Courts only, power to entertain and pass orders upon "applications by petition," which power was not before possessed by those Courts or by any Courts subordinate to them, but it does not either expressly or impliedly take away from any Court cognizance of claims in respect of the custody and guardianship of minors preferred in the form of regular suits, and otherwise cognizable by such Court.

The words in s. 1 "by which such application, if preferred in the form of a regular suit, would be cognizable" must be read in connexion with, and interpreted by, s. 7, and when so read present no difficulty: the meaning is that the application by petition which may be made under s. 1 shall be entertained by the principal Civil Court of original jurisdiction in the district in which it is made, provided that the jurisdiction of such Court would not be barred in a regular suit framed with a view to like relief, by reason, *e.g.*, of the minor being a European British subject, or being subject to the superintendence of the Court of Wards, or resident within the limits of the original jurisdiction of the High Court.

The other sections of the Act have no material bearing upon the question before us.

The true construction of the Act then seems to us to be that it provides a special and prompt remedy by application on petition instead of by regular suit, and was, it may be assumed, passed *inter alia* to meet cases in which a speedy decision by a competent Civil Court on the right to the custody of a minor, and an effectual order, are necessary to prevent action which might cause great, and perhaps irretrievable, injury to the minor, and with which a Magistrate might not be able to deal completely; that it vested the jurisdiction to hear the petition in the District Court only; and gave to the order which might be passed by that Court the force of a decree in a regular suit; but that it was not

(1) 2 N.W.P., 79.

KRISHNÁ v. READE.

the intention; and there are no words of which the effect is, to take away the ordinary remedy in cases in which the special procedure provided by the Act is not availed of.

A case was cited before us, *Mussamat Harasundari Baistabi* v. *Mussamat Jayadurga Baistabi* (1), in which it is said by Mr. Justice Hobhouse that the Court of a District Múnsif not being a principal court of original civil jurisdiction in the district had no power to entertain what in the last words of the judgment is described as a suit. The case was one in which a mother applied for the custody of her minor daughter after recovery of the child from another woman in whose charge she had left it, and it would appear from the wording of the first part of the judgment that "an application" had been made: if so, if the mother had "applied" under the provisions of Act IX of 1861, then no doubt, as is observed by the learned Judge "the application should have been made to the District Court" and we think we may assume this was so, and that the word "suit" was used inadvertently or unadvisedly. If not, we feel constrained, for the reasons given in this judgment, to differ. Of the other cases cited, some go rather to support the view we take, while in others the question either did not arise or was not necessarily or not directly decided.

We are then of opinion that the District Múnsif had jurisdiction to entertain and dispose of this suit, and accordingly set aside the decree of the Lower Appellate Court, and direct the District Judge to hear and dispose of the appeal on the merits.

Costs in this Court and in the Lower Appellate Court to abide and follow the result.

APPELLATE CRIMINAL.

Before Mr. Justice Hutchins.

1885. September 10.

QUEEN EMPRESS
against
NÁRÁYANASÁMI.*

Criminal Procedure Code, ss. 15, 264, 407, 414—*General Clauses Act, s.* 2 (13)—*Bench of Magistrates with second-class powers—Conviction—Appeal.*

An appeal lies under s. 407 of the Code of Criminal Procedure from a conviction by a Bench of Magistrates invested with second or third class powers.

(1) 4 B.L.R., App. 36.

* Criminal Revision Case 476 of 1885.

QUEEN EMPRESS v. NÁRÁYANASÁMI.

THIS was a case referred for the orders of the High Court by H. R. Farmer, Acting District Magistrate of Trichinopoly.

Náráyanasámi Náyak and another having been tried summarily by a Bench invested with the powers of a second-class Magistrate were convicted and fined.

On appeal the District Magistrate reversed the sentence and acquitted the accused. At the instance of G. Salisbury, a member of the Bench of Magistrates, the case was referred to the High Court in order to obtain a ruling as to whether the Bench were bound to record a judgment as provided by s. 264 of the Code of Criminal Procedure, or, in other words, whether the Code contemplated an appeal from a conviction by a Bench of Magistrates exercising second or third class powers.

Counsel did not appear.

The Court (Hutchins, J.) delivered the following

JUDGMENT:—This case was tried summarily by a Bench of Magistrates invested with powers of a Magistrate of the second class. The District Magistrate reversed the conviction on appeal, and the question raised is whether an appeal lay. The question hinges on this—Is a Bench invested with such powers a Magistrate of the second class within the meaning of s. 407 of the Criminal Procedure Code? If it is, it is quite clear that an appeal lies under that section and that the Bench is bound to record a judgment under s. 264. Section 414 precludes appeals in certain cases tried summarily by a Magistrate empowered to act under s. 260, but s. 260 itself refers only to Magistrates of the first class or a Bench having the powers of a Magistrate of the first class.

The District Magistrate has referred to the General Clauses Act, s. 2 (13), which provides that the term "Magistrate" shall include all persons exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure. But s. 15 of the Code itself is still more explicit. Every Bench, as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class, *i.e.*, of the highest class to which any one of its members belongs. It is true that this clause is exceptional, "except as otherwise provided" by any order of Government under the section conferring or limiting the powers of the Bench, but it renders it pretty clear that the Legislature intended that a Bench with the powers of a Magistrate of any class should be deemed to be itself a Magistrate of that class.

QUEEN EMPRESS v. NÁRÁYANA-SÁMI.

In Criminal Revision Case 3 of 1882 from the Godávari District a judgment was passed containing the following expressions:—"The Bench tried the case summarily, being duly authorized; there is, therefore, no appeal." But in that judgment, as explained very shortly afterwards by the learned Judges who delivered it, it was erroneously assumed that the Bench had been duly authorized to act as a first-class Magistrate. They, therefore, informed the District Magistrate of Godávari that they never intended to hold that no appeal lay against the decision of a Bench with only second or third class powers.

I entertain no doubt that the District Magistrate had jurisdiction to entertain the appeal, and, consequently, I refuse to disturb his order.

APPELLATE CRIMINAL.

Before Mr. Justice Parker.

1885. August 24.

OOTACAMUND MUNICIPALITY

against

O'SHAUGHNESSY.*

Towns Improvement Act, 1871, (*Madras Act III of* 1871), *ss.* 62, 169—*Profession tax, Non-payment of—Offence, Nature of—Prosecution—Limitation.*

A complaint having been laid (on the 26th March 1885), under s. 62 of Act III of 1871 (Madras) against O for having exercised his profession for more than two months in the official year 1884-85 in a municipality without paying the tax in respect thereof, the Magistrate dismissed the complaint, on the ground that the prosecution was barred by s. 169 of the Act, inasmuch as five months had elapsed since the last payment in respect of the tax became due:

Held, that the complaint if laid within three months from the close of the official year, or, if O ceased to exercise his profession before the close of the official year, within three months from such date, was not barred by s. 169 of the Act.

THIS was a case referred to the High Court under s. 438 of the Code of Criminal Procedure by L. R. Burrows, District Magistrate of the Nílgiris.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Parker, J.)

Counsel were not instructed.

* Criminal Revision Case 287 of 1885.

OOTACAMUND MUNICIPALITY v. O'SHAUGHNESSY.

PARKER, J.—The complaint laid against the accused was that he had exercised his profession for more than two months in the official year 1884-85 without paying the tax in respect thereof, and was therefore liable to conviction under s. 62, Act III of 1871.

The first-class Magistrate (Mr. Clarke) dismissed the charge on the ground that the prosecution was not instituted till more than five months after the last payment on account of the tax became payable and was therefore barred under s. 169, Act III of 1871.

It was held in High Court Proceedings of 11th August 1882, No. 1568, that the offence imputed in a similar case was not that the accused made default in payment of the tax on a certain day, but that, having received the prescribed notice, he had exercised his profession for two months in the official year without having paid the tax.

The Court held that the offence was a continuing offence and that it was immaterial at what part of the year it was first completed, and that a complaint was within time if laid within three months after the close of the official year; or when the accused had before the end of the official year ceased to exercise his profession within three months from the time at which he so ceased to exercise it.

According to this ruling the complaint, having been made on 26th March 1885, was in time.

The order of the Magistrate is set aside, and he is directed to restore the complaint to his file and dispose of it in due course of law.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. August 31. September 4.

RÁGAVA (PLAINTIFF), APPELLANT,

and

RÁJAGOPÁL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Jurisdiction—Cause of action—Suit to set aside order of Revenue Court directing ejectment—Res judicata.

A Revenue Court having ordered a tenant to be ejected under s. 10 of the Rent Recovery Act on the ground that he had refused to accept a pattá as directed by

* Second Appeal 194 of 1885.

RÁGAVA v. RÁJAGOPÁL.

the Court, the tenant brought a suit in the Civil Court to set aside the order of the Revenue Court:

Held, that the suit would not lie.

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, confirming the decree of N. Narasimháyyar, District Múnsif of Tiruvellúr, in suit 754 of 1884.

The plaintiff, Parasei Strinivása Rágaváchári, brought the suit against the defendants Rájagopaláchári and another to set aside a decree made by a Revenue Court under the Rent Recovery Act, directing him to be ejected from his holding, and to restrain the defendants from executing that decree.

The plaintiff alleged that he was a mirási raiyat of his village, of which the defendants were the izárádárs.

The defendants having brought a suit against plaintiff to compel him to accept a pattá on the 12th August 1882, the Revenue Court, having amended the pattá, directed the plaintiff to accept it.

The defendants then brought a summary suit under the Rent Recovery Act to eject plaintiff, alleging that he refused to accept a pattá tendered ten days subsequent to the order of the Revenue Court.

The Revenue Court found that defendants had tendered and the plaintiff had refused to accept a pattá as directed by the order of 12th August 1882.

The plaintiff alleged that this finding was based on false evidence.

It was contended by the plaintiff that the decision of the Revenue Court being summary, he was entitled to have it set aside by a regular suit.

The Múnsif held that the decision of the Revenue Court, not having been appealed against, had become final, and that the suit was not maintainable.

On appeal the District Judge held that the Múnsif had no jurisdiction, no appeal against the order of the Revenue Court being provided by the Rent Recovery Act.

Plaintiff appealed on the grounds, *inter alia*, that the decision of the Revenue Court was no bar to this suit, and that there was nothing in the Rent Recovery Act to prevent a Civil Court setting aside an order obtained by fraud.

Sadagopácháryar for appellant.

Srirangácháryar for respondents.

The Court (Hutchins and Parker, JJ.) delivered the following judgments:—

HUTCHINS, J.—In this case the appellant admits all the facts necessary to give the Revenue Court jurisdiction to determine whether he had made the default contemplated by s. 10 of the Act and was liable to be ejected. He admits respondent had sued him to enforce his acceptance of a pattá; that the terms of the pattá had been judicially settled and a decree passed requiring him to accept it; that ten days had elapsed from the date of the Collector's judgment, and that the amended pattá had not been accepted. Then, the section provides, the Collector, on application made to him by the plaintiff, and on proof of such default on the part of the defendant, shall pass an order for ejecting the defendant. Such an application was certainly made and proof was taken from both sides as to whether there had or had not been a wilful default. Thereupon the Collector came to the conclusion that the tender of the amended pattá on the 18th August was very clearly proved, and he ordered the appellant's ejectment. The object of the present suit is simply to induce the Civil Courts to go *de novo* into the evidence on this very same point and to revise the judicial finding of the Collector that the appellant had made wilful default and had not been in any way imposed on or deceived. I am clearly of opinion that such a suit will not lie, and that this second appeal should be dismissed with costs.

PARKER, J.—The suit is to set aside an order of the Assistant Collector directing that plaintiff be ejected from his holding for refusal to accept a pattá as amended by the Collector. The plaintiff alleged that the amended pattá had never been tendered him, that he had asked for one, and that defendant had neglected to give it. The Assistant Collector held that the refusal was that of the plaintiff and ordered his ejectment.

Both the Courts below have held that the suit is not maintainable.

It is clear that, if the suit be maintainable, the Civil Courts would really hear and determine certain issues of fact which have already been heard and determined by a Court of competent jurisdiction, whose decision the Legislature did not see fit to make subject to appeal.

It may be that a suit would lie to set aside an order of eject-

RÁGAVA v. RÁJAGOPÁL.

ment obtained against a wrong person, or to set aside an order irregularly obtained by abuse of legal process though under colour of the law. This, however, is not the case now before us. The suit here brought is to set aside a decision upon the ground that a Court of competent jurisdiction has come to a wrong conclusion, both sides having had full opportunity to plead and be heard, and the Legislature not having seen fit to allow an appeal.

I must hold that such a suit is not maintainable and dismiss this second appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. August 27.

QUEEN-EMPRESS

against

LAKSHMANA AND OTHERS.*

Criminal Procedure Code, s. 269—Jury wrongly treated as assessors by Judge—Unanimous opinion of jury treated as assessors accepted as formal verdict.

L and N were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of s. 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting L and N of dacoity, acquitted them of murder:

Held, that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect.

THIS was a case submitted to the High Court, under s. 307 of the Code of Criminal Procedure, by W. F. Grahame, Sessions Judge of Cuddapah.

The case was stated by the Sessions Judge as follows :—

"The prisoners were charged with dacoity, murder in committing dacoity, and murder. The jury have acquitted prisoners Nos. 2 and 3 and convicted Nos. 1 and 4. I overlooked the provisions of s. 269, para. 2, and took the verdict of the jury on the first head of charge, while I looked on them as assessors on the second and third heads. Therefore, as regards the dacoity I resolved to submit the matter to the High Court, but acquitted all prisoners on the charges of murder in dacoity and murder, omitting to notice that, as all charges ought to have been tried by jury under s. 269,

* Criminal Appeal 294 of 1885.

QUEEN-EMPRESS v. LAKSHMANA.

I ought not to have recorded a judgment of acquittal on any of the charges. My own opinion is that the evidence must be taken as a whole against all four prisoners together. If it fails against any one of them, it must fail against all. None of them can be separated from the others. I think that the jury are wrong in their verdict of guilty as regards prisoners Nos. 1 and 4 on the second and third heads of charge, and wrong as to the acquittal of Nos. 2 and 3 on the first head of charge. I think that all four prisoners are guilty of the dacoity charged against them and not guilty of murder in dacoity or of murder."

Mr. *Subramanyam* for prisoners Nos. 2 and 3.

Mr. *Powell* (Acting Government Pleader) for the Crown.

The judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.) was delivered by

HUTCHINS, J.—In this case there is no doubt that the woman Subbammá was killed and robbed of her jewels. Her death is shown by the medical evidence to have been caused by suffocation. The end of her cloth had been thrust ("plugged") into her mouth, and another cloth or jacket tied tightly over this gag, as if to keep it in its place, and over the nose. Those who gagged and secured her in this way must have been aware that their act was likely to cause death, unless her death had been caused by previous throttling or similar violence.

Five persons were accused of robbing her and causing her death. Of these, one is the approver, witness No. 9. The other four were charged before a jury with dacoity (Indian Penal Code, s. 395), with conjointly committing a dacoity, in the course of which one or more of their number committed murder (s. 396), and with murder (s. 302). The jury returned a verdict that prisoners Nos. 1 and 4, Lakshmana and Naráyana, were guilty on all the three heads of charge, but that Nos. 2 and 3, Seshayya and Gangireddi, were not guilty. The Sessions Judge overlooked the provisions of s. 269 of the Criminal Procedure Code, cl. 2, under which the first head of charge being triable by jury, the other heads should also be so tried, and treated the jury as assessors in regard to the second and third counts. He stated that he differed from them as assessors in regard to these counts, though in point of fact he only differed as regards prisoners Nos. 1 and 4 and concurred in respect of Nos. 2 and 3; and he recorded an acquittal of all the prisoners on those counts. He further

QUEEN EMPRESS v. LAKSHMANA.

stated that he differed from that part of the verdict which declared Nos. 2 and 3 not guilty of dacoity, and, therefore, referred the case to this Court under s. 307.

Various questions have been raised in consequence of this irregular procedure, but upon the view which we take of the merits of the case it is not necessary to determine them all. In our judgment the unanimous opinion of the jury on the second and third heads of charge must be treated as a formal verdict; the law made them the proper judges of the evidence and the facts, and the irregularity on the part of the Court could not deprive them of that power, or their opinion of its proper legal effect.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, and Mr. Justice Brandt.

1881. September 30. 1883. May 5. 1885. April 24.

VAYIDINÁDA (PLAINTIFF), APPELLANT,

and

APPU (DEFENDANT), RESPONDENT.*

Hindú law—Custom—Bráhmans—Adoption of daughter's and sister's sons.

In Southern India the custom which exists among Bráhmans of adopting a sister's or daughter's son is valid.

THIS was an appeal from the decree of M. Cross, Subordinate Judge at Kumbakónam, reversing the decree of H. Krishna Ráu, District Múnsif of Mannargudi, in suit 189 of 1880.

The plaintiff, Vayidináda Ayyan, a minor, represented by his natural father, sued the defendant, Appuváyyan, his alleged adoptive father, to recover Rs. 399 for the cost of his upanáyanam ceremony which the defendant had failed to perform, and for a decree that defendant should pay him Rs. 5 a month for maintenance during his minority.

It was alleged, in the plaint, that the family property was worth Rs. 1,50,000.

The defendant denied the adoption, alleging that, though he had intended to adopt plaintiff and had executed a will stating that he had adopted him, he had given up the intention on being informed that the adoption of a brother's daughter's son was contrary to the Hindú law and the decision of the High Court.

* Second Appeal 328 of 1881.

VAYIDINÁDA v. APPU.

The Múnsif was of opinion that the rule prohibiting the adoption of a daughter's son did not apply to the case of a brother's daughter's son.

Referring to *Gopál Narhar Safray* v. *Hanmant Ganesh Safray*,(1) he held that an exception to the rule could be established by proof of custom, and on the evidence he found that such a custom did exist in the district of Tanjore.

Judgment for plaintiff.

Defendant appealed.

The Subordinate Judge held that, whatever the custom might be among Bráhmans, the adoption of a daughter's son was invalid.

Judgment for defendant.

Plaintiff appealed to the High Court.

The case was referred to a Full Bench by Turner, C.J., and Kindersley, J., on the 30th September 1881.

On the 5th May 1883 the Full Bench (Turner, C.J., Innes, Kindersley, and Muttusámi Ayyar, JJ.) delivered the following

JUDGMENT.—We have come to the conclusion that sufficient ground exists for remitting for trial the issue—Whether, by the custom of Southern India, it is competent to a Bráhman to adopt the son of a sister or daughter; and we take occasion to correct the inference that has been erroneously drawn from the decision of this Court in *Gopálayyan* v. *Rághupati Ayyan* (2) that this Court is not prepared to recognize the existence of a customary law in the case of Bráhmans, of which no trace appears in any written authority of the place to which they belong. All that the Court intended by the observations from which this inference is drawn was that strong proof must be produced to establish a customary law at variance with the law declared in written treatises of which the authority is still recognized in the place in which the custom is alleged to exist. To the proposition thus stated no reasonable objection can be urged. As to the degree of proof required to warrant the Court in recognizing as customary law a usage at variance with the law established either by a uniform course of judicial decisions or by the dicta of received treatises, we adhere to the ruling of this Court in *S. Perumál Séthurráyar* v. *M. Rámalinga Séthurráyar*.(3)

(1) I.L.R., 3 Bom., 273. (2) 7 M.H.C.R., 250. (3) 3 M.H.C.R., 77.

VAYIDINÁDA v. APPU.

There must be satisfactory evidence of usage so long and invariably acted upon in practice as to show that it has become by common consent a governing rule of the family, class, or country; and, as observed in another case, it must be shown that the usage has been followed in pursuance of a custom understood to have the force of law, and not merely that there have been repeated instances of violation of the law.

The Judicial Committee, in *Rámalakshmi Ammál* v. *Sivanantha Perumál Séthuráyar*, (1) observed it is the essence of special usages modifying the law . . . . . that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence.

The Subordinate Judge is directed to try the foregoing issue upon the evidence already recorded and upon such further evidence as the parties may adduce, and to return his finding together with the evidence to this Court.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING:—"This second appeal has been referred by the Special Appellate Court for the trial of the following issue, on the evidence already recorded, and any additional evidence that the parties may offer.

"Whether, by the custom of Southern India, it is competent to a Bráhman to adopt the son of a sister or daughter?

* * *

"Of plaintiff's thirty-nine witnesses, twenty-two belong to the Tanjore district, sixteen to Trichinopoly district, and one to Madura district. The majority of these witnesses speak to their own adoption as sons of daughters, others are relatives in families where such adoptions have been made, and others speak to the usage of such adoption. Four documents have been filed by the 12th, 15th, 17th, and 39th witnesses in respect to their adoption varying in dates from 1847 to 1882.

"The traditional evidence of some of these witnesses as to such adoptions having been made compasses a period of 100 years.

"In addition to this evidence there is the testimony of eleven witnesses taken on commission by the Tinnevelly Subordinate Judge's Court of like adoption being the usage in that district.

(1) 14 M.I.A., 565.

"Defendant (respondent) offers no evidence in this inquiry. He states he knows nothing of the truth or otherwise of the evidence adduced by appellant.

"The Appellate Court sees no cause to disbelieve the evidence recorded in this Court and the Lower Court of such adoptions, and on that evidence it finds that it is competent to a Bráhman, by the custom of Southern India, to adopt the son of a daughter.

"No evidence has been adduced on the point of adoption of a sister's son."

On the 10th March 1884, the case was again argued before Turner, C.J., Kernan, Muttusámi Ayyar, and Brandt, JJ., and judgment was reserved.

Mr. *Subramanyam*, Hon. *Rámá Ráu*, and *Bháshyam Ayyangár* for appellant.

Mr. *Shephard* for respondent.

On the 24th April 1885 the Court delivered the following

JUDGMENT.—There is, it must be admitted, a very considerable quantity of evidence as to the fact of adoption of daughters' sons by Bráhmans in the Tanjore and Trichinopoly districts. One witness speaks to the custom as obtaining in the Madura district; and thirteen witnesses to the adoption of both daughters' and sisters' sons in the Tinnevelly district. In six cases witnesses (viz., the plaintiff's 9th, 10th, 12th, 13th, 32nd, and 46th witnesses) being the natural fathers of the adopted sons, depose to the adoption of their children by maternal grandfathers.

In thirty-one cases the adopted sons depose to having been adopted by their maternal grandfathers (viz., plaintiff's 13th, 14th, 15th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th, 26th, 27th, 28th, 29th, 31st, 33rd, 34th, 36th, 38th, 39th, 40th, 41st, 42nd, 43rd, 45th, 50th, and respondent's 1st, 2nd, 6th, 11th, and 12th witnesses). Of the natural fathers of sons so adopted, the plaintiff's 9th witness, Sadagopa Ayyangár, is a Vaishnavite Bráhman of the Nannilam taluk, Tanjore district; the 10th, Sambamurti Ayyan, is a Vaishnavite Bráhman of Mannargudi in the same district; the 12th is a Bráhman of the same sect of Srirangam, Trichinopoly taluk; the 13th witness for the respondent is a Bráhman of Tinnevelly taluk, one Surya Sekarayyar; the plaintiff's 32nd and 46th witnesses, Sambamurthi Ayyar and Rajagopaláchárýar, are Vaishnavite Bráhmans of the Mannargudi and Kumbakónam taluks, Tanjore district. Of the adopted sons

VAYIDINÁDA v. APPU.

who give evidence seventeen are from the Tanjore district, seven from the Trichinopoly district, one from Madura, and five from Tinnevelly.

In two cases the adoption is spoken to by the adopting fathers: the plaintiff's 30th and 35th witnesses, Krishnayyan and Pitchu Josyar, Sivite Bráhmans of the Tanjore district, depose to having adopted each a son of his daughter. In eight cases relatives depose to the adoption of daughters' sons in their families. Of these, four—the 16th, 24th, 27th and 48th witnesses—two from Trichinopoly and two from Tanjore, say that their fathers were so adopted; two, the 17th and 37th witnesses, speak to their brothers having been given in such adoption; the 44th witness deposes to his elder brother's son having been adopted by his mother's father; and the 45th witness, himself, as he says, adopted by his maternal grandmother, states that the son of his (witness') maternal grandmother's sister was adopted by his (the adopted son's) maternal grandfather.

Twenty-one of the witnesses speak with more or less detail as to not less than forty adoptions of this character, mostly within their own knowledge, and as having taken place in their own or neighbouring villages.

The plaintiff's 2nd, 7th, 10th, 12th and 13th witnesses speak to the custom generally as "recognized from time immemorial" or as "sanctioned by the usage of the elders," while the defendant's 2nd witness, Venkata Subba Sástri, who, in examination-in-chief, stated that he could not say whether such adoptions were sanctioned by the "Shastras" or not, in cross-examination admitted that "it is customary in this" (the Tanjore) "country to adopt daughter's sons" and that "they have also made such adoptions."

It must then, we consider, be taken as proved by this evidence that the practice is prevalent among Bráh[illegible] the Tanjore, Trichinopoly and Tinnevelly districts; that [illegible]as obtained for the last 80 years at all events, while, for reasons to be stated further on, we think it must be held to have obtained for not less than 150 or 200 years, and probably from time immemorial.

The 26th witness for plaintiff, Sivarámáyyar, says that from documents in his possession it would appear that such adoptions have been made for the last 200 years; but as the documents referred to were not produced, little or no weight can be attached to this assertion. It would further appear that such adoptions have been of more frequent occurrence in later years, excluding

VAYIDINÁDA v. APPU.

perhaps the last 10 or 12 years since the passing of the decision in *Gópáláyyan* v. *Rághupati Ayyan* (1), in which it was held that "in the case of Bráhmans it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong," and that there did not exist evidence of a usage so continuous, public and uniform, as to establish a rule of customary law affirming the legality of the adoption of a sister's son by a Bráhman.

The evidence recorded in the present case shows, however, that such adoptions have been made more than once in the same family; that the practice has obtained in several instances in the same village; and that it obtains alike among both Vaishnavites and Sivites; and there is no evidence on the side of the respondent showing that other members of the Bráhman community have declined to recognize sons so adopted as validly adopted sons, or that the custom is repugnant to the general sense of the community, or that it is regarded as made in violation of the law.

Direct authorities are, moreover, referred to in this case by Sheshayyangár (respondent's 9th witness), who says there are texts found in Vayidináda Díkshatar and Thôlappa's book; the witness adds that "there is custom long sanctioned by the said books in regard to them."

The first of the works so referred to is a commentary by Vayidináda Díkshatar, who is reputed to have lived not less than 150 or 200 years ago, and the work of Thôlappa is the "Sudhi Vilóchanam."

The former author lived in the district of Tanjore, and the latter about the same time in Conjevaram.

The texts and the commentaries to which the witness referred will be treated of in due course.

It is, however, desirable first to add a few more words on the evidence.

The plaintiff's 14th witness states that for the last 7, 8, or 10 years such adoptions have been challenged "by the people;" this, it may be presumed, is in consequence of the decision of this Court in 1873 above referred to.

No inference, either for or against the validity of such adoptions, can be drawn from the statement of the plaintiff's 7th witness,

(1) 7 M.H.C.R., 250.

VAYIDINÁDA v. APPU.

Pitchuváyyan, who admits that he cannot say whether such adoptions are valid or not according to the Shastras, as he says he is not conversant with the Shastras; and the omission of the plaintiff's 9th witness to consult any authorities on the subject before making such an adoption may have been the result of his having had no doubt as to the validity of the act, or of other reasons, not explained.

The plaintiff's 10th witness says he only gave his son in adoption after consulting a person skilled in the "Shastras," but there is no reason for inferring from this only that he had doubts on the subject; in this case as well as in the case of the plaintiff's 31st witness who states that at the time of his adoption, 50 years ago, question was raised as to the validity of the act, the result was, as the witnesses say, that the elders or authorities consulted declared that such adoptions were permissible. It was suggested in the argument on behalf of the respondent that, in several instances, the adoption was acquiesced in or not contested by reason of gifts or concessions made to other members of the family who would have taken by inheritance, but for such adoption, or that the arrangement under which the adopted son succeeded to property was in virtue of a testamentary disposition acquiesced in for similar reasons. It is unnecessary to go in detail through the cases in which there is evidence of such arrangement. We do not attach much importance to the fact. It is not unnatural, and we believe not unusual, for a person adopting a son to make, at his pleasure, some provision for daughters and other relatives, and we do not think that it is at all a necessary inference that this was done in the cases as to which there is evidence in the record with the object suggested on behalf of the respondent.

Before passing on to the authorities referred to by the appellant's 9th witness, we would refer to a case in Strange's Hindú Law (Appendix, Vol. II, p. 100), in which, in the year 1806, it was said that: "In practice the adoption of a sister's son by persons of all castes is not uncommon." The case was, it is true, one from the more northern part of the Presidency, Cuddapah, but the learned Judge, in his remarks, speaks of the custom as prevalent generally, after referring to the text which we quote elsewhere: "in distress (apadi) when no other son can be procured, &c."

We have further ascertained that in a case decided on the Original Side of this Court in the year 1859, in which unfortu-

VAYIDINÁDA v. APPU.

nately the judgment is not forthcoming, a decree was made by Sir H. Davidson and Sir A. Bittleston, dated the 22nd of March 1859, in the case of *Ingura Bráhmani* v. *Venkatalakshmi Ammál*, in which the adoption by a Bráhman of his sister's son was upheld as valid. Evidence had been given of the practice amongst Bráhmans of making adoptions of daughters' and sisters' sons. This decision is valuable as it was made after the express point was raised and pandits were examined as witnesses.

In Thôlappa's work on Sradhas, and on the subject of competency to offer funeral oblations, which is the only part of that author's writings of which we have been able to obtain a copy, we do not find anything bearing on the point now before us, although there is in the treatise obtained a brief notice on adoption. The text of Çaunaka as given in Vayidináda Díkshatar's commentary does not differ from the text as given in the Vyavahára Mayuka, chap. IV, sec. V, verses 9 and 10; in the Dattaká Mímánsá, sec. II, para. 74; and in the Dattaká Chandriká, sec. I, para. 17, until we come to the point to be specially noted further on. The latter texts are as follows: "The adoption, of a son by any Bráhman must be made from among sapindas, or on failure of these an asapinda may be adopted—not from others (than sagotras) (or, 'otherwise let him not adopt'). Of Kshatryas in their own class positively and (on default of a sapinda, kinsman) even in the general family following the same spiritual guide (guru). Of Vaiçyas from amongst those of the Vaiçya class; of Sudras from (their own) class only, and not otherwise. Of all, and the tribes likewise in (their own) classes only, and not otherwise."

Then comes a material divergence between the text as given by the authorities above quoted and that given by Vayidináda. The text, as given in the Vyavahára Mayuka, Dattaká Mímánsá, and the Dattaká Chandriká (as translated, the two latter by Sutherland and the former by Borradaile), runs thus: "But a daughter's son and a sister's son are affiliated by Sudras;" and in the text, as it is found both in the Dattaká Mímánsá and the Dattaká Chandriká, then follow these words: "For the three superior tribes a sister's son is nowhere (mentioned as) a son." But the text as given by Vayidináda Díkshatar is as follows: "Of all" or "as to all tribes (or classes) from (or in) their own classes only, daughter's son or sister's son; as for Sudras in time of distress only;" and

VAYIDINÁDA v. APPU.

the words "For the three superior tribes a sister's son is nowhere (mentioned as) a son" are wholly omitted.

On these words, omitted in the text given by Vaiydináda, there follows in the Dattaká Mímánsá, an elaborate dissertation, paras. 75 to 105 inclusive, the later clauses being devoted to showing that the words "sister's son" must include the daughter's son also.

The commentary of Vayidináda on the text, as given by him, is as follows: "as to all, from gnátis (a) son is to be taken, either daughter's son or sister's son (is) to be taken; as for Sudras in distress, daughter's son, &c., is to be taken"—"this is the meaning."

It is clear that if the words—"For the three superior tribes a sister's son is nowhere mentioned as a son"—were before the commentator when he wrote his gloss or if he had allowed them to remain, it would not have been possible for him to represent the permission to adopt a daughter's or a sister's son as applicable to the three superior classes; and it is not material whether the full text was not before him, or whether he intentionally omitted these words. But taking the text as given by him, the adoption of daughters' or sisters' sons being declared permissible among the three superior classes, it would seem to be wholly superfluous to add that such adoption was allowed in the case of Sûdras; still less does it appear why the permission should have been apparently further limited in the case of Sudras by the words "in (time of) distress" or necessity.

We cannot but conclude that the text was intentionally given by the commentator in the shape in which we find it, if indeed the whole of the concluding sentence as given in the other authorities was not also intentionally omitted, and the cause of this is not, we think, incapable of explanation.

The practice of making an appointed daughter whose son, if she had one, became the son of the father making the appointed daughter, if he had no male issue, was a mode of affiliation prevalent from the earliest times, even before the widow and daughter had a place assigned to them by the Mitákshará in the line of heirs. The law of adoption obtained a considerable extension in the Káli-yúg when only two sorts of sons, the "aurasa" (natural, or ordinary) and the "dattaká," (given) were recognized; and the Dattaká Mímánsá and Dattaká Chandriká show that the theory as to the prohibition of the adoption of a son born of a woman with whom the adoptive father could not legally have married arose out

VAYIDINÁDA v. APPU.

of a commentary on a passage in the Smriti of Manu or Çaunaka (it is uncertain which) to the effect that the adopted son should have or be "the reflection of a son," and it is probable that from this were developed other restrictions and rules intended to ensure that the adopted son should be as far as possible an imitation of a real son. Whatever doubt we may have as to how far the adoption of a daughter's son is inconsistent with the theory as to the invalidity of the adoption of a son within the prohibited degrees of connection, the usage may still be fairly referred to those texts which recognize the practice of creating a daughter's son heir by appointment, the only difference being one of form and not of principle, the consent being given in the one case at the time of marriage, and in the other at the time of adoption.

Among Sudras the adoption of daughters' and sisters' sons has always obtained, and whether the Bráhmans who settled in the south of India never recognized that such adoptions were prohibited in their case, or whether they adopted the practice which they found prevalent among the people of the country in which they settled, we are satisfied that the practice of making such adoptions has prevailed among Bráhmans in what are now the southern districts of this Presidency from time immemorial.

There is in West and Bühler's Digest of Hindú Law, Vol. II, pp. 884 to 888, 3rd edition, a passage bearing on the subject now before us, which deserves to be quoted at length—"The gradual abolition of the grosser means of supplementing a family in favor of the system of adoption is itself a striking evidence of progress in civilization. The appointment of a daughter held an intermediate place between this and the coarse materialism of the earliest modes of substitution. It is no longer recognized, but traces of the institution still remain in the existing law. From it, on the one hand, has been derived the right of succession of the daughter and the daughter's son, while, on the other, it is connected with the fitness of a daughter's son for adoption. As an imitation of a real son the adopted son ought to be born of some woman whom the adoptive father could have married. This excludes the son of a daughter, and such is the law generally received amongst the highest castes, but amongst the lower castes sub-divisions of the great Sudra class, almost everywhere, and amongst some of the higher castes by their customary law, the daughter's son is deemed fit for adoption, and even the most fit on

VAYIDINÁDA v. APPU.

account of the place he might formerly have taken as a son by appointment, as well as of the blood connection on which the system of appointment itself was founded. The passage of Vasishtha which directs that a man desiring to adopt shall make his selection from amongst near relatives, and for choice take the nearest, is so obscurely expressed as to admit of various interpretations. How the ingenuity of commentators has been exercised upon it may be seen in Colebrook's note to the Mitákshará, chap. I, sec. XI, verse 13. The Samskara Kaustubha, and the Nirnáya Sindhu, construing the direction most liberally, approve the adoption, failing a sagotra sapinda, of a daughter's or a sister's son. The Sástris, following Vyvahára Mayuka, are almost uniformly opposed to this, except in the case of Sudras. They rely on the impossibility of a real paternal and filial relation between the fictitious father and a son so born; and the decisions in Bombay must be considered, perhaps, to have confirmed the Sástris' view, but the customary law seems in a measure at least to have been represented by the doctrine of the two works referred to. These were, no doubt, written under the influence of ideas which shaped the customary law, and they afford an example in their divergence from the more generally received authorities of parallel growths of doctrine springing from the same original source, yet taking quite different lines of development according to the medium in which they were placed. The real nearness of the daughter's son once procured ready acceptance for the doctrine of appointment, and this in its turn has facilitated the admission of the daughter's son as fit for adoption. The Shastra had, however, to be interpreted accordingly, and this interpretation, setting aside the ordinary doctrine of a necessary difference in the families of birth of the real mother and the adoptive father, paved a way for the admission of the sister's son. In the south of India the Bráhmanical law was, for the most part, apparently accepted only with this qualification, adapting it to previously existing customs, as in the case of marriage between the children of a brother and a sister rejected by the stricter law of the north, but allowed in the south, because it could not be prevented."

The divergence between the generally accepted authorities and actually existing customs, and the survival of the customs sanctioned by the earlier law appear to us to be accounted for in the above passage on sound historical principles, and the conclusions

therein arrived at to receive confirmation from what we find to be established by evidence in the case before us.

Even supposing the custom, which we find to be established by the evidence to have sprung up after the text-books which distinctly prohibit these adoptions were written, though it cannot be affirmed that it did so, that fact will not of itself invalidate the custom; and the alteration in the text of Çaunaka as given by Vayidináda Díkshatar and his comments thereon, are, in our opinion, to be explained in this manner: the commentator finding, at the time when he wrote, that the custom was actually prevalent among the Bráhmans in the south of this Presidency, gave the version of Çaunaka's text which we find in his commentary together with his gloss thereon, with a view to the adoption of daughters' sons and sisters' sons being recognized as made in accordance with the authorities; and we are of opinion that the inception or prevalence of the custom is not the result of an innovation introduced by the commentator, but that the practice was followed and recognized as not only not inconsistent with the customary law of the land at the time when the commentator wrote, but as a custom having the force of law, and that the local authority simply gave or purported to give the color of authoritative sanction to such usage; and we consider that we ought judicially to recognize such usage.

The decree of the Subordinate Judge is reversed and that of the District Múnsif restored; but in view of the former ruling and of the relationship we have found to exist between the parties, we direct that each party do bear his own costs in the Lower Appellate Court and in this Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. September 17.

KRISTAYA (DEFENDANT), APPELLANT,

and

KASIPATI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Cause of action—Suit by debtor to compel creditor to accept money due.

A bond having been executed, whereby it was stipulated that a debt should be paid by instalments subject to the condition that if any one instalment were not

* Second Appeal 278 of 1885.

KRISTAYA v. KASIPATI.

paid within a certain time after it became due, the whole amount remaining due should become payable at once, the creditor evaded the debtor's attempts to pay the instalments as they became due, and the debtor brought a suit to compel the creditor to accept an instalment due :

Held, that such a suit would not lie.

THIS was an appeal against the decree of C. L. B. Cumming, Acting District Judge of Ganjam, confirming the decree of C. Simháchalam, District Múnsif of Chicacole.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

Anandáchárlu for appellant.

Srírangáchárlyar for respondents.

JUDGMENT.—The respondents executed a bond in appellant's favor for Rs. 1,150 in September 1882. The document provided for repayment by twenty-three annual instalments of Rs. 50 each, and for the entire unpaid balance becoming payable at once in case any one instalment was in arrear for three months or more. Prior to the date of this bond there was another bond with like provisions, but, as it contained a clerical error, the bond in suit was executed. The plaint prayed for a decree directing the appellant to receive Rs. 50 on account of the second instalment due under the bond and to pay the respondents' costs. It stated that the appellant desired to defraud the respondents by causing some one instalment to become overdue, that he evaded accepting the first two instalments due under the first bond, that in original suits 197 of 1881 and 177 of 1882 they compelled him to accept those instalments, that the appellant behaved in the same way in regard to the first instalment due under the second bond, that the respondents obtained a decree in original suit 154 of 1883 which directed him to accept that instalment, and that the appellant again declined to accept the second instalment. Both the Courts below decreed the claim, and the Judge observed that the respondents were forced, owing to the appellant's conduct, to protect themselves by bringing suits to enforce acceptance of payment of each instalment. It is urged in second appeal that the facts alleged disclose no cause of action, and we consider that the contention is well founded. The plaint contains no demand on the part of the respondents that any *right* be enforced, and though they are under an obligation to pay each instalment on or before the date fixed for its payment, it would be a sufficient answer to any action

KRISTAYA v. KASIPATI.

which might be brought thereon by the appellant that they tendered payment in time. A suit is a demand made judicially for attaining or recovering a right, and it does not lie for the bare performance of a duty at the instance of the person bound to perform it, for the evident reason that, when he is willing to perform it, there is no need for a suit, and that, if he is not, it is for the other party to enforce its performance. It is true that, under the terms of the bond, the regular payment of each instalment is necessary to enable the respondents to preserve their right to pay the balance still due by instalments ; but a tender of payment made in time would be effectual for this purpose also. It is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default, and that it continues to subsist. But the suit before us is not one of that kind, and it is not necessary for us to express an opinion on the question whether, under certain circumstances, a declaratory suit may not be brought. We are satisfied that, in its present form, the suit instituted by the respondents cannot be maintained. We set aside the decrees of the Courts below and dismiss the suit. Having regard, however, to the appellant's conduct as found by the Judge, we direct that each party do bear his or their costs.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. August 5, 10.

SIVARÁMÁ (PLAINTIFF), APPELLANT,

and

SUBRAMANYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 295—Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale—Limitation Act, sch. II, arts. 12, 13.

Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors.

By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs and for the sale of the land in satisfaction of the amount decreed.

The land was sold for Rs. 2,855 in March 1881.

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* Second Appeal 224 of 1885.

SIVARÁMÁ v. SUBRAMANYA.

In May 1881 B, a puisne mortgagee, applied to the Court for payment to him of Rs. 500 of this sum, alleging that A was entitled only to Rs. 2,000 and Rs. 280 costs, but not to arrears of rent, in preference to his claim as second mortgagee.

The claim of B was rejected on the 27th May 1881 and the whole amount paid out to A.

In February 1882 B (who had filed a suit on the 23rd March 1881) obtained a ecree upon his mortgage.

On the 23rd May 1884 B sued to recover Rs. 510 paid to A on account of rent on the 27th May 1881.

The lower Courts dismissed the suit on the grounds

(1) that A was entitled to treat the arrears of rent as interest;

(2) that the suit was barred by limitation:

Held, on second appeal, that B was entitled to recover the sum claimed.

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge at Calicut, confirming a decree of C. Gopálan Náyar, District Múnsif of Shernád, in suit 279 of 1884.

The facts necessary for the purpose of this report are set out in the judgment of the Court (Hutchins and Parker, JJ.).

Bháshyam Ayyangár for appellant.

Sankaran Náyar for respondent.

JUDGMENT.—The respondent (Subramanya Bhatta) was the first mortgagee of certain properties, on which the appellant (Sivarámá Krishna Bhatta) obtained a puisne incumbrance. Under the terms of his mortgage the respondent was to enjoy the lands as security for the principal sum (Rs. 2,000) advanced, to appropriate to the interest due on that advance a certain sum annually, and to pay the balance of the estimated net produce, 50 paras of paddy, to the mortgagors. He elected, however, to leave the mortgaged lands in the possession of the mortgagors, and he took from them an agreement for the payment of an annual rent equal to the interest and the 50 paras of paddy. In July 1880 he obtained a decree directing that the lands should be sold for the discharge of the principal sum (Rs. 2,000) and costs, and also for the arrears of rent due under the rental agreement. The lands were accordingly sold on the 24th March 1881 for Rs. 2,855.

On the day before the sale the appellant instituted a suit against the mortgagors on his subsequent incumbrance, and on the 24th May 1881 he applied to the Múnsif for payment of Rs. 500 and odd out of the sale-proceeds. He admitted that the respondent, as the first incumbrancer, was entitled to recover first his principal of Rs. 2,000 as well as Rs. 280 for the costs of his suit but he contended that the respondent was not entitled to any priority in respect of the sum decreed to him as rent.

SIVARÁMÁ v. SUBRAMANYA.

On the 27th May 1881 the Múnsif dismissed the appellant's application and directed the whole of the sale-proceeds to be paid to the respondent, and the whole sum was accordingly paid out to the respondent on the same day. The Múnsif treated the appellant's application as objecting to the sale as one made for the arrears of rent, and held that he was bound to take steps for the cancellation of the sale before he could lay claim to any part of the proceeds; but the appellant has never denied the validity of the sale; it had been ordered under a decree for the discharge of a prior incumbrance, to which he could not object. His claim was that the sale-proceeds must be taken to represent the mortgaged property, that the respondent was entitled to be paid the principal money due on his incumbrance and costs, but that he had no lien on the proceeds in respect of the rent, and that therefore the surplus proceeds should be paid to himself as the next incumbrancer.

In February 1882 the appellant obtained a decree on his mortgage. In November following he put up to sale and himself purchased the same properties. But these properties had already been sold under the respondent's decree in virtue of a prior incumbrance, and the subsequent sale under the appellant's decree had no legal effect whatever.

The present suit was instituted by the appellant on the 23rd May 1884 to recover from the respondent the sum of Rs. 510 paid to the respondent on the 27th May 1881 on account of his claim for rent. Both the Courts below have held that the appellant is not entitled to this sum as against the respondent, and also that the suit is barred by the Law of Limitation. In both respects the decrees seem to us erroneous.

When immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance, and there is no other incumbrance entitled to priority, the proceeds of sale represent the property itself; and s. 295 of the Procedure Code prescribes how the proceeds should be applied. They are to go

(1) in defraying the expenses of the sale—these have been defrayed;

(2) in discharging the interest and principal money out of the incumbrance;

(3) in discharging subsequent incumbrances if any.

And the penultimate clause of the section provides that, "if

SIVARÁMÁ v. SUBRAMANYA.

all or any of such assets be paid to a person who is not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

The appellant, as second incumbrancer, is clearly entitled to the surplus proceeds after discharging the principal and any interest which may be due on the respondent's incumbrance. The question between them, therefore, resolves itself into this—Can the sum claimed by the respondent as rent, and paid to him under the decree for rent, be regarded as interest due on his incumbrance? It appears to us that it cannot; and indeed both the Lower Courts have treated it as rent and not as interest. By letting the mortgaged properties to the mortgagors under the stipulation that they should pay rent in lieu of interest, the respondent elected to convert the interest into rent. No doubt such a course has its advantages; but he is not entitled to those advantages, and also to the advantage of treating the sum conditioned to be paid as if it were interest. He sued for it as rent, and not as interest, and under the terms of the decree, directing the sale of the property, the sum now in question was awarded to him as rent. There is no foundation for the contention that arrears of rent are a charge on the land as against an incumbrance.

As regards limitation, the Múnsif relied on articles 12 and 13, and the Appellate Court on article 12 alone. Article 12 relates to suits to set aside sales. We have already shown that the appellant admits the validity of the sale and does not seek to set it aside. Article 13 applies to suits to set aside the order of a Civil Court in *any proceeding other than a suit.* It has been repeatedly ruled that a proceeding in execution is a proceeding in the suit in which execution has been taken out, and the order in question appears to have been passed in a proceeding in execution in the respondent's suit. But even assuming that the order of the Múnsif, dated the 27th of May 1881, being an order as between the appellant, who was not a party to the suit in which execution had been taken out, and the respondent cannot be regarded as having been made in a proceeding in the respondent's suit, we still consider that article 13 does not apply to the present suit. The appellant does not seek to set aside the order, and the order was not one in a matter which the Múnsif was competent to determine finally. Section 295 does not provide that an order for a payment out of assets shall be final, but, on the contrary, that it shall be subject to the

SIVARÁMÁ v. SUBRAMANYA.

right of any person entitled to sue the person to whom payment has been made to compel him to refund. The appellant, we may observe, had not at that time obtained his decree, and his position was that of a person merely claiming to be an incumbrancer. It is not necessary to determine whether the plaintiff's suit falls under article 62 or under the general article 120, or whether he has not twelve years from the date of his incumbrance, for it is conceded that the suit will not be barred, unless article 13 applies.

The result is that the decrees of the Courts below must be reversed, and, in lieu thereof, there will be a decree requiring the respondent to pay to the appellant Rs. 510 with costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. August 27.

AIYAVU AND ANOTHER*

against

QUEEN-EMPRESS.

Criminal Procedure Code, s. 271—Murder—Explanation of charge essential.

At a trial before a Sessions Court a charge was read out to the prisoners to the effect that they at a certain place on a certain date committed murder by causing the death of M, and that they had thereby committed an offence punishable under s. 302 of the Indian Penal Code and within the cognizance of the Court of Sessions. The prisoners pleaded guilty and were convicted on their plea.

The charge was not explained to the prisoners. In answer to questions put by the Court, prisoners stated that they had killed M, and that they made the admissions of their own accord and not on the persuasion of any one:

Held, that the conviction must be quashed and a new trial ordered.

THIS was an appeal from a sentence of death passed by J. C. Hughesdon, Sessions Judge of Tinnevelly, in session case 25 of 1885.

The facts appear sufficiently, for the purpose of this report, from the judgment of the High Court (Muttusámi Ayyar and Hutchins, JJ.).

Mr. *Wedderburn* for the prisoners.

Mr. *Powell* (Acting Government Pleader) for the Crown.

For appellants, it was contended that the conviction must be quashed, the provisions of s. 271 of the Code of Criminal Proce-

* Appeal 288 of 1885.

AIYAVU v. QUEEN EMPRESS.

dure not having been observed—*Empress* v. *Vaimbilee*,(1) *In re Gopal Dhanuk*.(2)

The charge, which was as follows:—

"That you (1) Aiyavu Nádan, (2) Sivattiya Nádan, (3) Suppaya Nádan, and (4) Mari Nádan, on or about the 27th day of April 1885, at Panduvarapatti in Sattúr talúk, committed murder by causing the death of one Marimuthu Nádan, and that you have thereby committed an offence punishable under s. 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions," was read out, but not explained to the prisoners.

If it had been explained, it was probable from subsequent statements made by them that they would not have pleaded guilty.

For the Crown, it was contended that the facts admitted by the prisoners were sufficient to justify conviction.

JUDGMENT:—In this case four persons were tried on a charge of murder. Prisoners Nos. 1 and 2, the present appellants, pleaded guilty and the two others claimed to be tried. On recording their pleas, the Judge put a few questions to each of the four accused. He asked the appellants whether they killed Marimuthu Nádan as stated in the charge. Both said "yes." He next asked whether they said so of their own accord or whether they were persuaded by any one else to say so. The appellants said no one persuaded them to say what they said. The Judge then asked whether they knew they would be hanged for saying "yes." The appellant No. 1 said: "If I am to be hanged, let me be;" No. 2 said the same, adding "is it proper to deny after having done the deed."

The Judge then made a note that prisoners Nos. 1 and 2 will presently be convicted on their own plea, and that the trial does not proceed as regards them, that they are removed from the dock, and that it is probable they will be called as witnesses for the prosecution in the case against prisoners Nos. 3 and 4. Subsequently he examined them as the witnesses Nos. 1 and 2 against the prisoners Nos. 3 and 4. Eventually the prisoners No. 3 and 4 were acquitted. The Judge then convicted the appellants on their own plea, and having sentenced them to death, he has referred the sentence to this Court for confirmation.

In their petition of appeal they stated that they held the legs

(1) I.L.R., 5 Cal., 826. (2) I.L.R., 7 Cal., 97.

AIYAVU v. QUEEN EMPRESS.

of the deceased when his throat was being cut, but that they did so because Mari Nádan, the accused No. 4, threatened to kill them if they did not assist, and put them in fear of instant death.

After reading out the charge to the appellants, the Judge does not appear to have explained it to them as he is required to do by s. 271 of the Procedure Code. It was argued by the learned counsel for the appellants that "murder" is a technical word and that, unless it was explained as directed by that section, the plea of guilty should not be accepted.

We are precluded by the course taken by the Judge from looking at the evidence taken after the appellants were removed from the dock. The prisoners were not asked in their examination whether they intended to kill, or in what circumstances they killed the deceased, and their statements do not disclose on their part a knowledge of the elements constituting the offence of murder. If the statements contained in their petition of appeal could be taken to be true, we might convict them of murder, but we should then feel bound to take the whole of those statements together and to recommend a mitigation of the sentence on the ground that they committed the crime from fear of instant death.

We have asked the Judge to certify whether the nature of the offence with which the appellants were charged was properly explained, and he says that it was not. That being so, we cannot accept the admission "we *killed* Marimuthu" as an admission that the appellants had committed murder. We are constrained to set aside the conviction and to direct a new trial of the appellants.

In his explanation the Sessions Judge has referred us to two cases (Appeal 286 of 1884,(1) *Queen-Empress* v. *Nelai Laskar* (2)), in which the High Court might have pointed out, but did not point out, that the expression "I killed" did not amount to an admission of having committed murder. In both those cases the words "I killed" were coupled with other statements showing beyond doubt that the accused did not intend to admit facts which amount in the eye of the law to murder. Here no other statements were asked for, and the simple question is whether killing is equivalent and tantamount to murder. Most certainly it is not, or culpable homicide not amounting to murder would be an unmeaning expression.

(1) Not reported. (2) I.L.R., 11 Cal., 410.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

1884. October 1. 1885. May 1.

KRISHNA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

and

SÁMI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindú law—Inheritance—Partition—Disqualified heirs—Birth of qualified heir.

Under the Hindú law of inheritance which obtains in Southern India, the sons of a deaf and dumb member of an undivided Hindú family are entitled to a share of the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather.

In such a case the estate vests on the death of the grandfather in the qualified heirs subject to the contingency of its being divested on the recovery of the disqualified, or the birth of a qualified heir.

THIS was an appeal from the decree of Arunáchala Ayyar, Subordinate Judge at Tanjore, dated 13th April 1881, reversing the decree of S. Rámasámi Mudali, District Múnsif of Kumbakonam, in suit 383 of 1879, and remanding the suit.

The plaintiffs, Sámi Reddi and Gopálu, minors, by their guardian Laksmi Ammál, sued the defendants Krishna Reddi and five others for partition and possession of a moiety of certain property. In the plaint it was alleged that Sámi Reddi, the grandfather of plaintiffs, and Venkatasámi Reddi, the father of defendant No. 1 and grandfather of defendants 2 and 3, were undivided brothers: that plaintiffs' father was born deaf and dumb; that up to 1876 plaintiffs, their father, and defendants lived together; and since that time plaintiffs and their father lived separately from the defendants.

Defendants 4, 5, and 6 were made parties to the suit as being in possession of some of the property of which partition was sought.

Defendant No. 1 pleaded, *inter alia*, that as the father of plaintiffs was alive, plaintiffs were not entitled to a share.

* Civil Miscellaneous Appeal 410 of 1881.

The Múnsif held that the plaintiffs could not sue, inasmuch as they were not born in the lifetime of their grandfather, citing *Pareshmani Dasi* v. *Dinanath Das*, (1) *Kalidas Das* v. *Krishan Chandra Das*. (2)

On appeal the Subordinate Judge reversed this decree. His judgment was as follows:—

"The District Múnsif quotes two Bengal decisions referred to in ss. 408 and 515 of Mayne's Hindú Law. In reading those decisions, I find that Mr. Justice Norman dissented from the other Judges, and was of opinion that a son born to an incapacitated person after the death of the grandfather is entitled to inherit the grandfather's estate. The original texts, Mitákshará and Vyavahára Mayukha, which he quotes in support of his opinion, are overruled by the Chief Justice, on the ground that they are not the authorities in Bengal. Hence it is clear that the said authorities which govern the southern parts of India must be our guide. Besides, there is vast difference between the Hindú law of that country and that of ours. There, a son cannot claim a share of the family property during his father's lifetime, and the property descends to him after his father's death. But the case is quite the reverse in the southern parts, where a son participates with his father, and the right of the son to the property springs on the date of the birth, and in some cases even in conception—*Vide* M.H.C.R., Vol. III, pp. 100 to 104. The respondents' vakíl has not pointed out any provision in Hindú law that the son of a disqualified person, to be capable of inheriting the ancestral estate, should be born within the lifetime of his ancestor. The right of inheritance under Hindú law is based upon the principle of competency to perform the beneficial acts to the deceased proprietor of the estate. Since the son of a disqualified person, born after the death of the ancestor, is fully qualified to offer the funeral cakes to the ancestor, and since no difference is observed in that respect between a grandson born before and one after the death of the grandfather, it is reasonable that such a grandson should have his share in the ancestral property. Besides, in this case the defendant No. 1, as first witness for plaintiffs, has fully admitted the relationship of the plaintiffs, and asserted that they and their parents lived with him and enjoyed the property jointly up to a year previous

(1) 1 B.L.R., A.C., 117. (2) 2 B.L.R., F.B., 103.

KRISHNA v. SÁMI.

to the suit, and that plaintiffs are entitled to half of the family property. Under these circumstances, I am of opinion that plaintiffs have a right to claim their share in the family property."

Defendants 1 and 2 appealed to the High Court on the following grounds :—

(1) The plaintiffs' father being admittedly disqualified to inherit, and their grandfather having died long before they were born, they acquired no right by birth in the property sued for.

(2) The property having devolved upon the defendants by right of inheritance long before the plaintiffs were born, their subsequent birth cannot divest the defendants of their right to any portion of their property.

The case came on for hearing on the 11th November 1881, on the 25th November 1882, and on the 11th January 1884, when it was referred to a Full Bench by Turner, C.J., and Kindersley, J.

On the 1st of October 1884 the case was argued before a Full Bench and judgment was reserved.

Bháshyam Ayyangár for appellants.

If plaintiffs had been born in the lifetime of their grandfather, they would be entitled to a share.

The father being disqualified, the son cannot claim under the father.

(Muttusámi Ayyar, J.—What is the reason of exclusion? Why is he allowed to inherit when cured ?)

(1) His incapacity to offer funeral oblations and to perform other religious ceremonies on account of sin in previous birth ;

(2) His capacity by being cured is due to the fact that his sins are supposed to be atoned for.

Mitákshará splits up Yájnaválkya's text into two and deals with only one portion of it. We must confine ourselves to it.

In the *Tagore case* (1) it is laid down that property once vested cannot be divested. The only exception to the rule is when an adoption is made. So that when property vested is sought to be divested, clear authority must be shown.

[Muttusámi Ayyar, J.—When a coparcener goes abroad, the property is redistributed for seven generations.]

(1) 9 B.L.R., 397.

KRISHNA v. SÁMI.

There the vesting of the property is contingent. The question is whether the son of a disqualified person has higher right than a qualified son.

If the father were cured and if he could not sue, his sons could not maintain suit. Under Mitákshará law the father could not sue.

The texts say his case is analogous to that of an after-born son, who clearly takes only what his father owns at the time of the son's birth. In Stokes' Hindú Law Books, s. 10, cl. 7, it is said that the right of a son cured by medicine, to claim a share after division, is analogous to that of a son born after division.

(Muttusámi Ayyar, J.—The Sanskrit word is "*gnata*" "born" not "begotten," thereby suggesting that his case is analogous to that of the son in the womb on whose birth the property is redistributed.)

That is enough, the analogy goes only so far as to give the disqualified person his father's share when his disqualification ceases. It will not give him what he would have got if he was qualified and divided from his father and brothers.

The analogy relates only to division in the lifetime of the father. If the case of a disqualified person, subsequently cured, is analogous to a son in the womb, then he must be considered to be a son in the womb from the time of his conception till he is cured.

Further, the son of a disqualified person must stand in his own shoes and cannot step into his father's shoes. That is to say he cannot inherit every thing which his father would inherit if not disqualified. He can inherit only as son and not as substitute of his father, *e.g.*— The son of a great grandson is disqualified to inherit.

The birth of a son to a disqualified great grandson is no cure to his disqualification.

Mr. *Shephard* and Hon. *Rámá Ráu* for respondents.

The judgment of the Full Bench (Turner, C.J., Kernan, Muttusámi Ayyar, Hutchins and Brandt, JJ.) was delivered by

TURNER, C.J.—The decision of this appeal is governed by two rules of Hindú law—the rule which provides for the inheritance of the sons of persons who from some natural defect are themselves incapable of receiving a share, and the rule that an estate, which has once vested, cannot be divested by the occurrence of a contingency which, if it had occurred prior to the period of vesting, would have curtailed or avoided the rights of the person in whom the estate has vested.

KRISHNA v. SÁMI.

The first of these rules rests on the authority of a text of Vishnu: "The legitimate sons even of these (are sharers of the patrimony)," Vyavahára Mayukha IV, 11, 2, and of a text of Yájnaválkya: "But their sons, whether they be legitimate or the offspring of the wife by a kinsman, are entitled to allotments if free from similar defects," which is cited and thus paraphrased by the author of the Mitákshará: "The sons of these persons, whether they be legitimate offspring or sons of the wife, are entitled to allotments, or are rightful partakers of shares, provided they be faultless or free from defects which would bar their participation, such as impotency or the like."

The Múnsif relying on the decisions of the High Court of Calcutta in *Pareshmani Dasi* v. *Dinanath Das* (1) and *Kalidas Das* v. *Krishan Chandra Das* (2) held that, inasmuch as the respondents were not born in the lifetime of their grandfather, they were not entitled to claim his share. He therefore dismissed the suit. The Subordinate Judge considered that the decisions referred to by the Múnsif were not applicable to a case governed by the law of the Mitákshará, and held the plaintiffs entitled to share on the ground that there was no authority for imposing on the sons of disqualified persons, who are declared competent to share, the condition that they should be born in their grandfather's lifetime. The argument in support of the defendants' case repeated the reasoning of Sir Barnes Peacock in the Full Bench case before mentioned.

The eminence of the learned Chief Justice and Judges who took part in that decision entitles it to the highest respect. The decision proceeds mainly on two grounds on the rule that an estate once vested in a full and absolute owner cannot be divested, and secondly on an inference from the texts of the Mitákshará, which declare a disqualified person, whose disqualification is removed after partition, entitled to share in like manner as an after-born son.

The rule that an estate once vested in a full owner cannot be divested is nowhere stated in so many terms by the Hindú commentators, and where these commentators vary on fundamental questions regarding property, it is not *primâ facie* improbable that a variance would be found in the extent to which the rule against divesting ownership is applied.

(1) 1 B.L.R., A.C., 117. (2) 2 B.L.R., F.B., 103.

KRISHNA v. SÁMI.

The case which came before the High Court of Calcutta was presumably a case governed by the law of the Dáyabhága. The learned Chief Justice called attention to the definition of the term "dáya" adopted by the author of that treatise, "wealth in which property dependent on relation to the former owner arises on the demise of that owner"—chap. I, verse 5, and to the observation preceding this section that, although "dáya" by derivation signifies "what is given," the use of the verb "da" is here secondary or metaphorical, since the same consequence is here produced, namely that of constituting another's property, after annulling the previous right of a person who is dead or gone into retirement or the like—chap. I, s. 4. He also cited other passages to show that under the Dáyabhága law property arose on the natural or civil death of the owner—chap. I, verses 1, 2, and 31.

The author of the Mitákshará on the other hand defined "dáya" as wealth which becomes the property of another solely by reason of relation to the owner—Mitákshará, chap. I, s. 1, verse 2, and, citing a text of Gautama which it is said is not found in the institutes of that sage, "Let ownership be taken by birth," he declared it to be a settled point that property in the paternal or ancestral estate, that is to say in the heritage which he termed unobstructed, was by birth—verse 23.

Again, while the Dáyabhága regarded the estate of undivided coparceners as held in separate shares and consequently defined partition as a manifesting of a property which had arisen in goods and chattles but which extended only to a portion of them, the Mitákshará treated the estate of coparceners as held in entirety without recognition of shares, and defined partition as the adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate.

As consequences of these fundamental differences respecting the event which gave rise to ownership in paternal estate and the nature of the interests of coparceners in the undivided estate, the son under the Dáyabhága took nothing till his father's death, and the share of a brother, though unascertained by partition, descended to his widow, whereas under the Mitákshará, the son became at his birth a coparcener as well in paternal as in ancestral wealth, and the right of survivorship among undivided brethren excluded the succession of a brother's widow to her husband's interest in the joint estate.

KRISHNA v. SÁMI.

It may well be that these fundamental differences to which we have alluded would justify a distinction in the application of the rule respecting the divesting of an estate once vested. In some instances, to which allusion will presently be made, it is clear that a difference exists.

The Hindú law of the Mitákshará regards property as specially dedicated to the discharge of religious and moral obligations.

"Wealth was produced for the sake of solemn sacrifices and to the support of the joint family." Cited in Mitákshará II, 1, s. 14. "Immovables and bipeds should not be sold .... for they who are born and they who are yet unbegotten and they who are still in the womb require the means of support." Cited in Mitákshará I, 1, s. 27.

A right of maintenance was assigned to members of the family whose claims to inherit were postponed to preferable heirs, or whose possibility of inheritance had been lost, or who were disqualified for inheritance. Sons as coparceners with equal rights with their father in ancestral estate might compel the father to divide that estate and retain but a single share for himself; but they could not compel him to divide his self-acquired property, and, if he was willing to do so, he might retain a double share of it for himself and must make his wives participants of shares equal to those of sons, unless separate property had been given to them and in that case they received half shares. There was thus secured to the parents a fund for children who might be born after partition. The child, if a son begotten before partition, was entitled to re-open the partition and receive a share equal to that of his brothers; if begotten after partition, he inherited what wealth remained to his father and all the father's subsequent acquisitions, and, if there was no daughter, he solely inherited his mother's portion also. The case in which a son born after partition would receive nothing is not contemplated by any of the authors of the texts and commentaries to which we have had access except Varadarájá in the Vyavahára Nirnáya in a passage to which reference will presently be made.

The text of Manu as to the right of a son born after partition is as follows:—"A son born after a division shall alone inherit the patrimony or shall have a share of it with the divided brethren if they return and re-unite themselves with him"—chap. IX, s. 216.

Yájnaválkya, after declaring that a father may make a partition

KRISHNA v. SÁMI.

in his lifetime, and under some circumstances unequally, and that brothers after the father's death must make an equal partition, notices the case of the son born after partition: "When [after] the sons, &c., have separated a son is born of a wife of the same class, he becomes a partaker of a share, or his allotment should be made out of the visible estate corrected for profit or loss"—Yájnaválkya II, s. 123.

There is also a text of Bríháspati: "A son born before partition has no claim on the wealth of his parents, nor one born after it on that of his brother," and again "all the wealth which is acquired by the father himself who has made a partition with his sons goes to the son begotten by him after the partition. Those born before it are declared to have no right"—Mitákshará I, 6, s. 6.

Vijnanéswara commenting on these three texts observes that, the sons being separated from their father, one who shall be afterwards born of a wife equal in class shall share the distribution, and explains that the distribution means what is distributed, in other words the share of the father and the share of the mother, if there be no daughter. He deduces from the text of Manu that sons born previously to the distribution have no property in the share of the separated father and mother, and that a son born to separated parents is not a proprietor in his brother's allotments, but, as shown by the text of Bríháspati, is entitled to the property acquired by the father subsequently to partition as well as to the father's share. He meets the case suggested of a division after the father's death, wherein the father would receive no share, by deducing a rule from the last portion of Yájnaválkya's text. The posthumous son, whose mother's pregnancy was not manifest at the time of partition, must receive, out of his brother's allotments, a share equal to their shares after computing the income which has accrued and the father's debts that have been discharged.

As to the rights of sons born after partition, Devanna Bhatta, quoting the text of Vishnu that a son with whom a father has made a partition should give a share to the son born after the distribution (Vishnu, chap. XVII, s. 2 *) explains that it refers to a partition made when the fact of the existing pregnancy of the mother was unknown—Smriti Chandriká, chap. XIII, ss. 1, 2. He then refers to the text of Gautama, XXVIII, s. 29 †—"A son

* 7 Sacred Books of the East, p. 88. † 3 Sacred Books of the East, p. 302.

KRISHNA v. SÁMI.

begotten after partition takes the wealth of his father only :" (it may be observed this text is otherwise translated " takes *exclusively* the wealth of his father " the term " eva " being referred to the taker and not to the wealth ; but the sense is much the same). On this text Devanna Bhatta observes: " The reason why a son born after partition has no claim on the paternal wealth is because he has divided off from his father, and the reason why a son begotten after the partition has no claim on the wealth of the brother is because such a brother possesses no property in which the son born after the partition can have an interest. Thus it must be understood "—Smriti Chandriká, chap. XIII, s. 8. After adverting to a text of Bribáspati as to all the self-acquired wealth of the father, the commentator observes the term " all " was used to preclude the supposition that in the wealth acquired by the father subsequent to partition, the sons born before the partition have a claim to share, no share having previously been obtained by them in it. Hence he concludes that the sons born before partition and the sons born after it have no claim whatever on each other's wealth, and in this respect they are viewed as if they were not at all related to each other—s. 11.

The same commentator, quoting the text of Yájnaválkya before cited, explains it as referring to a partition made by brothers on the demise of their father while the pregnancy of the father's widow was not manifest.

The author of the Sarasvati Vilása, following Vijnanéswara, interprets the first part of the text of Yájnaválkya as applying to the son begotten after partition, and the last part of the text as applying to the son born of a mother whose pregnancy existed but was unknown at the time of partition—Sarasvati Vilása, 227-239.

Without contradicting the views of Vijnanéswara, Devanna Bhatta and the author last-mentioned, Varadarájá, in the Vyavahára Nirnáya, explains the texts in terms which would apply to a son born at any time after partition if the father has no property. He observes: " Yájnaválkya says that for one born after partition a provision is to be made from the divided brothers' own shares if there be no property of the father," and he cites the texts of Yájnaválkya and Vishnu before quoted in support of the statement.

Inasmuch as the rule declared by him accords with that stated by his more illustrious predecessors, if it be limited to the son born

KRISHNA v. SÁMI.

immediately on his father's death, it would perhaps be dangerous to accept it in its generality and rely on it as establishing an instance of divested estate.

The rule of the Mitákshará, the Smriti Chandriká, and the Sarasvati Vilása, that a son begotten after partition has no property in the separated shares of the brothers is the legitimate sequence of the rule that property is acquired by a son by birth and is acquired by a son only in property, whether ancestral or self-acquired, of which at the time of his birth his father is the owner. There is some reason for recognizing the inchoate right of the begotten : the obligation to provide for the unbegotten, though recognized as moral, has legal effect given to it in no other instance in Hindú law.

An argument that the share obtained by partition may be divested in part by the appearance of a co-heir, whose right was not anticipated at the time of partition, may, however, be deduced from the rule respecting the absent coparcener and his descendants. This rule, the author of the Sarasvati Vilása considers analogous to the rule respecting the son born after partition—Sarasvati Vilása, 240.

Quoting Bribáspati, he declares that " when a division is made in ignorance of the existence of one who has for a very long time been absent in a distant place, a share belongs even to him "—Sarasvati Vilása, 241 ; that this share is not a full share but a half share (Sarasvati Vilása, 240), and that the right to claim belongs to one in the third, fifth or even seventh degree from the ancestor (242) ; and he cites another text which he attributes to Vishnu, though it is elsewhere attributed to Bribáspati—" The right to take a share shall belong to him who returns after a division, or who returns before it and has determined to take his own share, when he has proved his proprietorship in wealth in the possession of another person by direct or indirect evidence, not otherwise."

The same rules will, with slight variation, be found in the Smriti Chandriká, chap. XIII, 21-26, and are apparently glanced at in Mitákshará, chap. II, ss. 9, 13. It may of course be said that the interest vested by birth in the coparcener who went to a distant country and was not divested by a partition made in ignorance of his rights. The point of analogy between the case of the after-born son and the absent coparcener is the ignorance of a latent right, which prevents the absolute vesting of the shares on partition.

KRISHNA v. SÁMI.

The Hindú law did not take thought only for those members of the family who were competent to discharge sacrificial functions, and while it saw the wisdom of restraining the disqualified from dealing with the family wealth, it secured to them maintenance during disqualification and a restoration to their rights when that disqualification ceased.

In Gautama's Institutes no mention is made of the persons disqualified except idiots and eunuchs. These must, it is said, be supported and it is added: "The male offspring of an idiot receives his father's share"—chap. XXVIII, 42–43.(1)

Nárada mentions, among those incapable of inheriting, persons afflicted with a chronic or an agonizing disease, idiots, mad men and lame men; and adds these must be maintained by their family, but their sons take their respective shares—chap. XIII, s. 22.(2)

Vishnu declares that "out-castes, eunuchs, persons incurably diseased or deficient in organs of sense or action, such as blind, deaf, dumb or insane persons or lepers, do not receive a share; they should be maintained by those who take the inheritance and their legitimate sons receive a share—chap. XV, ss. 32–35.(3)

Yájnaválkya's texts are rendered as follows:—

"An impotent person, an outcaste and his issue, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease . . . . . are to be maintained.

"But their blameless sons, whether legitimate or the offspring of a kinsman, are entitled to inherit. Their daughters should be maintained until they are provided with husbands. Their childless wives conducting themselves aright should be maintained until they are provided with husbands—" ss. 140–142.(4)

Nílakantha Bhatta, citing the text of Yájnaválkya regarding the disqualification of an impotent person, an outcaste, &c., observes: "If after division virility be restored or the other [disqualification] be cured by medicine or by other means, the person will then receive his share like a son born after partition." chap. IV, s. XI, 13 (Mandlik, p. 99). In chap. IV he had discussed what share was taken by a son begotten after partition

(1) 2 Sacred Books of the East, p. 301.
(2) Jolly's Translation, p. 97.
(3) 7 Sacred Books of the East, p. 64.
(4) V. N. Mandlik, p. 223.

KRISHNA v. SÁMI.

by a man separated from his sons, and in accordance with other commentators he declared him solely entitled to his father's wealth and to have no claim on that of his brothers (Mandlik, p. 47). He adds that, if the father leave nothing but debts, the son begotten after partition is not bound to pay those debts without receiving a share from those formerly separated, which seems to imply that, under such circumstances, a share should be given to him. But he also declares the right of a son born immediately after a partition of a mother or step-mother or brother's wife, whose pregnancy was uncertain, and he cites the text quoted by the author of the Mitákshará, and from which the learned Judges of the Calcutta Court inferred reference was made to the case of the son begotten after partition. Quoting this text: "When the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution," the commentator proceeds—"the partition is to be thus effected. Something is to be contributed by all the brothers or others (who had previously shared) until the posthumous son's share is equal to their own." And he concludes with a text of Vishnu, "Sons with whom the father has made a partition should give a share to the son born after partition." The text of Yájnaválkya is in truth an authority generally for the right of the son born after partition to participate in the inheritance. The words rendered in the Mitákshará "shares the distribution" may be rendered "is a share-taker."

The author of the Smriti Chandriká devotes a chapter (chap. V) to the consideration of exclusion from inheritance. He commences by quoting a text of Devala: "When the father is dead, an impotent man, a leper, a mad man, an idiot, a blind man, an outcaste, the offspring of an outcaste and an ascetic are not competent to share the heritage." He observes that the words "when the father is dead" were used simply to indicate the period of partition, and that it is not to be supposed that the classes mentioned would be entitled to inheritance if a partition were made during the lifetime of the father; and in support of his opinion he refers to the text of Apastamba(1)—"He should, during his lifetime, divide his wealth equally amongst his sons, excepting the eunuch, the mad man, and the outcaste"—Smriti Chandriká, chap. V, s. 3. He observes of the text of Vishnu above quoted that by the adjective "incurable" being placed in the

(1) 3 Sacred Books of the East, p. 132.

KRISHNA v. SÁMI.

text before the term "disease" alone, it would appear that persons afflicted with impotence, loss of limb (Qy. of power in a limb), &c., that are of a curable character are also disqualified for inheritance. Hence it must be understood that such as appear at the time of division to have been afflicted with impotence, &c., are excluded from their shares and that the exclusion is not confined to those only that are naturally, that it is by birth, impotent or the like (s. 9). He declares, citing the text of Yájnaválkya above quoted, that all whom he has enumerated as incompetent to inherit are entitled to be maintained (s. 20). Adverting to a text of Devala he states that the qualified sons of disqualified persons, other than the son of the outcaste born after his father's degradation, take the shares of their parents in the wealth of their grandfather—ss. 32–38, that disqualified sons of disqualified fathers must be maintained, and that unmarried daughters of such fathers must be maintained until marriage.

The following passages in the treatise on inheritance of the Sarasvati Vilása illustrate the views entertained in Southern India as to the position of disqualified heirs. The author declares it to be the duty of sons who take the inheritance to provide for the marriage of daughters who were capable of marriage, although they might have some personal defect which in a male would be ground of disqualification. He then quotes the text of Manu in the following terms :—

"The impotent and outcaste are not sharers : he who is born blind and he who is deaf : so also mad men, idiots and the dumb ; also those who are memberless—verse 148 (Foulkes, p. 31).

He proceeds to observe—

"The meaning of this is : 'Impotent persons and outcastes do not take shares. The two thus mentioned are to be nourished and cherished by their brothers who are eligible or by those who take the estate or by those who take the women.

"Those who are blind and those who are deaf, as to those thus coupled together, to them a share belongs certainly (*tayoh amsah aste eva*) ; but though they are possessed of a share they are maintainable (*Kantai amsahyuktam api poshyam*) by reason of potentiality of marriage (*vivahabhavat*). By the use of the word (*tata*) 'so' the inner meaning is, deformed persons, if they are eligible for marriage, are share-takers and are to be nourished and cherished."

KRISHNA v. SÁMI.

Mad men, idiots and the dumb, because all these are mentioned in a group, they are only to be maintained. They are not share-takers. "If they are not eligible for marriage" is to be supplied. The expression "memberless" includes also females. And in a later passage, commenting on the text of Apastamba "Let him divide the heritage among his sons in equal shares during his lifetime rejecting the impotent, the insane and the outcaste also," the commentator observes the word "also" includes those who are not eligible for marriage.

The right of the disqualified person to inherit, if he is cured of his disqualification, is likened to the right of a son born after partition.

The son born after partition may be a son begotten and born after partition in his father's lifetime. He may be a son begotten before partition and born after it in his father's lifetime. He may be a son begotten before partition and born after it when the partition has been made after the father's death.

The common feature in all three cases is that he takes a share in the wealth. In the first case he takes the shares of his parents and acquisitions made after partition, or, if his father has reserved no share, he may call upon his brothers to make up a share to him. In the second and third cases he takes a share made up out of the shares of his brothers. In no case is he excluded altogether although the estate may have vested.

Analogy is intended to illustrate and not to limit. The analogy between the case of the disqualified person and the case of the after-born son is incomplete if the opinion of the Calcutta High Court be adopted, and the true meaning of the analogy appears to be explained by the author of the Sarasvati Vilása. There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood : there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent, or may come into existence at a future time as it does in the case of the after-born son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies, he

KRISHNA v. SÁMI.

is at once entitled to be recognized as a member of the coparcenary: the only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested.

That the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exceptions, in respect of property governed by the law of the Mitákshará, appears to be established by admitted rules and by judicial decision.

A, who after his father's death becomes the sole and absolute owner of the wealth in which on his birth he had become a co-owner with his father, marries and has a son B born to him. His absolute estate is immediately converted into a coparcenary estate, and as other sons C and D are born, the interests of A and B are practically curtailed by the admission of new coparceners. It is true that while the estate remains coparcenary it is vested as a unit in all the male members, and that the diminution in the interest which each member would take on a partition is not strictly a divesting, though it must be remembered that the right vests in birth and not on partition. But let a partition be made in A's lifetime and let him reserve no share for himself and then let a son E be born to him who was not in the womb at the time of partition. We have authority for saying he would be entitled to require his brothers to contribute out of their allotments so that all might receive an equal portion of the family wealth. Again, let the eldest son B have gone to a foreign country and let his brothers in his absence make a partition of the family wealth: a share is not necessarily set apart for him: the time may have elapsed when it may reasonably be believed he was dead. According to Hindú law, which does not in other cases ignore limitation, he may, after seven generations, return and claim to have a share or a half share made up to him out of his brothers' allotments.

Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father—*Sri Raghunadha* v. *Sri Brozo Kishoro*.(1) To the argu-

(1) L.R., 3 I.A., 154; s. c. I.L.R., 1 Mad., 69.

KRISHNA v. SÁMI.

ment of Mr. Justice Norman that a widow by adopting a son caused a divesting of the estate, it was objected that she divested only her own estate. This no doubt is true where the estate has descended to her as the sole heir; but where the estate has descended to more than one widow jointly, an adoption by any one of them divests the estate of the others—*Rákmábái* v. *Rádhábái*.(1)

It may, however, be objected that in this case the estate had not vested in a full male owner, and that the learned Judges of the Bombay Court supported the adopted son's claim on the ground that the widow who had not made the adoption was bound to consent to it.

A case, however, arose in this presidency and went before the Judicial Committee, in which an estate was divested from a full male owner by reason of an adoption made by a widow.

An impartible zamíndárí, the property of two undivided brothers was in the possession of the elder. On his death, leaving a widow and no male issue, the brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her husband and it was held the adopted son was entitled to possession of the zamíndárí—*Sri Raghunadha* v. *Sri Brozo Kishoro*.(2)

The existence of a valid power creates a potentiality of inheritance, which may be likened to that of a son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified share-taker, who may afterwards become qualified to demand possession or who may beget a qualified son.

In our judgment, it must be held that the estate vests subject to its being divested on the recovery of the disqualified, or the birth of a qualified, heir. We, therefore, affirm the decree of the Court of the Subordinate Judge and dismiss the appeal with costs.

(1) 5 Bom. H.C.R., 181. (2) L.R., 3 I.A., 154; s. c. I.L.R., 1 Mad., 69.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. August 31. September 4.

SUDINDRA (APPELLANT),
and
BUDAN (RESPONDENT).*

Civil Procedure Code, s. 244.

B obtained a decree on a settlement of accounts made with V as trustee of a mutt. V's title as trustee having subsequently been negatived by decree and the title of S declared, B applied to execute his decree against the property of the mutt and to have S substituted as party to the suit in place of V.

The application was rejected by the Múnsif, but on appeal the District Judge made S a party and reserved for determination in execution proceedings the question whether the debt was contracted for the benefit of the mutt:

Held, that S was properly made a party, but that it was not open to him to raise this question in execution proceedings.

THIS was an appeal against an order of J. W. Best, District Judge of South Canara, reversing an order of K. Krishna Ráu, District Múnsif of Udipi, passed in execution of the decree in suit 374 of 1882.

The facts appear sufficiently, for the purpose of this report, from the judgments of the High Court (Hutchins and Parker, JJ.).

Rámáchandra Ráu Saheb for appellant.

Srinivása Ráu for respondent.

PARKER, J.—The plaintiff made a settlement of accounts with defendants Nos. 1 and 2 as representatives of the mutt in September 1882. He sued on that settlement of accounts in original suit 374 of 1882 and obtained a decree in October 1882. Defendants Nos. 1 and 2 had been declared trustees of the mutt as against defendant No. 3 by the District Court on 20th April 1881, but, at the time of the settlement of accounts and of the decree in suit 374, an appeal by defendant No. 3 was pending in the High Court.

That appeal (66 of 1881) was decided by the High Court in favor of defendant No. 3 in May 1883, defendant No. 1 being pronounced illegitimate and his consecration to the priesthood of

* Appeal against Order 69 of 1885.

the mutt invalid. The plaintiff then substituted defendant No. 3 for defendants Nos. 1 and 2 as the representative of the mutt on the record, and applied for execution.

The District Múnsif refused the application on the ground that the decree had been obtained against the wrong party, but the District Judge on appeal allowed defendant No. 3 to be taken as the representative of the mutt in succession to defendants Nos. 1 and 2, but reserved as open to be considered under s. 244, Code of Civil Procedure, the question whether the debt had been contracted for the service of the mutt, and remitted the application to be disposed of by the District Múnsif after taking the necessary evidence.

Defendant No. 3 appeals against this order on the grounds that s. 244 does not apply, that he cannot be bound by a decree obtained against trespassers, and that plaintiff's decree in suit 374 was fraudulently and collusively obtained.

The plaintiff, in dealing with defendants Nos. 1 and 2, was dealing with persons who had been pronounced by a Court of competent jurisdiction as rightfully representing the mutt. He could not have settled his accounts with defendant No. 3 as representing the mutt, but, as he brought his suit *pendente lite* without including defendant No. 3, he of course got his decree subject to the risk of having it questioned by defendant No. 3 should he succeed in his litigation.

Defendant No. 3 complains that the decree is not binding upon him. It is however binding on the mutt against which it has been given, and his only interest in the matter is as the representative of the mutt.

The question referred by the Judge to the District Múnsif really re-opens the whole litigation in an execution proceeding. The case relied on *Arundadhi* v. *Natésha*(1) is not in point, as in that case the plaintiff had been impleaded as the legal representative during the pendency of the suit and had been wrongly directed by the District Múnsif to bring a regular suit to try questions arising in execution.

In a suit brought by Sebaits entrusted with the property of an idol to set aside decrees obtained against their predecessors in the Sebaitship, it was held by the Privy Council in *Prosunno*

(1) I.L.R., 5 Mad., 391.

SUDINDRA v. BUDAN.

Kumari Debya v. *Golab Chand Baboo*(1) that, in the absence of proof of fraud and collusion, the judgments upon which these decrees were founded were not open to review, but were entitled to the force due to judgments of competent Courts. It was observed, however, that, before applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried and decided in the suits which led to them.

It appears, therefore, that it is open to defendant No. 3 to bring a suit to have plaintiff's decree set aside on the ground of fraud or collusion, in which suit the plaintiff would not necessarily be allowed to plead *res judicata*. The initiative, however, must rest with defendant No. 3 upon whom lies the *onus* of coming forward and taking steps to set aside a decree, which, as it stands, is binding upon the mutt represented by him. This is quite a different thing to allowing a new trial in execution proceedings, in which the plaintiff would certainly be entitled to plead that the cause was already heard and determined in his own favor.

We must set aside so much of the Judge's order as directs the District Múnsif to determine in execution whether the debt was contracted for the service of the mutt, and must allow the plaintiff to execute the decree.

Defendant No. 3 (appellant) must pay plaintiff's (respondent's) costs in this appeal.

HUTCHINS, J.—I think the conclusion arrived at by my learned colleague is right.

The first question is whether the appellant is the representative of the former Tirthaswámi in the sense that he can be placed on the record and the decree executed as against him. Vijayendra Tirthaswámi had been for some time the *de facto* trustee and manager of the mutt before the appellant brought his suit. The decree of the District Court, dated February 1881, dismissed that suit and confirmed Vijayendra in his position as manager. Although there was an appeal pending, the respondent could not have settled his accounts with any one but Vijayendra, and though he might perhaps have joined appellant as a defendant in his suit, it is obvious that appellant, being out of possession and

(1) 14 B.L.R., 450.

SUDINDRA v. BUDAN.

without access to the accounts, would have been placed at a great disadvantage in contesting the debt; indeed it is doubtful if he, a mere claimant as he then was, could have effectually resisted a suit on a settlement of accounts by the recognized trustee. The decree was given expressly against the mutt, though as represented by Vijayendra. Now that the appellant has succeeded in establishing his preferential title, he takes Vijayendra's place as representative of the mutt against which the decree was passed. I think the Judge has rightly held that he ought to be substituted for Vijayendra on the record as guardian and representative of the mutt.

But I also agree with Mr. Justice Parker that in execution the appellant cannot dispute the correctness of the decree. Under s. 244 the questions to be decided in execution are questions relating to the execution, discharge or satisfaction of the decree. A question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity. Such a question can only be raised by a separate suit.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Muttusámi Ayyar.

SUBBA

against

THE QUEEN-EMPRESS.*

1885. Sept. 18, 23. October 2.

Criminal Procedure Code, ss. 286, 288—Witnesses, Examination of—Irregularity.

At a trial before a Sessions Court, the Attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented.

Held, that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted.

THIS was an appeal from the sentence of J. W. Reid, Sessions Judge of Coimbatore, in case No. 33 of 1885.

* Criminal Appeal 404 of 1885.

SUBBA v. QUEEN EMPRESS.

Mr. *Grant* for the prisoner.

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan, Offg. C.J., and Muttusámi Ayyar, J.)

KERNAN, Offg. C.J.—When this case was called on for hearing on the 18th of September, Mr. Grant, Counsel for the prisoner, called the attention of the Court to the unusual course adopted at the trial in reference to the direct evidence of some witnesses for the prosecution, but which course, he admitted, was adopted by the Sessions Judge on the suggestion of the Attorney who acted for the prisoner and conducted his defence. The course adopted is specified at page 23 of the printed paper after the cross-examination of the sixth witness for the prosecution.

"Arrangement regarding the examination of witnesses:—The Attorney for the defence suggests that, to expedite the trial, the deposition of each witness called by the prosecution given by the witness before the Magistrate should be read in evidence and he be permitted to cross-examine. The Government Prosecutor consents to this procedure. The Court consents to this procedure if, on each witness being called, there be nothing which appears to render this procedure unadvisable."

Accordingly the rest of the prosecution witnesses, eleven in number, when called, were affirmed. The deposition by each witness before the committing Magistrate in the presence of the prisoner was read. The witness stated he had made that deposition which was then marked, and the witness was cross-examined on it.

The Sessions Judge does not refer to any section of the Code authorizing him to assent to the arrangement. Section 286 provides that after jurors or assessors are chosen, and after the prosecutor opens his case as thereby directed, "the prosecutor shall then examine his witnesses." This examination of witnesses present clearly means oral examination (except in cases where evidence is taken by commission or in any case where a witness is deaf or dumb). Such oral examination is therefore the general rule and has always been so.

It will be admitted that it is of the utmost importance that the rule should be followed in all cases where the witness is present

SUBBA v. QUEEN EMPRESS.

to be examined. If a witness before the Magistrate gave a true statement, he will probably, if intending to tell the truth, repeat the same statement without substantial difference at the trial. If, on the contrary, his statement before the Magistrate was not true in important particulars, he may not be able to repeat the same statement and may omit something important mentioned in his former evidence, or may deny on oral examination that he did make a particular statement before the Magistrate. The demeanour of the witness may be important for the assessors or Judge towards forming an opinion of his truth. It is not necessary to go into the many reasons why this rule should be followed. It is sufficient to say it is the rule, and is founded on reason and justice.

Is there then any legal ground in this case for departure from that rule?

Section 288 provides that the evidence of a witness, duly taken in the presence of the accused before the committing Magistrate, may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case. Section 288 is not an exception to the rule in s. 286, for it contemplates that the evidence taken in the presence of the Magistrate may, in the discretion of the Judge, if the witness is produced and *examined*, be treated as evidence. Section 288 does not dispense with the examination of the witness as directed by s. 286. The examination contemplated in s. 288 is examination of a witness in the ordinary way, viz., orally, in reference to the case. The provision is *not* that the evidence before the Magistrate may be put in as the evidence of the witness *if* he is tendered for cross-examination, but it is that such evidence before the Magistrate may be treated as evidence in the case if the witness is *examined;* that is, examined as a witness, not if he is cross-examined or tendered for cross-examination.

The rule appears to contemplate that the witness shall first have been examined, and that after that his evidence before the Magistrate may be *treated* as evidence. It cannot be said that the mere examination of the witness as to his making the deposition before the Magistrate is "examination" within the meaning of s. 288. Section 288 provides for the exercise by the Session Judge of a discretion whether he will treat the evidence of a witness before the Magistrate as evidence in the case.

SUBBA v. QUEEN EMPRESS.

Section 288 does not provide that the Judge may treat the evidence before the Magistrate of *all* the witnesses for the prosecution as evidence, if all the witnesses are produced and examined.

If such was the intention of the Legislature, different language would have been used. The language is "the evidence of a witness," and no doubt this language would justify a Judge in a proper case in exercising his discretion in respect of any witness or witnesses. But it does not appear to contemplate (by admitting the evidence before the Magistrate of all witnesses or a number of them together) a complete change of the course and practice of law especially laid down in s. 286.

Discretion is to be exercised by the Judge. Apparently this is discretion in respect of some circumstances affecting the evidence of the witness under the consideration of the Judge.

It appears to apply very usefully when, upon hearing the oral evidence of a witness and looking at his deposition before the Magistrate, the Judge may think that a witness has told the truth before the Magistrate, and has not, either through design, mistake, or forgetfulness, told the real facts at the trial. Without this s. 288 a witness might be cross-examined as to his prior evidence before the trial, and such prior evidence might be relied on to discredit the witness; but his evidence before the Magistrate could not be treated as evidence in the case except under proper circumstances governed by s. 288.

In my judgment s. 288 applies to the evidence of cases of individual witnesses, each case treated by itself and under the circumstances of which the Judge in his discretion thinks it advisable for the ends of justice that the prior evidence should be treated as evidence, and I think it does not justify the order made by the Session Judge.

In this case I do not see that there were any circumstances on which the Judge had to exercise discretion as to any witness. The reason for the proposal of the Attorney is recorded, "to expedite the trial." The meaning of this proposal was that the course which the law required to be taken should not be taken because such course would take time. To yield to the proposal on that ground the Judge would not exercise a discretion, because he was bound to take the time required by law, but he would be acting contrary to law. To yield to the proposal because the Attorney

SUBBA v. QUEEN EMPRESS.

for the defence requested, and for the prosecution assented, would not be exercising discretion. He had no discretion to exercise on either of these grounds.

The District Judge says: "The Court consents to the procedure if, on each witness being called, there be nothing which renders the procedure unadvisable." That is to say, the Judge adopts as the general rule that the evidence *before the Magistrate* of each witness is treated as evidence, unless, in the case of any witness called, it appears advisable to examine the witness orally. In adopting that as the general rule, he reverses or *primâ facie* refuses to act on the rule laid down in s. 286, and adopts as the general rule a procedure which can only be adopted when circumstances calling for exercise of discretion appear.

There is nothing on the record to show that any discretion was exercised by the District Judge in respect of admission of the evidence of any witness, or that any circumstances calling for exercise of discretion arose.

If the course adopted by the Judge had been taken on his own motion, or on the motion of the prosecutor, speaking for myself, I should feel it my duty to set aside the trial and conviction and direct a re-trial.

The question is whether we should take that course when the procedure by the Session Judge was adopted on the suggestion of the Attorney for the prisoner. We must assume that the Attorney acted in the interest of his client in making the application, though he put forward an inappropriate reason for it. Some of the most important witnesses against the prisoner were not examined orally on direct examination at the trial; their evidence before the Magistrate was put in; however, these witnesses were cross-examined for the prisoner. Considerng the part taken by the prisoner's Attorney for his benefit, we are unable to say that the course pursued was an error which occasioned a failure of justice, s. 537, and we proceed with the appeal.

MUTTUSÁMI AYYAR, J.—In this case the prisoner was arraigned on a charge of murder. The trial was held before the Judge aided by two assessors. The Public Prosecutor called seventeen witnesses for the prosecution. The first six witnesses gave their evidence *viâ voce* in the regular way, and, at the conclusion of the examination of the sixth witness, the Attorney for the defence suggested that,

SUBBA v. QUEEN EMPRESS.

to expedite the trial, the deposition of each witness called for the prosecution, given by him before the Magistrate, should be read in evidence, and that he should be permitted to cross-examine. The Government Prosecutor consented to this procedure. The Judge agreed to adopt the procedure if, on each witness being called, there was nothing which appeared to render the procedure unadvisable. It was followed with reference to the other witnesses for the prosecution—7 to 17. The witnesses for the defence were examined in the ordinary mode. At the conclusion of the trial the assessors found the prisoner not guilty. The Judge, differing from them, found him guilty and sentenced him to death. The Judge has referred the sentence for confirmation to this Court, and the prisoner has also appealed. At the hearing before us Mr. Grant, Counsel for the prisoner, called our attention to the special procedure which was adopted in the Court below, but did not object to it.

The question which we have to consider is whether the evidence recorded in the mode indicated above is such as we might act upon in deciding whether the sentence of death should be confirmed.

Section 286 directs that after the assessors are chosen, the prosecutor shall open his case and shall then examine his witnesses. In the absence of a special direction, the examination contemplated must be taken to be an examination in the ordinary mode.

Section 288 confirms this view. It provides that the evidence of a witness, duly taken in the presence of the accused before the committing Magistrate, may, in the discretion of the Judge, *if such witness is produced and examined*, be treated as evidence in the case. This shows that the evidence recorded by the committing Magistrate is not ordinarily evidence in the case, and that the Judge may treat it as such subject to the condition that the witness is produced and first examined by the Judge.

The intention was to confer a power on the Judge when he considers that the evidence given before the Magistrate is true and that the evidence given before him is not true, to treat the former as evidence in the cause, that is to say, as evidence on which he may found the conviction or acquittal of the prisoner. Unless the witness was first examined in the ordinary way there was no room for exercising any discretion. It follows then that the procedure adopted in this case is contrary to the Code of Criminal Procedure

SUBBA v. QUEEN EMPRESS.

The next question which requires to be considered is whether the depositions may be treated as evidence because the Attorney for the prisoner suggested that they might be so treated. The fact that the suggestion came from the prisoner's solicitor warrants the presumption that the prisoner was not prejudiced by their adoption. It is provided by s. 537 that no sentence passed by a Court of competent jurisdiction shall be reversed or altered on account of any irregularity in any inquiry under this Code, unless such irregularity has occasioned a failure of justice. It has been held in cases in which evidence which is legally inadmissible has been received at the trial without objection, that the opposite party is not entitled to ask for a new trial on the ground that the Judge did not warn the Jury to place no reliance upon it. In the case before us the prisoner's Attorney suggested the course that has been taken. I also think, therefore, that the appeal may be proceeded with, and that the irregularity in the procedure followed at the trial may be treated as one by which the prisoner has not been prejudiced.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

GAJAPATHI (PLAINTIFF), APPELLANT,

and

ALAGIA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1885. August 5, 12.

Vendor and purchaser—Fraudulent concealment by vendor of defect of title—Damages.

In 1881 a Hindú executed a sale-deed of a house in the Mufassal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Múnsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree.

On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks.

Held, that if there had been fraudulent concealment as alleged, the purchaser was entitled to damages.

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimháyyar, District Múnsif of Tiruvellúr, in suit 709 of 1882.

* Second Appeal 243 of 1885.

GAJAPATHI v. ALAGIA.

Mr. *Michell* and *Ambrose* for appellant.

Bháshyam Ayyangár and *Srirangácháryár* for respondents.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Hutchins and Parker, JJ.)

JUDGMENT.—The appellant (Gajapathi Sástri) purchased a house from the respondent No. 1 (Alagia Pillai) for Rupees 1,500 on the 16th September 1881. On the 26th December following he was ejected from half the house under a decree for partition, which had been obtained some eight years previously by a coparcener of respondent No. 1 against the father of respondent No. 1. The appellant alleges that at the time of his purchase the respondent No. 1 assured him that the house was his self-acquired property, and the title-deeds delivered to him by the respondent No. 1 (B and C) were conveyances in favor of respondent No. 1. The appellant's contention was that he was deceived by the fraudulent concealment by respondent No. 1 of the decree for partition, and is entitled to damages.

The pleas of respondent No. 1, so far as they are material, were—(1) that the appellant had notice of the decree, and received a copy of it along with the title-deeds; (2) that the house is in fact his self-acquisition.

Respondents Nos. 2 and 3 are the undivided brothers of No. 1 and deny their liability. The District Múnsif found that the respondent No. 1 had been guilty of fraudulently concealing the existence of the decree for partition, and awarded the appellant 750 rupees as damages with proportionate costs. As regards respondents Nos. 2 and 3 he found that they had taken the benefit of the purchase-money, and that their property was liable, but not their persons.

The respondents appealed to the District Court, which held that the vendor was not bound in law to have mentioned the existence of the decree, and that the vendee, having omitted to insist on a covenant for title, must be taken to have accepted all risks.

The Múnsif's decree rests on the following propositions, which, since the sale, have been enacted in the Transfer of Property Act, section 55 :—(1) The seller is bound to disclose to the buyer any material defect in the property, of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary

GAJAPATHI v. ALAGIA.

care discover; and the omission to make such disclosure is fraudulent; (2) the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same. It is contended for the appellant that these are no new principles enacted for the first time, but that the Transfer of Property Act has merely declared the law which already existed. On the other hand, the respondents assert that, although the appellant might have been entitled to set up the alleged concealment against a suit for specific performance, yet as the conveyance has been executed and there has been no covenant for title, the appellant is not entitled to any refund of the purchase-money.

It appears to us that, if the respondent No. 1 did conceal from the appellant the existence of the decree for partition, he was guilty of a fraudulent concealment, and is bound to refund half the purchase-money. In the absence of positive law, we are bound in this country to apply the principles of good conscience and equity. The strict doctrines of the English law relating to real property have never been applied to the mufassal, and it appears to us that it would be manifestly inequitable to attempt to apply them; but even under English law the vendee is bound to make compensation for a fraudulent concealment of a defect in the title or of an incumbrance. The same rules apply to incumbrances and defects in the title to an estate as to defects in the estate itself (Sugden, Vendors and Purchasers, p. 5, ed. xiii). Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to which his covenants do not extend, an exception is made to this rule in the case of a vendor or his agent suppressing an incumbrance or a defect in the title (*ibid.*). Even though the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title-deeds and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case, or file his bill in equity for relief (*ibid.* p. 443).

The District Judge considered it "probable that the vendor, having continued always in undisturbed possession, entirely overlooked or disregarded the existence of the decree." This, however, is contrary to the case of respondent No. 1, for he said in his

GAJAPATHI v. ALAGIA.

written statement that, so far from overlooking or disregarding the decree, he had before sale given a copy thereof with the title-deeds to the appellant's next friend. We observe, too, that the appellant was ousted by the respondent's coparcener within about three months after his purchase.

On being dispossessed, the appellant should have given his vendor notice of the proceedings. Although the respondent No. 1 has admitted that he has all along been aware of the decree for partition, and yet has never set up that the house was his self-acquisition, he may still be able to prove that he had in fact the interest which he assumed to transfer. There has been no direct issue upon this point, and notwithstanding his admissions, we think that the respondent No. 1 is entitled to show that the alleged defect in his title did not exist.

We will ask the Judge to return findings, within six weeks from the receipt of this order, on the following issues :—

1. Did the respondent No. 1 fraudulently conceal from the appellant the existence of the decree for partition?
2. Is the house the self-acquisition of respondent No. 1?
3. To what damages, if any, is the appellant entitled, and against which of the respondents?

Further evidence may be adduced by either side on the second issue only.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. September 25.

BRAHANNÁYAKI (REPRESENTATIVE OF MUTTU, DEFENDANT No. 2),

and

KRISHNA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Lis pendens.

N being mortgagee in possession of five-eighths of a pangu (share) of certain and—security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878 K bought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N claiming possession of his two-eighths on payment of Rs. 400 and obtained a decree and possession thereof.

Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883, K bought the remaining three-eighths from the mortgagor and sued N and M to recover possession thereof.

M pleaded that the suit was barred by s. 43 of the Code of Civil Procedure, inasmuch as K might have recovered the five-eighths in the suit against N :

Held, that this plea was bad. M also pleaded that he had a valid mortgage over three-eighths :

Held, by Muttusámi Ayyar, J., that, if the assignment of the mortgage by N to M was a real transaction, this plea was good.

Per Muttusámi Ayyar, J.—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit.

* Second Appeal 30 of 1885.

BRAHANNÁYAKI v. KRISHNA.

THIS was an appeal from the decree of G. A. Parker, District Judge of Tanjore, dismissing an appeal from the decree of E. Muttusámi Ayyar, Acting District Múnsif of Patukota, in suit 698 of 1883.

The facts appear sufficiently, for the purpose of this report, from the judgments of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Bháshyam Ayyangár for appellant.

Hon. *Rámá Ráu* for respondent.

HUTCHINS, J.—In 1871 defendant No. 1 (Naráyana Ayyan) obtained an assignment of five-eighths of a pangu (share) by way of usufructuary mortgage to secure the repayment of Rs. 400, and was put in possession.

In November and December 1876 he hypothecated the whole five-eighths to Muttu Ayyan, the appellant (defendant No. 2), as security for two sums of Rs. 50 and 99 respectively—exhibits I and II. Neither of these deeds was registered.

The original mortgagor died, leaving him surviving his brother Rámakrishna Ayyan and his mother Nacharammál. In 1878 both these sold to Krishna Ayyangár, the respondent (plaintiff), two out of the five-eighths mortgaged as aforesaid, together with other properties not in dispute, in consideration of Rs. 500, it being agreed that the purchaser should redeem the mortgage for Rs. 400 out of the purchase money.

On 10th March 1879 the respondent instituted Original suit 83 against defendant No. I alone, claiming redemption of the two-eighths so sold to him upon payment of the 400 rupees. A decree was passed accordingly in October 1879, affirmed in appeal in June 1880, and duly executed in October 1881.

While that suit was pending, on the 28th June 1879, defendant No. 1 settled accounts with the appellant and executed in his favor

BRAHAN-NÁYAKI v. KRISHNA.

an assignment (III) of the original mortgage for Rs. 400, including the sums mentioned in exhibits I and II and a further sum of Rs. 163. The appellant was aware of the suit then pending, but did not apply to be made a party to it; nor did he resist the execution of the decree by the respondent, who paid the money into Court and obtained delivery of the two-eighth pangu then in the appellant's possession.

On the other hand, the respondent must have been aware of the assignment of the mortgage by defendant No. 1 to the appellant at least in June 1881, when he wrote the letter IV, some 15 months before he paid the money into Court for defendant No. 1. He has also attested the assignment deed III itself.

In September 1883 Rámakrishna Ayyan sold the remaining three-eighth pangu to the respondent for Rs. 500 (A), and also his right to recover the mesne profits which had accrued thereon since the payment of the mortgage money into Court (B). Thereupon the respondent demanded from defendant No. 1 the return of the residue of the five-eighths mortgaged to him and mesne profits, and eventually instituted the present suit against him and the appellant.

The appellant pleaded that Rámakrishna Ayyan was incompetent to inherit, as he was lame, and that there had been no *bonâ fide* sale. Both these pleas were overruled and are no longer insisted on. The appellant does not rely on the unregistered hypothecations but on the third mortgage (III). As regards that the Judge held that, having been made during the pendency of Original suit 83, it was subject to the result of that suit; he further stated that he entertained a strong suspicion (as did also the Múnsif) that it was not a *bonâ fide* transaction at all, but there is no positive finding to that effect.

The two points urged upon our consideration by the learned Pleader for the appellant are—(1) that the suit is barred by s. 43 of the Civil Procedure Code; (2) that the *lis pendens* affected the two-eighths only, the three-eighths not being directly and specifically in question in Original suit 83; and that as to the three-eighths the appellant cannot be affected by respondent's payment of the debt to the original mortgagee after becoming aware of its transfer to the appellant.

The first contention is, in my opinion, unsound. It is true

BRAHAN-NÁYAKI v. KRISHNA.

that the assignee of the mortgagor's equity of redemption over a portion of the mortgaged property is generally entitled to redeem the whole and to hold the residue as against the mortgagor charged with its due proportion of the debt—*Asansab Ravuthan* v. *Vámana Ráu*(1); and if he fails to claim the whole in his suit for redemption, he would probably not be at liberty to bring another suit to enforce the right which he might have put forward before. But the present suit is not based on any right to hold the residue of the property as against the mortgagor, nor on any right which the respondent had acquired at the time of the previous litigation. It seems to me clear that, after the respondent had paid off the entire debt, the mortgagor became entitled to eject the mortgagee from the residue of the property. Such a suit would not, in my opinion, have been barred under s. 43; and under the conveyance A the respondent has now acquired all the rights then vested in the mortgagor. I further observe that, in the particular circumstances, the respondent could not have laid claim to the three-eighths at all in the former suit: he had acquired a title to two-eighths only on the express condition that he should pay off the entire mortgage debt.

Upon the second contention I am disposed to think that the appeal should be allowed, but it will not be necessary to determine this if the Judge intended to find that exhibit III did not represent a real *bonâ fide* transaction at all. I, therefore, propose that we should ask for a distinct finding on this point—to be submitted within a month and with reference to the evidence already recorded.

MUTTUSÁMI AYYAR, J.—Two questions are raised for decision in this appeal. It is urged first that the suit is barred by s. 43 of the Code of Civil Procedure. The respondent instituted Original suit 83 of 1879 to recover two-eighth pangu which he purchased in 1878 and he instituted the present suit to recover three-eighth pangu which he bought in September 1883. The causes of action in the two suits are not only distinct but the second cause of action had also no existence at the date of the first suit. But it is urged that, when the respondent instituted the first suit, he might have recovered the three-eighth pangu in trust for his vendors on another ground, viz., the payment

(1) I.L.R., 2 Mad., 223.

BRAHAN-NÁYAKI v. KRISHNA.

which he then offered to make extinguished the charge which defendant No. 1 had on the whole five-eighth pangu. Assuming that he was entitled to do so, it does not follow that he could not enforce a right of purchase which he acquired subsequent to that suit. The original mortgagor might sue to recover three-eighth pangu after the respondent satisfied the mortgage of defendant No. 1 over five-eighth pangu, and the respondent, who stands in his place as purchaser in regard to the three-eighth pangu, is equally competent to maintain the suit. Section 43 is clearly no bar to the present suit. The next contention is that, as Original suit 83 was instituted to recover two-eighth pangu only, the assignment of the mortgage from defendant No. 1 to the appellant, whilst that suit was pending, could invalidate it against the respondent only to that extent and that the assignment must be upheld as against the three-eighth pangu now in suit if it is valid in other respects. This contention is, in my judgment, well-founded. The true rule as to *lis pendens* does not rest either on implied notice of everything deducible from, or appearing in, the suit, or on the constructive extension of parties so as to warrant the purchaser *pendente lite* being treated as if he was a party to the suit in every respect. But it consists, as stated in *Bellamy* v. *Sabine*(1), in that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent." In that case the Lord Chancellor observed that the doctrine was not peculiar to Courts of Equity, and that in the old real actions the judgments bound the lands in suit notwithstanding any alienation by the defendant pending litigation. Lord Justice Turner also observed that the doctrine of *lis pendens* rests on this foundation; that it would plainly be impossible that any suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail, and that the plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or the decree and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceeding. According to the Roman law, after *litis contestatio*, the subject in dispute became litigious and passed into *quasi*-judicial custody and both parties came under an obligation not to withdraw it from the decision of the Judge—(Lord Mackenzie's Roman Law, page

(1) 1 De G. & J., 566.

BRAHAN NÁYAKI v. KRISHNA.

329, and Tomkins' and Jenkins' Modern Roman Law, page 91). It follows then that *lis pendens* can only be relied on as a protection of the plaintiff's right to the property actually sought to be recovered by the suit.

This being so, the further question arises whether apart from *lis pendens* an express notice or knowledge of the pending suit would make any difference. In the case before us, the Judge finds that the appellant was aware of the suit when he took the assignment and that he did not intervene until the decree was satisfied. If with the plaint the money due by the mortgagor were paid into Court, or if the respondent satisfied the decree before he became aware of the assignment, the question of actual knowledge might be material. But it appears that the appellant became aware of the assignment at all events in 1881, and before he satisfied the decree, whilst in the plaint in the suit of 1879 there was only an offer to pay the appellant's assignor the debt due to him. Thus, the payment made by the respondent, though it was in satisfaction of a decree, was made with the knowledge of the appellant's claim and could not be accepted against him as valid.

The Judge observes, however, that he suspects that the sub-mortgage in favor of the appellant was not a *bonâ fide* transaction but merely an attempt to evade the respondent's claim. It is, therefore, necessary before disposing of this second appeal to have a clear finding on the point. For these reasons I also think that the Judge must be asked to try the issue whether exhibit III represented a real transaction at all.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

THE QUEEN-EMPRESS

against

SESHAYA.*

1885. October 9.

Ábkári Act, 1864, *s.* 26—*Police Act*, 1859, *s.* 1—*Police officer—Village police—Mohatád.*

The term "Police officer" used in s. 26 of the Ábkári Act (Madras Act III of 1864) includes a mohatád or village policeman.

* Criminal Revision Case 531 of 1885.

QUEEN-EMPRESS v. SESHAYA.

THIS was a case referred for the orders of the High Court under s. 438 of the Code of Criminal Procedure by M. R. Weld, Acting District Magistrate of Kistna.

The case was stated as follows:—

"In this case the Magistrate convicted two accused persons under s. 22 of the Madras Ábkári Act III of 1864 of being in possession of more than one imperial quart of liquor without a valid permit, and fined them Rs. 5 and As. 8 respectively. A peon under the Ábkári renter gave information to the mohatád of the village, who apprehended the accused and seized the liquor. The Magistrate awarded half the fines (Rs. 2-12-0) to the renter's peon as informer and half to the mohatád of the village as apprehender and seizer under s. 26*b*.

"The Divisional Magistrate, the General Deputy Magistrate of the Vinukonda Division, has noted in the margin opposite the word 'mohatád' the words 'village police officer,' which seems to indicate that he considers that the Second-class Magistrate of Tumurukode is right, as a mohatád is a police officer within the meaning of the Ábkári Act.

"The term 'police officer' is not defined in the Ábkári Act.

"According to s. 1 of the Madras Police Act XXIV of 1859, the word 'police' includes village police.

"As I doubt whether it was the intention of the Legislature to give the powers conferred on police officers under the Ábkári Act to village police, I refer the case for the orders of the High Court.

"If the term police officer in the Ábkári Act does not include a village policeman, the mohatád's apprehension of the accused and seizure of the liquor was illegal, and the award made to him must be cancelled."

Counsel were not instructed.

The judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.) was delivered by

HUTCHINS, J.—It is conceded that a mohatád is a village policeman. It was not necessary in Act III of 1864 to define the term 'police officer'; the definition is contained in the General Police Act XXIV of 1859, which says that the "word 'police' shall include general and village police, kattubadies, kavalgárs, and all other persons by whatever name known, who exercise any police functions throughout the Madras Presidency." There is

QUEEN-EMPRESS v. SESHAYA.

nothing to show that the Ábkári Act intended to narrow this definition. Sections 24 and 24*a* confer certain powers to be exercised by officers in charge of a station only; 24*b* confers a power on the head of a village; 24*c* expressly requires all police officers and heads of villages to comply with any lawful requisition of a renter on his agent. When therefore section 26 speaks of any police officer, it must be taken to include an officer of the village police.

There is consequently no ground to disturb the order passed by the Second-class Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Parker.

1885. October 23.

LAKSHMANA (PLAINTIFF),

and

KULLAMMA (DEFENDANT).*

Married woman—Imprisonment for debt.

Married women against whom personal decrees for debt have been made are not exempt from arrest or imprisonment in execution of such decrees under the Code of Civil Procedure.

THIS was a case referred to the High Court under s. 617 of the Code of Civil Procedure by Rámasámi Mudaliar, District Múnsif of Bellary.

The case was stated as follows:—

"The suit was brought to recover a sum of money which the defendant contracted to pay to the plaintiff. It appears from the evidence of the plaintiff and his witnesses that the deb had been outstanding against the defendant and her husband, and that the defendant, when a demand was made against her husband, undertook to pay the debt herself.

"A decree was passed against the defendant Kullamma, who was arrested. She having failed to pay the decree amount, the plaintiff's vakil requested the Court to send her to jail; but this application is opposed by the vakil for the judgment-debtor, who

* Referred Case 12 of 1885.

LAKSHMANA v. KULLAMMA.

argues that she cannot be sent to jail as she is a married woman and that she is only liable to the extent of her stridhanam.

"There are two decisions of the Bombay High Court on the subject, one of which is reported at pp. 124, 125, Vol. I of the Law Reports, Bombay Series, and the other at p. 318 of Vol. IV of the same reports, which decide that any contract entered into by a Hindú married woman jointly with her husband or separately for herself must, in the absence of special circumstances, be considered as entered into with reference to her stridhanam, and that execution will only issue against her person.

"In s. 550 of Mayne's Hindú Law, however, Mr. Mayne says, 'when the suit is founded upon a purely personal debt or contract of her own, the decree can only be against her *own person* and property.'

"There seems to be no Madras cases deciding the point, and I respectfully refer the question of the liability of the person of a married woman for a debt contracted by her, under the circumstances above mentioned, for the opinion of the Honorable the Judges of the High Court, and further request instructions as to whether I am to try the question, whether the defendant has got any stridhanam, in case their Lordships should hold that her person is not liable."

Counsel were not instructed.

The judgment of the Court (Kernan, Offg. C.J., and Parker, J.) was delivered by

KERNAN, Offg. C.J.—We do not know any provision of law which exempts married women, against whom personal decrees have been made, from arrest or from being sent into civil custody in default of payment of the amount decreed. Section 640, Civil Procedure Code, provides that nothing contained therein shall exempt women (not bound to attend Court) from arrest in execution.

There is no exemption of married women from arrest in the Code, nor is there any proviso that a married woman shall only be liable to arrest to the extent of any stridhanam she may have, or that such stridhanam alone should be made available. The defendant may be sent in custody to the Debtors' Jail.

It is not necessary that we should make any further observation. The Múnsif will follow the provisions of the Code.

APPELLATE CRIMINAL.

Before Mr. Justice Hutchins.

THE QUEEN-EMPRESS

against

PILLALA.*

1885. October 6.

Civil Procedure Code, s. 258—Satisfaction of decree not certified—Fraudulent execution—Charge under Penal Code, s. 210—Proof of payment.

Section 258 of the Code of Civil Procedure which provides that no payment or adjustment of a decree not certified to the Court, as in the said section provided, shall be recognized by any Court, does not debar a Criminal Court from recognizing such payment where the decree-holder is charged with fraudulently executing a satisfied decree.

THIS was a case referred to the High Court under s. 438 of the Code of Criminal Procedure by J. R. Daniel, Sessions Judge of Ganjam.

The facts are set out in the judgment of the Court.

The accused did not appear.

HUTCHINS, J.—The accused was charged under s. 209 of the Indian Penal Code with having made a false claim in a Court of Justice. Apparently the offence, if any, was one falling under s. 210 rather than 209, in that he fraudulently caused, or attempted to cause, a decree to be executed after it had been satisfied.

But the Principal Assistant Magistrate (H. W. Foster) acquitted the accused on the ground that he was precluded by s. 258 of the Civil Procedure Code from recognizing in any way the alleged payment made in satisfaction of the decree, because it had not been duly certified. The Civil Procedure Code was enacted to regulate the procedure of the Courts of Civil Judicature, and unless the contrary clearly appears, nothing therein contained should be deemed to affect the Criminal Courts. I am clearly of opinion that the acquittal on the ground stated is wrong, and I therefore set it aside and direct the Principal Assistant Magistrate to dispose of the case on the merits.

* Criminal Revision Case 368 of 1885.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

1885. May 27, 29.

PITCHI

against

ANKAPPA.*

Criminal Procedure Code, s. 250—Frivolous complaint—Compensation—Cattle Trespass Act, ch. v—Complaint of illegal seizure not complaint of offence.

The illegal seizure of cattle under colour of the Cattle Trespass Act, 1871, not having been constituted an offence under that Act or otherwise, an award of compensation under s. 250 of the Code of Criminal Procedure to the accused on such complaint is illegal.

THIS was a case referred for the orders of the High Court by J. Grose, District Magistrate of Nellore.

The facts appear sufficiently for the purpose of this report from the judgment of the Court.

Counsel were not instructed.

BRANDT, J.—The illegal seizure of cattle under the colour of Act I of 1871 is not constituted an offence under that Act or otherwise, and the Third-class Magistrate was not empowered under s. 250 of the Criminal Procedure Code to award compensation for what he held to be a frivolous and vexatious complaint in respect of such alleged illegal seizure, for, as the District Magistrate observes, that section deals with the acquittal or discharge of an accused person in a case instituted upon "complaint" which, for the purposes of the Code, is defined as "an allegation * * * made * * * that some person has committed an offence." The order of the Magistrate, in so far as it awards compensation, must then be, and it is, set aside and the money awarded must be refunded.

* Criminal Revision Case 271 of 1885.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. July 13. Sept. 28.

APPASÁMI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

and

MÁNIKAM (REPRESENTATIVE OF RAMANÁDHAN, PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 375—Agreement to compromise appeal—Petition to Court by both parties—Consent withdrawn before decree by one party—Remedy—Transfer of Property Act, s. 59—Charge on immovable property—Oral agreement as to terms of compromise of suit—Terms of compromise in dispute—Proof by affidavit and further evidence.

The parties to an appeal, in which an issue had been remitted for trial to the Lower Court, having presented a petition to the Lower Court stating that the suit had been compromised and the terms of the compromise, requested the Lower Court to move the Appellate Court to pass a decree in accordance with such terms. Before a decree was passed, one of the parties objected to the compromise being accepted:

Held, that it was open to the Court, such objection notwithstanding, to pass a decree in accordance with the agreement—*Ruttonsey Lálji* v. *Pooribái* (I.L.R., 7 Bom., 304) and *Karuppan* v. *Rámasámi* (I.L.R., 8 Mad., 482) followed; *Hara Sundari Debi* v. *Kumar Dukhinessur Malia* (I.L.R., 11 Cal., 250) observed upon.

An oral agreement by the parties to a suit that a decree be passed creating a charge on immovable property above, Rs. 100 in value, is not rendered inoperative by s. 59 of the Transfer of Property Act.

The parties to an appeal applied to the Court to pass a decree in accordance with the terms of a compromise, and, before decree was passed, one of the parties objected to such decree being passed on the ground that certain conditions precedent to be performed by the other party had not been performed. The Court (this being denied by the other party) called for affidavits in proof of the terms of the agreement of compromise, and, these being found not to be sufficiently conclusive, directed the Lower Court to take evidence on the point.

APPEAL from the decree of C. Purushotam Ayyar, Acting Subordinate Judge of Madura (West) in suit 8 of 1883.

The facts and arguments in this case, so far as they are material for the purpose of this report, appear from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Bháshyam Ayyangár and *Kalidnaráma Ayyar* for appellants.

Hon. *Subramanya Ayyar* and *Rangácháryar* for respondent.

* Appeal 43 of 1884.

APPASÁMI v. MÁNIKAM.

JUDGMENT. — The respondent (Ramanádhan Chetti) sought to recover from the appellants (Appasámi Náyak, zamíndár of Kannivádi and three others) Rs. 16,000 with interest due upon a hypothecation bond which the appellants executed in his favour on the 6th June 1882. He alleged that, out of Rs. 16,000, Rs. 1,000 was a debt acknowledged to be due upon a settlement of accounts in respect of monies advanced by him from time to time, and Rs. 15,000 the purchase money due under a deed of sale executed by him at the request of the appellants in the names of first appellant's wives. At the trial it was elicited that one Naráyana Ayyar, from whom title to the land sold was derived, had a minor son, and that on his behalf a guardian objected to the sale. The Court of First Instance however decreed the claim, but on appeal this Court considered that the hypothecation was valid to the extent of Rs. 1,000, but in regard to the claim for Rs. 15,000 referred for trial the issue—Whether with reference to the minor's interest, if any, in the property agreed to be sold, the respondent could make out such a title as a purchaser would be bound to accept.

During the trial of this issue in the Subordinate Court, on the 23rd February 1885, the appellants and the respondent presented a petition of compromise reporting that the respondent's claim was amicably adjusted. The petition stated the terms on which the parties had agreed to compromise the suit and requested the Subordinate Court to move this Court to pass a decree in accordance with those terms.

In pursuance of this request the petition was forwarded to this Court, but when the appeal came on for disposal, the appellants presented Civil Miscellaneous Petition No. 226 of 1885, objecting to the compromise being accepted. It was alleged that the compromise was entered into subject to certain conditions, that it was agreed that those conditions should be fulfilled prior to the acceptance of the compromise by this Court, that they were not inserted in the razináma because they were not connected with the subject-matter of the suit, and that the respondent failed to fulfil those conditions.

The conditions were :—

(*a*) The plaintiff should satisfy the claims of the minor son of the said Naráyana Ayyar and convey the property in dispute to defendants free of any defects in the plaintiff's title to the said property and that he should execute a registered sale-deed.

(*b*) The plaintiff should be responsible for any expenses to be incurred in getting the possession of the property transferred to petitioners.

(*c*) That plaintiff should lend Rs. 60,000 to petitioners and get a bond executed by them for the said sum, payable in six years with interest at 12 per cent. per annum and with a bonus of Rs. 7½ per 100.

APPASÁMI v. MÁNIKAM.

On the other hand the respondent contended that the petition of compromise contained the whole agreement, that it was absolute and unconditional, and that as a special consideration for entering into the compromise, a sum of Rs. 4,500 was paid to the zamíndár.

The agreement set out in the petition of compromise is that Rs. 19,000 was to be paid with interest at 12 per cent. per annum in certain instalments in full satisfaction of the respondent's claim, that on default being made in respect of any instalment, the instalment overdue together with interest was to be recovered by taking out execution on the twenty-five villages mentioned in the compromise and their income, and that no execution was to be taken out against any other property or against the body of either of the judgment-debtors.

Before deciding whether the razináma should be accepted, it was considered desirable to call for affidavits. Affidavits having been filed on both sides, the appeal comes on again for disposal. It is urged by the learned pleader for the appellants (1) that we are not at liberty to accept the compromise unless the parties thereto continue to consent to it until we pass a decree in its terms; (2) that the agreement is not valid nor enforceable by suit; and (3) that the affidavits filed for the appellants show that the agreement made in adjustment of the suit was conditional.

As to the first contention, our decision must depend on the construction which we ought to place on s. 375 of Act XIV of 1882. It is in these terms: "If a suit be adjusted wholly or in part by *any lawful agreement*, or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final,

APPASÁMI v. MÁNIKAM.

so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction." The appeal before us was adjusted by an agreement, and the only questions open to us under s. 375 are whether there was an agreement in adjustment of the appeal, and whether that agreement was lawful. If we are satisfied on both these points, the section seems to us to leave no alternative but that of recording the agreement and passing a decree in accordance with it so far as it relates to the suit. Apart from this section, the parties to a suit are at liberty to ask for a decree by consent, and if the contention for the appellants, viz., that the parties should continue in agreement up to the date of moving for the decree, were to prevail, there was no necessity for inserting in the Code s. 375. We, accordingly, held *Karuppan* v. *Rámasámi* (1) that, when it was shown that a suit had been adjusted by a lawful agreement, a decree must be passed in accordance with it and concurred in the decision of the Bombay High Court in *Ruttonsey Láji* v. *Pooribái.*(2)

Our attention is now drawn to the decision of the Calcutta High Court in *Hara Sundari Debi* v. *Kumara Dukhinessur Malia.*(3) In that case the plaintiff claimed relief as against defendant No. 1, who was in possession of the property in dispute. Both those parties receded from the compromise and prayed that the suit might be dealt with on its merits, but defendant No. 2, who was not in possession, insisted on the agreement being enforced. It appears further that the agreement provided for partitioning the property in suit among the members of the family, whilst defendant No. 1 had no beneficial interest in it but held it as a trustee for certain idol. Thus, there were other grounds on which the decree made under s. 375 was set aside and the observation made as to the construction of s. 375 could only be regarded as an *obiter dictum.* It was no doubt observed that s. 375 is but an amendment and modification of the corresponding section of Act VIII of 1859 and that it did not apply to a case in which the parties concerned, or some of them, declined to carry out the agreement before judgment was recorded, and in support of this view, it was pointed out that s. 375 allowed no appeal while, if a suit were brought for the specific performance of the agreement

(1) I.L.R., 8 Mad., 482. (2) I.L.R., 7 Bom., 304.
(3) I.L.R., 11 Cal., 250.

APPASÁMI v. MÁNIKAM.

and a decree obtained, an appeal would lie. In answer to this remark it may be observed that under s. 523 an order may be made specifically enforcing an agreement to refer a matter in dispute to arbitration and there too no appeal is allowed. The question whether or not a compromise had been agreed to, may have been considered so simple that the decision upon it might well be made conclusive, especially as the parties entering into such an agreement *pendente lite* would have distinct notice that there would be no appeal.

We are still inclined to agree with the Bombay High Court that s. 375 was intended to meet cases in which the parties having once agreed subsequently fall out and that it was framed to provide an alternative and a more expeditious remedy than a suit for specific performance. It will be observed that the section puts an adjustment by agreement upon the same footing as a satisfaction in whole or in part by payment. It does not seem open to question that a payment after suit brought would entitle the defendant to a decree *pro tanto*, and if he can rely on a payment he is equally entitled to rely on an agreement or compromise.

As to the English cases referred to on the subject—*Pryer* v. *Gribble*,(1) *Scully* v. *Lord Dundonald*,(2) *Holt* v. *Jesse* (3)—their result, as stated by the Bombay High Court, is that a simple agreement for the compromise of a suit may be enforced by an interlocutory application in the pending suit, but when the agreement goes beyond the subject-matter of the suit, the remedy is a bill for specific performance. This rule is extended by s. 375 and the agreement is rendered enforceable even when it goes beyond the subject-matter of the suit in so far as it relates to it. This is only in accordance with the observation made in some of the English decisions. The intention of the Legislature, therefore, appears to us to have been to carry out, as far as possible, the policy of avoiding a multiplicity of suits and of determining all matters in controversy in a pending suit in that suit—(See also the Judicature Act, s. 24, cl. 7). For these reasons we still adhere to the opinion we expressed in *Karuppan* v. *Rámasámi.*(4)

It has however been urged by the appellants' pleader that the agreement recited in the petition of compromise was oral and that

(1) L.R., 10 Ch. App., 534. (2) L.R., 8 Ch. D., 658.
(3) L.R., 3 Ch. D., 177. (4) I.L.R., 8 Mad., 482.

APPASÁMI v. MÁNIKAM.

it is invalid and ineffectual to create a charge on the villages under s. 59 of Act IV of 1882. The intention of the parties to the agreement was, not that it should of itself create a charge on immovable property but only that it should create a right to obtain a decree by way of specific performance. It is in the nature of a preliminary contract intended to be perfected by another document, and we do not consider that it is inoperative under Act IV of 1882.

As to the third contention, the case made out by the affidavits for the respondent is that, on the 7th February, he arranged with the persons acting for the minor that Rs. 4,500 should be paid for his benefit, that the minor's claim should be renounced, that until the renunciation was communicated to the Court, the money should be deposited with one Sitaráma Ayyar, and that after it was so communicated, it should be paid by Sitaráma Ayyar to those who acted for the minor; that on the 12th February the zamíndár invited the respondent to arrange the whole matter with him, and offered to settle with the minor about his claim, and to put in a razináma admitting the whole of the respondent's claim in the suit and making the zamíndárí security for it if the respondent paid him Rs. 4,500 and agreed to receive the decree amount in five instalments, and further undertook not to proceed in execution against his body or that of his son; that the respondent accepted the offer, that the razináma was then drawn up and signed by the zamíndár and his son, that on the 23rd February it was brought to Madura by Appasámi Náyak, that it was then presented to the Subordinate Court by the pleaders of both parties and acknowledged by them, and that thereupon Rs. 4,500 was paid to Appasámi Náyak for the zamíndár. Manikam Chetti, the respondent, has filed an affidavit to that effect, and it is supported by the affidavits of Balagurunatha Pillai, Alagappa Chetti and Perya Karuppan Chetti. It is supported further by the affidavit of Annámalai Chetti in regard to the remittance of Rs. 4,500 from Madras to Madura, and by the letters which then passed between Annámalai Chetti and the respondent.

On the other hand, the appellants' case, as sought to be established by four affidavits, is that the terms of the compromise were settled with the zamíndár's manager, that the respondent agreed to fulfil the conditions referred to before the razináma was accepted by the High Court, that on the 25th February the respondent

APPASÁMI v. MÁNIKAM.

took a list of immovable property to be attached to the razináma and asked the zamíndár to sign it, that the zamíndár refused to do so until the conditions were fulfilled, and that the respondent since promised to get Rs. 60,000 from Rayapuram within one week when called upon to lend that sum according to his agreement. Appasámi Náyak, to whom the respondent states that he paid Rs. 4,500, produces a letter, dated 26th February, purporting to be signed by the respondent. It states that Rs. 64,500 will be paid through the Village Magistrate of Rayapuram and that Rs. 322½ are sent for the stamp. This letter is denied by the respondent. As to the affidavits filed for the appellants, it must be observed that some of them speak of a proposal that the zamíndár and his son should execute a bond for Rs. 19,000. This is inconsistent with the terms of the razináma. Again, Appasámi Náyak does not distinctly deny that he received Rs. 4,500 for the zamíndár as a consideration for entering into the compromise. Nor is the statement that a list of immovable property to be attached to the razináma was taken to the zamíndár for his signature on the 25th February at all likely, for, the razináma was presented to the Subordinate Court on the 23rd February, and the twenty-five villages seem to comprise the whole zamíndárí. Further, it is in the highest degree improbable that if the appellants' contention is *bonâ fide*, the petition of compromise would have been presented for transmission to this Court with the prayer that a decree should be passed in accordance with it. The story that the alleged conditions were not inserted in the razináma because they were not connected with the subject-matter of the suit is also unlikely, for the present contention is that the razináma was intended to have no legal force at all until these conditions were fulfilled.

Judging from the affidavits the appellants' contention does not appear to be free from suspicion, but the affidavits are not sufficiently conclusive. As our decision under s. 375 will be final, we consider it proper to direct the Subordinate Judge to take evidence and forward it to this Court with his opinion. He will also ascertain on which villages the debt was agreed to be a charge. We, accordingly, order the Subordinate Judge to try upon such evidence as the parties to this appeal may adduce, what was the real agreement made between the parties to this appeal in view to its adjustment.

APPASÁMI v. MÁNIKAM.

And the Subordinate Judge is directed to submit his finding and the evidence thereon on the foregoing issue.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. Oct. 30, 31.

LOGAN (PRESIDENT OF THE MUNICIPAL COMMISSION, TELLICHERRY), PLAINTIFF,

and

KUNJI (DEFENDANT).*

Small Cause Court Act XI of 1865—Jurisdiction—Suit to recover municipal tax.

A suit to recover a municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865.

THIS was a case referred to the High Court under s. 617 of the Code of Civil Procedure by the Acting District Judge of Tellicherry (L. Moore) at the request of the District Múnsif of Tellicherry.

The case was stated by the District Múnsif as follows :—

"The Municipal Commissioners of Tellicherry, through their President, the Collector of Malabar, sued the defendant for the recovery of Rs. 14-1-4, being the municipal tax due by the defendant for the years 1882, 1883 and 1884. The amount was due by the defendant as the tax on houses and lands owned by the defendant within the municipality.

"The defendant admits the legality of the assessment and his liability to pay the rate, but only pleads payment of the same. The defendant further pleads that the suit by the municipality is not one cognizable by the Court of Small Causes.

"The Municipal Commissioners brought two other suits in the Subordinate Court of Tellicherry on its small cause side—suits 361 of 1885 and 357 of 1885. The Subordinate Judge, Mr. Kunjan Menon, held that the suits were not in the nature of those cognizable by Courts of Small Causes, and ordered the plaints to be returned. The plaint in 361 of 1885 was presented in my Court on the regular side on the 22nd June 1885. I was of opinion

* Referred Case 11 of 1885.

that the suit was one clearly falling under s. 6 of Act XI of 1865. I held that I had no jurisdiction under s. 12 of Act XI of 1865, and ordered the plaint to be returned. The plaintiff, the President of the Municipality, appealed against my order, and the District Judge, Mr. Moore, reversed my order, holding that the suit was not cognizable by a Small Cause Court. The other plaint 357 of 1885 returned by the Subordinate Judge is also re-presented in this Court. Though I am still of opinion that a suit by the municipality for the arrears of tax is one cognizable by the Small Cause Courts, I feel considerable doubt about the soundness of my view, as my appellate authority differed from me.

"I think there is an implied contract between the citizens, the rate-payers, and the Municipal Commissioners. The latter contracted to see to the general conservancy and sanitation, &c., of the towns, and the former undertook to supply the latter with the necessary funds. The liability is cast on the rate-payers by legislative enactments. Section 161 of Act IV of 1884 recognized the privilege of the municipality to enforce the liabilities of the tax-payers by suits before competent civil courts. Suits to enforce the liability under implied or constructive contracts are cognizable by Courts of Small Causes—see cases reported in 5 M.H.C.R., 200; 12 W.R., 372; 10 Bom. H.C.R., 21; I.L.R., 4 Bom., 321; I.L.R., 3 All., 67; I.L.R., 4 All., 19; I.L.R., 4 All., 6; I.L.R., 2 All., 671; I.L.R., 8 Mad., 277.

"Suits to recover tax illegally levied by the municipality, &c., are cognizable by Courts of Small Causes—I.L.R., 1 Mad., 159 and 14 W.R., 248.

"The case in I.L.R., 2 Mad., 146, relied on by the Subordinate Judge and the District Judge, in my humble opinion, does not apply, for the right of the inámdár to collect the proprietary dues referred to therein was not admitted there, and consequently the liability of the defendants was not determined.

"I had many suits by the municipality against the tax-payers on the small cause side of the Múnsif's jurisdiction. I disposed of them as small cause suits. The suit 396 of 1885 is still pending in my Court on the small cause side, and there will be many more cases of such nature. I, therefore, deem it necessary to refer the question for the decision of the Honorable the Judges of the High Court.

"The question is one of general importance.

LOGAN v. KUNJI.

"The question I respectfully beg to submit, for the decision of the Honorable the Judges of the High Court, is "whether a suit by the Municipal Commissioners for the recovery of municipal tax is one cognizable by Courts of Small Causes."

Counsel were not instructed.

The judgment of the Court (Hutchins and Parker, JJ.) was delivered by

HUTCHINS, J.—The question submitted is whether a suit by Municipal Commissioners for the recovery of municipal tax is one cognizable by a Court of Small Causes. The tax is not one due under a contract, either express or implied or constructive as supposed by the District Múnsif, but the obligation to pay is imposed on the rate-payer by law; nor is the suit one for damages. We are of opinion that the suit is not cognizable by a Court of Small Causes.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. October 2, 3.

SÉTHU, APPELLANT,

and

VENKATRÁMÁ, RESPONDENT.*

Civil Procedure Code, ss. 5, 360, ch. XX—Small Cause Court, Mufassal—Insolvency jurisdiction.

Under s. 360 of the Code of Civil Procedure, the Local Government cannot invest a Mufassal Small Cause Court with the insolvency jurisdiction conferred on District Courts by ch. XX of the said Code, inasmuch as, by reason of s. 5, ch. XX does not extend to such Courts of Small Causes.

THIS was an appeal against an order of G. Rámasámi Ayyar, District Múnsif of Kumbakónam, passed in a small cause suit declaring one Venkatrámá Ayyan, a judgment-debtor, an insolvent, and appointing a receiver under ch. XX of the Code of Civil Procedure.

The appeal was made by Séthu Ammál, creditor No. 6, who opposed the application on the ground that the insolvent had been guilty of bad faith.

* Appeal against Order 94 of 1885.

SÉTHU v. VENKATRÁMÁ.

This creditor also presented a petition under s. 622 of the Code against the same order on the ground that the Court had no jurisdiction to pass it.

Bháshyam Ayyangár for appellant.

Krishna Ráu for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.).

JUDGMENT.—The Government notification of 17th October 1877 invested the Courts of all Subordinate Judges and District Múnsifs in this Presidency with the powers conferred on District Courts by chapter XX of the Code of Civil Procedure. In the Proceedings of Government which directed the publication of this notification (17th October 1877, No. 2473), there are some expressions tending to show that they may have had in view insolvent applications by parties arrested under any warrant of a District Múnsif, whether in a regular suit or under a decree passed on the small cause side of his court, but this is not very clear and the notification itself does not say so. We must assume that the Government only intended to exercise such powers as it possessed; and if the notification went beyond those powers, it would, to that extent, be *ultrâ vires* and of no legal effect whatever.

Section 360 of the Code then in force empowered the Local Government to invest any Court other than a District Court with the powers conferred on District Courts by the preceding sections of chapter XX, and provided that any Court so invested may entertain an application to be declared an insolvent by any person arrested under its decrees. But s. 5 of the same Code declares that no section or chapter of the Code, other than those mentioned in the second schedule, shall extend to Courts of Small Causes. Neither s. 360 nor any part of chapter XX of the Code was then to be found in schedule II, and it follows that on the date of the notification the Government had no authority to apply s. 360 to Courts of Small Causes or under that section to confer any powers on such Courts. Subordinate Judges and District Múnsifs are Courts of Small Causes constituted under Act XI of 1865 when exercising their small cause jurisdiction.

We hold therefore that the Government did not intend by their notification to give authority to a District Múnsif in the exercise of his small cause jurisdiction to entertain petitions of insolvency; and also that, if they did intend to confer such

SÉTHU v. VENKATRÁMÁ.

authority, their notification is to that extent invalid. The latter conclusion has been arrived at by the High Court of Bombay on the same ground. *Lallu Ganesh* v. *Ranchhod Rahandás.*(1)

The proceedings of the District Múnsif in this case must be quashed as without jurisdiction. The judgment-debtor must pay the costs of this appeal as well as the appellant's costs in the Múnsif's Court. The revision petition No. 180 of 1885 will be simply dismissed. The order of the District Múnsif was one made under s. 351 and therefore an appeal lay to this Court under ss. 588, cl. (17) and 589. In such an appeal it is open to the appellant to take the preliminary objection that the Court had no jurisdiction to make such an order.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. Sept. 14, 22.

CHENCHAMMA (DEFENDANT No. 4), APPELLANT,

and

SUBBAYA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 3), RESPONDENTS.*

Hindú Law—Illatam custom—Status of son-in-law—Co-parcenary—Survivorship—Proof of special custom.

Although an illatam son-in-law and a son adopted into the same family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindú co-parceners having the right of survivorship.

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, confirming the decree of V. Rámá Ayyar, Acting District Múnsif of Ongole, in suit 571 of 1882.

The facts necessary for the purpose of this report appear from the judgments of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Mr. *Wedderburn* for appellant.

Rámachandra Ráu Sahib for respondents.

MUTTUSÁMI AYYAR, J.—Both parties to this second appeal derive their claim from one Nalluri Ramanappa. He gave his daughter Mangamma in marriage to one Ala Ayanna and admitted

(1) I.L.R., 2 Bom., 641.

* Second Appeal 994 of 1884.

CHENCHAMMA v. SUBBAYA.

him into his family as illatam son-in-law. Subsequently, Ramanappa adopted one Venkataramanappa. Ala Ayanna had by Mangamma a son named Rámudu and a daughter named Sitamma. Venkataramanappa married Sitamma and had by her a son named Punnaya and a daughter named Chenchamma who is the appellant before us. On Mangamma's death, Ala Ayanna married another wife, and, in consequence of this marriage, a disagreement arose between him and the other members of the family. Thereupon, Ala Ayanna left the family with his second wife, but, before doing so, he renounced his illatam rights, with the consent of the rest of the family, in favor of his son Rámudu. It is found by the Judge that Rámudu, the son of Ayanna, enjoyed, in commensality with Venkataramanappa, the property belonging to the family, and to this finding no objection has been taken. Rámudu and Venkataramanappa died first, and Punnaya, Venkataramanappa's son, died afterwards. Sitarámudu, the son of Rámudu, and Chenchamma, the sister of Punnaya, and Ala Ayanna are the only members of the family now alive. In October 1881, the respondent No. 1 purchased the land in suit, which admittedly belonged to the family, from the guardian of Sitarámudu, who is a minor, and brought this suit to recover possession. Both the Lower Courts upheld the purchase and considered that, as the sole surviving male co-parcener of the joint family, the minor Sitarámudu was entitled to the whole property. It was urged in second appeal that Ayanna having separated from his father-in-law, he could not assign his illatam right to his son, and that, even if it was assignable, Venkataramanappa's adoption put an end to that right. When the second appeal came on for disposal on the 9th March last, three issues were referred for trial with reference to the customary law, viz., (1) What share is taken by an illatam son-in-law in competition with an adopted son? (2) Whether there can be union between an adopted son and an illatam son-in-law or the son of an illatam son-in-law? (3) Whether an illatam son-in-law inherits from an adopted son's son. But neither of the parties produced evidence of usage in regard to any of these points.

Ala Ayanna was taken as illatam son-in-law before Venkataramanappa was adopted, and, in the absence of evidence in regard to any special usage, I do not see my way to hold that the adoption could divest any interest which had already vested in Ayanna. Nor do I see any ground for the contention that it was not

CHENCHAMMA v. SUBBAYA.

competent to Ayanna to renounce his illatam right in favor of his own son. It is found by the District Múnsif that this renunciation was made with the consent of the rest of the family, and the Judge has adopted the finding. As an illatam son-in-law and the natural son share equally, we see no reason to think that the adopted son could be in a better position than the natural son. The question which remains to be considered is whether, when an illatam son-in-law and an adopted son live in commensality, they are to be regarded as co-parceners. The right of survivorship is an incident under Hindú Law of co-parcenary, which is only possible between the male descendants of a common paternal ancestor, and, in the absence of proof that it is also an incident of the illatam custom, we are unable to treat it as such, for the custom derogates from the Hindú law, and the extent to which it does so must be proved like any other fact when it is disputed. We can therefore only uphold the sale to respondent No. 1 to the extent of Sitarámudu's share and decree to him possession of a moiety of the land in suit. I would modify the decrees of the Lower Courts accordingly and award proportionate costs.

HUTCHINS, J.—The sole question is whether the lands in dispute belonged to the appellant, Chenchamma, or to the minor Sitarámudu whose rights have been assigned to the plaintiff, now respondent No. 1, or to both, and if to both in what shares.

On the findings, we must take it that the minor has succeeded to all the illatam rights of his grandfather, Ala Ayanna. Both the Courts below agree that Ala Ayanna's evidence may be implicitly relied on: he became affiliated to Nalluri Ramanappa as illatam, and his account is that some time after Ramanappa's death, his wife, the daugher of Ramanappa, having died and he having married again, he was asked by Chenchamma's father—an adopted son of Ramanappa with whom till then he had lived in commensality—to relinquish his illatam right to his son Rámudu and quit the Nalluri family, and that he did so accordingly. It follows that whatever right to the property in dispute was formerly vested in Ala Ayanna was transferred to Rámudu with the assent of Chenchamma's father, and Chenchamma herself cannot question the validity of the transfer. The rights of Rámudu have now passed to his son, the minor Sitarámudu, by inheritance. So it has been found, and even if the finding is not indisputable as it seems to

CHENCHAMMA v. SUBBAYA.

me to be, it has become conclusive by appellant's failure to object to it.

Thus all the illatam rights formerly vested in Ayanna are now vested in his grandson Sitarámudu, and we have next to see in what those rights consisted with regard to this particular property. After Ramanappa's death, when his illatam son-in-law and his adopted son lived in commensality, were they Hindú co-parceners to all intents and for all purposes, or joint tenants, or tenants in common? Whatever their true relation, it must be remembered that Rámudu took exactly his father's place by mutual consent and the very same relation, and no other, was continued between Chenchamma's father and Rámudu.

The learned Counsel for the appellant maintains that they were not co-parceners, but join tenants. His contention is that Rámudu having predeceased Chenchamma's brother, Punnaya, the former's rights did not pass to his son by representation, as would have been the case if they had been true co-parceners, but to the other joint tenant, Punnaya, by survivorship. He overlooked, however, that the original co-parcenary or joint tenancy was between Rámudu and Punnaya's father, and that no interest could have passed even to Punnaya himself except upon the principle that the son represents the father. Yet there is no doubt that the interest of Punnaya's father devolved on Punnaya himself and the patta was for many years in his name.

But I see no reason why Rámudu and Punnaya's father should be supposed to have been joint tenants, and, in the absence of evidence on the third issue remitted, I do not see my way to holding that they were fully co-parceners. It seems to me that they were merely tenants in common if they were not co-parceners, and *Hanumantamma* v. *Rámi Reddi*(1) is an authority for saying that Rámudu's share was a full moiety. It follows that the minor's share, now conveyed to respondent No. 1, was also a moiety and the decree in his favor must be modified accordingly.

Although the respondent No. 1 brought his suit in ejectment and has only proved a title to partition, there is no reason why the decree should not run as for the delivery up of half the land. I agree that the costs should be borne throughout proportionately.

(1) I.L.R., 4 Mad., 272.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Hutchins.

ERAJABI (PLAINTIFF),
and
MAYAN (DEFENDANT.)*

1885. Sept. 11, 29.

Village Múnsif—Civil Jurisdiction—Limitation of suits—Regulation IV of 1816, *s. 5—Limitation Act,* 1877, *s. 6.*

Section 5 of Regulation IV of 1816, which prohibits Village Múnsifs from trying any suit cognizable by them, unless (*inter alia*) the cause of action has arisen within twelve years previous to the institution of such suit, does not exclude such suits from the operation of the Indian Limitation Act, 1877.

THIS was a case referred to the High Court by W. P. Austin, District Judge of North Malabar.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Kernan, Officiating C.J., and Hutchins, J.).

Counsel were not instructed.

HUTCHINS, J.—In this case the plaintiff sued before the Village Múnsif of Mylanjenmom to recover a sum of money due on a bond. According to the contract, and as stated in the plaint itself, the money accrued due and the cause of action arose on the 14th November 1880.

The time limited for such a suit by art. 66, sch. II of the Limitation Act, is three years from that date, but the plaint was not presented till on or after 17th November 1884. Without noticing that the suit was barred, the Village Múnsif took cognizance of it and has passed a decree in the plaintiff's favor.

It is possible that the Village Múnsif was under the impression that the Limitation Act of 1877 did not apply to his Court, and that under cl. 2, s. 5 of Regulation IV of 1816, he was only bound to see that the cause of action had arisen within twelve years before suit; but he does not appear to have considered the point. Section 4 of the Limitation Act plainly says that every suit

* Civil Revision Case 158 of 1885.

instituted after the prescribed period shall be dismissed. The language is quite general, and the Act applies to the whole of British India and to all suits instituted therein. It is expressly provided in the Code of Civil Procedure, s. 6, that nothing therein shall affect the jurisdiction or procedure of Village Múnsifs, but no such exception is to be found in the Limitation Act.

It is true that s. 6 of the Limitation Act provides that nothing contained in the Act shall alter or affect a period specially prescribed by any special or local law for any suit, appeal or application, but s. 5, Regulation IV of 1816, can hardly be said to prescribe a period of limitation for any particular suit or class of suits. It simply prohibits a Village Múnsif from taking cognizance of any suit, whatever its nature, unless the cause of action has arisen within twelve years. It would be unreasonable to suppose that, when prescribing different periods of limitation for different suits according to their nature, the Legislature intended to preserve a rule of limitation applicable only to a particular class of tribunals, and which would entirely defeat their object in regard to all suits which might be brought before such tribunals.

We set aside the decree passed by the Village Múnsif, direct him to exercise his jurisdiction and consider the question of limitation, and whether there are any circumstances sufficient under the law to save the claim from limitation.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice), Mr. Justice Hutchins, and Mr. Justice Parker.

KADAR (DEFENDANT No. 2), APPELLANT,
and
ISMAIL (PLAINTIFF), RESPONDENT.*

1885. September 9. October 20.

Registration Act, s. 50—Registered purchaser—Notice of prior contract to sell.

The words "former part of this section" used in the second paragraph of s. 50 of the Registration Act, 1877, refer to the whole preceding portion of the section:

Held, therefore, that a registered purchaser of land, who bought with notice of a prior unregistered contract by his vendor to convey to the plaintiff, could not resist a suit for specific performance on the plea of registration.

* Second Appeal 221 of 1885.

KADAR v. ISMAIL.

THIS was an appeal from the decree of C. Rámachandra Ayyar, Subordinate Judge of Madura (East), confirming the decree of A. Kuppusámi Ayyangár, Acting Additional Múnsif of Madura, in suit 126 of 1884.

The plaintiff, Kaji Shaik Kaji Ismail, sued (1) Husain Bíbí, (2) Kadar Padsha, and (3) Muhammad Ali to obtain a decree cancelling the sale-deed of a house executed by defendants Nos. 1 and 3 to defendant No. 2, and directing defendant No. 1 to execute a conveyance of the said house to plaintiff and for possession thereof.

The plaintiff alleged that, on the 17th May 1883, defendant No. 1 agreed to sell the house to him for Rs. 275, from which sum certain prior debts were to be deducted, and that in breach of such agreement she, jointly with defendant No. 3, fraudulently sold the house to defendant No. 2.

Defendant No. 1 denied the alleged agreement. Defendant No. 2 pleaded that he was not aware of the agreement and that he had obtained a registered sale-deed on the 21st of May 1883 and paid Rs. 250 to his vendors.

Defendant No. 3 was *ex parte*.

The Múnsif found that defendant No. 1 had orally agreed to sell the house to the plaintiff on the 17th or 18th May, that defendant No. 2 had notice of this agreement, that his purchase was not *boná fide*, and that plaintiff was entitled to specific performance of the agreement alleged in the plaint with costs against defendant No. 1.

Defendant No. 2 appealed.

On appeal, the Subordinate Judge found that the agreement by defendant No. 1 to sell had been reduced into writing in the form of a receipt (exhibit F) which was as follows :—

"Receipt granted by Husain Bíbí Ammál, widow of Shaik Imam Sahib, living in the East Masi Street, Madura, to Shaik Ismail Sahib of the same place on the 17th May 1883.

"As it has been settled that I should sell you the house belonging to me for Rs. 275, and as I have agreed to sell the same by receiving the balance after deducting from the said amount the sum due to you and to your younger paternal uncle, Kadumiya Sahib, I have received in advance one rupee for my subsistence and three rupees for purchasing stamp paper. For this sum of four rupees you are to hold this as a receipt."

KADAR v. ISMAIL.

The Subordinate Judge held that, under s. 27, cl. (*b*) of the Specific Relief Act, the plaintiff was entitled to specific performance of this agreement.

Defendant No. 2 appealed.

Bháshyam Ayyangár for appellant.—But for ss. 48 and 50 of the Registration Act, a purchaser with notice would take subject to the prior contract; but this Court has held that the equitable doctrine of notice has been rejected in earlier Registration Acts—*Nallappa* v. *Ibram*,(1) *Madar* v. *Subbaráyalu*,(2) *Muthanna* v. *Alibeg*.(3) By reviewing the history of legislation as to registration, the Court was led to the conclusion that notice was immaterial. The Specific Relief Act, s. 27, does not affect the Registration Act (see s. 4).

(KERNAN, Offg. C.J.—The Registration Act gives the registered document priority. The Specific Relief Act then introduces a new element by which the registered holder with notice is bound: that does not affect the operation of the Registration Act).

The Specific Relief Act was passed first, but the Registration Act came into operation first.

Section 91 of the Trusts Act, which makes a purchaser with notice a trustee in certain cases is similarly limited in its operation, and the Transfer of Property Act also saves the operation of the Registration Act (s. 2, cl. *a*).

Further, s. 50 of the Registration Act refers firstly to documents which take priority if registered, and secondly to all unregistered documents with two exceptions (decree or order) which are postponed to the former. Then from the privileged class of registered documents, certain documents are excepted, viz., those mentioned in cls. (*e*), (*f*), (*g*), (*h*), (*i*) of s. 17 and (*a*), (*b*) of s. 18. If the agreement here, which comes under cl. (*h*) of s. 17 had been registered, it could have gained no priority.

If the words "former part of the section" mean all that precedes, then there is redundancy, for decrees and orders have already been dealt with, and decrees or orders are the documents referred to in cl. (*i*) of s. 17.

But there will be no redundancy if "the former part of this section" is taken to refer to the enacting portion only of the preceding paragraph.

(1) I.L.R., 5 Mad., 73. (2) I.L.R., 6 Mad., 88. (3) I.L.R., 6 Mad., 174.

KADAR v. ISMAIL.

The reason for the existence of the second paragraph of s. 50 may be that, if the provisions were included in the first paragraph, the sentence would be too long and complicated.

Hon. *Subramanya Ayyar* for respondent.—The contention is not that a document required to be registered shall operate if unregistered, but that although defendant has a registered document plaintiff is entitled to specific relief. A fraudulent conveyance, though valid between parties, may be invalid against a third party—Transfer of Property Act, s. 53.

A registered document can be impeached on the ground of fraud; why not on the ground of notice?

Section 50 of the Registration Act does not deal with fraud. If the Specific Relief Act intended that relief should not be granted against a registered purchaser, it would have said so.

Former decisions of this Court only deal with rival conveyances. In construing s. 50, there is a difficulty in either case. Former part does not mean half a sentence.

Title by specific performance is acquired by the decree, therefore on getting this decree plaintiff is not affected by the registered conveyance.

The only person protected by s. 53 of the Transfer of Property Act is a *bonâ fide* purchaser.

Bháshyam Ayyangár.—Section 53 does not apply; plaintiff is not a prior transferee.

The Court (Kernan, Offg. C.J., Hutchins and Parker, JJ.) delivered the following judgments:—

KERNAN, Offg. C.J.—The facts of this case are sufficiently stated in the judgments of my learned colleagues.

Reading s. 50 of the Registration Act, I am not able to see that there is any ambiguity, patent or latent, in the language used, and we must take the meaning to be that which is plainly expressed thereby, reading it exactly as it is printed.

It is argued that the word "former" mentioned in the second paragraph refers not to the whole of the antecedent sentence, but only to that *portion* of it which mentions the documents that are declared to have priority by registration, that is, as far as the figure 18. My answer to this argument is that the second paragraph refers in express terms to the whole of the former part of the section. The words used are "nothing in the former part of this section, &c.;" the words "portion of" the former part are not used

KADAR v. ISMAIL.

It is contended that the use of the words "former part" show that a contrast has been drawn by the section between a former part and a latter part (not expressed), and that the former part refers to the documents which have priority by registration, and that the latter part (not expressed but understood) refers to unregistered documents. This is, as it appears to me, a forced construction.

Is not the contrast satisfied by treating the first paragraph, which is a complete sentence, as the "former part" of the section and the second paragraph as the latter part?

Moreover, the construction would seem to be impossible, as the whole of the first paragraph of the section is only one sentence, which must be read in its entirety before the sentence and the meaning of it is complete.

It is sought to make the true reading thus, after 18 insert the words, "not being, cases, &c."

But why should the language of the Act be thus displaced or transposed and new language introduced? It does not appear necessary to do so in order to effectuate any intention of the Legislature apparent from what is the plain meaning of the language used.

It is true that if the words "former part" of this section apply to the whole section, then the documents mentioned in the second paragraph, though not registered, will not have their priority affected by registered deeds. It is contended that this was not the meaning of the Legislature.

The argument, I believe, is that, if all the documents referred to in the second paragraph of the section are omitted, there will be many unregistered documents not affected by registered documents.

I cannot see this is any answer, as the question is what is the meaning of the Legislature expressed by the language they have used. The plain meaning of the section appears to be the words "former part" of this section refer to so much of the section as consists of the one sentence as the first paragraph. The draftsman has adopted this very form of expression "former part of this section" in the proviso to s. 17. Giving the language of the second paragraph its ordinary construction, it means that those documents mentioned in it are to be considered as if the former part of the section had not been enacted.

KADAR v. ISMAIL.

The language, "nothing in the former part, &c.," shows that it was intended that these excepted documents were not to be treated as unregistered documents for the purpose of the former part of that section.

The result of the construction contended for by the appellant would be that all the excepted documents, viz., "leases, &c.," mentioned in the second paragraph of s. 50, would be placed under a double disadvantage—

(1) they would not be allowed any priority by registration over unregistered documents, and

(2) they should be registered or they would be postponed to registered documents. Practically these documents would be "compulsorily registrable" in order to save them from registered documents.

In the present case and such like cases there would be the further disadvantage that the plaintiff would have to register his contract, which is excepted under (*h*), and would have to register his conveyance also when he got it.

As the Court is now unanimous in deciding that the defendant's registered conveyance does not take priority of the contract sued on by the plaintiff under the Registration Act, it is clear that s. 4 of the Specific Relief Act does not apply, and that a decree was rightly made for the plaintiff by the lower Courts.

I would dismiss the appeal with costs.

HUTCHINS, J.—The respondent brought this suit to enforce the specific performance of an agreement to sell a house. Defendant No. 1 was the former owner. Defendant No. 2 and appellant is a purchaser, with notice of the agreement in respondent's favor under a registered conveyance. The appellant may or may not have obtained possession: the respondent certainly did not.

In both the Courts below a decree has been passed in the respondent's favor. The Múnsif treated the agreement as an oral agreement, but upheld it upon the authority of *Chunder Nath Roy* v. *Bhoyrub Chunder Surma Roy*.(1) The Subordinate Judge found that it had been reduced to writing in the receipt F, upon which an agreement stamp and penalty have been levied accordingly. He pointed out, in his judgment, that the Calcutta cases [and the same remark applies to the Bombay cases—including

(1) I.L.R., 10 Cal., 250.

KADAR v. ISMAIL.

Wáman Ramchandrá v. *Dhondibá Krishnáji* (1)] proceed upon the notion that notice of a prior unregistered document prevents the holder of a subsequent conveyance from setting it up, although he may have had it registered, and that is a doctrine which this Court has more than once declined to follow—I.L.R., 5 Mad., 73; 6 Mad., 88; 8 Mad., 167; S.A., 221 of 1885. He held, however, that the agreement F fell under the exceptional cl. (*h*) in s. 17 of the Registration Act, 1877, and was, therefore, exempted from the operation of s. 50 of that Act by its second clause.

Assuming the agreement to be an oral one, it has not been accompanied or followed by delivery of possession, and, under s. 48 of the Registration Act, it must give place to the registered instrument, unless there is anything in the respondent's argument that agreements for sale are to be specifically performed without reference to the Registration Act.

We all consider, however, that the Subordinate Judge was right in holding that the agreement had been reduced to writing. The only object of inserting in the receipt all the terms of the agreement—the settlement of the price and the consequent promise to sell on payment of the balance, deducting two prior charges which the respondent already held on the premises—was to have those terms embodied in a writing. The Subordinate Judge was therefore right in treating the respondent as the holder of an unregistered document, creating a right to obtain a conveyance for a sum exceeding Rs. 100, and falling under cl. (*h*) of s. 17 of the Registration Act.

The next question is whether he was also right in treating this document as wholly exempted from s. 50 of the Act by its second clause. The contention, on the other side, is that this second clause, exempting certain documents from the former part of this section, refers not to the whole of the first clause of the section, but only to the former of the two categories of documents with which the first clause deals. The argument is ingenious and there is certainly much to be said in its favor.

Section 50 of the Act of 1871 consisted simply of one clause and an explanation. The second clause is an interpolation and in drawing it the draftsman may have regarded the old existing clause

(1) I.L.R., 4 Bom., 126.

KADAR v. ISMAIL.

as *the section* and have referred to the former part of the clause as the former part of this section. The first clause is even now the only enacting part of the section: the second clause merely contains a proviso or exception. Grammatically "the former part of this section" seems hardly equivalent to "the whole preceding part."

Former and latter are expressions usually applied to distinguish the first and second of two things both mentioned just before. Although the first clause is not divided into two distinct sentences, still it does mention and set in apposition two things, and the words "the former part of this section" would have a reasonable meaning if they are restricted to the former of these two things. There is, first, a class of documents to which priority is given, and next another class which are postponed to the first class. The first class comprises all documents mentioned in cls. (*a*), (*b*), (*c*), (*d*) of s. 17 or in cls. (*a*) and (*b*) of s. 18. Now, if we turn to s. 17, we find that (*b*) and (*c*) are general clauses, which but for a special exemption would include all the documents mentioned in the second clause of s. 50. It seems natural that the same Act, which in s. 17 had said that the cls. (*b*) and (*c*) should not include these exempted documents, should maintain just that very exemption and no other in s. 50. In other words, read as the appellant would read it, the second clause of s. 50 merely repeats the very same qualifications which had been enacted before in s. 17. The very documents which s. 17 declares must be registered are given priority, but certain other documents, which come under the general terms of s. 17, but are exceptionally declared to be optionally registrable, are also excepted from the general words which would have otherwise given them priority.

The second category of documents, viz., those which are postponed to the first class, comprises "*every* unregistered document relating to the same property and not being a decree or order." Now, if the exemption made in the second clause is to apply to this class as well as to the first class of documents, the second class is cut down from a category including every document not duly registered with the solitary exception of a decree or order to one with many exceptions, viz., first, a decree or order expressly excepted in the first paragraph and next those numerous documents exempted by the second paragraph; and one of these exempted documents is itself a decree or order [cl. (*i*)], so that a decree or order is needlessly repeated.

KADAR v. ISMAIL.

The interpretation for which the appellant contends gives some meaning to the words "the former part of this section" and also to the words, "not being a decree or order" and it also appears to be in harmony with the whole enactment. According to it no document would obtain priority to a decree or order merely by virtue of its registration—the reasonableness of this is obvious enough—but every other unregistered document, except a decree or order, would be liable to be defeated by certain favored documents, the registration of which had been made compulsory under s. 17 or was to be specially encouraged. It seems difficult to conjecture why the holder of a registered conveyance should be allowed to defeat one who has long been in possession under an unregistered conveyance, but not one who has merely obtained an agreement to sell.

It has, however, now been pointed out to me by the learned Chief Justice that the very same words "the former part of this section" occur in the proviso to s. 17, where they certainly refer to all the preceding part of the section. The same meaning should therefore be given to them, if possible, in all parts of the same enactment, and I therefore now agree that the appellant's contention is unsound, and that the view taken by the Subordinate Judge is right. The whole foundation of the appellant's argument therefore fails, and it becomes unnecessary to consider the further question whether, if his registered document gave him priority under s. 50, the Specific Relief Act would take it away. Upon that point I will not now say more than that I cannot agree that the competition would be between the decree, to which, it is assumed, the respondent is entitled, and the appellant's document. It seems to me that the competition must be between the two documents, for the very question before us is whether respondent is entitled to a decree on his contract, or whether that contract has been defeated and made of no effect by the registered conveyance.

PARKER, J.—The suit is to compel specific performance of the agreement of defendant No. 1 to sell plaintiff the plaint house. The agreement was reduced to writing on 17th May 1883 (exhibit F), but the document was not registered. Four days later—on 21st May 1883—defendant No. 1, together with defendant No. 3, executed a deed of sale in favor of defendant No. 2 (exhibit I), which deed was registered. It does not appear

KADAR v. ISMAIL.

that defendant No. 2 got possession. On 5th August the plaintiff brought this suit to compel specific performance as regards defendant No. 1, to cancel the sale-deed given by her to defendant No. 2, and for possession of the house.

The District Múnsif found that defendant No. 3 had no title in the house, and that the sale-deed of defendant No. 2, though registered, was not *bonâ fide*. The Subordinate Judge generally concurred in that opinion and both the Courts decreed in plaintiff's favor.

In second appeal it is urged that the Courts below have not followed the decisions in the Presidency with regard to the doctrine of notice; and that under s. 50 of the Registration Act the registered conveyance of defendant No. 2 will take priority over plaintiff's unregistered agreement.

It is not denied that s. 27, cl. (*b*), of the Specific Relief Act gives plaintiff a general right to enforce specific performance as against defendant No. 2, but it is urged that the provisions of the Specific Relief Act are controlled by the operation given to documents by the Registration Act (s. 4, cl. (*c*) of the Specific Relief Act), and that the rulings of this Court in *Nallappa* v. *Ibram* (1) and *Madar* v. *Subbarâyalu*(2) give absolute priority to a subsequent registered deed, notwithstanding notice.

Section 50 of the Registration Act consists of two sentences and an explanation. The second sentence runs as follows: "Nothing in the former part of this section applies to leases exempted under the proviso to s. 17, or to the documents mentioned in cls. (*e*)—(*l*) of the same section." According to the ordinary meaning of language the words "former part of the section" would appear to refer to the first sentence of the section, in which case it would follow that an agreement under s. 17, cl. (*b*) would gain no advantage by being registered, and be under no disability from non-registration. But the learned pleader for the appellant has put forward a very ingenious argument to the effect that the words "former part of this section" do not refer to the whole of the preceding sentence, but to the words "every document of the kind mentioned in cls. (*a*), (*b*), (*c*), (*d*) of s. 17 and cls. (*a*) and (*b*) of s. 18 only. The argument is that this sentence in s. 50 divides documents into two classes, one

(1) I.L.R., 5 Mad., 73. (2) I.L.R., 6 Mad., 88.

KADAR v. ISMAIL.

privileged, the other unprivileged, and that the effect of the second sentence is to enact that the documents therein mentioned never can gain admission into the privileged class by the fact of registration.

The second clause of s. 50 is, it must be admitted, somewhat awkwardly expressed, but it appears to me the meaning contended for is non-natural. I take the words "former part of this section" as being synonymous with "preceding part" or "first clause of this section" and cannot but regard this as the more natural interpretation. If the Legislature had intended to draw the distinction between the "former" and "latter" class of documents, nothing would have been easier than to say so in express terms.

Independently however of this argument, I am not prepared to admit these two documents, exhibit F and exhibit I, are really brought into competition. Exhibit F does not of itself create any title which will come into competition with the title of defendant No. 2 under exhibit I, but it creates a right to receive from defendant No. 1, or from the Court, a title which will do so. The plaintiff's right to succeed as against defendant No. 2 depends entirely upon his being able to show that he has a right to a decree for specific performance as against defendant No 1. Such decree is a condition precedent, and though defendant No. 2 is joined in the same suit, this is a mere exception to the ordinary rule of pleading that a stranger is not a proper party to a suit for specific performance (*vide* Fry on Specific Performance, ss. 183—185). If the plaintiff can establish no such right, the title of defendant No. 2 is good and valid against all the world; but if he can, it is the decree to that effect against defendant No. 1 (not the unenforced and perhaps unenforceable agreement F), which entitles him to further relief and makes defendant No. 2 *ipso facto* a trustee for plaintiff and bound to re-convey to plaintiff the property which had passed to himself subject to the equity previously created by his vendor—see s. 91, Indian Trusts Act, II of 1882. Section 50 of the Registration Act gives no priority to a registered conveyance over a decree; and as the decree declares defendant No. 2 a trustee bound to re-convey to plaintiff, the prior date of the sale-deed of defendant No. 2 will avail him nothing. In other words I hold that the relief given to plaintiff as against defendant No. 2 is not given upon plaintiff's prior but unregistered contract with defendant No. 1, but upon the contract

KADAR v. ISMAIL.

of trust which is by construction of law imposed upon defendant No. 2.

On these grounds, therefore, I would dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Parker.

1885. September 22.

SUBBAYA (PETITIONER),

and

YELLAMMA AND OTHERS (RESPONDENTS).*

Decree—Execution—Invalid sale—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit.

Certain land having been attached in execution of a decree by a District Court, S, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger, and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by S, set aside the order rejecting his claim.

The District Court, in ignorance of the order of the High Court, having subsequently put the purchaser in possession of the land, S applied for restitution:

Held, that the order of the District Judge confirming the sale was passed without jurisdiction, but that the District Judge had no power to restore possession to S.

THIS was a petition to the High Court under s. 622 of the Code of Civil Procedure against an order of W. F. Grahame, Acting District Judge of Cuddapah, rejecting an application by Voraganti Subbayya (a minor), representative of the judgment-debtor in suit No. 16 of 1876, to be put in possession of certain land which had been sold in execution of the decree in the said suit.

The facts are fully set out in the judgment of the Court (Kernan, Officiating C.J., and Parker, J.).

Rámachandra Ráu Saheb for petitioner.

Krishnasámi Chetti for respondents.

KERNAN, Offg. C.J.—The plaintiff in suit 16 of 1876 obtained a decree against the defendant in that suit for Rs. 5,617-12-0. The defendant died and his son was made party to the suit, as representative of his father, and then that son died and his son,

* Civil Revision Petition 29 of 1885.

SUBBAYA v. YELLAMMA.

the present petitioner, was made party to the suit, as representative of his grandfather, the original defendant.

In June 1883, the decree-holder attached lands in Vontimitta and in certain villages in Proddatur taluk. The present petitioner filed an objection to the attachment and claimed the attached property as his own. That objection and claim were disallowed by the District Judge by order dated the 20th of August 1883. On the 5th day of December 1883, the petitioner filed civil miscellaneous appeal No. 162 of 1883 in the High Court against that order, and the High Court on the 22nd of February 1884 reversed the order of the District Court of the 20th of August. In the meantime, the lands attached were put up for sale and were purchased; and on the 22nd February 1884, the same day as the High Court set aside the order disallowing petitioner's claim, the District Judge made an order confirming the sale.

At the time the District Court made the order of the 22nd of February 1884, the District Judge was not aware of the order of the High Court; nor does it appear which order was made first in point of time on the 22nd February. The purchaser appears to be a stranger to this suit; he paid his purchase money into Court and is a *bonâ fide* purchaser. On the 16th of August 1884, the petitioner filed in the District Court a petition No. 217 of 1884, praying that the attached lands might be given to, and put in possession of, the petitioner. The District Judge was referred to ss. 583—590, but said he did not see how they affected the case. He treated the application as one to set aside the sale which had been confirmed and which, he was of opinion, could not be set aside, and dismissed petitioner's petition.

The petitioner now applies to this Court under s. 622 to revise the District Judge's order on the ground that he refused to exercise the authority vested in him to restore petitioner to possession under the order of the High Court and on the ground that the confirmation only was made without jurisdiction. The petitioner also presented an appeal against the order as a question between the decree-holder and petitioner, parties to the suit, relating to execution.

The petitioner could not after the appeal order appeal against the confirmation order under s. 588, as there was no material irregularity in publishing or conducting the sale, s. 311, Procedure Code, and, as no application was made under that section, neither

SUBBAYA v. YELLAMMA.

could the order for confirmation be set aside, s. 312; and, if the order of the District Judge disallowing petitioner's objection was valid, and if the confirmation order was valid, the sale should have become absolute. But it was not necessary to set aside the confirmation order, as it was void and made without jurisdiction. Until reversed, the order of the District Judge of the 20th of August 1884 was valid; but it was reversed by the order of the High Court of the 22nd February 1884, and from the time that order was pronounced, the order of the 20th August had no legal existence, and the District Judge had no jurisdiction to act on it. If any authority was wanted on this point, see *Basáppá* v. *Dundáyá*.(1)

The order of reversal of the High Court and the order of confirmation being made on the same day, are subject to the rule that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done—*Wright* v. *Mills*.(2) The law does not regard fractions of a day—*R.* v. *St. Mary, Warwick*,(3) *Lester* v. *Garland*.(4) In *Pugh* v. *Robinson*(5) it is said that to avoid injustice the day is divisible; but in this case it seems to be impossible to ascertain which order was made first on the 22nd of February 1884; and as one or other of the two orders must prevail, it is obvious that the order in reversal should. The fact that the District Judge and the purchaser were not on the 22nd of February aware of the order in reversal, is not material, as their ignorance on the subject could not affect the reversal force of the order of the High Court. See *Basáppá* v. *Dundáyá*.(1)

The purchaser bought while the appeal was pending; under the ordinary rule he took subject to whatever would be the ultimate result of the decision in the pending appeal, whether he knew of the *lis pendens* or not—*Pranjivan Govardhan Das* v. *Baju*,(6) *Manual Fruval* v. *S. Latchmidévamma*,(7) *Mina Kumari Bibee* v. *Jojat Sattani Bibee* (8). Section 583 enables a party entitled to any benefit under a decree passed in appeal to apply to the Court that passed the decree appealed against, and that such Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suit.

(1) I. L.R., 2 Bom., 540.
(2) 28 L.J. Ex., 223.
(3) 1 El. & Bl., 816.
(4) 15 Ves. 257.
(5) 1 T.R. 116.
(6) I.L.R., 4 Bom., 34.
(7) 7 M.H.C.R., 104.
(8) I.L.R., 10 Cal., 220.

SUBBAYA v. YELLAMMA.

The appeal in this case was against an order; however s. 590 provides that the same procedure prescribed in ch. XLI, viz., s. 583, shall apply to appeals from orders.

The petitioner was entitled under the appeal order to the benefit of having the sale and the confirming order treated by the District Judge as no longer of any valid legal existence, and to the benefit of being free from any further proceeding to carry out the sale or put the purchaser in possession.

If the petitioner had at once carried out the order in appeal before the Subordinate Judge, it cannot be doubted that no further proceedings to carry out the sale would have been taken. But the petitioner appears to have taken no steps to bring the appeal order to the notice of the Judge until the 16th of August 1884 when the petition was filed praying for possession of the lands sold. In the meantime the purchaser got an order for confirmation.

The purchaser thus obtained possession under the order of the Court, but such order was made after the order in appeal and was made without jurisdiction. However he acted *bonâ fide* and paid his purchase money and it has been paid out to the creditor.

The petitioner might have applied to the District Court to stay the execution pending the sale, but did not do so, and he might, by diligence, after the appeal order was made have prevented the sale certificate and the possession from being given to the purchaser; but he did not do so; under such circumstances, if we had power to order the District Judge to deliver possession to the appellant (and if we had any discretion in the matter) we should be inclined to refuse to do so and to leave the appellant to assert his title against the purchaser by a separate suit. However we do not see that the District Judge had any jurisdiction or authority after possession was given over to the purchaser (who is not one of the parties to the suit) to make an order on him to deliver up possession as prayed for by the appellant. If the plaintiff desires to assert his rights, whatever they may be, he must proceed by separate suit.

We must therefore dismiss the appeal and revision petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

In re KOTA.*

1885. July 28.

Court Fees Act, s. 14, sch. I, arts. 4, 5—Review of judgment—Stamp duty--Ninety days—Computation of time.

In computing the period of eighty-nine days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee leviable on the plaint or memorandum of appeal (under art. 5 of sch. I of the Court Fees Act, 1870), the time during which the Court is closed for vacation cannot be excluded.

THE question raised in this case was whether the petitioner was entitled to present a petition of review of judgment on payment of the Court fee leviable under art. 5 of sch. I of the Court Fees Act, after ninety days had elapsed from the date of the decree, on the ground that the Court was closed for two months, during which period the time had expired, the petition being presented on the re-opening of the Court.

Mr. *Wedderburn* for petitioner.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following judgments:—

HUTCHINS, J.—I am clearly of opinion that the petitioner must pay the full stamp. I have already ruled in the Admission Court that art. 4 in the first schedule of the Court Fees Act must be construed strictly and cannot be modified by any argument from analogy, based on provisions contained in the law relating to limitation of suits, &c., and the same view was taken in Civil Miscellaneous Petition, No. 431 of 1884, by the late Chief Justice and Mr. Justice Muttusámi Ayyar, who held that the applicant for review must pay the full stamp, as the Court Fees Act did not recognize any allowance for the time requisite to obtain a copy.

In the present case the ninetieth day from the date of the decree fell on the 23rd May during the Court vacation. The

* Civil Miscellaneous Petition 307 of 1885.

petition for review would not have been received then even if presented. It was presented on the day that the Court re-opened. It is therefore clearly in time so far as limitation is concerned under s. 5 of the Limitation Act, 1877. But so was Miscellaneous Petition, No. 431 of 1884, under s. 12 of the same Act, which declares that, for purposes of limitation, the time requisite for obtaining a copy shall be excluded.

The wording of the Court Fees Act, taken by itself, seems perfectly plain. Article 4 says if the application is presented on or after the ninetieth day, if shall pay the same stamp as the plaint. Article 5 reduces the fee by one-half if the application is presented before the ninetieth day. It is perhaps not altogether without significance that the full stamp is put first as the rule, and the levy of half the stamp treated as a concession or exception; but I do not wish to lay stress on that, for the words are plain enough anyhow.

In contending that the full stamp is not necessary, Mr. Wedderburn relies on s. 377 of the first Code of Civil Procedure and on the Full Bench decision of the High Court of Calcutta in *Narayan Mandal* v. *Beni Madbal Sircar*(1), and he argues that the Limitation Act is *in pari materiâ* with the Court Fees Act and that, therefore, regard may be had to the former in interpreting the latter.

It seems to me, however, that the two Acts are not at all *in pari materiâ*. It is true that the old Code generally dealt indiscriminately with matters of stamp, matters of limitation and matters of procedure, but the inconvenience of this soon became apparent and they have long since been separated and are governed by distinct Acts, each of which contains its own rules and principles. In this very point of delay, for example, the Limitation Act has its s. 5 containing a proviso that an application for review may be admitted freely after the period of limitation if the applicant can show sufficient cause for the delay. The Court Fees Act, on the other hand, has its fourteenth section, the provisions of which are not quite similar though evidently aimed at the same class of cases, and it seems to me that in regard to stamp questions that alone can be looked to. In my opinion, this section shows beyond all doubt that the full stamp must be paid in all cases after the eighty-ninth

(1) 4 B.L.R. (F.B.), 32.

In re KOTA.

day, whatever the cause of the delay, but it allows the Court to certify for a refund if satisfied that the delay was not caused by the applicant's laches. It is argued that, in this case, there has been no delay, but the section itself shows that it is not speaking of delay caused by laches but simply of the eighty-ninth day having been allowed to pass from causes for which the applicant cannot be held responsible.

And when I look at s. 377 of the old Code I find that the law was precisely the same then. The Court could excuse delay for purposes of limitation but it was never authorized to excuse payment of the stamp. "The application shall be made within ninety days . . . . unless the party preferring the same shall show just and reasonable cause . . . . If made within the period above-mentioned, it shall be written on the stamp paper prescribed for petitions . . . . but if made after the expiration of that period, it shall be written on the stamp prescribed for plaints." The second clause was absolute and the proviso in the first clause could not be imported into it. The "period above-mentioned" must refer to the ninety days and not the ninety days *plus* any time allowed by the Court, for no application was receivable at all after the ninety days so extended, and if every application made within the ninety days so extended were to bear a petition stamp, there would be nothing left on which a plaint stamp could be levied. On the true construction of s. 377, as on that of the present law, it seems to me that the Court has no jurisdiction to look at the petition or consider whether it is or is not barred by limitation, whether certain days must be excluded or others can be excused, until it has been properly stamped; and the proper stamp depends on the mere arithmetical calculation of the number of days since the date of decree.

The Calcutta case referred to does not touch the question of the stamp, for the applicant had been required to pay, and had paid, the full stamp prescribed for a plaint. If he had not, his petition would have been dismissed on those grounds. The decision only dealt with the question of limitation and even upon that it is at variance with a decision of this Court—*K. J. Subburajulu* v. *N. Venkataraya*(1)—and was professedly based to a great extent on the practice of the Northern Presidency.

(1) 2 M.H.C.R., 268.

In re KOTA.

I would allow the petitioner twenty days to pay up the full stamp.

MUTTUSÁMI AYYAR, J.—This is an application for review of judgment. It was presented on the day the Court was re-opened after the last vacation, but the ninety days prescribed for its presentation expired on the 23rd May when the Court was closed. The question raised for our decision is whether, for purposes of Court fees, it is governed by art. 4 or art. 5, sch. I, of Act VII of 1870.

Article 4 directs that full stamp should be paid if the application is presented "on or after the ninetieth day from the date of the decree." Article 5 prescribes half stamp "if presented before the ninetieth day from the date of the decree." Taking the articles by themselves, it is clear that the liability to pay full stamp accrues on the expiration of eighty-nine days from the date of decree. The words used in the articles are clear and unambiguous; and they afford no ground for the contention that, when the Court is closed on the ninetieth day, they ought to be taken to refer to that date after the ninetieth day on which the Court is re-opened.

Our attention was drawn to s. 14 of Act VII of 1870 as supporting this contention. It provides that "when an application for review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may in its discretion grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day." This section treats every application presented on or after the ninetieth day as presented out of time and authorizes the Court to refund the excess stamp in its discretion, unless the delay is caused by the applicant's laches. According to it, there may be delay but it may not amount to laches, and in such cases the Court is to have a discretion. When the delay amounts to laches, no refund is to be made. The apparent intention is to require full stamp in every case of delay after the eighty-ninth day from the date of the decree, and to permit a refund at the discretion of the Judge when the delay is not due to the applicant's laches.

In the case before us, it cannot be said that there was no delay by reason of the vacation, though the delay was not due to the applicant's laches.

It might no doubt seem anomalous at first sight that the time

In re KOTA.

during which the Court was closed for the vacation should be treated as delay. It is possible that a special arrangement might be made for the reception of material papers during the vacation and duly notified, and in that case the Court might reasonably hold that the delay amounted to laches and refuse a refund.

Another contention is that the period of ninety days, which is referred to in the Court Fees Act, is the period prescribed by art. 173, sch. II, of Act XV of 1877, that that Act should be treated as one *in pari materiâ* with the Court Fees Act and that s. 5 of the one enactment should be read as if it were part of the other. It does not appear to me, on further consideration, that it would be accurate to say that the two Acts are *in pari materiâ*. Their object-matter is not the same, and the delay in excess of the prescribed period may be treated strictly for fiscal purposes, whilst it may be differently treated for purposes of limitation. As to the Calcutta case cited, the decision proceeded on the ground of the practice which obtained in that Presidency with reference to s. 377 of Act VIII of 1859. I do not consider that the circumstance of the provision as to stamp and the provision as to the limitation of ninety days having been inserted together in that section can be accepted as a sufficient warrant for the contention that s. 5 of the Limitation Act should be read as if it formed part of Act VII of 1870. The suggestion is at variance with the language of s. 14 of the last-mentioned enactment.

On these grounds, I also come to the conclusion that we must follow the decision of this Court in Civil Miscellaneous Petition, No. 431 of 1884, and direct that the application should be on full stamp.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Officiating Chief Justice), Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, Mr. Justice Parker, and Mr. Justice Handley.

1885. November 6.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, s. 67.

The second clause of s. 67 of the Indian Stamp Act, 1879, is not controlled by the first clause of the section, which refers only to bills of exchange and promissory notes, but applies to all cases in which a document is executed with intent to defraud the Government of stamp duty.

* Referred Case 5 of 1885.

REFERENCE UNDER STAMP ACT, S. 46.

REFERENCE from the Board of Revenue under s. 46 of the Indian Stamp Act, 1879.

The facts were stated as follows :—

"The executant of an instrument for repayment of loan, and the person in whose favor it was executed, were both convicted by the Sub-Magistrate of Kundapúr under ss. 61 and 67 of the Stamp Act.

"The Head Assistant Magistrate, on appeal, confirmed the conviction of the executee (first accused) under s. 64, cl. 2, on the ground that the document itself contained evidence of intent to defraud Government of duty.

"The High Court, however, (Mr. Justice Brandt) quashed the conviction on the ground that cl. 2 of s. 67 is governed by cl. 1, and relates only to bills of exchange or promissory notes, which the instrument in question was not.

"The Board take exception to the ruling of the learned Judge and are unanimously of opinion that cl. 2 of s. 67 is of general application, otherwise the Act will be deprived of any provision for the punishment of those who, with intent to defraud Government of duty, resort to any of the practises set forth in paragraph 2 of s. 67.

"The case is of importance, as the ruling, on an apparently novel point, is likely to exercise an injurious influence on the stamp revenue."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The judgment of the Full Bench (Kernan, Offg. C. J., Muttusámi Ayyar, Hutchins, Parker, and Handley, JJ.) was delivered by

KERNAN, Offg. C. J.—We are of opinion that the second clause in s. 67 of the Indian Stamp Act is not controlled by the first clause so as to restrict its application to negotiable instruments. It is a clause of general application as suggested by the Board.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Offg. Chief Justice), Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, and Mr. Justice Parker.

1885. November 6.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, s. 3 (17) sch. II, 15 (b)—Receipt—Consideration—Barrister's fee, Honorarium not merces.

A receipt given by a Barrister for a fee is exempted from stamp duty by art. 15 (*b*) of sch. II of the Indian Stamp Act, 1879.

THIS was a case referred to the High Court by the Board of Revenue under s. 46 of the Indian Stamp Act, 1879.

The reference was in the following terms:—

"The accompanying document, which purports to be an unstamped receipt, dated 15th December 1880, for a Barrister's fee, amounting to Rs. 50, issued by Mr. (now the Hon.) J. W. Handley to a client, was recently impounded under s. 33 of the Stamp Act by the District Múnsif of Tiruvádi and forwarded to the Collector of Tanjore, who has submitted it for the orders of the Board with the remark that the only course open is to prosecute the executant under s. 61 of the Act.

"The case turns upon the question whether a Barrister's fee is a payment of money without consideration or not. If not, then a receipt for the amount thereof exceeding Rs. 20 is an instrument chargeable with duty under s. 3 (17) sch. I, art. 52, and such instrument is not "duly stamped" until a one anna receipt stamp has been affixed.

"The Board see no reason for the exemption of such receipts from liability to stamp duty."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

Mr. *Wedderburn*, *contra*.

It was contended, for the Board of Revenue, that the receipt being for money which was paid for consideration, the question,

* Referred Case 6 of 1885.

whether the right of suit was barred or not, was immaterial, and, therefore, that art. 15(*b*) of sch. II of the Stamp Act did not apply.

A. C. Kunhammu v. *Gantz* (1) and *Kennedy* v. *Broun* (2) were cited *contra*.

The judgment of the Court (Kernan, Offg. C. J., Muttusámi Ayyar, Hutchins, and Parker, JJ.) was delivered by

HUTCHINS, J.—A Barrister's fee for services in litigation is a gratuity or honorarium. The relation of counsel and client in litigation creates an incapacity to contract for such services. Such services are not capable of forming such a valuable consideration as will support an action on the client's promise to pay, and conversely, if the client does pay, the payment must be held to be one without consideration.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Hutchins.

1885. November 4.

THE QUEEN-EMPRESS

against

APPÁVU.*

Ábkári Act, s. 2—Sale—Barter—Payment of wages in liquor.

Payment of wages in liquor does not amount to a sale of liquor within the meaning of s. 2 of the Ábkári Act (Madras Act III of 1864).

THIS was a case referred under s. 438 of the Code of Criminal Procedure by H. R. Farmer, Acting District Magistrate of Trichinopoly.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Kernan, Officiating C.J., and Hutchins, J.).

Counsel were not instructed.

HUTCHINS, J.—The facts found are that the accused gave the tope-watcher a bottle of toddy as wages in consideration of his service in watching the trees the previous night. The question is whether this amounts to "selling" liquor.

(1) I.L.R., 3 Mad., 138. (2) 13 C.B.N.S., 677.

* Criminal Revision Case 585 of 1885.

QUEEN-EMPRESS v. APPÁVU

The District Magistrate's argument is that such a transfer of liquor may be included in the term "barter," and he refers to s. 2 of the Ábkári Act (Madras Act III of 1864), which expressly provides that the term "selling" shall include bartering. But the section does not stop there: it says that selling shall include bartering . . . . for liquor, grain, or any other articles. It is clear that labour is not an article, so that, even if the delivery of toddy for wages could be deemed to be included in the general term "barter," it is not included in that particular kind of barter which the section mentions. On the principle *expressio unius est exclusio alterius*, any exchange of liquor for a consideration which is not an article would seem not to be a "selling."

The definition, however, is not exhaustive, and the question still remains whether a payment of wages by liquor is included in the general term selling. It seems to us that it is not. Both in the Contract Act and the Transfer of Property Act a sale is defined to be an exchange of property *for a price*. Section 118 of the latter Act deals with exchanges for other considerations than a money payment and thereby indicates that a price included money only, and that is the ordinary meaning of the word price.

The point is not altogether free from doubt, but a penal statute must always be construed in favour of the subject. On the ground that the Legislature has not made it clear that the delivery of liquor in consideration of wages is an offence, we think the acquittal in this case was right and decline to disturb it.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. August 3, 27.

VENKATAGIRI ZAMÍNDÁR (PLAINTIFF), APPELLANT,

and

RÁGHAVA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Unregistered lease—Proof of tenancy ejectment—Occupancy rights.

If a contract of lease is, for want of registration, ineffectual, the landlord is not debarred from giving other evidence of a tenancy and requiring the Court to adjudicate on his right to eject.

Dictum in *Nangali* v. *Ráman* (I.L.R., 7 Mad., 226) observed upon.

* Appeal 76 of 1884.

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, in suit No. 2 of 1883.

The plaintiff, Unidi Rájaha Rájá Velugoti Srí Rájá Gopála Krishna Yachendra Bahadur, zamíndár of Venkatagiri, sued the defendants, Duvúr Chinna Rághava Reddi and another, to eject them from certain land. He alleged that defendants held the land, which was styled "nagari iduva," under a muchalká executed in 1876 by the father of defendants which contained a condition that the land was to be returned whenever wanted, and that due notice to quit had been served on them.

The defendants denied that the lands were "nagari iduva" and alleged they were "izárá iduva." They also relied on the terms of the muchalká, under which, they contended, they were bound to deliver possession if the lands were leased out by the plaintiff on izárá to a third party, but not otherwise.

The District Judge held that, on the construction of the muchalká, the defendants could not be ejected unless the land was let on izárá by the plaintiff to a stranger.

Plaintiff appealed.

Hon. *Rámá Ráu* for appellant.

Mr. *Wedderburn* for respondents.

For the respondents it was contended that if the judgment of the District Court could not be supported, yet the decree might stand, because the lease on which the plaintiff claimed to eject reserved an annual rent above Rs. 50 and was not registered, and the plaintiff had proved no right to eject, apart from the muchalká—*Nangali* v. *Raman*.(1)

The judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.) was delivered by

TURNER, C. J.—The Judge has, in our judgment, misunderstood the condition in the muchalká of fasli 1285. If the lands held by the defendants are what are known as "home-farm" lands of the zamíndárí, they are lands, which, according to a very general custom of the country, the zamíndár reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue. The zamíndár, when he lets such lands, has ordinarily a right to resume them at the end of any agricultural year on giving due notice.

(1) I.L.R., 7 Mad., 226.

VENKATAGIRI ZAMÍNDÁR v. RÁGHAVA.

The condition to which the Judge alludes was intended to secure to any person, who might take a farm of the village, the same rights as the zamíndár himself would enjoy. If the farmer desired to have the lands, they were to be surrendered to him: if a lease was made, the lands were to be at once vacated. But the condition on the part of the tenant for the surrender of the lands would not imply that the landlord deprived himself of the right to resume the lands when he thought fit. But in this Court, it is contended that the muchalká cannot be accepted as evidence of any contract affecting the land, inasmuch as it is not registered.

This plea was not raised in the Court of First Instance because both parties relied on the terms of the muchalká. Let it be granted that the muchalká cannot be received in evidence for want of registration and is, on that account, inoperative. With all respect for the learned Judges by whom *Nangali* v. *Ráman*(1) was decided, we cannot altogether agree with them. We are unable to hold that, if a contract of lease is for want of registration ineffectual, the landlord would not be able to give other evidence of a tenancy and to require the Courts to adjudicate on his right to eject on the footing of a tenancy, for instance, where, as in this case, the defendants admit they are tenants and that they had paid rent. There is ample proof of the existence of a tenancy, and if the written contract cannot be looked at to establish or limit the rights of one party, neither can it be looked at to establish or limit the rights of the other. These rights must be ascertained independently of the abortive contract. In the view we should take of the muchalká, if admissible, it would matter little whether it was admitted or not. For while, on the one hand, we understand it to confer on the tenant no right against the zamíndár with regard to the duration of the tenancy, neither, on the other hand, does it impose on the tenant an obligation to resign the land to the zamíndár which would not have attached to the tenancy independently of the contract.

The main questions which must be determined are—(1) Whether, by the custom of the zamíndárí, such a right can be acquired in any land; (2) Whether the lands were of such a character that the tenants could acquire a right of occupancy therein; and (3) Whether if it could be acquired in the lands in suit it has been acquired by the defendant.

(1) I.L.R., 7 Mad., 226.

VENKATAGIRI ZAMÍNDÁR v. RÁGHAVA.

The zamíndár maintained that the lands were home-farm lands in which no right of occupancy could be acquired—the defendants that they were ordinary visabadi lands on which such a right could accrue and had accrued to them. Lands which the zamíndár may have held as home farm might be so treated by him as to lose their distinctive character. If it is shown that certain lands were home-farm lands and that a right of occupancy could not be acquired on such lands, it would nevertheless be open to the tenant to show that the zamíndár had consented to change their character and to treat them as ordinary lands.

As the issues we have indicated were not specifically raised, we shall remit them for re-trial on the evidence on the record and such further evidence as the parties may adduce.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1884. November 24. 1885. August 28.

LAKSHMANA (AUCTION-PURCHASER), PETITIONER,

and

NAJIMÚDIN AND ANOTHER (JUDGMENT-DEBTOR AND CREDITOR), RESPONDENTS.*

Civil Procedure Code, s. 622—Jurisdiction—s. 311, Sale set aside on account of irregularity only.

Where a Court, professing to act under s. 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant:

Held, that such order was passed without jurisdiction within the meaning of s. 622 of the said code.

THIS was an application to the High Court under s. 622 of the Code of Civil Procedure to set aside an order of J. H. Nelson, District Judge of Chingleput, cancelling a sale in execution of a decree in suit No. 4 of 1882 in the District Court under s. 311 of the Code of Civil Procedure.

The District Judge found that there had been manifold irregularities in the conduct of the sale, and held that the existence of such irregularities was of itself sufficient to prove

* Civil Revision Petition 360 of 1884.

LAKSHMANA v. NAJIMÚDIN.

substantial injury within the meaning of s. 311 of the Code of Civil Procedure.

Mr. *Branson* and *Rámánújáchárya*r for petitioner.

*Sadagópáchárya*r, for respondent No. 1, objected that the High Court could not interfere under s. 622.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following

JUDGMENT:—The finding now returned by the Judge is in substance that no substantial injury has been sustained. Upon this finding the order of the Judge setting aside the sale cannot be supported. It is then contended that this is not a case in which we ought to interfere under s. 622 of the Civil Procedure Code; but under s. 311, no sale ought to be set aside unless substantial injury as well as material irregularity is proved, and the Judge who set aside the sale in this case, though no substantial injury was proved, clearly exercised a jurisdiction which the law did not vest in him.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Officiating Chief Justice), Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, Mr. Justice Parker, and Mr. Justice Handley.

1885. November 6.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Court Fees Act, sch. II, art. 10(a)—Stamp Act, sch. I, art. 50(b)—Power to vakíl to obtain copies from Collector's office—Stamp.

A document authorizing a vakíl to apply for copies of records from the Collector's office is properly stamped with a Court-fee stamp under art. 10 (*a*) of sch. II of the Court Fees Act, 1870, and does not require to be stamped as a power-of-attorney under art. 50 (*b*) of sch. I of the Indian Stamp Act, 1879.

THIS was a case referred, for the decision of the High Court, by the Board of Revenue under s. 46 of the Indian Stamp Act, 1879.

The Resolution of the Board of Revenue, dated 27th May 1885, was as follows:—

"A difference of opinion having arisen in the Board as to the

* Referred Case 4 of 1885.

REFERENCE UNDER STAMP ACT, S. 46.

proper stamp duty leviable on the document submitted in this case, they resolve to refer the question for the decision of the High Court under s. 46 of Act I of 1879.

"The document purports to appoint one Chittúr Sundara Ráu as vakíl for the executant, and authorizes him to obtain for the latter copies of certain papers from the Collector's record; and the question for consideration is whether the document is properly stamped as a vakálatnáma with a Court-fee stamp of the value of eight annas under art. 10(*a*), sch. II, of Act VII of 1870, or whether it should be stamped with stamp of the value of one rupee as a power-of-attorney under art. 50, cl. (*b*), of the schedule to the Stamp Act I of 1879.

"In support of the former view, it is urged that an application for copies of records in a Collector's office must bear a Court-fee stamp of one anna under art. 1(*a*), sch. II, of the Court Fees Act, and that a document authorizing a person to make such application on behalf of another and obtain copies falls under art. 10(*a*) of the same schedule. A majority of the Board, however, do not consider that making an application, such as that referred to, can be regarded as conducting a 'case' within the meaning of the above article, and that the document in the present case is really a power-of-attorney and should be stamped as such under the Indian Stamp Act.

"The decision turns upon the construction placed on the phrase 'conduct of any one case.' On the one hand it is held to be a term of special and restricted meaning, within which an act of the kind under reference cannot be included; on the other, it is argued that the phrase includes all transactions connected with the conduct of any one case in the Court or executive office where presented, and must necessarily cover authority to apply for any papers connected with the case, such, for instance, as a copy of the decision; but in the case under reference there is nothing to show that the application for copies of records was connected with any case, or if it was so, that the application was made by the same person who conducted the case.

"The case is of considerable public importance; hence the expediency of a reference to the High Court."

The Acting Government Pleader (Mr. *Powell*) appeared to support the opinion of the majority of the Board.

REFERENCE UNDER STAMP ACT, s. 46.

The Court (Kernan, Offg. C.J., Muttusámi Ayyar, Hutchins, Parker, and Handley, JJ.) delivered the following

JUDGMENT:—A case need not necessarily mean a suit or judicial proceedings, but would include any petition or application to a Court or officer. A power to a vakíl authorizing him to present an application for copies falls under art. 10, sch. II, of the Court Fees Act and does not require to be stamped under art. 50 of sch. I of the Indian Stamp Act, 1879.

The party must apply to the Collector and affix an anna Court-fee stamp on the application. The Collector may, perhaps, consider he ought not to give a copy. The person holding the vakálatnáma may have to conduct *the case* for his client before the Collector and satisfy him, if he saw that the party is entitled to the copy. The matter is inquired into and the right of the party is investigated. Does not, therefore, the matter become a *case?* If there is a doubt in the matter, we are bound to decide in favor of the applicant as the subject cannot be taxed except by clear language.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1883. March 19. 1885. May 1.

VÍRARÁGAVA (PLAINTIFF), APPELLANT,

and

RAMALINGA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindú Law—Adoption after upanáyanam of sagotra—Bráhmans—Custom—Proof.

According to the custom obtaining amongst Bráhmans in Southern India, the adoption of a boy of the same gotra, after the upanáyanam ceremony has been performed, is valid—*P. Venkatesaiya* v. *M. Venkata Chárlu* (3 M.H.C.R., 28) overruled.

THIS was an appeal from the decree of R. Vasudeva Ráu, Subordinate Judge at Negapatam, confirming the decree of A. Sámi Ayyar, District Múnsif of Tirutarapúndi, in suit 242 of 1877.

On the 19th March 1883, after two remands for fresh evidence,

* Second Appeal 434 of 1879.

the case was heard by a Full Bench of five Judges (Turner, C.J., Innes, Kernan, Kindersley, and Muttusámi Ayyar, JJ.).

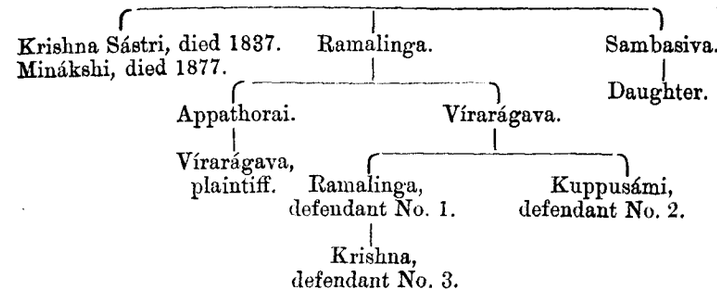
Hon. *Rámá Ráu* for appellant.

Rámánujácháryar for respondent No. 4.

The facts and arguments appear from the judgment.

On the 1st May 1885 judgment was delivered by

TURNER, C.J.:—The following pedigree illustrates the relationship of the persons whose respective claims to the property of Krishna Sástri form the subject of these proceedings:—



Krishna Sástri, Ramalinga and Sambasiva were three Bráhman brothers and were divided.

Krishna Sástri died about 30 years before suit without issue, but leaving a widow who obtained possession of his property and died in 1877. Sambasiva left no male issue. Ramalinga left two sons, Appathorai, the father of the appellant, and Vírarágava, the father of the respondents Nos. 1 and 2.

The appellant, alleging that the property in suit was the property of Krishna Sástri, sued to obtain a moiety alleging it to be the share to which he is entitled as the grandson of Krishna's brother, but of which the respondents refused to deliver possession to him. Respondent No. 4, the maternal uncle of respondents Nos. 1 and 2, was impleaded as in joint possession with the respondent No. 3, of a house forming part of the estate which he claimed to hold under a sale-deed executed by Minákshi and the respondent No. 3, and the respondent No. 5 is a stranger who claimed to hold certain plots of lands Nos. 24 and 25 under a sale-deed from the respondent No. 3. Respondents Nos. 1, 2, 3, did not appear to contest the claim; Nos. 4 and 5 put the appellant to proof of the title he asserted and alleged that the respondent No. 3 had been adopted by Minákshi.

VÍRARÁGAVA v. RAMALINGA.

The appellant denied the adoption.

Three issues were framed—

(1) Whether the plaintiff (appellant) and defendants (respondents) Nos. 1 and 2 stood to Minákshi in the relationship alleged?

(2) Whether the defendant (respondent) No. 3 had been adopted by Minákshi with the authority of her husband? and

(3) Whether the plaintiff (appellant) was entitled to the relief claimed by him?

At the trial three witnesses were called by the appellant to prove the relationship which subsisted between the appellant and Krishna Sástri. Of these, the first, a son of the daughter of Sambasiva, spoke of the respondent No. 3 as the adopted son of Minákshi and deposed that respondent No. 3 had lived with that lady for some years before her death and had performed her funeral ceremonies. The second witness, who owned a house in the street in which Minákshi resided, admitted he had heard of the adoption about the time it is alleged to have been made, and that he knew of his own knowledge that respondent No. 3 had subsequently performed the annual ceremonies of Krishna Sástri and had also performed the funeral ceremony of Minákshi. The appellant's third witness deposed that Minákshi celebrated the marriage of respondent No. 3 and that the respondent No. 3 had performed her funeral ceremony. Respondents Nos. 4 and 5 examined respondents Nos. 1 and 3 whom the Múnsif describes as unwilling witnesses. Respondent No. 1 admitted that respondent No. 3 had been adopted by Minákshi. Respondent No. 3 deposed that he had been adopted by Minákshi as a son to her husband about ten years before suit; that the ceremony took place in the house of Krishna Sástri and in the presence of a large number of persons; that he had thereafter performed the funeral ceremonies of Krishna Sástri, had dealt with the estate and had performed the funeral ceremony of Minákshi. It transpired, on his cross-examination, that he was between twelve and thirteen years of age when he was adopted, and that his upanáyanam ceremony had been performed before the adoption. Respondent No. 3 admitted also that he had joined Minákshi in dealing with Krishna Sástri's property.

The Múnsif, himself a Bráhman, found the fact of adoption proved and, although he did not distinctly express any opinion as to the validity of the adoption, he gave effect to it and dismissed the suit. An appeal was preferred to the Subordinate Judge on two grounds, namely—(1) that the adoption of a Bráhman after the performance of the upanáyanam ceremony was invalid, and (2) that there was no proof that the widow of Krishna Sástri had received from her husband authority to adopt.

The Subordinate Judge held that, inasmuch as the boy was of the same gotra as Krishna Sástri, his adoption after the performance of the upanáyanam ceremony was not invalid. He also held that, although the authority to adopt was not proved, the consent of respondent No. 1, a sapinda, evidenced by his gift of the boy was sufficient. On second appeal the grounds of objection taken in the Lower Appellate Court were repeated.

The learned Judges by whom the appeal was heard dealt with the first only of these questions. They observe that on the authority of the Dattaka Chandriká, which obtains in Southern India, such an adoption ought not to be recognized; that in 1838 the Pandit of the Sadr Court had declared that the period for adoption among the regenerate classes was prior to upanáyanam; that this opinion was followed by the Sadr Court in 1853 and 1859 and adopted by the High Court in 1865—*P. Venkatesaiya* v. *M. Venkata Chárlu* (1). They explained that, according to a text of Vasistha, filial relation in a religious sense proceeded from initiatory rites and that a son initiated by his natural father was regenerated and born a second time to his father by virtue of his consecration to the obsequies to be performed in the family and stood in the place of a post consecrated for a sacrifice and thereby rendered unfit for other similar purpose—Dattaka Mímansá, ch. iv, ss. 39 and 41.

They thought it clear from the text of Vasistha, which speaks of the eight initiatory rites, that directly the investiture of the characteristic thread was made, the son became the twice-born son of his father, and, by reason of the consecration to the performance of religious obsequies in his father's family implied by the investiture, ceased to be a competent subject of affiliation by another. With regard to the argument that, where the adoption was in the

(1) 3 M.H.C.R., 28.

VÍRARÁGAVA v. RAMALINGA.

same gotra, it was no bar to adoption that the upanáyanam had been performed on the proposed boy, they observed that, as pointed out by Mr. Justice Holloway, the very writers who fix the maximum of age also enjoin the invariable adoption of one of the same gotra. They noticed that in the *Travancore case* (1) the point actually decided was only that a brother's son could be adopted after upanáyanam. They, however, considered it desirable to remit an issue as to the usage obtaining among Bráhmans in Southern India, and framed and remitted the issue accordingly.

On the trial of the issue the respondents Nos. 4 and 5 examined six witnesses, the appellant examined none. Of the six witnesses examined by the respondents, five were Smartha Bráhmans and one Madhava Bráhman. Sámi Sástri, a Vakíl of the District Múnsif's Court at Trivalúr, deposed that his uncle Ráju Sástri of Mannargudi had adopted his (witness') younger brother Nilakandan five years after the upanáyanam had been performed, and that the young man was living with Ráju as his adopted son, and that Ráju was a Pandit of reputation for Vedic learning and of some substance.

On cross-examination, he admitted that Ráju had actually recited the Bramavupatheisam to Nilakandan at the time of his upanáyanam and had then expressed his wish to take the boy in adoption, but he explained that the ceremony of upanáyanam was being performed on two brothers simultaneously, and that his father was performing it on the other, and he asserted that the adoption took place five years after upanáyanam when a datta homam was performed. Krishnasámi Sástri, a professional alms-seeker, having also a small quantity of land, deposed that when he was eighteen years of age, he had been adopted by his undivided paternal uncle, and that his upanáyanam had been performed when he was seven or eight years of age; that his natural and adoptive father had made a partition between them, and that after their deaths his elder brother and the witness took their shares respectively. The witness had but one brother, consequently each of the brothers would have taken precisely the share they received had there been a partition and no adoption. The witness could not recollect whose son he was called at the time of his marriage.

(1) 8 Mad. Jur., 151.

VÍRARÁGAVA v. RAMALINGA.

He admitted that he performed the annual ceremonies of his natural as well as of his adoptive parents and still addressed them as his parents.

He deposed to the adoption mentioned by Sámi Sástri as having been made by Ráju with whom he was connected by marriage, and gave as other instances the adoption of Pichikaruppan by his uncle Nanu Ayyan, one of three brothers, two years after the performance of upanáyanam; the adoption of Venkata Rámayyan by his uncle Punju three days after upanáyanam had been performed by his natural father under the advice of the Pandit that the latter ceremony should be performed by a married man; the adoption of Krishna by his uncle Krishna Sástri, and an adoption by Aiyathorai Sástri of a boy on whom upanáyanam had been performed.

Venkata Ráyar of Mannargudi deposed that he was adopted after upanáyanam by the widow of Appu Ráyar, his father's dáyadi in the first degree with the consent of a dáyadi; that the lady celebrated his marriage and that he performed her funeral and annual ceremonies and had taken possession of his uncle's property without objection on the part of other dáyadis who were equally entitled if no adoption had been made. This witness produced a deed registered on the 15th June 1865 which contained the following recital: — "I and my husband having been living since the last 68 years and not having had any issue and having therefore intended to adopt a boy, resolved to select you for our adopted son, although upanáyanam has been performed upon you, on the ground that you are the son of one of our dáyadis, and on the ground that such an adoption of a competent boy of such an age being consistent with Dharma Sástras." The deed further recites that as the husband had died before the boy could be brought down from Madura he could not adopt him and that the widow had adopted him under her husband's orders. The recital in this deed suggests that the propriety of the adoption had been considered.

Muttu Ayyan of Mannargudi, a relative of respondent No. 4, deposed that his uncle Nanu Ayyan had a son who died, and that thereafter he adopted Kumarasámi Ayyar, a son of his younger brother then 12 years of age, and after upanáyanam; that he, the witness, was present at both ceremonies, that Nanu was dead and his funeral and annual ceremonies were performed

VIRARÁGAVA v. RAMALINGA.

by Kumarasámi—the witness asserted he knew of many other instances in which adoption had followed upanáyanam, and that although he had not been present when the ceremonies were performed he knew that the adopted sons were living in their adoptive fathers' houses. He mentioned the adoptions by Aiyathorai, Ráju, and Punju, which were spoken to by the witness Krishnasámi. Krishna Sástri of Mannargudi, who described himself as related, he knew not how, to respondent No. 4 and whose adoption was spoken to by Krishnasámi, deposed that when he was of the age of 22 his elder brother (his father had died) gave him as an adopted son to their uncle Krishna who had no issue—he stated he was nine years of age when his upanáyanam had been performed, and that at the time of his adoption his younger brothers had been married. Lakshmana Ayyan of Negapatam deposed that his father Krishnayyan had given him in adoption to Kylásayyan, his father's younger brother—that the adoption took place fifteen years ago when he was thirteen years of age, and after his upanáyanam had been performed he had been instructed in the Brahmavupatheisam by his natural father. He stated further that his adoptive father was dead and that he had performed his funeral rites and was performing his annual ceremonies. He stated on cross-examination that Kylásayyan's wife was alive and had made no objection to his adoption, and that there were also other dáyadis in the family.

Upon this evidence the Subordinate Judge found that the adoption of a Bráhman after upanáyanam was customary when the adoption was made of one in the gotra by an uncle or great uncle.

On the return of this finding the learned Judges pointed out that the inquiry was to extend to the usage in Southern India—they intimated their opinion that the evidence was insufficient to establish a usage so general, uniform and certain as that contemplated by the issue. But seeing that the appellant had called no evidence to rebut that of the respondents and they considered it desirable that the inquiry should be extended further so as to ascertain what was the usage in the southern Districts of the Presidency, they remitted the issue for further trial. This inquiry was accordingly re-opened, seven witnesses were examined on the part of the respondents under a commission issued to the Subordinate Judge of Madura.

VÍRARÁGAVA v. RAMALINGA.

Chandrasékara Váthiar deposed that he had been adopted by his father's younger brother when he was fifteen years of age, and after upanáyanam; that the adoption had not been disputed; that he was married in his eighteenth year; that his natural father had performed Brahmavupatheisam on him; that his natural and adoptive fathers lived in commensality when the adoption was made, but had since separated, and that he was living at Madura where he was performing the functions of purohit.

Venkataráma Sástri, an old man, deposed that he had heard of adoptions after upanáyanam, and then withdrew his statement and professed he had not cared to inquire whether they had taken place or not.

Pachi Ayyan deposed that his father's younger brother, a widower, living with his elder brother, adopted the elder brother's son after upanáyanam and when the lad was of the age of eighteen. That the lad so adopted was married on the same day, the adoptive father performing the functions of parent—the witness added that he himself would have been selected for adoption had he not been married.

Subramanya Sástri asserted that he was adopted in his twelfth year (his upanáyanam ceremony having been performed in his seventh year) by his senior paternal uncle's widow; that his elders consulted several authorities and performed the adoption; that at the time of the adoption his natural and adoptive fathers were undivided; that his uterine brothers had lately effected a partition and had offered him a share but that he had declined to receive it as he had enough property from the father of his adoptive mother. The witness added he had looked for authorities in books but could find none—that with respect to usage even married men had been adopted by dáyadis. He admitted he could not cite instances in support of this assertion.

Muttu Krishna Ráu deposed that he had adopted a boy, the son of a gnati on whom upanáyanam had been performed by his natural father after he had consulted the purohits who advised him that the adoption could be made and that all his brothers and relations agreed to the adoption.

He asserted that there were 1,000 cases of such adoptions though he remembered only one—he also asserted that even married men could be adopted among gnatis though he could mention no other case. He considered that the prohibitions against

VÍRARÁGAVA v. RAMALINGA.

adoption after upanáyanam was valid only in the case of persons of different gotras.

Venkata Ráu deposed that he had adopted after upanáyanam his uncle's son; that the boy had died and the witness had made a provision for the boy's widow; that his uncle was his nearest dáyadi and his property was all self-acquired. He also stated that one of his distant relations, Muttu Krishna Ráyar, had made a similar adoption.

Ranga Subbayyar deposed that one of his relations, Vethalagundu Rámayyan, adopted Melmungalam Subrayar's son after upanáyanam and that the brothers of Rámayyan consented to the adoption—the witness did not mention whether Rámayyan and the boy were of the same gotra or not.

Naráyana Sástri, schoolmaster, examined by the Subordinate Judge of Negapatam, deposed that he had been adopted after upanáyanam by his uncle, whose property he had inherited; that his natural father's father and his natural father had died; and that the property of his natural father had been taken by another adopted son; that his natural father was the only near dáyadi; that there were distant dáyadis who made no objection. The witness asserted that adoptions after upanáyanam were customary though he could not specify instances.

Sitarámayyar, petition writer of Negapatam, deposed that his younger brother had been taken in adoption by his uncle after upanáyanam.

Chinna Rámayyan, village headman of Kolimani in the District of Trichinopoly, deposed that after upanáyanam he gave his son in adoption to his dáyadi, Visvanáthayyan; that the adoptive parents had died and his son had performed their funerals and succeeded to their estate. He also stated that he was aware that similar adoptions had taken place in the District of Trichinopoly; and that among his dáyadis, Subramanya Ayyan, taken in adoption by Visvanáthayyan after upanáyanam, performed Visvanáthayyan's funeral ceremonies and inherited his estate; and that Aiyathorai Ayyan took Narainayyan of the same gotra in adoption after upanáyanam; and that Dorasámi Ayyan's wife, with the permission of her husband and his dáyadis, adopted Sámi Ayyan after upanáyanam, and Sámi Ayyan had taken his adoptive father's property.

On cross-examination the witness admitted that the adoption

VÍRARÁGAVA v. RAMALINGA.

of his son was contested by the mother of the adoptive father who filed a suit, but withdrew it on receiving some property and allowed the validity of the adoption. He also admitted that the brothers of the other Visvanáthayyan had contested the adoption made by Visvanátha, and that one of them, Rangasámi, filed a suit, but afterwards compromised it allowing the adoption, as it was thought a question might arise as to the validity of the adoption of one of Rangasámi's sons.

Narainappayyan of Kolimani, who appears to be the same person as was mentioned by the preceding witness as Narainayyan, deposed that he was adopted after upanáyanam by his uncle Aiyathorai Ayyan, and had inherited his property maintaining the widow. He spoke to the instances mentioned by the preceding witness—the adoption by Visvanáthayyan, one of his gnatis, the adoption by Dorasámi Ayyan and the adoption of the witness Rámayyan's son. Tirumalai Ayyangár of Tinnevelly deposed he had given his son in adoption to his uncle Ramánúja Ayyangár three months after upanáyanam had been performed—that he had acted on an opinion he had received from Peria Sástrial. He also mentioned that one Krishna Ayyangár had adopted his dáyadi, Ponnu Ayyangár, after upanáyanam and that one Alwar Ayyangár had similarly adopted his brother's son Appana. On cross-examination this witness stated that he had been present at the adoptions he had mentioned which took place in the temple street and he admitted that in these cases there were no dáyadis competent to object.

Kuppusámi Ayyan of Mannargudi deposed he had been adopted by his paternal uncle Nanu after upanáyanam, and that he had after his uncle's death received the estate, 5 vélis of land, without opposition on the part of any dáyadi, but he did not mention whether there were any dáyadis who would object.

Srinivasa Ayyangár of Mannargudi deposed that he had given his son Krishnasámi Ayyangár after upanáyanam in adoption to the son of his paternal uncle—that the boy had performed the funeral ceremony and succeeded to the estate of his adoptive father. He also mentioned, as instances of similar adoptions, the adoption of his brother-in-law's son, Krishna Ayyangár, by his paternal uncle Savari, who had succeeded to Savari's property without opposition, and the adoption of Chinnasámi by the widow of his uncle in

VÍRARÁGAVA v. RAMALINGA.

accordance with her husband's permission. He admitted in cross-examination that there were no dáyadis to contest the adoption of his son.

Ten witnesses were examined on the part of the appellant.

The 1st, 2nd and 3rd witnesses, who were called to speak to the circumstances of the family, gave no evidence as to custom. They admitted that the defendant No. 3 had been adopted by Minákshi; that he had thereafter performed the annual ceremony of her husband; that she had arranged his marriage, and that he had performed her funeral rites and subsequently lived in the house she had occupied.

Appu Sástri of Idayathamangalam, who professed to have studied the Sástras and Rigveda and was a nephew of the late Pandit of the Sadr Court, denied that the custom of adoption after the upanáyanam ceremony had been performed was recognized as valid in the Districts of Tanjore and Trichinopoly even when the parties to the adoption were of the same gotra. He asserted that such an adoption had been set aside in the Trichinopoly Court and no appeal had been preferred. He mentioned that at Tirupalathurai, in the District of Trichinopoly, one Rangasámi Ayyan had adopted a boy after upanáyanam, and his dáyadis had interfered and the adoption was set aside, but he could not say what relationship existed between Rangasámi and the boy. He knew of the adoption made by Ráju to which the witnesses for the respondents spoke. He gave it as his opinion that an adoption would be invalid in which the adoptive father did not perform at least the ceremony of upanáyanam.

Rámá Sástri of Tanjore, a Bráhman mírásidár, an officiating priest for 50 years, deposed that he had seen many adoptions by Bráhmans—he had not seen generally an adoption made after upanáyanam. One or two had been made but they had been set aside—that in Tirupalathurai Venkatarámayyan's house his brother had adopted a boy after upanáyanam and the adoption had been set aside in a suit that went up to the High Court. Natal Nandu Kaveri Vasudeva Sástri adopted his paternal uncle's son after upanáyanam and the adopted boy sued to recover a debt, but failed as the Sadr Pandits, whom the Múnsif consulted, pronounced the adoption invalid and the widow recovered the estate. In his opinion no adoption of a Bráhman could be made after the

VÍRARÁGAVA v. RAMALINGA.

performance of the upanáyanam, and after a person had attained that stage in his religious life his father could not give him away.

Vythinátha Sástri, a mírásidár and priest of Kurambal who professed he had officiated at several adoptions among Bráhmans, declared that in not one of them was the adoption after upanáyanam. In all the cases a boy of a certain gotra had been given to a boy of the same gotra. He was not examined as to whether an adoption after upanáyanam would be valid if made in the gotra. Gurusámi Sástri, officiating as priest in Sámimalai near Kumbakonam, deposed he had officiated at 4 or 5 adoptions all made before upanáyanam. He considered an adoption after upanáyanam forbidden by the Sástras even to persons of the same gotra and that the usage coincided with the law.

Sitaráma Díkshatar, priest residing at Palmanari in Tanjore, deposed he had officiated at ten or twelve adoptions in some of which the boys were, and in others in which they were not, of the same gotra as the adopter, and that all were made before upanáyanam. He was not examined as to whether such an adoption as we are considering, if made, would be valid.

Vythinátha Sástrial of Negapatam, priest of seventy or eighty families, had seen no instances in which adoption had taken place after upanáyanam. He knew only one adoption which took place and the parties were then of different gotras. He had heard of one case in which an adoption after upanáyanam had been set aside in a suit though the parties were dáyadis, but he added that he knew the adopted boy had nevertheless been performing, up to the time when he was examined, the annual ceremonies of his adoptive father and mother. Rájappayyan of Idayathamangalam in Trichinopoly had attended about ten adoptions in all of which the boy had not undergone upanáyanam. He had heard of an adoption at Tirupalathurai after that ceremony and that it was set aside. This is possibly the same instance as was mentioned by other witnesses. The witness did not state what was his own opinion as to the validity of an adoption among dáyadis after upanáyanam.

Upon this evidence the Subordinate Judge, himself a Bráhman, again returned a finding that the adoption was valid and the learned Judges, before whom the case came for hearing, considering that there were grounds for doubting the correctness of this

VÍRARÁGAVA v. RAMALINGA.

Court's decision in *P. Venkatesaiya* v. *Venkata Chárlu*(1), referred the appeal to the Full Bench for disposal.

The general rule that the adoption of a Bráhman after upanáyanam is invalid is not, I understand, questioned, but it is alleged that this general rule is subject to exception when the person taken in adoption is of the same gotra as the adopted, and the question, which is presented to us for decision, is whether the evidence in this case is sufficient to warrant the Subordinate Judge in arriving at the conclusion that the exception is a part of the customary law of the Southern Provinces of this Presidency, while it has been ruled that "under the Hindú system clear proof of usage will outweigh the written text of the law." We have been warned that "it is of the essence of special usages modifying the ordinary law . . . . that they should be ancient and invariable and that they should be established to be so by clear and unambiguous evidence."

English Judges in this country have been placed at some disadvantage in ascertaining the laws and usages accepted by the people. The treatises, which have commanded the highest and most extensive authority, were composed some centuries before the introduction of British Courts. With the reference for antiquity characteristic of Hindúism, they are not, nor were they intended to be, records of law obtaining in practice, but commentaries on the text of treatises accepted as inspired. Although now and again they refer to existing practice they do so as corroborating a subtle exposition of a text. At the same time they disclose that the law had undergone changes, that considerable variety obtained between the practice of the present and the practice of the past, and that the opinion even of the learned was still in many points unsettled. Between these principal treatises and the institution of Courts with proceedings regularly conducted and recorded, we have a long interval during which one or other of the controverted opinions must have found more or less general acceptance. But there has been no living authority commonly recognized as decisive and coercing to uniformity. Hence local divergences of practice necessarily ensued. But while it is not impossible to detect these divergences when they can be traced to the influence of a school of Pandits which has accepted the teaching of a

(1) 3 M. H. C. R., 28.

VÍRARÁGAVA v. RAMALINGA.

particular commentator, it is especially difficult to do so when the views of the commentator locally accepted as authoritative have been modified by practice. In a country in which property is greatly sub-divided and the written law obscure and available but to few, many causes conduce to bring about partial deviations even from such portions of the law on which educated opinion had attained more or less unanimity. The influence of natural affection may have induced the head of the family to dispose of the family wealth otherwise than in strict conformity with the precepts of the law, and the good feeling of the members has led them not to be too exact in vindicating their legal rights. Of this we have an instance at the present day in the very usual abstinence of Muhammadan ladies from insisting on their claim to share in their husbands' estate in competition with their children.

The ignorance of the local Pandits may have led here and there to an unintentional deviation from the law—and in places where the influence of the Muhammadan has for a season prevailed, the absence of an authority to constrain obedience to the personal law of the conquered cannot have been altogether without effect in unsettling the law. Lastly there are the great changes which changed circumstances must operate in the legal conceptions of the persons subject to a personal law and which probably have never been more active than in this century.

In the case before us there is considerable evidence that, notwithstanding the ruling of the High Court, the practice of adopting dáyadis after upanáyanam obtains, and seeing that no less than three Bráhman Judges, the Múnsif, the Subordinate Judge and our learned colleague, have pronounced in favor of the usage, I should be reluctant to hold that the Subordinate Judge was not justified in finding it sufficiently established to have the force of law. The evidence as to present practice appears to me to be supported precisely where it requires support to justify us in accepting the alleged usage as customary law. Our learned colleague has shown us that filiation is not constituted by upanáyanam but by the gift and acceptance of the youth—that adoption within the gotra and çaka works no necessary change on what is fixed by upanáyanam, the gotra, the çaka and the çama. The introductory words of the text of Vasistha "Sprung from one following a different gotra" permitted the opinion that the rule

VÍRARÁGAVA v. RAMALINGA.

which has been inferred from it applied only to those born out of the gotra. And we have been shown that this opinion was entertained by the author of the Datta Kaustabam. It is said that, when one of the same gotra is adopted, the rules as to initiatory rites do not apply, and one may be adopted after upanáyanam, and this author, indeed, goes further and maintains in reference to the instance of Somaseka in the Ramáyana that adoption after upanáyanam is permitted even when the youth is of a different gotra. Then we have the text of Prajápati—The acceptance of a son in adoption is good if in 12 days, middling if after tonsure, and inferior if after upanáyanam. The adoption of one who is married will become a cause of distinction to the family. So also in the Smriti Sangraha we find the injunction "Do not give one who has entered on an Asramam (period of life) give one who is not invested when there is no distress. In distress give though he is even a Brahmáchári (*i. e.*, a person who has been invested with the sacrificial thread) if a second son."

The passage in Daksha has also been brought to our notice. "A wife may give in distress a younger son though he is a Brahmáchári and 12 years of age as in the case of Somaseka."

These texts are cited in Vythinátha Díkshatar, a writer of authority in the Tamil Districts, who approves of them. Here, it appears to me, we have a foundation for the existence of a local custom at variance with what is now recognized as the more general rule. It may, I think, be shewn that the exception had at one time more general acceptance than is now admitted.

It must always be a task of some difficulty to ascertain how far an apparent deviation from the text of the law is unintentional, and how far it is due to some temporary circumstances. And the difficulty is increased when the investigation must be conducted on materials supplied by suitors who have not the means to defray the cost nor in many cases ability to suggest the course it should pursue. It is not, therefore, matter for surprise that, in their anxiety to act on such information as appeared to them the more reliable, the Courts of British India should have exposed themselves to the criticism that they have guided their decisions too much by the treatises of ancient commentators and have disregarded existing usage. There has not been any unwillingness on the part of the Courts to undertake inquiries into custom, but there has been absence of material which would enable them to ascertain the

existence of usage sufficiently proved to be accepted as law, and a reluctance to introduce confusion into the law and uncertainty as to their rights among those who are governed by the law by the recognition of a deviation from the texts of the law which has been unintentional or would be explicable if the circumstances were more fully known.

I cannot admit that these considerations ought not greatly to influence the Courts, but on the other hand, I am compelled to admit that they have in some instances been accorded somewhat too much weight and that it is possible that in view of fuller information it may be necessary to modify in some few instances the conclusions at which the Courts have arrived. I say in some few instances because I do not think much difference will be found to exist between the established usage and the written law on the points on which the circumstances accepted in the locality have pronounced themselves explicitly.

The earliest recorded precedent under British rule relating to this Presidency is mentioned in *Veeraperumal Pillai* v. *Narain Pillai*.(1)

"Sir Archibald Campbell, in consequence of opinions given him by the Pandits of Tanjore, had placed Ameersing on the musnud of that Kingdom in derogation of Serfogie (the present Rajah) claiming as an adopted son. The integrity of the opinion being suspected, there was a reference to Lord Cornwallis who got Sir William Jones to state the substance of the questions in Sanskrit to some of the most learned Pandits in Bengal and Benares which that eminent person took pains to do in such a manner as to render it impossible for those persons to guess who were the interested parties."

The learned Judge proceeded to say that being actuated by similar jealousy and solicitude he had prepared and circulated a string of questions pertinent to the points before him and was in possession of answers from Kási (Benares) to Ramésvaram from various parts of India in every direction.

One of the questions that called for decision was the limitation of age, and the learned Judge after noticing the distinction between Bráhman and other castes, observed "with regard to the age of five as agreed to have been limited by the Sástra for

(1) 1 Strange's Notes of Cases, 83.

VIRARÁGAVA v. RAMALINGA.

adoption, the result of a careful perusal of all the texts in the digest and commentary was found to be consistent with, if not to confirm, the law as declared by the Pandits of the Sadr Dewani Adálat in the Tanjore case." He cited the answer of the Pandits as follows:—"That the restrictions as to purification and age are to be observed only in instances where adoption takes place of those who are not sagotras. That no Muni or divine legislator has positively said so, but that in a number of books of high authority the rule is understood to be that in case of filiation by adoption, provided the adopted be a sagotra, the adoption is valid and the right to inheritance will attach though he have passed his fifth year and undergone the purification by tonsure." He added "The strict interpretation of sagotra is one who has descended in a direct male line from one common ancestor."

The opinion of the Benares Pandits was also cited as follows:—"In the central region the inhabitants adopt children who are advanced more than five years in age and have undergone the tonsure and other modes of purification among the lineage of their natural father, and sons so adopted inherit the estates of their adoptive fathers. That in the Deccan, when adopting from their own lineage, if they do not find a child who has not undergone the tonsure, they take a child who has undergone it."

Sir Thomas Strange inferred from this opinion that the limitation as to age was inapplicable not only where the person to be adopted was a sagotra, but connected with the adopter through a female. It is obvious that the terms of the translation do not necessitate this conclusion, and it is not supported by any authority which we have as yet discovered. It would appear from the rest of the judgment that Sir Thomas Strange was not at the time fully informed of the supposed reason for the rule respecting the limitation of age, and of the grounds on which it was considered inapplicable where the person to be adopted was a sagotra.

The judgment is nevertheless important—although the opinions cited are those of the Pandits of Benares and of the Sadr Dewani Adálat of Bengal, it is certain that if Sir Thomas Strange had discovered any discrepancy between those opinions and the opinions he had collected from the Southern Presidency, he would not have failed to mention it.

We have then authority for the position that as early as the

VIRARÁGAVA v. RAMALINGA.

commencement of this century there was a *consensus* of opinion among Hindú lawyers that the rule prohibiting the adoption of a Bráhman after the performance of tonsure or the other purificatory ceremonies was not understood to apply in the case of an adoption of a sagotra. We have also authority for the position that although it was admitted that this doctrine was not expressly declared by the leading authorities on the law of adoption, it was known to be declared in treatises recognized as authoritative.

The judgment to which we have referred was delivered by Sir Thomas Strange in 1803 when he filled the office of Recorder. His work on Hindú Law was published in 1830. He there recognizes the grounds on which the rule respecting adoption prior to the completion of the initiatory ceremonies was founded, but he observed "The question (of age) varied according as the adopted is taken from a family nearly related or from strangers," ch. iv, and again "that they" (the ceremonies of tonsure and upanáyanam) "should so remain (to be performed) is of less consequence in proportion as the adopted is nearly related to the adopter," and finally he leaves the question, as to the eligibility of a boy for adoption after the performance of the ceremonies, an open one.

In *Prayaga Venkana* v. *Lachsmi* (27th July 1809) (1), the question was raised whether a brother's son was eligible for adoption. The Pandit replied that according to the Dattaka Mímánsá the sons of brothers invested with the sacrificial thread might be adopted, and Mr. Ellis observed that the more correct because the more reasonable opinion appeared to be that a person on whom upanáyanam had been performed was eligible "if of the same gotra; ineligible if of a different gotra from the adopter." *

In *Sadasiva Pillai* v. *Vadaganadha Pillai* (2), the Pandit certified that the adoption of an adult being a brother's son was valid. Mr. Colebrooke observed that a difference of opinion prevailed in regard to the adoption of adults or persons for whom certain ceremonies (Samskara) had been performed, the prevalent doctrine in

(1) 2 Strange's H. L., 102. (2) 2 Strange's H. L., 109.

* In a note which will be found in Strange's Hindú Law, 3rd edition, 169, Mr. Ellis refers to the chapter in the Madhaviyam on religious rites to be performed on adoption, and observes "This Pracarana concludes thus: Etadaswagotra putra grahana vishayum Dattaurasa." Thus is particularized the ceremonies required on adopting a son not of the same gotra. Whence it is inferred that the performance of the Datta Homam ceremony, of which the effect was to change the gotra of the adopted son was not necessary in the case of an adoption within the gotra.

VÍRARÁGAVA v. RAMALINGA.

most parts of India being adverse to it. He added "the objections are less forcible in the instance of a relation on the male side than in the case of a stranger." Mr. Ellis considered the Pandit's opinion correct. In *Kerutnaraen* v. *Mussummaut Bhobinesree* (September 1806) (1), where the person adopted was apparently not a sagotra, Mr. Colebrooke observed "in other provinces and even in Bengal if the adoption be of a near relation on the paternal side no difficulty would occur, as the adoption of a brother's son or other nearest male relative would be unquestionably valid at an age much exceeding that specified."

We can find no ruling on the point before us in the reported decisions of the Sadr Court of this Presidency. It was, however, taken in *P. Venkatesaiya* v. *Venkata Chárlu*(2), but it appears from the report that the question was imperfectly argued. No reference seems to have been made to *Veeraperumal* v. *Narain Pillai*(3), *Prayaga Venkana* v. *Latchsmi* (4), and *Sadasiva Pillai* v. *Vadaganadha Pillai* (5), nor were the learned Judges referred to the passages in the unprinted commentaries which have been collected by our colleague.

In *Ramasami Iyen* v. *Bhagati*(6), decided by the High Court of Travancore, the Chief Justice referring to the text from the Kálika Purána—"Sons given and the rest though sprung from the seed of another, yet being duly initiated under his own family name become sons" &c. Dattaka Mímánsá s. 4, para. 22, and to the commentary—"Although sprung from the seed of another, sons given and the rest when 'duly initiated under his own family name' (that is, by the adopter according to the form prescribed by his own code under the family name of himself) into the different rites commencing with that for a male born, then become sons of the adoptive parent, not otherwise," *Ibid.*, para. 23, observed in the case of a brother's son it cannot be said that by the upanáyanam already performed in the united family he had been initiated under a family name different from that which he would have to take if he had to be adopted by the uncle or uncle's wife. The distinctive family name (tribe or gotra) would be identical and the code or branch of the Veda which the boy and the uncle follow would be also the same, and he held the reason of the prohibition

(1) 1 Sel. Rep., 161.
(2) 3 M.H.C.R., 28.
(3) 1 Strange's Notes of Cases, 83.
(4) 2 Strange's H. L., 102.
(5) 2 Strange's H. L., 109.
(6) 8 Mad. Jur., 151.

VÍRARÁGAVA v. RAMALINGA.

ceasing the prohibition would not apply and that the said prohibition is clearly directed to a case where the gotra of the adopter is different from that of the natural family of the boy adopted. For there might be cases in which adoption from a different family (gotra) may become necessary, that is, in the absence of nearer relatives and it is to such cases clearly the case applies. The other learned Judges concurred.

In view of the support which the evidence in this case receives from the circumstances that the usage was regarded as sanctioned by some writers of authority, that it was accepted by a more recent writer held in esteem in the Tamil Districts and that evidence of its recognition is afforded by the earlier cases to which we have referred, I consider we should not be justified in holding that the Subordinate Judge ought not to have accepted the usage as sufficiently established by the evidence to be received as a part of the law.

This being the only question referred, the case will be sent to the Division Bench for disposal.

KEENAN, J.— I concur.

MUTTUSÁMI AYYÁR, J.—I concur.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

THE QUEEN-EMPRESS

against

APPATHORAI.*

1885. November 17, 23.

Act XXIV of 1859 (*Madras*), *s.* 48 (5)—*Act I of* 1885 (*Madras*)—*Dung-heap kept in a town, no offence.*

By cl. 5 of s. 48 of Act XXIV of 1859 (Madras), as amended by Act I of 1885 (Madras), any person, who within the limits of a town "throws or lays down any dirt, filth, rubbish or any stones or building materials; or who constructs a cow-shed or stable within the bounds of any thoroughfare; or who causes any offensive matter to run from any dung-heap into the street" is punishable.

A was convicted and fined for having kept a manure-heap in a town but not in a street:

Held, that the conviction was bad.

* Criminal Revision Case 565 of 1885.

QUEEN EMPRESS v. APPATHORAI.

THIS was a case, referred for the orders of the High Court, under s. 438 of the Code of Criminal Procedure, by H. P. Gordon, District Magistrate of South Arcot.

The facts were stated as follows :—

"In this case the Magistrate has convicted the accused under s. 48 of Act XXIV of 1859, cl. 5, for keeping a manure-heap in a vacant spot near the public street.

"The Joint Magistrate refers the conviction as illegal on the ground that it is not shown that the heap was within the bounds of a thoroughfare, or that offensive matter ran from it into the street.

"I am of opinion, looking to the effect of Act I of 1885, which came into force on the 1st July, that the conviction is good; but having regard to the collateral results which would attend that construction, have thought it better to refer the question for the decision of the High Court. It seems to me that the effect of the repeal by Act I of 1885 of the expressions in the body of s. 48, as applied to cl. 5, is to render penal not only the deposit of dirt or rubbish, but also that of stones or building materials in any place within the limits of the town. It is impossible to suppose that it could have been the intention of the Legislature to prohibit the deposit of building materials in convenient places within the town, but it is possible that the concluding words of the first part of cl. 5 were overlooked when the words limiting the provisions of the section to thoroughfares, &c., were repealed. The object of the amendment is known to have been to afford facilities for the prevention of ill-usage of animals.

"The punctuation and the grammatical construction of cl. 5, as printed in the authorized edition of the Madras Code, would appear to prevent the application of the words 'within the bounds of any thoroughfare' occurring in the second paragraph of cl. 5, to the first paragraph of that clause."

Counsel were not instructed.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following judgments :—

MUTTUSÁMI AYYAR, J.—In this case the accused kept a manure-heap in a vacant spot *near* his house and a public street, intending to remove it ultimately to his field for use. The Second-class Magistrate convicted him of an offence punishable under cl. 5, s. 48, of Act XXIV of 1859, and sentenced him to pay a

QUEEN EMPRESS v. APPATHORAI.

fine of eight annas. The Joint Magistrate considered that the conviction was illegal because the dung-heap was not kept *in* any public street, nor was any offensive matter permitted to run from it into such street. The District Magistrate is, however, of opinion that, under s. 48, as amended by Madras Act I of 1885, it is no longer necessary that the manure-heap should be kept *in* any street. The amendment consisted in the omission in the body of s. 48 of the words "in any street or thoroughfare or passage," and the words "to the obstruction, inconvenience, annoyance, risk or damage of the residents and passengers." The amending Act, however, does not alter cl. 5. It is in these terms :—"Any person who throws or lays down any dirt, filth, rubbish, or any stones or building materials; or who constructs any pial, cow-shed or stable, or the like within the bounds of any thoroughfare; or who causes any offensive matter to run from any house, factory, dung-heap, or the like into the street." I am unable to adopt the construction suggested by the District Magistrate. It could never have been intended by the Legislature to make the deposit, either of rubbish or building materials, in convenient places within the limits of a town penal. The last sentence in cl. 5, which makes it penal to cause any offensive matter to run from a dung-heap into the street, contemplates the deposit of a dung-heap near a street or within the limits of a town as otherwise than penal. If the District Magistrate's construction is right, there was no necessity for retaining the word "dung-heap" in this sentence. The omission to insert the words, "in any street," in the first part of cl. 5 is an oversight; but the latter part of the clause sufficiently indicates the intention of the Legislature, and the construction we place should be such as is consistent with that intention. I would set aside the conviction and the sentence referred to us and direct that the fine be refunded.

PARKER, J.—It was certainly not the intention of the Legislature to make it penal to lay down a heap of dirt or materials for building *anywhere* within a town, but only in such places where those acts might cause public inconvenience or annoyance.

I observe that in some editions there is only a comma and not a semicolon after the word "materials" in cl. 5, and looking at the context, it appears to me probable that the Legislature intended to make the words "within the bounds of any thoroughfare" apply to both classes of acts spoken of, viz., the throwing

QUEEN EMPRESS v. APPATHORAI.

or laying down of certain substances, or the construction of certain buildings. It will be seen that the third class of acts spoken of in the same clause, viz., the causing any offensive matter to run from any house, &c., is only made penal when the offensive matter is allowed to run "into the street" and not in any other case.

In the decision before us, as there is no evidence that the heap of rubbish was deposited in a public thoroughfare, I would set aside the conviction and direct that the fine be refunded.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Parker.

1885. November 17.

VÍRARÁGAVA, PLAINTIFF,

and

RÁMUDU, DEFENDANT.*

Army Act, 1881, *s.* 151 (3)—*Civil Procedure Code, s.* 266, *expl.* (*b*)—*Debtor subject to military law—Attachment of moiety of salary under Rs.* 20 *per mensem.*

Section 151 of the Army Act, 1881, not being affected by the provisions of s. 266 of the Code of Civil Procedure, the attachment by a Civil Court of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs. 20, is legal.

THIS was a case stated under s. 617 of the Code of Civil Procedure by B. Rámasámi Náyudu, District Múnsif of Bellary.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan, Officiating C.J. and Parker, J).

Counsel were not instructed.

JUDGMENT.—In this case, after decree against the debtor, who is a person subject to military law, but not a soldier of the regular forces, the judgment-creditor put in an execution petition, asking for a special order under the Army Discipline Act, 1879, s. 144, and Army Circular thereunder, No. 66, for the attachment of half the salary of the judgment-debtor, and obtained a special order granting the relief prayed for.

The Executive Commissariat officer objected to the attachment

* Referred Case 8 of 1885

VÍRARÁGAVA v. RÁMUDU.

on the ground that the judgment-debtor's salary, being less than Rs. 20 per mensem, was exempt from attachment under clause (*h*) of s. 266 of the Code of Civil Procedure.

The last proviso of that section, however, enacts that nothing in the section shall be deemed to affect the Army Act, 1881, or any similar law for the time being in force; s. 151 of the Army Act, 1881, which corresponds to s. 144 of the Army Discipline Act, 1879, on which the Army Circular of March 1882 quoted by the District Múnsif was issued, enacts that a Court may direct specially that the whole or any part of the sum decreed shall be paid by instalments out of any pay payable to the debtor, and the amount named in the direction not exceeding half of such pay shall, while the debtor is in India, be stopped and paid in conformity with the direction.

The effect of that section is, that in no case shall the pay of a person subject to military law, but not a soldier of the regular forces, be liable to stoppage to a greater amount than one-half, but the stoppage is not confined to pay of Rs. 20 or upwards. Clause (*b*) of the proviso to s. 266 of the Civil Procedure Code provides that nothing in that section affects the Army Act, 1881, or any similar Act.

Our reply, therefore, is that the attachment of half the judgment-debtor's salary is valid and in accordance with law.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. November 16, 27.

KOTTAM ZAMÍNDÁR (PLAINTIFF), APPELLANT,

and

PITTAPÚR ZAMÍNDÁR (DEFENDANT), RESPONDENT.*

Act XXVII of 1860, *s.* 2—*Bond given to secure debt due to estate of deceased Hindú—Suit by heir—Waiver of right to protection implied.*

R being a debtor to the estate of a deceased Hindú, executed a bond promising to pay the debt to V, the divided brother of the deceased, as his heir.

A suit having been filed against V by the widow of the deceased, who claimed his estate, R offered to pay the debt to V on production of a certificate under Act XXVII of 1860, but not otherwise.

Held, that, as R had executed a bond promising to pay the debt to V, he could not rely on the protection afforded by Act XXVII of 1860.

* Appeal 78 of 1885.

KOTTAM ZAMÍNDÁR v. PITTAPÚR ZAMÍNDÁR.

THIS was an appeal from the decree of T. Rámasámi Ayyangár, Subordinate Judge at Cocanáda, in suit 1 of 1884.

The facts necessary for the purpose of this report appear from the judgment.

Hon. *Rámá Ráu*, for the appellant, contended that s. 2 of Act XXVII of 1860 did not apply, and that there had been no proper tender by the defendant.

Mr. *Wedderburn*, for the respondent, urged that no question of tender arose; that under Act XXVII of 1860, the defendant was entitled to demand that plaintiff should produce a certificate before he could claim payment of the debt sued for, and that, as he declined to do so, he absolved defendant from the duty of tendering. The fact that the debt was secured by a bond did not alter the nature of the debt. There was no consideration to support any promise to pay the plaintiff otherwise than as his brother's representative.

The judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.), which was reserved till the 27th November, was delivered by

MUTTUSÁMI AYYAR, J.—The appellant, Sri Rájá Vatchavaya Venkata Simhadri Jagapathiráju, is the zamíndár of Kottam, and the respondent, Sri Rájá Ráu Venkata Mahipathi Gangádhara Rámá Ráu, is the zamíndár of Pittapúr in the Godávari district. The appellant had a divided brother, and, upon his death, a certain sum of money was paid to his widow and a release was obtained from her of her claim to her husband's property. The respondent owed to the deceased a large sum of money on account of certain húndies and executed the bond (ex. A) to the appellant, as his heir, for Rs. 83,679-1-1 on the 12th November 1880. This document provided for the re-payment of the debt at Tuni, where the appellant resides, in two instalments, the first on the 20th November 1881 and the second on the same date in 1882.

In 1881 the appellant's brother's widow instituted a suit to set aside the release which had been obtained from her. Whilst this suit was pending, in March 1882, the respondent appointed the Official Trustee of this Court to pay off his debts and entrusted to him six lakhs of rupees for that purpose. The debt now in dispute was one of the debts which the Official Trustee was authorized to pay. On the 3rd April 1882 the Official Trustee addressed the letter (ex. I) to the appellant on respondent's behalf. It stated that, owing to the litigation between the appellant and his sister-

KOTTAM ZAMÍNDÁR v. PITTAPÚR ZAMÍNDÁR.

in-law, he was not in a position to give a valid receipt, and that as the respondent was ready to pay off the whole debt, the appellant should produce a certificate under s. 2, Act XXVII of 1860. It further intimated to the appellant that the principal and interest due under the bond would be lodged in the Bank at Cocanáda on the 12th April 1882, that the respondent would not pay interest after that date, and that the money to be lodged would be paid to the appellant on his furnishing to the Official Trustee at Madras a copy of the certificate which he was required to obtain. The appellant at once sent a reply, declining to produce a certificate and calling attention to the fact that the bond was in his name and payable at Tuni.

In February 1883, the appellant was informed that the amount mentioned above, *i.e.*, the principal and interest up to 12th April 1882, would be paid if he gave an indemnity. The appellant declined to give an indemnity, adding that he would accept the amount, which the respondent offered to pay, as a part-payment, without prejudice to his right to institute legal proceedings to recover the balance.

The Official Trustee was examined as a witness, and proves that on the 12th April 1882 he had funds in the Bank at Cocanáda to his credit from which the appellant might have obtained payment if he had produced a certificate. It does not appear that there was any attempt or offer to remit the money to Tuni. The appellant having declined to produce a certificate, the money lodged in the bank was shortly after paid to other creditors.

In December 1882 the suit instituted by the widow was dismissed, but she appealed from the decision to the High Court and the present suit was instituted whilst her appeal was pending. The respondent paid into Court the sum formerly lodged in the bank, which includes interest up to 12th April 1882 only, and denied his liability for subsequent interest and costs. The Subordinate Judge upheld this contention and decreed that the plaintiff (appellant) is entitled, on producing a certificate that he is the legal representative of his deceased brother, to receive the amount paid into Court by the respondent, and dismissed the remainder of the claim with costs. A certificate has since been obtained and the money in Court has been paid to the appellant. His appeal is against only so much of the decree as disallowed costs and interest from the 12th April 1882.

KOTTAM ZAMÍNDÁR v. PITTAPÚR ZAMÍNDÁR.

The suit having been brought upon the specific contract (ex. A), any defence available to the debtor must arise out of the contract, and he cannot be permitted to rely on the prior state of things which had merged into it in order to add to its terms. It was open to him to have inserted a provision in document A that the debt would be paid only on the production of a certificate, but this he did not choose to do. On the contrary, he waived the right which he had under Act XXVII of 1860 and contracted a new obligation. It is not alleged that he was induced to do so by fraud or that document A was executed otherwise than with full knowledge of the material facts.

The institution of a suit by the appellant's sister-in-law was a contingency which was not foreseen and provided for by the debtor; and such default on his part could not operate to make his obligation, which was unconditional, conditional. If the widow had succeeded in her suit, no doubt, he might have pleaded a failure of consideration. If the litigation excited a reasonable apprehension, his proper remedy was perhaps an interpleader suit, but he had no right to vary, of his own choice, the contents of the obligation created by the bond. The Official Trustee was clearly right in himself refusing to pay, and advising the respondent not to pay, otherwise than into Court so long as there was any doubt as to the widow's title, but when once the respondent had accepted appellant as his creditor, he was not entitled to require either a certificate or indemnity bond; and even assuming that he could demand an indemnity, his liability to pay interest would not cease unless he tendered payment at Tuni according to the terms of the document. There is no evidence that a specific sum was set apart in the bank to the appellant's credit and to be appropriated in liquidation of his debt. This is not a case of reciprocal promises in which the mere offer of performance on one side may be accepted as a fulfilment of the obligation.

We must reverse so much of the Subordinate Judge's decree as disallowed the claim to interest from the 12th April 1882 and costs, and direct that the respondent do pay interest at the contract rate, viz., 12 per cent. per annum up to the date of the plaint with further interest at 6 per cent. until the date of payment into Court and the appellant's costs throughout.

APPELLATE CIVIL.

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

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF), APPELLANT,

and

VÍRA RAYAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1880. Septembe 1885. May 2

Forest lands, Malabar—Presumption as to ownership—Rights of Crown and of occupier of waste land under Hindú law—Suit by Crown for declaration of title and possession—Plaint—Cause of action within Statutory period not alleged—Burden of proof—Limitation—Regulation II of 1802—*Remedy suspended, Right surviving —Act XIV of* 1859—*Claim by Crown not affected—Limitation Act,* 1871—*Effect on subsisting rights—Limitation Act,* 1877, *ss.* 2-28—*Construction.*

In the district of Malabar and the tracts administered as part of it, there is no presumption that forest lands are the property of the Crown.

According to the Hindú law a right to the possession of land is acquired by the first person who makes a beneficial use of the soil, the right of the Sovereign being to assess the occupier to revenue.

Assuming that the Crown has the right to oust any person who, without sanction, occupies waste land which has not been appropriated for any public purpose, it cannot, by a suit brought for a declaration of title, or for ejectment, the date at which the cause of action arose not being stated in the plaint, compel a defendant to prove possession for 60 years.

As a general rule, a plaintiff must not only show he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act.

The probable explanation of the ruling in *Radha Gobind Roy's Case* (Suth. P. C. Cases 809) is, that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession was interrupted, but that where the plaintiff can prove title only, and not possession, he must prove that the adverse possession of the defendant or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act.

In a suit instituted in March 1879 by the Crown for a declaration of title to certain forest land and for possession of a portion thereof, the defendants alleged that the land has been in their possession for more than 60 years.

Held, that it was incumbent on the Crown, under art. 149 of sch. II of the Indian Limitation Act, 1877, to show possession of the proprietary rights claimed

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* Appeal 100 of 1879.

SECRETARY OF STATE v. VÍRA RAYAN.

within 60 years, or, if the defendants proved possession, that such possession commenced or became adverse within such period.

The District Court having held, that up to April 1, 1873, when the Limitation Act of 1871 came into force, the limitation for such a suit was 12 years from the time when the cause of action arose, and that the suit was barred by adverse possession for 12 years prior to April 1, 1873:

Held, that, even if Regulation II of 1802 applied to claims by the Crown, inasmuch as the Regulation only barred the remedy and did not extinguish the right and Act XIV of 1859 did not extend to such a claim, the right subsisted when the Limitation Act of 1871 came into operation, and as long as that Act was in force, and that the Crown, being entitled under that Act to sue within 60 years from the date of the cause of action, and under s. 28 of the Limitation Act of 1877, to sue within 2 years from the 1st of October 1877, the suit was not barred, provided it could be shown that the cause of action arose within 60 years from the date of its institution.

THIS was an appeal from the decree of H. Wigram, District Judge of South Malabar, in suit No. 15 of 1879.

The facts and arguments appear from the judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.)

The Acting Government Pleader (Mr. *Shephard*) for appellant.

Mr. *Branson*, Mr. *Johnstone*, *Bháshyam Ayyangár* and *Sankaran Náyar* for respondents.

JUDGMENT.—This suit was brought by the Secretary of State against nine persons, of whom Nos. 8 and 9 were described as holding under No. 2 to obtain a declaration that the lands, hills and forests forming part of the upper water-shed of the Bhawáni river and known as the Attapadi valley are the property of Government, and that no one of the defendants had any right or title thereto, to obtain an injunction restraining the defendants Nos. 1—7 from cutting timber on the lands, hills, forests, and to recover possession from defendants Nos. 8 and 9 of 500 acres of land described in the 2nd schedule to the plaint as "To be selected from out of the lands on the Elamala hills being a part of the hills before mentioned."

The plaint avers that lands, &c., of which the extent is estimated at about 232 square miles are the property of Government, and that no private persons have any proprietary rights therein: that the Government always received and still receives plough dues and spade dues and formerly received grazing rent in respect of some of the lands: that the defendants Nos. 1—7 claim jenm or proprietary rights over the lands or portions of them, but that the plaintiff does not know what portions of them are respectively

SECRETARY OF STATE v. VÍRA RAYAN.

claimed by the defendants: that the defendants Nos. 1—7 or some of them have of late years been granting leases of the said lands to various persons: and that in particular defendant No. 2 has granted to defendant No. 9 a lease of the lands described in the 2nd schedule attached to the plaint, dated September 11, 1877, for 25 years, and that defendant No. 9 has entered into possession of the lands so leased, and cleared some of them: that defendant No. 8 has some interest in the lease: and that the defendants Nos. 1—7 have of late years been granting leases to cut timber in the said lands to various persons and have in various ways been attempting to exercise acts of ownership over the lands. It will be seen that the plaint in many respects violates the requirements of the Code of Civil Procedure. It does not state any common ground of action against the defendants Nos. 1—7. It asserts a claim to 232 square miles of country without specifying of what lands the defendants Nos. 1—7 severally claim possession. The reason assigned for this omission was not sufficient unless it had been shown that application had been made to the several defendants to state in respect of what lands they claimed rights and they had refused to give it or had laid claim to the whole extent. And although want of information on the part of the plaintiff's agents might have excused the presentation of the plaint in this form if reasonable diligence had been used to procure better information, yet when the defendants had been summoned, they should have been examined and the plaint amended and made more precise.

Again, the plaint contained no statements of the date when the cause of action arose except in respect of 500 acres leased by defendant No. 2 to defendant No. 1. This defect should, if possible, have been corrected, especially when it was found that the contesting defendants set up a plea of limitation. At the hearing of the appeal we were unable to understand the bearing of much of the evidence adduced, as the maps which were before the Court did not show the names of the hills nor could we ascertain precisely what portions of the valley were claimed by the several defendants. We therefore adjourned the further hearing and directed that maps should be prepared and that the respondents (defendants) should point out what lands they severally claimed. A map was prepared and produced in compliance with our order. It shows that a large block of land on the west and a small block on the east marked green are claimed by neither party:

SECRETARY OF STATE v. VÍRA RAYAN.

that some lands are claimed by respondent No. 1 only, some by respondent No. 2 only, some by both, and some by these respondents and by respondent No. 8, Colonel Scott, who claims under the respondent No. 2. Of the original defendants, Nos. 3, 4, 5, 6 and 7 averred they had some ancestral rights in the tract, but expressed their willingness to surrender them, and No. 9 alleged he had relinquished his rights to No. 8. The suit proceeded against the defendants Nos. 1, 2 and 8 who are the respondents to the appeal. Respondent No. 1 is Víra Rayan, Eralpád, or holder of the second stánam in the family of the Zamorin. He objected to the frame of the plaint, denied that the Government has ever taken possession of the lands which he claimed, and asserted he had enjoyed them as part of his ancestral domain for a period of upwards of 60 years adversely to the claim made by Government. Respondent No. 2, who is the Mannargát Mupil Náyar, also took exception to the frame of the plaint, and averred that the Government had not held the jenm right in the lands claimed by him though it had collected revenue from some of his tenants: that the lands to which he laid claim formed a part of Malabar and had before British rule been held by petty chiefs of the Vallavanád family as part of the property attached to their stánam: that he and his ancestors had held jenm rights throughout the whole period of British rule: that with the knowledge of Government officials he has spent large sums of money on improvements: and that he had granted subordinate tenures to persons who ought to be made parties.

Respondent No. 8, Colonel Scott, set up a title under the respondent No. 2 and alleged that he was induced to acquire a lease from defendant No. 2 by reason of the representations of the officers of Government, and that he had expended moneys in obtaining the lease and in effecting improvements.

We have allowed the case to stand over for some time, as we were informed that the parties contemplated a compromise, but we have recently been informed that the negotiations have failed, and we must therefore dispose of it.

The tract of country known as the Attapadi valley lies to the east of the Western Ghats through which a stream has worked its way and formed a pass by which access is afforded to Malabar. On the east it is bounded by Coimbatore. A question was raised as to whether it formed a part of the District of Coimbatore or of

SECRETARY OF STATE v. VÍRA RAYAN

that of Malabar. We agree with the Judge that there is no proof that it ever formed part of Coimbatore. On the other hand, there is evidence that it was dependent on, if it was not a part of, Malabar before British rule. Dr. Buchanan, who visited Malabar in 1800, described it as having been ruled by an hereditary chief from whom the Zamorin exacted tribute in order that the residents of Attapadi might pass through the ghat and trade in Malabar. It cannot be ascertained whether the Attapadi valley was ceded with Malabar by the treaty of 1792. It is known that certain of the adjoining territories were claimed by the British as forming part of Malabar, and that the claim was disputed by Tippu. The Attapadi valley appears in Sartorius's map of 1793 as forming part of Malabar. It was regarded by Buchanan, who would have gained his information from the Collector, as part of Malabar, and the earliest official acts of which we have information were executed by Malabar officials. Mr. Ward in 1826 describes it as included in Malabar, and it has throughout been administered as part of the Malabar District. The question is important, because it is argued that there is a distinction respecting the right of the Crown to question the occupation of waste in Malabar and its right to question the occupation of waste in raiyatwári districts: and it was probably in reference to this presumed distinction that there is an argumentative statement in the plaint that the land formed part of Coimbatore. According to what may be termed the Hindú common law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil. The Crown is entitled to assess the occupier with revenue, and if a person who has occupied land omits to use it and the claim of the Crown to revenue is consequently affected, the Sovereign is entitled to take measures for the protection of the revenue. Whether the practice which has obtained in certain districts of requiring a person who desires to cultivate waste to apply to the local revenue officer for permission to do so has abrogated in those districts the Hindú law, or whether it may be justified by the establishment in those districts before British rule of the analogous doctrine of the Muhammadan law, we consider it unnecessary to determine in this suit, for we have found that the land appertains to the district of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part of it, that forest lands are the property of the Crown. At the commencement

SECRETARY OF STATE v. VÍRA RAYAN.

of the century it was the policy of the Government to allow all lands to become private estates where that was possible. Despatch of Lord Wellesley quoted in *Baskarappa* v. *The Collector of North Canara*.(1) The despatch and order of the Governor-General in Council on the annexation of Malabar, dated the 31st December 1799 and the 18th June 1801, have not been adduced, but their purport appears from the despatch of the 19th July 1804, quoted in *Vyakunta Bapuji* v. *Government of Bombay*.(2) It was intimated that it never could be desirable that the Government itself should act as the proprietor of the lands and should collect the rents from the immediate cultivators of the soil. When in 1808 the Board of Revenue suggested that an augmentation of revenue might be derived from waste lands reserved, they were informed that the Government did not look to any advantage of that nature beyond the benefit of increasing the amount of the public taxes in proportion to the existing taxes of the country (Fifth Report, Appendix 30, page 902. Revenue and Judicial Selection, Volume I, p. 842). It will be seen that at that time the Government so far from abrogating the Hindú law intended to assert no proprietary right to the waste, but limited itself to its claim to revenue. At the time Malabar came under British rule, all the forests were claimed as private property (I.L.R., 3 Bom. 586). In their despatch of 17th December 1813, relating to the settlement of Malabar, the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates (Revenue Selection, Volume I, p. 511). Although a different policy was subsequently pursued in other districts, and, especially in more modern times, rules have been framed for the sale of waste lands, there is nothing to show that any such change was notified in Malabar up to a period much later than that at which there is considerable evidence to show that the respondents Nos. 1 and 2 were in possession of and recognized as proprietors of the lands they claim by Government officials. But assuming that even in Malabar the Crown had the right to oust any person who without its sanction occupied waste land which has not been appropriated for any public purpose, the question that presents itself for determination at the outset of this case is whether it is competent for the Crown by instituting a suit for a declaration of right or ejectment without

(1) I.L.R., 3 Bom., 550. (2) 12 Bom. H.C.R., 144.

SECRETARY OF STATE v. VÍRA RAYAN.

specifying a date at which the cause of action arose to compel a defendant to prove possession for 60 years.

The proposition appears unreasonable. We apprehend that the Crown must, as other suitors, disclose in its plaint a cause of action and aver that it arose within the period of limitation or the existence of some of those circumstances which extend the period allowed by the Limitation Act, and that the rule respecting the burden of proof where the existence of a subsisting title in the plaintiff is challenged by a plea of limitation, is the same whether the suit is brought by the Crown or by a private suitor.

The Courts have hitherto regarded *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh*(1) as the leading case on the subject. In that case the Privy Council observed: "The appellant is seeking to disturb the possession, admitted to have existed for about 11 years, of defendants who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof, that the cause of action accrued to him (for that is the way in which the Regulation puts it) or a dispossession within 12 years next before the commencement of the suit, and therefore that he or some person through whom he claims was in possession during that period. No proof of anterior title . . . . . can relieve him from this burden or shift it upon his adversaries by compelling them to prove the time and manner of dispossession." It will be noticed that this case fell to be decided under the Regulation which prohibited the Court from entertaining a suit if it was instituted more than 12 years after the cause of action had accrued: but the rule it declared was held to apply equally to cases governed by Act XIV of 1859, where the words are "No suit shall be entertained . . . unless the same is instituted within the period of limitation." *Pándurang Govind* v. *Bálkrishna Hari*.(2) In *Gossain Doss Koondoo* v. *Seroo Koomaree Debia*(3) Couch, C.J., observed, "The plaintiff must show that he or some one through whom he claims has had possession within twelve years before the suit. If he sues for the recovery of immovable property on the ground of having been dispossessed from it, he must show that he has come within 12 years from the time when his cause of action arose, the time when he was dispossessed. It is not enough for him to prove his title to

(1) 8 M.I.A., 220. (2) 6 Bom. H.C.R., 125. (3) 19 W.R., 193.

SECRETARY OF STATE v. VÍRA RAYAN.

the property which is the subject of the suit and leave it to the defendant to show that the suit is barred by the Law of Limitation by proving when the plaintiff was last in possession."

Notwithstanding the rulings to which we shall presently advert, the Courts have held that, as a general rule, a plaintiff must not only show that he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act. *Mano Mohun Ghose* v. *Mothura Mohun Roy*.(1)

The Code of Civil Procedure recognizes the rule in that it declares that the plaint must contain a statement of the circumstances of the cause of action and when it arose [s. 50 (*d*)] and that if the cause of action arose beyond the period ordinarily allowed by law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed (s. 50). It is, however, contended that the rule, which had been thus generally received, is impugned by the decision of the Privy Council in *Radha Gobind Roy* v. *Inglis*.(2) In that case, the plaintiff proved a title to the soil of a lake which afterwards became dry and culturable: the defendant denied the plaintiff's title and relied on adverse possession for more than 12 years. Their Lordships observed: "The question remains whether the disputed land had or had not been occupied by the defendant for 12 years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question undoubtedly the issue is on the defendant. The plaintiff has proved his title: the defendant must prove that the plaintiff has lost it by reason of his (the defendant's) adverse possession."

This decision does not appear in the Law Reports, Indian Appeals, and we have no note of the argument so as to ascertain whether the ruling in *Maharajah Nitrasur Singh* v. *Baboo Nund Loll Singh*(3) was quoted or discussed at the hearing. The absence of any reference in the judgment to this leading case has led the High Court of Calcutta to the conclusion that their Lordships did not intend to reverse the earlier ruling, but that the circumstances of the particular case warranted an apparent departure from it. Mr. Justice Wilson considers that the facts established shifted the burden of proof by warranting the presumption that the possession of the plaintiff continued until the contrary was shown (p. 232)

(1) I.L.R., 7 Cal., 230. (2) Suth. P.C. cases, 809. (See I L.R., 7 Cal., 232). (3) 8 M.I.A., 220.

SECRETARY OF STATE v. VÍRA RAYAN.

Mr. Justice Field considered that it was the intention of the Privy Council to graft an exception on the general rule where the property in dispute is not susceptible of actual and visible possession (pp. 238, 241). While upholding the rule of law declared in *Maharajah Nitrasur Singh's case*(1) the High Court of Calcutta has in some cases held that the burden of proof is shifted if the land in dispute is *chur* land, land formed by alluvion or jungle or waste land. *Mahomed Ibrahim* v. *Morrison*.(2) We must express our concurrence with the observation of the learned Chief Justice of Calcutta in *Kally Churn Sahoo* v. *The Secretary of State*(3) that there cannot be one principle applicable in the case of jungle land and another principle applicable in the case of other lands. The owner of jungle land is as much bound as the owner of any other kind of land to watch his property, and if he omits the necessary precautions and a person enters and holds adverse possession of a peice of jungle for 12 years, he has obtained a title by prescription. The circumstance that the property was of such a character that it was more or less easy for the owner to discover the intrusion of a stranger is immaterial, unless there has been such fraud as to bring the case within the provisions of s. 18 of the Act. The ignorance of the owner will not prevent the accrual of a title by prescription. *Rains* v. *Buxton*.(4) Of course the enjoyment necessary to create a title by prescription must not be a mere succession of independent trespasses—it must be, if not continuous, at least of such a character that an intention to assert a right as owner may be inferred from it. We find nothing in the judgment of their Lordships in *Radha Gobind Roy's case* to intimate an intention to lay down an exception to a general rule founded on the peculiar character of the disputed property, and we therefore agree with Mr. Justice Wilson that the probable explanation of the ruling in *Radha Gobind Roy's* case is that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession was interrupted, but that where the plaintiff can prove title only and not possession, he must prove that the adverse possession of the defendant or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act.

This suit was instituted on the 27th March 1879 and is

(1) 8 M.I.A., 220. (2) I.L.R., 5 Cal., 36. (3) I.L.R., 6 Cal., 725. (4) 14 Ch. D., 537.

SECRETARY OF STATE v. VÍRA RAYAN.

governed by the Limitation Act, 1879, which prescribes (art. 149) that a suit in the name of the Secretary of State must be brought within 60 years from the date when the period of limitation will begin to run against a like suit by a private person.

It is therefore incumbent on the Crown either to show possession of the proprietary rights claimed within 60 years, or if the respondents prove possession, it is incumbent on the Crown to show that the possession of the respondents commenced or became adverse within the period of limitation.

The Judge has gone further, and has held that up to April 1st, 1873, when the limitation sections of Act IX of 1871 came into force, the period of limitation for a suit of this nature was 12 years from the time when the cause of action arose; and that inasmuch as the suit was not brought until Act XV of 1877 had come into force, and that Act provided that nothing therein contained should be deemed to revive any right to sue barred under the Act of 1871 or under any enactment thereby repealed, (a provision which was absent, it may be observed, from the Act of 1871,) if the right to sue was barred by more than 12 years' adverse possession on March 31st, 1873, it cannot now be revived; and holding that the Crown had failed to prove its title and that the respondents had held adverse possession for considerably more than 12 years prior to the 1st April 1873, the Judge has held the suit barred by limitation. A question is raised as to the propriety of the ruling that the right of the Crown to sue (if it otherwise could maintain suit) would have been lost by adverse possession on the part of the respondents for a period of 12 years prior to the 1st April 1873.

It has been a much vexed question whether in this Presidency suits by the Crown for the enforcement of public rights were affected by any Law of Limitation prior to the enactment of Act IX of 1871. It is true that Regulation II of 1802, s. 18, cl. 4, prohibited the Courts of Adálat from hearing, trying or determining the merits of any suit whatever against any person . . . if the cause of action should have arisen 12 years before any suit should have been commenced on account of it, and that in Bengal, where a similar prohibition was laid on the Courts by Regulation III of 1793, s. 17, Regulation II of 1805 was enacted to declare that the condition of 12 years was not to be considered applicable to any suits for the recovery of the public revenue, or any public right or claim. But it is apparent from the

SECRETARY OF STATE v. VÍRA RAYAN.

preamble and probably from the form of the late Regulation that doubts were already entertained as to whether Regulation III of 1793, s. 17, applied to suits in respect of public rights.

On the one hand, it is argued that a Regulation of the local Government could not bind the Crown, and that no enactment would bind the Crown unless the Crown was then expressly mentioned in it. On the other hand, it is argued that, although the East India Company enjoyed delegated Sovereign rights, it did not claim them in matters of litigation, and that the Crown, on resuming the rights it had delegated, voluntarily placed itself in such matters in the position of the Company. It is, however, unnecessary for us to determine the question whether the Regulation II of 1803, s. 18, did or did not apply to suits to enforce public rights; for the Regulation did not provide that when the period of limitation had expired, the right should be extinguished. It simply prohibited the entertainment of a suit after a certain period: the right subsisted but could not be enforced by being put in suit. Act XIV of 1859 did not extend to any public property or right, s. 17. The right then, if it had at any time subsisted, was in force when the limitation provisions of the Regulation were finally repealed by Act IX of 1871. By this repeal the prohibition, if it affected public rights, was removed and a period of limitation of 60 years was prescribed for suits by the Crown.

We have noticed that Act IX of 1871 contained no provision similar to that contained in s. 2, Act XV of 1877, declaring that nothing therein contained should be deemed to revive any right to sue barred under an earlier Limitation Law, and therefore between the time when Act IX of 1871 came into operation and the time when Act XV of 1877 came into operation, the Crown was, in our judgment, entitled to sue at any time within 60 years from the date of the cause of action even in cases in which the exercise of the right may have been suspended by the Regulation. But the clause of Act XV of 1877, which precluded the revivor of a right to sue barred was not confined to that Act but was extended to Act IX of 1871. The words are "All references to the Indian Limitation Act, 1871, shall be read as if made to this Act and nothing herein or in *that Act* contained shall be deemed to revive . . . any right to sue barred under that Act or under any enactment thereby repealed." Had this stood alone and had we come to the conclusion that Regulation II of 1802, s. 18, applied to public rights, we should have agreed with the Judge that 12 years'

SECRETARY OF STATE v. VÍRA RAYAN.

adverse possession would have barred the right of the Crown to sue, and that the right would, under s. 28 of the Act, have been extinguished, but the clause to which we have referred is followed by another which declares that "Notwithstanding anything therein contained . . . . any . . . suit for which the period of limitation prescribed by that Act is shorter than the period of limitation prescribed by the 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.

The words "Where the period of limitation prescribed is shorter" have received a liberal interpretation and been held to apply to cases where a change of the date from which the computation is to be made operates to effect a shortening of the period of limitation, and on the same principle we consider it may be contended that when the effect of the provision prohibiting the revivor of suits operated to shorten the period of limitation, the provision we are considering takes effect and preserves a right of suit which subsisted under Act IX of 1871 for a period of two years from the 1st October 1877, and that as this suit was brought not on the 1st March 1879, the provisions of the preceding clause will not apply to it. The right of the Crown then to maintain suits had not been lost by adverse possession for 12 years before 1st April 1873, and if it could be shown that the causes of action asserted in this suit had arisen within 60 years before the date of the institution of this suit, the suit would not be barred by limitation, nor would the respondents be entitled to rely on prescription.

Taking the evidence for the Crown, we find no sufficient proof of possession on the part of the Crown and no proof that any cause of action has arisen against any of the defendants within 60 years before suit. The evidence adduced by the Government is extremely meagre.

It is customary in Malabar to collect the revenue more generally from the tenants than from their landlords, and it is also the occasional practice of Government to grant kauls to strangers for the cultivation of waste lands of private owners which the owner is considered at liberty to allow or disallow as he thinks fit, the kaul being regarded as a mere revenue engagement. This appears from Mr. Logan's recent report. Care must be taken then to distinguish between payments made as revenue and payments made to the Government as the sole superior. There is evidence to show that

SECRETARY OF STATE v. VÍRA RAYAN.

the Government has collected dues on certain lands and that the payment varied according to the use made of the lands, but we are not able to contradict the conclusion of the Judge that these payments were revenue payments and consistent with the proprietary right of the respondents. It is shown that the land has throughout been regarded as jenm land and it is not shown that the Government has at any time held possession of the jenm rights. The parol evidence adduced on the part of the Government has been deemed by the Judge untrustworthy, and it was not relied on at the hearing of the appeal.

It is not shown that the respondents or those from whom they claim have ousted the Government or for the first time entered on the lands now in their possession or for the first time exercised rights over them within the period of limitation, and had they produced no evidence, we should have to hold that the suit failed on that ground.

We may add that a declaratory decree could not have been given in respect of lands of which it is proved the respondents are in possession.

But the respondents have adduced considerable evidence to prove their possession of the lands claimed by them . . . . . .

[After discussing the evidence, documentary and oral, the judgment proceeded as follows :—]

The evidence adduced by both the respondents is no doubt greatly wanting in precision, but this is due in a great measure to the defects in the plaint and also the nature of the property in dispute. The Attapadi Valley has never been properly surveyed nor boundary marks fixed. The rights of the different proprietors are known to the people of the country more or less imperfectly by natural features. But it is not shown that the Judge who had before him the headmen of the villages and could therefore have obtained better information as to localities than has been available to this Court has erred in finding that the respondents have long been in possession of the lands they severally claim. On the whole, we do not find ourselves at liberty to interfere with the decree of the Judge and must dismiss the appeal with costs in proportion to the value of the property claimed by the defendants severally. We observe that this judgment leaves unaffected the right of the Crown to revenue or the rights of inferior proprietors.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Muttusámi Ayyar.

1885. Sept. 4, 23.

SIVAGANGA ZAMÍNDÁR (PLAINTIFF), APPELLANT,

and

LAKSHMANA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindú Law—Impartible zamíndári—Money decree against zamíndár—Attachment and sale of estate—Suit by son to recover after father's death—Rights of purchaser.

In execution of a money decree obtained against the holder of an impartible zamíndári, the creditor attached certain immovable property—portion of the zamíndári—which he described as the property of the debtor.

This was sold by the Court and purchased by L.

A suit having been brought by the son of the judgment-debtor, after his father's death, to recover the property from L:

Held, that all that L acquired was the life-interest of the judgment-debtor in the property, and therefore the plaintiff was entitled to recover

THIS was an appeal from the decree of C. Rámachandra Ayyar, Subordinate Judge of Madura (East) in suit No. 1 of 1884.

The facts and arguments appear from the judgments of the Court (Kernan, Officiating C.J., and Muttusámi Ayyar, J.).

Bháshyam Ayyangár, *Kaliánarámayyar*, and *Krishnamáchárya*r for appellant.

Hon. *Subramanya Ayyar* and *Sankara Menon* for respondents.

KERNAN, Offg. C.J.—This is an appeal by the zamíndár of Sivaganga, the plaintiff in suit No. 1 of 1884 in the Subordinate Court of Madura, against a decree of that Court made on the 30th of September 1884, whereby that suit was dismissed with costs. The relief sought by the plaintiff is to have a declaration that a sale (in favor of the defendant Lakshmana Chetti) of the Sivaganga palace and some devastánam offices made on the 9th of April 1884 is invalid against the plaintiff and his right in the properties, and that the defendant is not entitled to enforce the sale against the plaintiff and his interest in the properties through process of Court or otherwise.

* Appeal 18 of 1885.

The facts are these :—Chidambaram Chetti on the 22nd of January 1876 obtained a decree against Dorasinga Tévar, the late zamíndár, for payment of Rupees 33,500 at the times and in the manner thereby specified. Dorasinga Tévar succeeded as zamíndár in 1877 on the death of Kattama Náchiar, his aunt. In May 1881 he was, by the decree of the Privy Council, following the decision of this Court, declared entitled to the zamíndári of Sivaganga as the heir, daughter's son of his maternal grandfather Gouri Vallaba Tévar, a former zamíndár.

The plaintiff was born several years before his father succeeded in 1877.

To execute the decree of the 22nd of January 1876, a petition was, on the 14th of September 1882, presented (by the parties entitled to execute it) to the Court, praying for the attachment of the building of the palace of Sivaganga, inclusive of the devastánam and head-office buildings described in the list; and on the 11th of April 1883 the palace and other buildings were sold by auction to Lakshmana Chetti for Rupees 18,050, and on the 24th of June 1883 the sale was confirmed (s. 312 of the Code); and on the 12th of August 1883 a certificate (s. 316) was given by the Court stating that the purchaser purchased the immovable property of the defendant out of those immovables thereunder specified.

The particulars specify the palace buildings, aiyan and devastánam head-offices, giving the boundaries.

On the 19th of July 1883 Dorasinga Tévar died, leaving appellant, plaintiff, his eldest son, in possession of the properties attached and sold. On the 31st of August, the plaintiff was made party to the suit No. 2 of 1875 as the representative of his father under s. 367.

On the 9th of October 1883 the respondent here, the purchaser in No. 2 of 1875, applied for possession of the palace buildings. The plaintiff resisted an order for possession on the ground that the property sold was the joint ancestral property of himself and his father, and that he became, on the death of his father, entitled to the possession, and that the sale was invalid against him and his interest in the zamíndári. The Court, however, made an order for possession and referred the plaintiff to a regular suit to establish his claim. The plaintiff, thereupon, while in possession, filed this suit for a declaration of his title. It has been found that the debt

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

contracted by Dorasinga Tévar to the plaintiff in No. 2 of 1875 was not contracted for illegal or immoral purposes.

The Subordinate Judge in his judgment, referring to the decision in *Muddun Thakoor* v. *Kantoo Lall*,(1) says: "In this case the first defendant is a perfect stranger to the parties to the suit, and he was not bound to have made any inquiry beyond what appeared on the face of the decree and proceedings." Again, referring to the case of *Hardi Narain Sahu* v. *Ruder Perkash Misser*,(2) and to appeal suit No. 102 of 1883, High Court, Madras, he says that in those two cases the decree-holder was the purchaser. He thus distinguishes the two last cases from the present, and says the zamíndári of Sivaganga was inherited by plaintiff's father from his maternal grandfather and was not, therefore, his ancestral property, and the plaintiff could not restrain him from dealing with it. He says: "I am of opinion that the first defendant as purchaser *bonâ fide* for value in Court sale of the plaintiff's father's property is entitled to be protected against the plaintiff."

The Subordinate Judge, therefore, decided first, that the zamíndári was not ancestral property of plaintiff's father and plaintiff; secondly, that it was the property of plaintiff's father, and that plaintiff had no power of restraining him in the disposal of it; thirdly, that the decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*,(2) did not apply, because in that case the decree-holder was the purchaser, and also because what was sold in this case was the property and not the right, title, and interest of the plaintiff's father.

The first and second questions are exactly the same as two of the questions discussed and decided by this Court in the case of *Muttayan Chetti* v. *Sivagiri Zamíndár*.(3) There the plaintiff was a creditor who obtained a decree for money and against hypothecated property and against the zamíndár of Sivagiri alone, who inherited the zamíndári as daughter's son of his grandfather. The zamíndári was attached under the decree for instalments and portions of it were sold in the lifetime of the zamíndár. He died in 1873, leaving the defendant, his son, surviving, who thereupon went into possession of the zamíndári. After the death of the defendant's father, applications were made to the Court to execute

(1) L.R., 1 I.A., 321. (2) I.L.R., 10 Cal., 635. (3) I.L.R., 3 Mad., 370.

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

the decree as against the hypothecated property and portions of the zamíndári not hypothecated. These applications were refused, and the plaintiff, the execution creditor, filed the suit. The Judge dismissed it, and, on appeal before this Court, there were several grounds of which only one need be referred to, viz., No. 3. "That the zamíndári was either self-acquired property of the late zamíndár, or was at any rate not property in which the defendant acquired any right by reason of his birth or any independent title."

It was contended for the plaintiff that when the estate vested in the late zamíndár on the death of his mother, it became his self-acquired property. The Court after going through the arguments on this point says: "It is clearly erroneous to say that property inherited through a mother is self-acquired as between her son and grandson."

Again, the question was there discussed whether the estate was ancestral between the son and grandson, and the Court says: "It may not be ancestral in the sense in which property, inherited by the father from the paternal grandfather, is liable to partition under the Mitákshará law at the instance of the son; but it is not self-acquired property on that ground for purposes other than partition." The Court referred to the list which classes property as ancestral, paternal, and self-acquired, and says: "It is contended that ownership by birth is restricted to the property of the paternal grandfather, and that paternal or maternal property is not ancestral. Here again the purpose of the classification seems to be mistaken." After further discussion it is observed: "The conclusion we come to is that ownership by birth is not, as alleged, confined to ancestral or paternal grandfather's property, but extends also to paternal, *i.e.*, father or mother's property, and that, in the former case it is a vested interest and equal to and co-ordinate with that of the father, while in the latter, it is inchoate, and consists in a chance of succession and in a power of prohibition where the father alienates immovable property for other than authorized purposes. In this view the theory of ownership by birth has nothing to do with the question before us, which relates to the father's power to alienate immovable property, and not to partition. The texts which seem to us to govern it are those that restrict the power of alienation, and define the son's liability to pay the father's debts." The Court then proceeds to refer to the

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

decisions which recognized the right of the father to alienate property acquired by himself and observes: "This, though no doubt resting on equitable considerations, is a departure from the strict Mitákshará law, and the question we have now to decide is reduced to this, viz., whether we should sanction a similar departure from the Mitákshará law in the case of immovable property, descending on the father through his mother from his maternal grandfather."

Again the Court says: "We do not therefore think that the contention that this zamíndári should be treated, for purposes of alienation, as if it was acquired by the late zamíndár, is well founded."

That decision was the subject of appeal by the plaintiff in the suit to the Privy Council, and is reported in I.L.R., 6 Mad., p. 1. The Privy Council in their judgment say: "It was contended on the part of the plaintiff, first, that the zamíndári having descended to the defendant's father from his maternal grandfather, was his self-acquired property, or at any rate that he was not, as regards his son, under the same restrictions as to the alienation or hypothecation of the property as he would have been if it had descended to him from his father or paternal grandfather; secondly that the whole zamíndári..... was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts. Their Lordships are of opinion that the appellant is entitled to succeed upon the second ground, and they therefore think it unnecessary to express any opinion upon the first. Indeed, as the case has been argued before them on one side only, and the same question may hereafter be raised in some other case, they consider it right to abstain from expressing any opinion upon it, except that they concur with the High Court in holding that the property was not the self-acquired property of the defendant's father."

Applying the principle of those decisions, it is clear that the zamíndári was not the self-acquired property of the late zamíndár of Sivaganga. He was not, therefore, absolute owner of the zamíndári. What estate or interest then did he acquire as heir of his maternal grandfather? The zamíndári is impartible and the present plaintiff is his son. The zamíndári plainly was the joint estate of the late zamíndár and his son the plaintiff. Though the plaintiff could not insist on partition, it does not follow that the estate of the father and son was not ancestral, inasmuch as in

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

the case of impartible zamíndáries, though the zamíndári is the ancestral family property, it is incapable of partition. No doubt, the zamíndári may be in the hands of his son liable to pay the debts of the late zamíndár, but that liability does not prove that the late zamíndár was the owner of the property, nor does it prove what his interest in the estate was. In like manner, the late zamíndár might have alienated the whole or part of it for purposes properly binding on his son; but neither does such power of alienation prove that his estate or interest was absolute, nor what his estate was. The question in this case between the purchaser under the execution and the plaintiff is, what interest or property had the late zamíndár in the zamíndári. According to the decision of this Court in the *Sivagiri case*, the zamíndári inherited by the late zamíndár was ancestral property of him and of the plaintiff his son; I am unable to see what other decision could be legally made upon the facts. The late zamíndár was, therefore, at the time of the attachment under the execution and of the sale, entitled to the property in the zamíndári during his life, and the plaintiff, his son, had a clear right of interdiction in case of any waste or anticipated waste by his father. With the life of the zamíndár his interest and property in the zamíndári ceased, and the plaintiff became entitled to the property in the zamíndári not as heir of his father, but as survivor in the co-parcenary estate.

The third question is whether the principle of the decision of *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1) applies to the sale in this case.

It is contended it does not, because of the circumstance that the purchaser in that case and in the case of *Deendyal Lal*(2) was the decree-holder. No doubt, there is that circumstantial difference between those cases and this, but that circumstance is of no importance, and neither of the above decisions turned on it, although it was referred to in the judgment.

The Privy Council say: "The next and the principal question in the case was, what right or interest in the property, which is the subject of the suit, was acquired by the appellant Hardi Narain by his purchase at the sale in execution of a decree which he had obtained against the father of the respondents, Shib Perkash Misser? It appears that Shib Perkash Misser was indebted

(1) I.L.R., 10 Cal., 635. (2) L.R., 4, I-A 247, s.c., I.L.R., 3 Cal., 198.

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

to Hardi Narain, partly on account of a mortgage and partly for further advances . . . . The decree was the ordinary one for the payment of the money; and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitákshará law, had mortgaged the family property to secure a debt, and the decree had been obtained upon the mortgage and for a realization of the debt by means of the sale of the mortgaged property. It is a simple money decree . . . . . The property was attached on the 1st of April 1873" (by an order prohibiting the sale of the whole property), "but what was attached and subsequently sold really was the right, title, and interest of the father against whom the decree was obtained, and it is clear from the terms of the sale certificate." . . . . The sale certificate stated the proclamation, and that the property was sold, and whatever right and interests the judgment-debtor had in the said property were purchased by Hardi Narain, decree-holder, auction-purchaser. "Therefore, what was purchased on that occasion were the rights and interests of the father, the person against whom the decree was had, and this is precisely like the case of *Deendyal Lal* v. *Jugdeep Narain Singh*(1) where their Lordships held that the purchase being, as it was here, by the person who had obtained the decree only that passed which the father, the person against whom the decree was obtained, had . . . According, therefore, to the authority of *Deendyal Lal* v. *Jugdeep Narain Singh*(1) the present appellant became entitled only to one-third (the debtor's interest), treating it as if the sale was to operate as a partition at that time."

Referring to the decision in *Deendyal Lal* v. *Jugdeep Narain Singh*(1) in the judgment, the Privy Council say: "The appellant cannot be taken to have acquired more than the right, title, and interest of the judgment-debtor. If he had sought to go further and enforce his debt against the whole property and the co-sharers thereon, who were not parties to the bond, he ought to have framed his suit accordingly and made the co-sharers parties to the suit. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title, and interest of the father." The fact that the decree-holder was the purchaser did not in the least affect the decision in *Deendyal Lal's*

(1) L.R., 4, 1-A, 247, s.c., I.L.R., 3 Cal., 198.

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

case according to the report. I cannot see how such circumstance could affect the decision in *Hardi Narain Sahu* v. *Ruder Perkash Misser*. The essence of this latter decision is that it draws a distinction between sales in execution in suits on mortgages where decrees were made directing the sale of property specified in the mortgages, and mere money decrees, which do not direct the sale of any property, but direct payment of the money by the defendant to the plaintiff.

For a long time after the report of the cases of *Girdharee Lal* v. *Kantoo Lal* and *Muddun Thakoor* v. *Kantoo Lal*,(1) followed up by *Suraj Bunsi Koer's case*, (2) and other cases decided by the Privy Council, it was considered by many of the Judges in India that there was a conflict between the cases of *Deendyal Lal* and the subsequent cases, and it was considered that the Privy Council intended to decide, on a mere money decree against a father, and on sale of his rights and interests in execution, the decree-holder could sell, and the purchaser at auction could acquire, not only the rights and interests of the father, but also the shares, rights, and interests of his sons in ancestral property. This Court, however, did not adopt that view. See *Venkataram Ayyan* v. *Venkata Subramaniya Dikshatar*.(3) On looking at the cases decided by the Privy Council it seemed to me that the principle of the decision and the decision supposed to be in conflict with *Deendyal Lal's case* were really not so. In all those cases it appeared to me that the Privy Council either were dealing, or believed they were dealing, with sales under decree on foot of mortgages in which the property was specified, and was directed to be sold. In *Muddun Thakoor's case* it is said: "A purchaser is surely not bound to go beyond the decree to ascertain whether the Court was right in giving it, or having given it, to put up the property for sale under an execution on it. It has already been shown that if the decree was a proper one, the interest of the sons as well as of the father were liable to the father's debts. The purchaser under the decree was not bound to go further back than to see if there was a decree against the fathers, that the property was liable to satisfy the decree if the decree was properly given against them, and having inquired into that, and *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid for the property, the

(1) L.R., 1 I.A., 321. (2) L.R., 6 I.A., 88, s.c. I.L.R., 5 Cal., 148.
(3) I.L.R., 1 Mad., 358.

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

plaintiffs are not entitled to come in and set aside all that has been done under the decree and execution and recover back the estate from the defendant."

Now this judgment clearly contemplates that a purchaser referring to the decree would find that there was a decree for sale of the property; see the words "the purchaser is not bound to go back beyond the decree, to ascertain whether the Court was right in giving the decree, or, having given it, in putting up *the* property for sale in execution on it."

A purchaser could learn nothing from a money decree as to *the property*, but he could, in the case of a mortgage decree, see what property was directed to be sold, and could ascertain whether the property set up for sale was "liable to satisfy the decree," *i.e.*, by inquiring if it was the property directed by the decree to be sold. Sir Charles Turner, the late Chief Justice, upon investigation came to the conclusion that *Muddun Thakoor's case* was not on foot of a mortgage. Mr. Justice Field, in *Ramphul Singh* v. *Deg Narain Singh*,(1) states that it was on foot of a mortgage, and I agree with him, and I think the Privy Council acted on that view. In *Suraj Bunsi Koer's case*,(2) it is expressly stated the decree directed a sale, and in that case as stated in *Hardi Narain Sahu* v. *Ruder Perkash Misser*, the case of *Deendyal Lal* was cited, and it was not then said to be in conflict with *Muddun Thakoor's case*.

The result of *Hardi Narain Sahu* v. *Ruder Perkash Misser* is to remove the misunderstanding by the legal profession and the different Courts in India as to the effect of sales in money decrees against a father and of sales made under mortgage decrees against a father, when the mortgaged property was either specifically set out by descriptions, or referred to as contained in the mortgage instrument and was thereby directed to be sold. The Subordinate Judge says further that *Hardi Narain Sahu* v. *Ruder Perkash Misser* does not apply, as the sale in this case was not of the rights and interests of the late zamíndár. The description of the property to be sold in the application under s. 235 of the Code is "The four boundaries of the palace to which the defendant is entitled (it sets out the boundaries). The said buildings, &c., are at present in the possession and enjoyment of the defendant."

(1) I.L.R., 8 Cal., 522. (2) I.L.R., 5 Cal., 159.

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

The certificate of sale under s. 316, Civil Procedure Code, states that at an auction on the 11th of April 1883, in execution of the decree in No. 2 of 1875, Lakshmana Chetti purchased the immovable property of the defendant of the said suit out of those immovables hereunder specified, and that the sale was duly confirmed by the Court on the 24th of June.

In the application for sale, the property is described as the palace to which the defendant is entitled, and in the certificate for sale the property sold is described as the immovable property of the defendant. In reality, what was attached and set up for sale was the property of the zemíndár, the defendant in the suit, in the palace buildings. There is no substantial or practical difference between a sale of the buildings, the property of the defendant, and a sale of the right, title, and interest of the defendant in the buildings.

Nothing could be sold, or was purported to be sold, than the property of the defendant in the buildings.

In strictness the proclamation and certificate should have stated what interest in the property the defendant, the zamíndár, had.

It was the business of the purchaser to satisfy himself what the property of the zamíndár in the buildings was. But if they were sold as the absolute property of the zamíndár, that fact would not interfere with the right of the plaintiff or protect the purchaser from being ejected by the plaintiff who proves that his father was only entitled to the zamíndári during his life.

The purchaser contended that as his purchase money was applied to pay off debts on the estate for which the zamíndári and the plaintiff were liable, that he is in equity entitled either to the possession of the property bought, or to hold the property until he shall be recouped the purchase money. This view is now suggested for the first time, and I do not see how it can be taken advantage of. If the question had been raised in the Court below, there might have been answer to it either in fact or law.

I do not see what equity the purchaser can have. He did not get an assignment of the decree; he was a volunteer in buying against the plaintiff. He made a bad speculation as it turned out on account of the death of the zamíndár, but if he had lived, the purchaser probably by having possession of the zamíndár's residue would be able to make money from his bargain.

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

I would reverse the decree of the Subordinate Judge and make a decree for the plaintiff in the terms of the prayer of the plaint with costs in the lower Court and of this appeal.

MUTTUSÁMI AYYAR, J.—The appellant is the zamíndár of Sivaganga. His father succeeded to the zamíndári in December 1877 and died in July 1883. The estate descended to him as the eldest son of the eldest daughter of the istrimirár zamíndár on the death of Kattama Náchiar, a junior daughter. On the 10th August 1868 the appellant's father executed a simple bond for Rupees 40,000 in favor of one Chidambara Chetti. The creditor instituted original suit 2 of 1875 upon that bond, alleging that though it had been executed for Rupees 40,000 he had lent thereon only Rupees 15,417-10-9. The suit terminated in a compromise which provided, *inter alia*, that Rupees 33,500 should be paid by the zamíndár to the creditor with interest at 6 per cent. per annum in six months after Dorasinga Tévar acquires either the whole of the zamíndári or more than a moiety of it. A decree was made in accordance with the compromise (exhibit ii) and Chidambara Chetti made an attempt to execute the decree when Dorasinga Tévar's claim to the zamíndári was still pending before the Privy Council. By an order dated the 27th October 1878, the then District Judge rejected the application for execution, observing that the result of the appeal to the Privy Council was not known, and that the possession obtained by Dorasinga Tévar was not such an acquisition of the zamíndári as entitled the creditor to take out execution (exhibit iii). This order was confirmed by the High Court on appeal in December 1879. On the 10th May 1880 a decree was passed by the Privy Council in favor of Dorasinga Tévar. Chidambara Chetti died, and a creditor who had obtained a decree against him in original suit 471 of 1880 on the file of the High Court attached the rázi decree and executed it by attaching the property now in suit in August 1882 under s. 273 of the Code of Civil Procedure. In the list of attachment, the property attached is described as the palace of the zamíndár in his possession, inclusive of a devastánam, kachéri, and other head offices. The proclamation of sale was issued in these terms: "Notice is hereby given that on the application for execution of the decree passed in the said suit, the immovable property of the first defendant described below having been attached, will be sold by this Court in public auction on the 10th January 1883 next, if the sums

mentioned below be not sooner paid into this Court, or if steps be not taken to satisfy the amount of decree. In so doing the undermentioned right of the first defendant in the said property will be sold:—

Decree amount ..	Rs. 33,500	0	0		½ per cent. interest on the decree amount from 13th August 1882 is also to be collected."
Interest ..	„ 13,902	8	0		
Court costs ..	„	...			
Costs of execution	„ 226	8	0		
Total	Rs. 47,629	0	0		

Respondent No. 1, who was not connected with original suit 2 of 1875, became the purchaser, the sale was confirmed, and a sale certificate (exhibit xii) was issued: this document described respondent No. 1 as having purchased the immovable property of the defendant (in original suit 2 of 1875) out of the immovables specified in the certificate. The purchaser applied for possession, and the appellant contended that his own interest in the property, as contradistinguished from that of his father, did not pass by the sale. He was referred to a regular suit. Thereupon, he sought to obtain a declaration to that effect in this suit. The Subordinate Judge of Madura held that what was purchased was the entire property, and not merely the right, title, and interest of the late zamíndár in it. The plaintiff appeals.

It was not seriously contended that the debt was immoral, or that the transaction was tainted with fraud, or that the sum of Rupees 10,000 and odd was not originally advanced as alleged, and I concur in the opinion expressed by the Subordinate Judge in regard to those matters. The substantial question raised for decision on appeal is, what interest passed by the Court-sale. The sale notice proclaimed that the right of the first defendant, the late zamíndár, in the said property will be sold, and the sale certificate described the purchase as the immovable property of the late zamíndár in "the undermentioned" immovables. In the view that more than the late zamíndár's interest was intended to be sold, the expression "the right or property of the late zamíndár in the immovable property" was superfluous. Apart from this circumstance the decree which was obtained by Chidambara Chetti was a mere money decree, and according to the latest decision of the Privy

SIVAGANGA ZAMÍNDÁR v. LAKSHMANA.

Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*,(1) which we have followed in several cases, nothing more than the interest of a Hindú father would pass by a sale of ancestral property in the execution of such decree. It is then urged by the respondent's pleader that that decision would be applicable if the purchaser in this case were the judgment-creditor as in the other, and not a stranger who paid his purchase money in good faith. The only distinction between a stranger who purchases *bonâ fide* and the judgment-creditor who buys at an execution sale is, as pointed out in *Muddun Thakoor's case*, that the former is not bound to look beyond the decree, and that no knowledge of facts which do not appear on its face can be imputed to him. But this does not alter the character of the decree in original suit No. 2 of 1875 as a money decree which was passed against a Hindú father and zamíndár. It does not show on its face that specific property is directed to be sold as in the case of a decree founded on a mortgage. Having regard to the observations of the Judicial Committee in the latest case and in *Muddun Thakoor's case*, it seems to me that the distinction made is between a money decree and a decree which in substance executes the father's mortgage, and that in one case the son's interest is not bound by a sale in execution, unless the son is made a party to the suit, whilst in the other, his interest also passes by the Court-sale. It is then urged that the appellant's father inherited the zamíndári from his maternal grandfather, and that as such it must be treated not as ancestral, but as his father's self-acquired property. In the *Sivagiri case*, in which I took part, it was held by this Court that it was not the father's self-acquired property in the sense that he could alienate it at his pleasure. Adverting to this part of the case, the Judicial Committee concurred in the view that it was not the father's self-acquired property, and though the Privy Council did not desire to decide the question, their *dictum* so far as this Court is concerned has considerable weight as that of the highest judicial tribunal. Another contention is that if the appellant's title to the zamíndári is declared, he should be declared entitled to its possession on payment of his father's debt or the purchase money. The purchaser bought the late zamíndár's interest, whatever that was,

(1) I.L.R., 10 Cal., 635.

for the money which he advanced. If the zamíndár had lived long, it would have been a profitable speculation. In the event which has occurred, it has turned out to be a losing speculation. I do not see how this can give rise to any equity in favor of the purchaser. For these reasons, I concur in the decree proposed by the learned Officiating Chief Justice.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

NARASIMHA, *in re.**

1886. January 29.

Criminal Procedure Code, ss. 133, 137, 140.

A Sub-divisional Magistrate having made a conditional order, under s. 133 of the Code of Criminal Procedure, against a person to abate a nuisance or appear and show cause before a Second-class Magistrate why the order should not be enforced, the said person appeared as directed and the order was made absolute under s. 137. The Second-class Magistrate then issued a notice and order under s. 140, requiring the nuisance to be abated within a certain date. The District Magistrate having referred the case on the ground that the Second-class Magistrate had no jurisdiction to pass final orders in such cases :

Held, that the order was not illegal.

THIS was a case referred to the High Court, under s. 438 of the Code of Criminal Procedure, by A. Cruickshank, District Magistrate of Anantapúr.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Kernan and Brandt, JJ.).

Counsel were not instructed.

BRANDT, J.—In August 1884 a Sub-divisional Magistrate considering, on reports received from a Tahsildár under him, that unlawful obstructions had been caused by two persons in a public way or place, made a conditional order under s. 133, Criminal Procedure Code, requiring them to remove the obstructions or to appear before the Second-class Magistrate, the Tahsildár, and move to have the order set aside.

They did appear and produce evidence; but the Second-class Magistrate being, it is to be presumed, satisfied that the order was reasonable and proper, issued the notice, addressed to one of the

* Criminal Revision Case 678 of 1885.

In re NARASIMHA.

two persons cited and purporting to be passed in accordance with s. 140, which the District Magistrate refers as illegal by reason of a Second-class Magistrate having "no jurisdiction to pass final orders in such cases."

The question is whether the conditional order made under s. 133 can be made absolute in the events specified in s. 137 by a Second-class Magistrate before whom the parties have been ordered to appear under s. 133, or by the First-class Magistrate who makes the original order alone; whether, after the reference is once made, it rests with a Second-class Magistrate to pass a final decision and thereon issue the consequential order, or whether the reference contemplated is only for the purpose of local inquiry and report with opinion, or finding by the officer making the report?

The words "the Magistrate" in the first two clauses of s. 137 can only mean the Magistrate empowered and directed to take the evidence, as it provides that, after the Magistrate takes the evidence, if he is satisfied that the order is not reasonable, no further proceedings shall be taken in the matter. No reference to the Magistrate who made the order is required. Presumably the same expression used in the three clauses should refer to the same person; it would also seem reasonable to infer that "the Magistrate" who is to issue notice under s. 140 is the Magistrate indicated in s. 137.

At the same time the impersonal form of the concluding part of s. 137 is to be noted, and it might perhaps have been expected and might be preferable that the superior Magistrate making the order in the first instance should decide in any case whether the order should be made absolute or not.

On the other hand, in the case of appointing a jury there is no ambiguity, s. 135 (*b*); the application is to be made "to the Magistrate by whom the order was made." We are then of opinion that the order referred in revision is not illegal, but it appears to us undesirable, as a rule, for First-class Magistrates to call on the officer who reports on a nuisance in his administrative capacity to decide judicially whether it is a nuisance or not.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KARUTHÁN, PLAINTIFF,

and

SUBRAMANYA AND ANOTHER, DEFENDANTS.*

1885. July 6. 1886. January 9.

Civil Procedure Code, s. 268—Decree—Execution—Attachment—Deposit by servant of railway company—Rights of attaching creditor.

Where money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment-creditor of such servant under s. 268 of the Code of Civil Procedure:

Held, that the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under cl. (c) of s. 268, and also to payment of the interest, if any, due by the company on such deposit to the servant.

THIS was a case referred under s. 617 of the Code of Civil Procedure by R. Vasudeva Ráu, Subordinate Judge of Negapatam.

The case was stated as follows:—

"Plaintiff obtained a Small Cause judgment against both the defendants jointly and severally, and having applied for execution, moved the Court for attaching about Rs. 300, being the guarantee amount deposited by the defendant No. 1 with the South Indian Railway Company for the faithful performance of his duties. The attachment was made under s. 268 of the Code and the usual notice was duly served upon the Agent on the 27th August 1885; but the Agent addressed to me a letter on the 4th September 1885, inviting my attention to subsidiary orders accompanying Government of India circular No. 13, Railway, dated Simla, 7th August 1884, and informing me that the Honorable the Advocate-General of Bengal had therein represented to Government that compulsory deposits made by railway employés in India cannot be attached by judgment-creditors. I have not been able to find a copy of the order, but on a reference to the additional rule 3 A appended to page 130 B to be found in page 3 of the twelfth list of corrections to be made to the Civil Account Code received in this office on the 5th instant, I find that the said Advocate-General has expressed

* Referred Case 16 of 1885.

KARUTHÁN v. SUBRAMANYA.

his opinion accordingly. He says: 'If, as stated in this case, the deposits under notice are payable to discharged railway employés subject only to Government claims, and they can insist on having payment thereof made to them, I am of opinion such deposits can be attached by judgment-creditors. My previous opinion has been very properly limited (as the case on which I advised would show) to the case of a railway servant in actual service.'

"Upon the foregoing facts, although I see the propriety of the rule proposed to be followed by the Advocate-General, I doubt, whether I am bound to follow the said rule. On one hand, it would be very inconvenient for the railway company if the rule were otherwise. It is very seldom that a railway employé allows the guarantee amount to be attached, as he is sure that any reduction of the guarantee amount would entail the forfeiture of his appointment, and when he finds it impossible to avoid it, the attachment is effected. The moment it is effected, the railway company hands up the amount to the Court and dismisses the man for want of sufficient guarantee being deposited. At present, on an average, amounts are drawn from the railway company in the case of two employés in a month. I need hardly point out how inconvenient and difficult it would be for the railway authorities to turn out old and experienced men and go on enlisting new people who can furnish sufficient amount of guarantee; and this simply because the employés concerned have turned poor and not dishonest or inefficient. When they enter the service they entrust the amount with the authorities with a special object, and until that object is fulfilled and the guarantee amount becomes returnable, it is my impression that the authorities have virtually a prior lien over the particular amount deposited with them in preference to other simple money decree-holders.

"On the other hand, it may be urged with equal plausibleness, that the rule, if allowed to have effect, would, to a great extent, help a dishonest debtor who, having recklessly contracted debts and spent money for improper purposes, may, as the last resource, enter the railway service, having collected and deposited all that he has in the shape of a guarantee amount, while his honest creditors could have no other means of recovering their debts but quietly to look on their debtor leading a decent life with a portion of his property quite safe in a public office which would otherwise be liable to be appropriated for some of his proper debts.

KARUTHÁN v. SUBRAMANYA.

"Section 266 of the Code of Civil Procedure contains a list of the property which is held not liable to attachment; but while it includes a moiety of the salary of a servant of the railway company, it does not include the guarantee amount now in question. But, considering the principle involved, it appears to me that the object of the Legislature is to see that the man is not allowed to starve, which would be the consequence if the whole of his salary is attached and taken away by his creditors, or his guarantee amount is attached and he is left without any employment whatever. Hence my impression is that such compulsory deposits by railway servants in actual service should not be attached by judgment-creditors in execution of their decrees consistently with the intention of the Legislature and with the despatch of public business in railway offices. There are four similar petitions now pending before me which await the decision of the question, and I feel diffident to decide the question one way or the other. Hence the reference.

"The question, therefore, that I would respectfully submit for the decision of the Honorable Judges is, whether, with reference to the opinion of the Honorable the Advocate-General of Bengal referred to by the Acting Agent of the South Indian Railway Company, compulsory deposits of railway employés in actual service are liable to be attached and realized for satisfaction of decrees under the Code of Civil Procedure."

Mr. *Wedderburn* for the attaching creditor.

The judgment-debtor did not appear.

The Court (Brandt and Parker, JJ.) delivered the following

JUDGMENT:—The question for decision, as we understand it, is whether money or other valuable securities deposited as security for the due performance of their duty by servants in the employ of a railway company can, while the depositor remains in the service of such company, be attached and sold in execution of decrees obtained against such servants. The learned counsel who argued the case for the execution creditor before us does not contend that more can be done than to place an attachment on such deposits so as to prevent the railway company from paying over the deposit either to the depositor or to any one else without the order of the Court; it is admitted in fact that the railway company has a lien on the deposit, which is pledged to it for a specific purpose so

KARUTHÁN v. SUBRAMANYA.

long as the relation of master and servant continues between the company and the servant.

We are of opinion that this is so, and that it is not therefore open to a Court executing a decree against a person so employed to order sale of the deposit or to direct that it be paid over to the judgment-creditor. But we see nothing to prevent an attachment being placed thereon at the instance of the judgment-creditor; indeed this appears to be a case to which the provisions of ss. 266 and 268 of the Code clearly apply.

The deposit is movable property belonging to the judgment-debtor subject to the lien of the company; on termination of the contract of service the judgment-debtor is entitled to its return, provided that the company has no right under the terms of the contract under which it is deposited to retain the whole or a portion of it, and s. 268 provides for attachment of such property not in the possession of the judgment-debtor by a written order prohibiting the person in possession of the same from giving it over to the judgment-debtor. We answer the question then as follows: the Court may place an attachment on such deposits, subject to the lien of the company, but cannot proceed to order the sale thereof until the deposit is at the disposal of the judgment-debtor free from the lien of the company, and if the deposit carries interest, and the interest is not, under the terms of the contract between the employer and the employé, at the disposal of the employer, order may be made for payment to the judgment-creditor of the interest as it from time to time falls due.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. November 2.

MAHOMED KOYA (PLAINTIFF), APPELLANT,

and

KASMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Small Cause Court Act XI of 1865—Jurisdiction—Suit to declare movable property not liable to attachment—Civil Procedure Code, s. 283.

Certain movable property having been attached in execution of a Small Cause decree passed by the Court of a Subordinate Judge, a claim thereto was preferred

* Appeal against Order 122 of 1885.

MAHOMED KOYA v. KASMI.

by M and rejected. M then brought a suit in the District Múnsif's Court for a declaration that the property was his and was not liable to be sold in execution.

The suit was dismissed on the ground that it was cognizable by a Court of Small Causes:

Held, that M was not bound to sue for recovery of the property and that the suit was not cognizable by a Small Cause Court constituted under Act XI of 1865.

THIS was an appeal against an order of W. P. Austin, District Judge of North Malabar, reversing the decree of A. C. Kannan Nambiar, District Múnsif of Kavai, in suit 39 of 1884, and returning the plaint.

The plaintiff, Nalupurappattil Madathil Syed Mahomed Koya Thangal, sued to obtain a declaration that 5,205 seers of paddy attached by the defendants Nos. 1 and 2, Anakaran Kasmi and his brother, in execution of a Small Cause decree, obtained in the Court of the Subordinate Judge of North Malabar, were not liable to be sold in execution of that decree.

Defendants Nos. 1 and 2 pleaded that the Court had no jurisdiction to entertain the suit, because the value of the paddy was less than Rupees 500, the limit of the Small Cause Jurisdiction of the Subordinate Judge.

The District Múnsif held that the suit, which had been brought according to the provisions of s. 283 of the Code of Civil Procedure, was not cognizable by a Small Cause Court, and referred to *Ilahi Bakhsh* v. *Sita*(1) and *K. I. Narainan* v. *K. I. Nilakandan Nambudri.*(2) He decreed the claim.

On appeal, the District Court, referring to *Janakiammal* v. *Vithenadien*,(3) *K. N. Booche Naidoo* v. *R. Lutchmeepaty Naidoo*,(4) *Nathu Ganesh* v. *Kálidás Umed*,(5) and *Gordhan Pema* v. *Kasandás Balmukundás*,(6) held that the suit ought to have been brought in the Small Cause Court, and, reversing the decree of the Múnsif, directed the plaint to be returned to the plaintiff.

Mr. *Wedderburn* for appellant.

The Acting Advocate-General (Hon. Mr. *Shephard*) for the respondents.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following

(1) I.L.R., 5 All., 452.
(2) I.L.R., 4 Mad., 131.
(3) 5 M.H.C.R., 191.
(4) 8 M.H.C.R., 36.
(5) I.L.R., 2 Bom., 365.
(6) I.L.R., 3 Bom., 179.

MAHOMED KOYA v. KASMI.

JUDGMENT :—The plaintiff's movable property had been attached in execution of a decree against the defendant No. 3, and his claim having been disallowed, he brought this suit to establish his right. The relief asked is a declaration that the property is not liable to be sold for the judgment-debt of defendant No. 3. The District Múnsif granted the declaration prayed for, but the District Judge has held in appeal that the suit, being one for personal property, ought to have been instituted in the Court of Small Causes.

A Small Cause Court is not entitled to make a declaration, and the District Judge's order cannot be supported on the ground upon which it has been put. On behalf of the respondent it has been contended that the appellant was dispossessed by the attachment, and, therefore, could not ask for a declaration without also seeking recovery of the property; if he had sought recovery of the property there is no doubt that the suit would be cognizable by a Court of Small Causes. But we do not think he was bound to sue for possession. Section 283 permits him simply to establish his right. The property is not in the possession of any private person, and he could not sue the Court which attached it. It is probable that, in framing s. 283 of the Code of Civil Procedure, the Legislature bore in mind that, if a suit for possession was required, the owner of property might be put to heavy expense in the way of institution fees upon his property being wrongly attached.

The decree of the District Judge is reversed, and the appeal remanded for disposal on the merits. The costs of this appeal will be paid by the respondent.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1885. September 18. 1886. January 6.

CHANDU (PLAINTIFF), APPELLANT,

and

KOMBI (DEFENDANT No. 1), RESPONDENT.*

Jurisdiction—Civil Courts' Act (Madras)—Court Fees Act, s. 7, cl. 9—Ejectment—Mortgage set up by defendant exceeding limit of jurisdiction.

In a suit brought in a District Múnsif's Court to recover several parcels of land from the defendant, plaintiff alleged that defendant held a valid mortgage of

* Appeal against Order 62 of 1885.

CHANDU v. KOMBI.

Rs. 206 on two parcels which he offered to redeem. As to the other parcels he alleged that if any charges had been created in defendant's favour over them by his predecessor in title such charges were invalid. The suit, as valued by the plaintiff, was within the pecuniary limit of the Múnsif's jurisdiction. Defendant pleaded that he held a mortgage for Rs. 3,000 over the land and therefore the Múnsif's Court had no jurisdiction to try the suit. The Múnsif tried the question of the validity of the defendant's mortgage and decreed possession to plaintiff on payment of Rs. 906 due on account of mortgages and Rs. 1,647-11-9 on account of improvements. On appeal the District Judge held that the Múnsif had no jurisdiction, reversed the decree, and ordered the plaint to be returned to be presented in the proper Court.

Held, that the Múnsif's Court had jurisdiction.

If a suit is brought in ejectment, and the defendant proves that he holds a mortgage, a decree for redemption cannot be made without his consent.

If, in such case, defendant consents to a decree for redemption, and the amount secured by the mortgage exceeds the limit of the pecuniary jurisdiction of the Court, the Court should not proceed further, but return the plaint to be presented in a superior Court.

THE facts and arguments in this case appear sufficiently, for the purpose of this report, from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

The Acting Advocate-General (Hon. Mr. *Shephard*) for appellant.

Srínivása Ráu for respondent.

JUDGMENT.—This is an appeal against an order of the Officiating District Judge of North Malabar (H. T. Ross), dated the 19th of December 1884, made in appeals 224 and 268 (in original suit 583 of 1883 on the file of the District Múnsif of Badagara), whereby the Officiating District Judge reversed a decree made for the plaintiff, and directed the plaint to be returned to the plaintiff for presentation in the proper Court. The Officiating District Judge held that the subject-matter of the suit exceeded Rs. 2,500.

In the plaint, plaintiff (Valathilathil Chandu), as holder of the stánam of the Kannambalath Náyar, sought to recover possession of several properties mentioned in the schedule to the plaint. He admitted that defendant No. 1 (Kombi Poker) held kánam on the properties Nos. 1 and 2 for Rs. 206, which he offered to redeem. He alleged in the plaint that defendant No. 1 and the other defendants under him got possession of the remaining properties from No. 3 inclusive, belonging in jenm to the plaintiff as stáni through means of one or other of his predecessors in the stánam, who had not delivered marupats (counterparts of

CHANDU v. KOMBI.

lease) or documents to him by reason of existing enmity. But, in the plaint, it was alleged that defendants were not entitled to any charge except as before stated on the properties, or to possession of the properties, inasmuch as any kánams, except as above, were not granted by his predecessors for purposes binding on the family. He prayed for delivery of all the properties on payment of Rs. 206, and for rent of all the remaining properties from No. 3, from the institution of the suit, and further relief.

He valued his suit at—

	RS.	A.	P.
(1) Value of kánam admitted	206	0	0
(2) Five times the income of the properties from No. 3	221	5	2
(3) The rent of the properties	425	0	0
In all ...	852	5	2

Defendant No. 1 pleaded that the suit was not properly valued, and if it was, it would be beyond the jurisdiction of the Múnsif, as his kánam and other claims amounted to Rs. 3,000, besides other items. Some of the other defendants set up separate defences as to property in their possession, which it is not necessary to refer to in detail.

The issues framed were (so far as is important to the present question)—

(6) Whether the sale set up by defendant No. 1 in respect to properties Nos. 1, 2, and 17 sued for is true, and valid, or not?

(7) Whether the plaint kánam grants are true, or not?

(8) Whether the kánam set up by defendant No. 1 is true and valid and binding upon the plaint properties concerned, or not?

(9) Whether the Court-sale set up by defendant No. 1 in respect to properties Nos. 7, 11, 17, and 21 sued for is true and valid, or not?

The Múnsif having heard the case, made a decree directing restoration to the plaintiff of all the properties on payment of Rs. 906, kánam amount due to defendant No. 1, and Rs. 1,647-1-9 due for improvements due to all the defendants. Defendant No. 1 appealed on many grounds, of which one only

CHANDU v. KOMBI.

need be referred to, viz., the ground that he held a kánam for 2,500 rupees and other claims, and that the suit is not within the jurisdiction of the Múnsif. On appeal, the Judge decided that the suit was beyond the Múnsif's jurisdiction and was not properly valued. He says that the Múnsif treated the suit as one to redeem kánam, and went on trying whether the kánams set up by the defendant were valid or not, and valued the suit according to the result. This, moreover, the Judge says, is unsound, and he considers this proved by supposing the case that the kánams set up by the defendants were found valid, and he asks, what then would become of the Múnsif's jurisdiction, and says, the mere accident that he found some of them not valid cannot affect the principle.

He decided that treating the suit as one to redeem kánam, the proper valuation of the suit for jurisdiction was the amount of the mortgage set up by the defendant, on whom plaintiff relied to show how the properties were held. He also decided that the proper valuation for Court fees was, under s. 7, cl. 9, Act VII of 1870, according to the amount specified in the instrument of the mortgage, and not the amount ultimately found due. He then refers to exhibits 1, 5, 8, 9, 10, 11, and 14 which are kánams set up by the defendant, and the sums expressed in these amount, in the whole, to Rs. 2,740, which is beyond the jurisdiction of the Múnsif. He also says that the plaintiff alleged he did not know what kánams there were, and that he threw on the defendant the *onus* of proving what kánams were outstanding to be redeemed. We are of opinion that the suit should not have been valued then and there on the mortgages disclosed by defendant No. 1, before going into the question of their validity or otherwise. We do not agree that the plaintiff was bound to accept the principal amount stated in the mortgages produced by the defendant as the value of the subject-matter of the suit, unless so far that plaintiff may have admitted that the mortgages, or any of them, were binding on him, and were valid charges on the land.

If a plaintiff was bound to value the subject-matter according to the amount specified in mortgages produced by the defendant, whether he admitted them or not, the result would be to give the defendant the selection of the Court in which the suit should be brought, if he chose to set up unfounded claims on invalid

CHANDU v. KOMBI.

kánams. Moreover, if a plaintiff filed his suit in the District Court merely because the defendant alleged kánams binding upon plaintiff which were over Rs. 2,500, and if it was found they did not bind plaintiff, then he might be in the difficulty of having his plaint returned to have the suit filed in the Múnsif's Court.

In the present case, as we understood, several documents set up by the defendant were not admitted by the plaintiff and were found not to be binding on him. Why then should plaintiff accept the amount of any of such documents as any part of the value of the subject-matter of the suit. The Court Fees Act refers to suits to redeem mortgages, that is when the mortgage is admitted.

It was contended for the defendant that the mortgages produced by Defendant No. 1 did bind the plaintiff as they were made by a predecessor in office of the plaintiff, and that he could not avoid redeeming them if he claimed possession. We are not prepared to admit this, as the plaintiff, not having executed any of the documents, was not bound to file a suit to set them aside. He would be entitled, as admitted jenmi, to possession, if the defendant does not establish any title, and such title he could only establish by proving mortgage and the validity and binding effect of it on the plaintiff. If the defendant failed in so doing, as he did in some instances in this case, his alleged mortgage, even though registered, would not stand in the way of a decree for possession which plaintiff would be entitled to.

Plaintiff's case on the plaint was that he did not admit any mortgage held by defendant was binding on him except what he offered to redeem. We think the Múnsif had jurisdiction. In argument of the appeal some matters were referred to, and to which, it may be of use to the parties in a future trial, that we should refer.

In the course of the trial, inquiry was made whether other kánams set up by defendant No. 1 were binding on the plaintiff. The Judge says, the Múnsif varied the value of the suit according to the result. But the plaintiff could not take from the defendant possession of any land on which the latter proved a valid kánam, unless he offered to redeem. It is quite intelligible therefore that plaintiff, whenever a mortgage (not admitted) was proved and its amount fixed, to propose (*if the defendant did not object*) to redeem that mortgage. In this way, the amount of the subject-matter might become increased in value, and then further duty

CHANDU v. KOMBI.

should be payable. If the amount in value of the subject-matter at the conclusion of the trial or before that appeared to be more than Rs. 2,500, then the Judge should not proceed further in the suit, but should give back the plaint to be filed in the proper Court. It is contended that the Civil Courts' Act does not contemplate an increase in the value of the subject-matter in the course of the suit, but I do not see any objection on principle to such increase arising on the construction of the Civil Courts' Act, or the Court Fees Act. It is not always possible, before filing a suit, to fix the exact value for jurisdiction in the Múnsif's Court. It is enough if it is below Rs. 2,500. If the subject-matter is valued for duty under the Court Fees Act at a fixed amount, that amount may be increased under ss. 9 to 12 in the cases there mentioned, if the amount proved exceeds the original value stated in the plaint, and thereupon the excess duty becomes payable and is directed to be levied. It does not appear that the defendants denied the right of the plaintiff to redeem any of the kánams proved, or relied on any right to continue in possession under any of them. The only question in respect of such kánams set up by the defendant was whether they bound the plaintiff, and what sum was due on foot of them. We think, therefore, that there was no objection to the course adopted by the Múnsif in allowing the amount of the subject-matter to be valued at an increased amount, if defendant did not object. The question, however, of more importance, is whether the plaintiff should, in the course of this suit, be allowed to redeem any kánam proved, which he had not offered either specially or under general terms in the plaint to redeem, if the kánam-holder *objected*. We think he should not have been so allowed. The plaintiff did not admit any kánam except as specified in the plaint. Defendant No. 1 set up others; and there was an issue, whether they were true or not.

The plaintiff did not, in the plaint, offer to redeem any of those others, but insisted on his title to the lands discharged of them. At the hearing, the Múnsif treated the suit as one to redeem any kánam proved. Defendant No. 1, it is stated by the Judge, *objected* to that course. The objection, if made, was a good one, inasmuch as whether the Múnsif at the hearing altered the plaint so as to make it appear that the suit was for redemption of all kánams proved, or whether without alteration he treated the

CHANDU v. KOMBI.

suit as one for such redemption, he altered the nature of the suit so as far it prayed for possession irrespective of defendant's kánams, to one for redemption of the kánams proved by the defendant. If on, appeal, the kánams set up by the defendant No. 1 are held to bind the plaintiff, he may be able to say that he did not offer to redeem them, and then the defendant would lose the advantage of the decree which, if the suit was a redemption suit, he would have been entitled to, viz., that if plaintiff did not redeem within a given time his right should be barred.

The plaintiff ought to decide for himself, while framing his plaint, whether he is to sue to redeem or to eject, and value his suit accordingly. It is certainly irregular without defendant's consent, to allow a suit to eject to be treated as a suit to redeem, without amending the plaint. The right to amend ceases with the first hearing, and it was again irregular to treat the plaint as amended according to the result of the findings at the conclusion of the trial.

We reverse the order of the Officiating District Judge, dated the 19th December 1884, and direct the appeal to be restored to the file of the District Judge to be disposed of *de novo*.

The costs of this appeal will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. October 27.

VENKATANÁRÁYANA (PLAINTIFF), APPELLANT,

and

SUBBARÁYUDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Regulation XXIX of 1802—*Karnam—Incapacity of next heir—Minority—Appointment by landholder of successor without proof before Zila Court of incapacity of heir.*

A karnam in a zamíndárí village having died leaving a minor son, the landholder appointed the brother of the late karnam to the office.

In a suit brought by the son, after attaining majority, to establish his right to the office and to recover its emoluments:

* Appeal 54 of 1885.

VENKATANÁRÁYANA v. SUBBARÁYUDU.

Held, that, under the provisions of Regulation XXIX of 1802, he was not entitled to recover.

Section 7 of the Regulation provides that, in filling the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders except in cases of incapacity on proof of which before the Judge of the Zila the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies.

Held, that where the incapacity arose from minority about which there was no dispute an appointment by a landholder made without proof before the Court of the incapacity of the heir was valid.

THIS was an appeal from the decree of E. C. Johnson, Acting District Judge of Vizagapatam, in suit 19 of 1883.

The plaintiff, Reparti Venkatanáráyana, sued (1) Reparti Subbaráyudu and (2) Reparti Venkatanáráyana, to have his claim established to the office of karnam of certain villages in the zamíndárí of Vizianagaram, and to recover the emoluments of the office. He alleged that his father was the sole mirásí karnam in 1864 when he died. Plaintiff being then a minor, his father's brother, Appaya, was appointed, and defendant No. 2 was appointed as a joint karnam by the Mahárájá of Vizianagaram. On the death of Appaya, his brother, defendant No. 1, was appointed in his place. Plaintiff contended that he, being now of age, was entitled to recover the office from the defendants; he had applied to the Mahárájá of Vizianagaram for the office without success in 1882. Defendant No. 1 denied plaintiff's right to sue. Defendant No. 2 alleged, *inter alia*, that his family had a joint mirásí right with plaintiff's family, and denied plaintiff's right to question the validity of his appointment.

The Mahárájá of Vizianagaram was made a defendant in the suit, and pleaded, *inter alia*, that he was entitled to appoint as many karnams as were required to do the work of the office under Regulation XXIX of 1802, and that, as one of plaintiff's family was in office, plaintiff had no right to sue.

The District Judge found that the family of defendant No. 2 had an hereditary claim to the office, and had enjoyed half of the emoluments thereof, and held that the appointment of defendant No. 2 was legal.

As to the appointment of defendant No. 1, he ruled that it also was valid, citing *Ooluty Bhoopatyrauze* v. *Vuddy Putty Gourrauze.*(1)

(1) M.S.D., 1853, p. 91.

VENKATANÁRÁYANA v. SUBBARÁYUDU.

The suit was dismissed.

The facts and arguments appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

Mr. *Michell* for appellant.

Hon. *Rámá Ráu* for respondent No. 2.

Mr. *Wedderburn* for respondent No. 3.

Respondent No. 1 did not appear.

JUDGMENT.—The main question for decision in this appeal is whether the appellant has established an exclusive title to the office of karnam for the villages of Vepada and Bakkunaidupeta.

The respondents Nos. 1 and 2 denied his exclusive title, and contended that they had joint mirási rights with him. The Judge has upheld their contention, and we consider that upon the evidence on record he has come to a correct conclusion. It is not denied that the respondent No. 2 and his father have been in possession of about a moiety of the lands attached to the office from 1844. It is stated in the plaint that the respondent No. 2 is a distant kinsman of the appellant's family. Although the names of the ancestors of respondent No. 2 do not appear in the accounts relating to the lands in dispute prior to 1844, yet exhibit II shows that his branch of the family was in possession in that year. It appears from exhibit D that his father's name was entered in 1862 as one of the karnams who then had mirási rights in the village of Vepada. It would seem, however, that though his father was entered as a person who had mirási right, he had not been doing work as karnam of Vepada; but that by a family arrangement he had been doing duty as karnam of Velupati, though he had been enjoying a portion of the lands attached to the office now in suit. In 1872 respondent No. 2 was appointed as a joint karnam by the Mahárájá of Vizianagaram on the ground that the then working karnam, Repati Appaya, did not conduct his duties properly, and that respondent No. 2, who was in possession of a portion of the mirási lands, should also do the duty devolving on him as a mirásidár. From 1872 the respondent No. 2 has been doing duty as one of the karnams of the villages in dispute. These facts appear to us to warrant the conclusion at which the Judge has arrived. It is urged for the appellant that the appointment of respondent No. 2 was contrary to the provisions of s. 7, Regulation XXIX of 1802. It is provided by that section that "in filling

VENKATANÁRÁYANA v. SUBBARÁYUDU.

vacancies in the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders except in cases of incapacity, on proof of which before the Judge of the Zila, the said landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies."

It is not denied that at the date of the appointment the appellant was a minor, and we must take it as finally settled by the decision of this Court in *Venkata* v. *Rámá* (1) that minority is a ground on which the heir may be lawfully passed over and a selection made by the landholder from among the other members of the family. It is then said by the learned counsel for the appellant that the Regulation requires that the incapacity should be proved before the Zila Judge, and that it was not complied with in the case before us. As the incapacity arose from minority, and as it is not denied that the respondent No. 2 was then a minor, we do not think that section has any application to a case in which there could be no dispute as to the incapacity of the legal heir. Thus, it is clear upon the evidence that this respondent's branch of the family has been in enjoyment of the lands in his possession for upwards of forty years, that his father was entered as a co-mirásidár as early as 1862, and that his appointment as joint karnam was made in circumstances which renders it legal. We see, therefore, no ground to hold that the suit was not properly dismissed as against him. Nor do we consider the claim to be good as against respondent No. 1, though he has not appeared to oppose this appeal. On the death of appellant's father, Joganna, between 1862 and 1865, appellant's uncle, Appaya, was appointed as the adult male member of the family, competent to perform the duties of the office of karnam, the appellant being a minor at that time. After Appaya's death, respondent No. 1, his brother, was appointed to succeed him, and this appointment was also made during the appellant's minority. We consider that it was a valid appointment for the reasons already mentioned.

We are of opinion that this appeal must fail, and we dismiss it with two sets of costs in favor of the respondents Nos. 2 and 3.

(1) I.L.R., 8 Mad., 249.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. November 19. 1886. February 6.

ALIBA (DEFENDANT), APPELLANT,

and

NANU (PLAINTIFF), RESPONDENT.*

Limitation Act, sch. II, arts. 132, 147—*Hypothecation.*

In 1884 N sued A to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871 and certain immovable property was hypothecated as security for repayment of the debt:

Held, that the suit did not fall under art. 147 of sch. II of the Indian Limitation Act, which allows sixty years to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under art. 132 of the same schedule which allows twelve years to enforce a payment of money charged on immovable property.

THIS was an appeal from the decree of H. J. Stokes, Acting District Judge of South Malabar, reversing the decree of U. Achutan Náyar, District Múnsif of Betatnád, in suit 135 of 1884.

The plaintiff Motavangattil Nanu Panikar sued the defendant Aliba to recover Rs. 130, being 56 rupees principal and 93 rupees interest due under a bond executed in 1870 by which certain land was hypothecated by way of security for the repayment of the debt, giving credit for a payment alleged to have been made by defendant in 1872.

The bond stipulated that the principal should be paid with interest at twelve per cent. in April 1871.

The Múnsif dismissed the suit as barred by limitation.

On appeal the District Judge held that the suit was governed by art. 147 of sch. II of the Indian Limitation Act and was therefore not barred.

Defendant appealed.

Sankara Menon for appellant.

Sankaran Náyar for respondent.

* Second Appeal 654 of 1885.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following judgments:—

MUTTUSÁMI AYYAR, J.—The respondent instituted this suit upon a deed of hypothecation dated 1870 and asked for a money decree and for a decree for the sale of the hypothecated property. The appellant pleaded, *inter alia*, limitation in bar of the claim. On appeal the Judge overruled the contention and held that art. 147, sch. II, Act XV of 1877 applied, and that sixty years was the period of limitation prescribed by that article. On this ground he decreed the whole claim, and the objection taken in second appeal is that the suit is barred by limitation.

I do not consider that this decision can be supported. It is at variance with *Davani Ammál* v. *Ratna Chetti.*(1) That was a suit brought to recover the interest due under a mortgage deed, such interest being charged on land. Following the decision in *Lallu Bhái* v. *Naran*,(2) this Court held that the suit might be brought under art. 132 within twelve years, though until then six or three years had been considered to be the prescribed period of limitation for mere money decrees according as the instrument was registered or not. The Bombay case was one in which the plaintiff asked for a money decree for the debt due upon an instrument of mortgage, and the High Court at Bombay held that art. 132 was applicable. It was argued in that case that under Act XIV of 1859 and Act IX of 1871, a suit for a money decree was a suit "for money lent" and subject to the three or six years' rule according as the bond was not or was registered; and that a suit for foreclosure or sale was held to be a suit "for the recovery of immovable property or of an interest in immovable property" and, therefore, governed by the twelve years' rule. The Court then drew attention to the words, "to enforce payment of money charged upon immovable property," substituted in art. 132, Act XV of 1877 for the words in Act IX of 1871, "for money charged upon immovable property" and observed that the change was not made without intention. The learned Judges further observed that art. 147 had introduced a special provision, not contained in the previous Acts, for a suit by a mortgagee for foreclosure or sale. They then referred to the provisions of the Transfer of Property Act and came to the conclusion that art. 132 applied to a suit by a mortgagee for a money

(1) I.L.R., 6 Mad., 417. (2) I.L.R., 6 Bom., 719.

ALIBA v. NANU.

decree. I may also refer to *Mahammad Zaki* v. *Chatku*(1) in which the same view was taken by the High Court at Allahabad. In the case before us the claim for a money decree would be barred even under the twelve years' rule, but for the acknowledgment pleaded by the respondent. The Judge must therefore be asked to determine the question whether the acknowledgment is true or not, and if it is true, to proceed to dispose of the case on the merits.

As to the claim for a decree for the sale of the hypothecated property, the Judge's view is in accordance with the opinion expressed by the High Court at Allahabad. *Shib Lal* v. *Ganga Prasad*.(2)

In that case it was held by the Full Bench of that Court that a suit by the obligee for a decree for the sale of hypothecated property was governed by art. 147, sch. II, Act XV of 1877. The Court then said, and it seems to me very justly, that if the transaction, which is the subject of the suit, really amounts to a mortgage, and the right to pay off the encumbrance is in law a right to redeem, there is no reason why the right of the mortgagee to bring the mortgaged property to sale, and that of the mortgagor to pay off the encumbrance, should stand on a different footing in respect of limitation. The provisions of the Transfer of Property Act which were next referred to to show that the right of the obligor to pay off the debt due under a simple mortgage and to recover back the mortgage deed, is as much a right to redeem as that of the obligor to satisfy the debt payable on a mortgage with possession and to recover the mortgaged property. Section 60 of Act IV of 1882 leaves no room for doubt on this point. Such being the case, the construction placed on arts. 147 and 148 is that the right to redeem and the right to foreclose or sell are related to one another as rights arising out of the same mortgage in favor respectively of the mortgagor and the mortgagee, that the suits mentioned in arts. 147 and 148 are the remedies provided for the enforcement of those rights, and that they are both governed by the sixty years' rule. This view appears to me to be reasonable. There then remained for decision the further question what suits are then to be treated as suits brought under art. 132 "to enforce payment of money charged upon immovable property." It has already been stated that a suit for a money decree upon a mortgage

(1) I.L.R., 7 All., 120. (2) I.L.R., 6 All., 551.

ALIBA v. NANU.

deed would fall within those words. As pointed out by the Allahabad High Court, a suit for the enforcement of a charge on immovable property as defined by s. 100 of Act IV of 1882, might also fall under that section. It is of importance that that Act and the Limitation Act should be read together, and that the mode in which mortgages are classified, the remedies enacted as available for each description of mortgage, and the distinction made between a mortgage and a charge should be steadily kept in view. Section 58 defines a mortgage to be the transfer of an interest in immovable property for the purpose of securing the payment of money lent. Clause B defines a simple mortgage to be one in which there is no delivery of possession of the mortgaged property, but in which the mortgagor binds himself to pay the debt personally and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money. In s. 100, a charge is defined to arise where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage. The distinction then between a simple mortgage and a charge consists in this, viz., where a power of sale is conferred upon the mortgagee expressly or impliedly by the instrument of mortgage, the transaction is a mortgage; otherwise it only creates a charge. Clause C, s. 58 defines a mortgage by way of conditional sale. Clause D defines a usufructuary mortgage as generally understood in this country. Clause E defines an English mortgage. Section 60 creates a right in the mortgagor to require the mortgagee, on payment or tender of the debt, to deliver up the mortgage deed, if any, and where the mortgage is with possession, to deliver the mortgaged property. It then enacts that this right shall be called the right to redeem, and that a suit to enforce it shall be called a suit for redemption. Section 67 creates a right in the mortgagee to obtain an order from the Court for foreclosure or sale in the absence of a contract to the contrary, but adds that nothing in this section shall be deemed to authorize a simple mortgagee as such to institute a suit for foreclosure or an usufructuary mortgagee as such to institute a suit for foreclosure or sale or a mortgagee by conditional sale as such to institute a suit for sale. It is provided

ALIBA v. NANU.

by s. 100 that all the provisions as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having a charge. Section 69 specifies the cases in which alone a power to sell without the intervention of the Court may validly be conferred upon the mortgagee by the instrument of mortgage.

Having regard to these provisions the substantial question is whether the hypothecation, which is the subject of the present suit, is a simple mortgage within the meaning of Act IV of 1882, and whether that Act has application to mortgages which were executed prior to the 1st July 1882 when it came into force. The mode in which this Act affects the Act of Limitation is by creating new rights and liabilities in the mortgagor and in the mortgagee, and I do not think that such rights and liabilities can have retrospective operation.

Prior to Act IV of 1882, the obligor had only the rights of an ordinary debtor under a hypothecation deed. On the one hand he had no right of redemption, whilst on the other the obligee had no power of sale as inherent in the contract. If the Courts ordered a sale, they did so as it was the only mode in which a charge could be enforced. There is no doubt that Act IV of 1882 affects the Act of Limitation as to mortgages executed subsequently to July 1882, but as already remarked, it does so by creating new rights and liabilities in the obligor and obligée with reference to those mortgages.

In this view it seems to me that Act IV of 1882 could have no retrospective operation, and I hold therefore that the claim for the sale of the hypothecated property was one to enforce a charge, that it falls under art. 132, and that the hypothecation on which it is based does not possess the properties with which mortgages executed subsequent to 4th July 1882 are invested by Act IV of 1882.

I am also of opinion that the decree of the Lower Appellate Court must be set aside and the appeal remanded for decision upon the question whether the acknowledgment, referred to in paragraph 7 of the District Múnsif's judgment is true, and, if it is found to be true, upon the merits. The costs will abide and follow the result.

PARKER, J.—This is a suit by a simple mortgagee to enforce payment of a debt by the sale of the property hyphothecated. The deed was executed in May 1870, the debt being payable in April 1871. The suit was brought on 22nd March 1884, and if art. 132

ALIBA v. NANU.

sch. II of the Limitation Act applies, it would be barred unless an acknowledgment alleged to have been made by defendant's father on 24th March 1872 is genuine. The District Múnsif found that the acknowledgment was not genuine; and held that the suit was barred under art. 132.

On appeal the District Judge has held on the strength of *Shib Lal* v. *Ganga Prasad*,(1) that the suit is governed by art. 147 and not art. 132, and that the time of limitation is sixty years.

If this decision be held correct, the introduction of art. 147 into the present Limitation Act made a change in the law of very serious importance. From 1793 to 1877 twelve years was the period of limitation for suits of this character, and it would be indeed strange if we should find, while the English Real Property Act of 1874 reduced the period from twenty to twelve years within the United Kingdom, that the Indian legislature extended it from twelve to sixty years in 1877 for British India. We do not find however that the other High Courts in India have adopted the same construction as Allahabad. The doubt caused by the introduction of art. 147 was discussed by the Bombay High Court in *Lallu Bhái* v. *Naran*,(2) and the learned Judges came to the conclusion, in a case similar to the present, that money lent on mortgage was, in ordinary legal phraseology, money charged on immovable property, and that art. 132 would govern the suit.

This decision was assented to, with the same hesitation, by this Court in *Davani Ammál* v. *Ratna Chetti*.(3)

Mahammad Zaki v. *Chatku*(4) was referred to as being somewhat at variance with the Full Bench decision in *Shib Lal* v. *Ganga Prasad*,(1) but on reading the former case it would appear that the Court held that the unsatisfied balance was a debt charged upon immovable property in contradistinction to a mortgage and hence that art. 132 applied.

Although the words "by a mortgagee for foreclosure or sale" would under the definition of "mortgagee" given in the Transfer of Property Act, 1882, s. 58, include an hypothecatee, it must be remembered that there was no such definition of the term "mortgagee" in 1877 when the present Limitation Act was passed. For some eighty years previous to 1877 an hypothecatee (or simple mortgagee as now defined) had always been regarded as

(1) I.L.R., 6 All., 551. (2) I.L.R., 6 Bom., 719.
(3) I.L.R., 6 Mad., 417. (4) I.L.R., 7 All., 120.

ALIBA v. NANU.

one who had a *charge* upon immovable property, and the "mortgagee" who according to the old law could be sued within sixty years of the mortgage was the party in possession. An extended technical definition given to the term "mortgagee" by legislation subsequent to 1877 will not also extend the period during which one who was not technically a mortgagee at the time of the passing of that Act can sue to enforce a claim.

No sufficient ground has, to my mind, been shown to impugn the decision of the Division Bench of this Court in *Davani Ammál* v. *Ratna Chetti*,(1) and I am fortified in this conclusion by the fact that the Bombay High Court has arrived at a similar opinion.

With all deference, therefore, to the ruling of the learned Judges of the Allahabad High Court, I would reverse the decree of the Lower Appellate Court and remand the appeal for a decision upon the other points which arise. The costs to abide and follow the result.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1886. Feb. 12, 17.

QUEEN-EMPRESS

against

VÍRAN AND OTHERS.*

Criminal Procedure Code, ss. 164, 364, 533—*Evidence Act, ss.* 65, 80—*Confessions—Improper examination of accused person by Magistrate—Record rejected.*

The Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative and was signed by the Magistrate only.

The same Magistrate shortly afterwards, purporting to act under the Code of Criminal Procedure, before any evidence was recorded against V, examined him as to this statement which was read over and translated to him. In answer to questions, V admitted that he had made it voluntarily.

This examination was recorded according to the provisions of s. 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the Sessions, tried and convicted mainly on his own recorded statement and examination.

(1) I.L.R., 6 Mad. 417.

* Referred Trial 61 of 1885.

QUEEN-EMPRESS v. VÍRAN.

The Deputy Magistrate was examined as a witness and stated that the statement recorded by him was made by V and was correctly recorded and was made voluntarily:

Held, that the record of the statement made by V to the Deputy Magistrate was not admissible in evidence against V.

Per Parker, J.—The provisions of s. 164 of the Code of Criminal Procedure are imperative, and s. 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section.

If the confessional statement of V was recorded by the Magistrate in his executive capacity, it was not receivable in evidence under s. 80 of the Evidence Act.

The action of the Magistrate in examining V as to his confessional statement before there was any legal evidence on the record against him was illegal and, therefore, the record of such examination could not be used in evidence against V.

Inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given.

THIS was an appeal from the conviction and sentence of the Sessions Judge of South Malabar (H. J. Stokes).

The facts and arguments appear from the judgments.

Mr. *Wedderburn* for appellants.

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The Court (Brandt and Parker, JJ.) delivered the following judgments:—

PARKER, J.—The three prisoners (Mapillas) have been sentenced to death for having taken part in the murder of one Kutti Karian and his family on the night of 2nd May 1885. Of the fact of the murder there is no doubt. This Kutti Karian (a low-caste man) had become converted to Islam, but had reverted to his former condition. The Mapillas of his neighbourhood, under the impulse of religious fanaticism, resolved to revenge the insult to their religion by taking his life, and on the night of 2nd May a body of them surrounded his hut, set fire to it, slaughtered him and his wife and one child, and three other children perished in the flames. They then marched away to some distance, took possession of the house of a Nambudri where they resolved to make a stand, and there waited to be attacked. In the course of the afternoon troops arrived, and all that were in the house (eleven men and a boy) were shot.

The case for the prosecution is that the three prisoners (appellants) were members of the gang who murdered this family, but deserted their comrades before they occupied the house of the Nambudri. Prisoner No. 1 was arrested on 8th May; prisoner No. 2 at Calicut on 15th May; and No. 3 at Cannanore on 23rd May. The case against them turns almost entirely upon confes-

QUEEN-EMPRESS v. VÍRAN.

sions which they are alleged to have made, which confessions were retracted at the Sessions. Evidence has been called to corroborate those confessions, but taken by itself it is very inconclusive and meagre; and it is conceded that the convictions cannot stand unless the confessions are held admissible in evidence and reliable in character.

It is objected by the learned counsel for the prisoners that these confessions are not admissible in law as evidence.

Prisoner No. 1 made three separate statements before the Deputy Magistrate (Mr. Karunákara Menon) on 9th May; a fourth on 19th May, and a fifth on 31st May; but none of these statements were recorded under ss. 164 or 364 of the Code of Criminal Procedure. The questions put and answers given were not written down; they were not taken down in the language in which they were made, but in English; they were not signed by the prisoner or certified by the Magistrate. Similar statements were taken from prisoner No. 2 on 18th and 19th May and from prisoner No. 3 on 25th and 26th May. At the trial the Sessions Judge held that the testimony of the Deputy Magistrate would not cure these radical defects under the saving provisions of s. 533 of the Code of Criminal Procedure since the provisions of ss. 164 and 364 had not only not been *fully* complied with, but not complied with at all; but he held that, since these statements were read over to the prisoners on 5th June, and were acknowledged by them to have been voluntarily made (which acknowledgments were duly recorded and signed), secondary evidence of the contents of these confessions could be given by the oral testimony of the Deputy Magistrate.

The points argued in this appeal are—

I. Whether the provisions of s. 533 enable these statements to be tendered in evidence, presuming that the Deputy Magistrate was acting under s. 164, notwithstanding the neglect of the provisions of that section and of s. 364?

II. Whether if these statements were taken under any other procedure, they are admissible in evidence under s. 80 of the Evidence Act?

III. Whether the acknowledgments made by prisoners on 5th June have the effect of incorporating those statements in the acknowledgments that day made?

QUEEN-EMPRESS v. VÍRAN.

IV. Whether secondary evidence of the contents of these documents can be and has been given by the testimony of the Deputy Magistrate?

Upon the first point I am of opinion that the provisions of s. 164 are imperative and that s. 533 will not render the confession admissible where no attempt at all has been made to conform to its provisions. We have been referred to the rulings of *Dayá Anand* v. *Regina*,(1) *Regina* v. *Amritá Govindá*,(2) *in re Mayadeb Gossami*,(3) *Regina* v. *Shivyá*.(4) These rulings were given under the old Code, but the immense importance of having the exact words of the prisoner recorded in his own language has in no way diminished. I hold that the Sessions Judge rightly ruled they were inadmissible under s. 533.

It is contended, however, that when these confessions were taken by the Deputy Magistrate, he was acting not under the Criminal Procedure Code, but under the provisions of the Mapilla Act (Madras Act XX of 1859). Section 7 of that Act authorizes the District Magistrate to cause the apprehension of any Mapilla and his detention "after such inquiry as he may think necessary;" and though the Deputy Magistrate may have been acting in an executive capacity under the orders of the District Magistrate, and aiding him to make an inquiry under this section, there is nothing in the Mapilla Act authorizing the District Magistrate to examine a suspected person or to take from him any statement or confession. Such a course may not be improper and may even be advisable; but the statements as to which s. 80 of the Evidence Act says that certain presumptions shall be drawn are statements or confessions taken in accordance with law. This section does not render admissible any particular kind of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, s. 80 does not operate to render it admissible. The section merely gives legal sanction to the maxim "*Omnia præsumuntur rite esse acta*" with regard to documents taken in the course of a judicial proceeding. In my opinion, therefore, these statements, if recorded by the Deputy

(1) 11 Bom., H.C.R., 44.
(2) 10 Bom., H.C.R., 497.
(3) I.L.R., 6 Cal., 762.
(4) I.L.R., 1 Bom., 220

QUEEN-EMPRESS v. VÍRAN.

Magistrate as an executive officer, are not receivable under s. 80 of the Evidence Act.

I now come to the third point—whether the acknowledgments made by the prisoners on 5th June had the effect of incorporating these statements. In recording these statements of 5th June the Deputy Magistrate was admittedly acting and purported to be acting in a stage of a judicial proceeding, and not as an executive officer. He was, therefore, governed in recording these statements by the provisions of the Code of Criminal Procedure, and it is necessary to consider whether his proceedings were in accordance with that Code.

On 5th June when the prisoners were placed before the Magistrate there was no evidence on the record against them. Such evidence, as was afterwards obtained, was not obtained till later in the month and all previous proceedings appear to have been under the Mapilla Act. The statements, which they had previously given, had not been made legal evidence against them; nor, as it appears from the examination itself, had they up to that time been brought on to the record of the preliminary inquiry. Under s. 342 of the Criminal Procedure Code, therefore, the Deputy Magistrate was not justified in putting *any* question at all to the accused since it is only for the purpose of enabling an accused person to explain circumstances *appearing in the evidence* against him that a question ever can be put; and still less of course was the Magistrate justified in putting questions for the purpose of getting the accused to incriminate themselves—a procedure which s. 342 was specially designed to prevent. Had the accused on 5th June offered to confess, such confessions could no doubt have been taken and recorded *before the commencement of the inquiry* under s. 164, and after the Magistrate had satisfied himself upon questioning the accused that they were going to make voluntary confessions. Such confessions could then have been recorded with the declaration prescribed by s. 164. But these statements were not given, and do not profess to have been given under s. 164, but under s. 364 in answer to questions put by the Magistrate; and not only did the Magistrate put questions to each accused when there was no evidence on the record against him which he could be asked to explain, but he actually cross-examined each prisoner at great length with regard to the part supposed to have been taken by the other prisoners—a course of proceeding most

QUEEN-EMPRESS v. VÍRAN.

unjustifiable and which has often been noticed with censure by this Court. I am of opinion that the procedure of the Deputy Magistrate on 5th June was illegal and that the questions put to and answers then obtained from the prisoners must be excluded from the record of this trial.

And lastly with regard to the secondary evidence of the contents of these statements, I am of opinion that it is not admissible under s. 91 of the Evidence Act, since the statements recorded are in themselves inadmissible—*Regina* v. *Bái Ratan*(1) and *Queen* v. *Shivyá*.(2) The question does not arise whether the Deputy Magistrate could be asked to give evidence as to what was said to him as an executive officer and not as a Magistrate, using the statements to refresh his memory, since he has only stated in general terms that the prisoners "made confessional statements"—but was never asked what each prisoner said or to connect any one prisoner with any particular statement.

The result of the case, therefore, is that, as none of the statements made by the prisoners are admissible in evidence, and as the prisoners completely retracted all former statements at the trial, there is no evidence on which the conviction can stand.

I have found it necessary to go then minutely into the legal points, but in justice to prisoners Nos. 1 and 2 I feel bound to state that, irrespective of technical objections, I should also have held them entitled to acquittal on the merits. Had the statements taken from them been admissible in evidence, they would not have sufficed for a conviction unless the Court were satisfied that they were voluntarily made and were true in fact. On neither of these points do I feel myself satisfied.

No less than three statements were taken by the Deputy Magistrate on 9th May from prisoner No. 1. In the first two of these he certainly did not confess and manifestly had no intention of confessing. No explanation at all is given of the complete change of front executed on the same day.

Prisoner No. 2 presented himself before the District Magistrate at Calicut on 15th May. The Sessions Judge says: he "surrendered" himself and next day (16th) made a "confessional statement." This is altogether inaccurate. In the statement made on 16th May he declares that the murders took place during his

(1) 10 Bom., H.C.R., 166. (2) I.L.R., 1 Bom., 220.

QUEEN-EMPRESS v. VIRAN.

absence; that on his return he heard of them and for some days went about his business, but finding that he had somehow incurred the suspicion of the police he came with his wife and children to the District Magistrate—obviously for protection. There is not a word in the statement which can be construed into a confession of guilt or guilty knowledge. This is not the conduct or the language of a man who knew himself to be guilty, or of one who *intended* to confess. He was, however, given into custody, and after being three days in custody he makes—a confession (?) On the very same day (19th May) prisoner No. 1 finds it necessary to make an additional statement in which the confession (?) of the prisoner No. 2 is corroborated in due detail and he begins it as follows: I wish to make a statement. Through stupidity I made *several false statements* when examined the other day. *I did not tell the whole truth then.*"

A few days pass and the prisoner No. 3 is arrested at Cannanore on 23rd May. On 25th May he makes before the Deputy Magistrate Mr. D'Cruz a statement in which he represents himself an unwilling spectator of the murders. On the next day (26th) he is produced before the same Deputy Magistrate who has recorded the other statements, and makes a long confession in which he represents himself as having taken a very prominent part in the whole plan. After he has done this the prisoner No. 1 again finds it necessary (on 31st May) to make a long statement, correcting and enlarging his former statements and bringing them into conformity with the story as told by the prisoner No. 3.

I find it impossible, under these circumstances, to believe that the confessions of prisoners Nos. 1 and 2 were voluntarily made, and it seems also open to doubt whether that of prisoner No. 3 was untutored and voluntary. In any case great reliance cannot be placed upon a confession which requires such frequent correction, and the sequence of these statements seems far more suggestive of a concocted case than of true confessions.

There is yet another piece of internal evidence which makes me doubt whether the story put forward by the prosecution is a true story. The prisoners represented—or were made to represent—that the Mapillas who went to murder Kutti Karian were 12 in number. This corresponds exactly with the number killed at the Nambudri's illam, and gave rise to the obvious suggestion that prisoners might not really have been there. They account for

QUEEN-EMPRESS v. VIRAN.

this by saying that they left their comrades before they occupied the illam, and this—with the fear of the consequences before their eyes—would not be in itself improbable. What is improbable is that their places would be readily taken by three other men,—or two men and a boy—not concerned in the murders. If I understand rightly the aim of the fanatics who perpetrate outrages of this description, it is to gain eternal happiness for themselves by some signal act in vindication of their religion in the doing of which they will sacrifice their own lives, and thus die what they regard as a glorious death. But to court the death without the glory is another matter and it is not easy to imagine the frame of mind in which a man would feel attracted to sacrifice his own life and be shot down by troops merely because glory had been achieved by somebody else, and not by himself. Such an act is no doubt possible, but it is not *primâ facie* so probable as to be readily accepted without clear proof.

As a matter of fact, however, I may point out that the prisoners spoke only to the gang being joined by *one* young Mapilla, and that the presence of the other man and of the boy among the dead bodies is wholly unaccounted for, and there is nothing on the record to bear out the statement in the judgment that the number shot down in the illam was made up to twelve by *two* men (one of whom brought a child with him) having voluntarily joined them.

Under all these circumstances, I cannot but regard the case for the prosecution with great distrust. On all grounds, therefore, I would reverse the conviction and direct that the prisoners be discharged.

BRANDT, J.—The three appellants, (1) Nadutodiyil Parambil Viran *alias* Viran Mohidin, (2) Vaduvan *alias* Ariparambil Kunhi Koya, (3) Edavalat Parambil Pari Mohidin, have been convicted by the Sessions Judge, South Malabar, concurring with the assessors, of murder abetment of murder and mischief by fire with intent to destroy a dwelling house—ss. 302, 109 and 302, and 436 of the Penal Code, and have been sentenced to death subject to confirmation of the sentences by the High Court.

In the memorandum of appeal preferred by the appellants Nos. 1 and 2, the grounds stated are that the appellants were induced to make the incriminating statements recorded as given by them by promises and threats and torture on the part of the police,

QUEEN-EMPRESS v. VIRAN.

and that the whole number of persons who committed the offences were killed by the English soldiers.

Appellant No. 3 states that, under the influence of fear, he accompanied those who committed the offences for a short way, but represents that he escaped before the murder was done.

The case has been further ably argued both on points of law and on the facts by the learned Counsel appointed to defend the appellants, and in support of the conviction by the learned Government Pleader.

There is no question as to the fact of the murder of a Cheruma or low-caste man and his wife and family on the night of 1st or early morning of the 2nd May 1885; of five children only one escaped, one of those who died having been cut to death and three others having perished in the flames of the hut which was set fire to.

It may also be taken as proved that this terrible act was committed by a gang of men consisting of ten or twelve persons, and that the motive was revenge and fanatical rage caused by the Cheruma's apostacy from the Muhammadan religion which he had embraced for a while, only to give it up again for his former persuasion or religion; and that twelve persons (one of whom was a child) were shot down in a house in which they made a stand on the evening of the 3rd May, and that of these there is very little doubt that nine at least were some of those who had committed the murder.

It is the case for the prosecution, and the Sessions Judge finds that the other three then shot had joined the gang in the place of the three appellants, who left their comrades—appellants Nos. 1 and 3 on the evening of the 2nd May, and the appellant No. 2 on the morning of the 3rd idem.

The convictions depend almost entirely, it may be said, on certain statements or confessions recorded as made by them on various occasions between the 9th May and 5th June; there is evidence of some witnesses, which is referred to as corroborating the confessions in certain respects.

The Sessions Judge expresses himself as very doubtful whether these statements were admissible in evidence, they not having been recorded under either s. 164 or 364 of the Criminal Procedure Code; and held that, not having been recorded as required by the Code, evidence orally given by the Magistrate who recorded them

QUEEN-EMPRESS v. VIRAN.

that they were "duly" and voluntarily made could not make them admissible under s. 533, Criminal Procedure Code; that in fact s. 533 did not apply at all, as the requirements of that section were not only not fully complied with, but not complied with at all.

He held, however, that these statements having been read over to appellants Nos. 1 and 2 on the 5th June, and acknowledged by them to have been voluntarily made, and the acknowledgments having been duly recorded under s. 364 and signed by them, they constitute admissions in writing, that secondary evidence of these documents is therefore admissible under s. 65 of the Evidence Act (cl. *b*), and that "the fact that they confessed on the dates appearing on the several documents may be proved and is proved" by the Magistrate who recorded them.

I understand the same course of reasoning to be followed, and the same grounds for admitting the statements made, to apply in the case of the appellant No. 3.

Then taking the accounts of the three appellants as telling against them and showing in what respects there is independent evidence to corroborate these, and using the statements made by appellants Nos. 2 and 3 implicating appellant No. 1 as against the latter, and similar statements made by Nos. 1 and 3 as against No. 2, and a statement made by No. 2 as against No. 3, the Judge held the charges fully established.

It is contended in appeal that the statements recorded as made by appellant No. 1 on the 9th, 19th and 31st May, by appellant No. 2 on the 16th and 19th May, and by the appellant No. 3 on the 25th and 26th May are wholly inadmissible in evidence, (1) because if taken or purporting to be taken under the provisions of s. 164, Criminal Procedure Code, they are not recorded in the manner therein required, and that they cannot be admitted, all defects being cured and omissions supplied under the provisions of s. 533, Criminal Procedure Code, and (2) that if not taken or purporting to be taken under s. 164, they were taken without any authority at all—not in accordance with law—and that therefore s. 80 of the Evidence Act does not in any way apply to them.

To ascertain if possible the nature of the statements recorded as made by the appellants before and on the 5th June, it is necessary to note the dates on which the appellants were severally arrested, and the stages at which those statements were made, and to give an outline of the contents of those statements.

QUEEN-EMPRESS v. VIRAN.

Appellant No. 1 was, as appears from the register, apprehended on the 8th May; No. 2 on the 15th; No. 3 on the 22nd *idem*. The earliest date on which evidence was recorded against the appellants was the 10th June 1885; on that day the eleventh witness appears to have been examined (if the stamp date is correct, but from all the serially-numbered preceding witnesses having been examined on the 18th June there is doubt as to this): the medical witness was examined on the 11th June: the fourteenth, fifteenth and sixteenth witnesses' depositions are dated the 11th: the first to the tenth witnesses were examined first on the 18th June and they were "recalled" and further evidence taken from them in December when the inquiry was closed. There is evidence recorded on the 12th December.

On the 9th May 1885 appellant No. 1 made before the First-Class Deputy Magistrate a statement, which is described at the heading as "a deposition" and the deponent as "Criminal No. 13," in which among other matters not material, he said that one Varikottil Ali Ahmed described as rebel No. 7 said to him one day "Kutti Karian (one of the persons murdered on the 2nd May 1885) was a Mapilla. He embraced our religion. Now he walks about as a Cheruma. Should we not avenge ourselves? Is it not meritorious to us? I told him I could not do it or go with him."

This statement is simply signed by the Magistrate and is recorded in English. On the same day the same appellant was again examined by the same Magistrate, and the material parts of his statements in this are that on the night when Kutti Karian's hut was set fire to the witness was at home, and that next day at about 8 A.M. he heard that Kutti Karian had been murdered and the hut burnt down by Mapillas. This statement is recorded in the same manner as the first, except that it is not headed deposition.

On the same day yet another statement, recorded in the same manner as the last, appears as made by the same appellant. This is of very considerable length. In it the deponent stated that on a Friday, nine days previously, he was aroused by certain persons named, including appellants Nos. 2 and 3, and called to join in the matter of Kutti Karian as to which he had (as they said) been previously spoken to, and to take revenge on him; that at first he refused, but then partly by persuasion and partly or eventually by

force, he was caused to accompany them to the deceased's hut, that then the hut was forced open and set fire to, and the Cheruma and his wife stabbed and killed; that they then went in a body, and some among them threatened to shoot any one who approached them, and then went eastwards; at daybreak his companions said "Let us go to Uragam," and they reached Urothmala hill before noon; that in the afternoon a young man of about 20 or 22 years of age came and asked them what had been done, and then, hearing the occurrences narrated, said he too was coming with them and they consented; that they reached Tirurangadi about dark, when taking an opportunity and being afraid the appellant left his comrades and went home.

On the 19th May he made yet another statement as recorded by the same Magistrate, which begins thus "I wish to make a statement. Through stupidity I made sundry false statements when examined the other day. I did not too tell the whole truth then." He then proceeded to give details as to how, previous to the 2nd May, one Friday, he had been at a consultation at the mosque at Omachchapuzha where persons named were present, and it was arranged that ammunition should be bought: he then repeated what occurred when he was called by rebel No. 7, as he says, on the night of the 2nd May, and at the hut, and spoke of the part taken by three of the rebels specially in the murder of Kutti Karian: and he speaks incidentally of the time at which "we" killed that man.

On the 31st May he was again "recalled" and the statement commences: "I made a mistake in my former statement which I wish to correct": and further details are given.

Then comes what is headed a "statement" made by this appellant and dated 5th June 1885, recorded by the same Magistrate at the commencement of which appears ("*N.B.*—The statements made by the prisoner on the 9th, 19th, and 31st May 1885 were read over to him"). And the following questions and answers are then recorded:—

Q.—Are these statements read over made by you?

A.—Yes.

Q.—Are they made by you voluntarily?

A.—Yes.

Then follows more which it is not at present necessary to set out.

QUEEN-EMPRESS v. VIRAN.

As regards appellant No. 2 there is first what is styled a deposition given by him as "Criminal No. 15," "Second prisoner" and dated 16th May 1885 in which he says he was away from home on the night on which (as he was informed on the day following, Saturday) the Cheruma was stabbed to death: that on the following Thursday or early next morning (Friday) he was informed by his wife that policemen had come to apprehend him and that he with his wife and children went straight to Calicut, and appeared before the Collector on the day preceding that on which he was examined, viz., the 15th May.

On the 19th May this appellant was again examined; he then stated that fifteen days before the Cheruma was killed he was asked to take part in killing the Cheruma for forsaking the Mussalman faith and that he consented; that they went to the mosque on the following Friday and consulted, and certain arrangements were made and then he described the attack on the hut on the 2nd May and the murders: he then tells how the party journeyed to the Uroth hill and how the Mapilla youth joined their party; and how in the morning when they came near the Nambudri's house he took the opportunity to leave the gang and go to his home about half of a mile off.

On the 5th June these two depositions or statements were, as it is recorded, read over to this appellant, and he was asked questions similar to those put to appellant No. 1 on the same day and was further asked other questions as to which more hereafter.

The first statement recorded as made by appellant No. 3 is dated the 25th May: he was it appears produced before another Magistrate (Mr. D'Cruz), and was asked "why he was produced there by the police?": he is said to have replied that he was produced in connection with this affair: that at first he refused to go, but when pressed he went: he then describes how the Cheruma and his wife were killed, and the hut burned, but he does not say that he took part in this, and he stated that he left the gang at about 6 P.M. the next day.

The next statement or deposition made by appellant No. 3 and headed in the same manner as those given by appellants Nos. 1 and 2 on the dates previous is dated the 26th May 1885.

In this the whole of the occurrences referred to by the other appellants are detailed at great length including the part taken by

QUEEN-EMPRESS v. VIRAN.

the deponent, up to the time when as he states he left the company before they entered the Nambudri's house.

On the 5th June this appellant was again examined, and his previous statement having been read out he is asked, "Is not the statement just read out yours?"

A.—Yes.

Q.—Was it made voluntarily by you?

A.—Yes. I made it of my own accord.

Q.—Have you anything further to say?

A.—I have nothing to say.

He is then further questioned at considerable length.

On the 5th December 1885 all three appellants were questioned as follows:—

"You have heard the depositions of the prosecution witnesses. Have you anything to say now?" or to one "How say you?"

Appellant No. 1 then stated that he made the (former) statements because he was tortured by the police; that when he was asleep in his house Varikottil Ali Ahmed came and called him to go to a Nercha (feast or festival), that he declined to go, and he knows nothing more; that he did not recollect pointing out certain spots under a tree to the committing Magistrate, and that he had no witnesses.

Appellant No. 2 reverted to the account originally given by him, adding that after giving himself up to the Collector he had been tortured by the police and confessed his guilt; that he had no witnesses.

Appellant No. 3 again repeated his story in the main outlines as to being called to take part in the attack on the Cheruma's hut, but he now said he went because he feared the others would kill him if he refused, and that before they reached the hut he slipped away and went home and next day at 4 A.M. heard of the murder; that four days afterwards the police came and commenced "to seize and bind and beat," and that coming to know the police were aware he had some knowledge of the affair he went to Cannanore, through fear, and he was there apprehended.

It does not appear whether the appellants were arrested by the police under the powers conferred by the Criminal Procedure Code, or in virtue of the powers with which the District Magistrate is invested under the Malabar Mapilla Outrages Act XX of 1859, but it is assumed by the Sessions Judge that the proceedings

QUEEN-EMPRESS v. VÍRAN.

were taken under that Act, and this would appear to be the case from a note by the committing Magistrate to the effect that the delay between January and October was due to non-receipt of an order from the Governor in Council, presumably an order made under s. 7 of the Act. There is nothing in the Act authorizing the examination of accused or suspected persons, but if the police were investigating the circumstances connected with the murder of the Cheruma, and no "inquiry" had been begun by the First-Class Magistrate, Karunákara Menon, it may be assumed that it was open to him "to record any statement or confession made to him in the course of such investigation."

But whether what was said by the appellants on days prior to the 5th June was intended to be or taken as recorded by way of "statements" or "confessions" does not appear.

There is however a very clear and important distinction drawn in s. 164: a statement is to be recorded in one of the modes in which evidence is to be taken: a confession in the manner required under s. 364.

The taking of a "statement" contemplated by s. 164 appears to me to presuppose a charge or reasonable suspicion against some person other than the person making such statement. The Magistrate, Karunákara Menon, in his evidence before the Sessions Court has deposed that none of these statements were taken on oath or solemn affirmation; but the earlier ones are headed "depositions," and for all that appears they may have been taken as recording information given respecting persons other than those making them; for it must be noted that at the time when they were made there were a number of other persons under arrest and detention under the special Act, these appellants being numbered as thirteenth, fourteenth, and fifteenth "Criminals." It appears to me necessary to make these observations as bearing upon the question of the statements having been "voluntarily" made *quâ* confessions, as which and as which alone they were afterwards used.

Treating them as confessions taken under s. 164 it is not pretended they were recorded and signed in the manner therein required.

As to the certificates appended to the statements dated the 5th June, from the manner in which they are worded, it would appear that they were recorded as examinations of accused persons (s. 364, Criminal Procedure Code); but power is given to Courts to

QUEEN-EMPRESS v. VÍRAN.

examine accused persons not for the purpose of causing them to incriminate themselves, but "to explain any circumstances appearing in the evidence against" them (s. 342, Criminal Procedure Code).

Can it be said that anything appeared in the evidence against the appellants at that time? The word "evidence" must be taken to be used in s. 342 in the sense in which it is defined in the Evidence Act, viz., as meaning and including (1) in respect of oral evidence "all statements which the Court permits or requires to be made before it by witnesses," and (2) documentary evidence.

There was no evidence then on the record given by witnesses, and I am of opinion that it was equally impermissible to use as documentary evidence "against them" their previous statements, as to use those statements as "evidence given by witnesses against" them.

Assuming however that all the statements made prior to the 5th December were made under the provisions of s. 164, can they be admitted and treated as if recorded in accordance with law by reason of the evidence given by the Magistrate Karunákara Menon in the Session Court to the following effect:—

"I conducted the inquiry into the murder of Kutti Karian. The first, second, third, and fourth prisoners made confessional statements. They were not taken on oath. They are correctly recorded. I believe they were voluntarily made" ..... To Court, "I remember that before and after examining these prisoners on the 9th, 19th, 31st, and on the 16th, 19th and 26th May I satisfied myself by questioning them that they were making them voluntarily."

If the Magistrate was holding an inquiry in the case as against these appellants at the time when these statements were taken, they are each and every one of them inadmissible under s. 164, for that section applies only to statements and confessions made "before the commencement of the inquiry or trial."

I am further of opinion that the Magistrate's evidence is insufficient to show that the statements recorded as made by the several appellants on the several dates enumerated were duly made by them.

These statements were not, so far as appears, put into the hands of the witness one by one, nor then read out, and it does not appear sufficiently to which statements the witness was referring:

QUEEN-EMPRESS v. VÍRAN.

they are not numbered nor marked nor filed as exhibits in the Sessions trial. Some statements of the accused appear to have been read after the close of the evidence for the prosecution: which statements these were does not clearly appear. Section 533 directs that "when the provisions of such section (*viz.*, in this case s. 164) have not been fully complied with," the Court shall take evidence that the person purporting to have made a statement under the provisions of that section duly made it; but it is for the Court to determine in this respect whether the evidence given in proof of the fact is sufficient, and for the reason stated above, I am of opinion that in this case it is not sufficient.

It was then contended in appeal that the Court was bound with reference to the provisions of s. 80 of the Evidence Act to presume that these confessions were "duly taken," and that they were "taken in accordance with law." No such presumption could arise when on the face of them it appeared that they were not duly taken; the fact that the Court was obliged to have recourse to the provisions of s. 533, Criminal Procedure Code, shows this, and s. 80 can have no further application when it is a question for determination in the particular case whether the evidence recorded with reference to s. 533 is sufficient or not to show that particular statements are admissible for the purpose for which they are produced, or not.

Reference is made by the Sessions Judge to s. 65 of the Evidence Act, the words appearing in cl. (*b*) in that section being quoted; but for the reasons above stated I am of opinion that it was not open to the Magistrate to procure an admission in writing—if the affixing of his mark to the whole statements by each accused can be held to constitute an admission in writing for this purpose—in respect of the contents of the previous statements.

It remains to consider whether evidence could be given by the Magistrate of the fact that confessions were made to him by persons subsequently committed by him to the Session Court, irrespective of the provisions and requirements of s. 164, Criminal Procedure Code.

Evidence may be given of a confession provided that it be not excluded by an express provision of law, whether made to a private person, or to a Magistrate otherwise than in the course of an inquiry or other judicial proceedings; it may then be proved, and must be proved, if at all, like any other fact.

QUEEN-EMPRESS v. VÍRAN.

I have already given my reasons for holding that the fact of the several statements in this case having been made by the several appellants is not sufficiently proved by the evidence of the Magistrate, the twenty-seventh witness.

We might require further evidence in this respect, but this should not be done unless in very exceptional circumstances; and, as I am not prepared to say that, even if the appellants were proved to have stated what the recorded statements show, it should be held that they voluntarily made those statements, I consider that no further reference should be made, especially when regard is had to the length of time the appellants have already been in custody with this charge hanging over them, and to the fact that the Judge who tried the case no longer presides over the Court.

It must not be supposed that any imputation is intended as against the Magistrate in so far as he has deposed that to his belief the statements were voluntarily made. That is a matter of belief and inference only; his evidence goes to show that so far as he is aware no pressure had been brought to bear or was influencing the appellants at the time when they made statements implicating themselves and one another. But it is quite possible that the Magistrate's impression was not well founded.

The precise circumstances in which and the objects with which the appellants were examined in the first instance are not disclosed and cannot be ascertained from the records. There is however nothing in the first statement made by the appellant No. 1 on the 9th May, but a distinct denial that he was in any way concerned in the murder: he does no doubt say he was asked to take part in wreaking vengeance on the Cheruma, but he says he refused.

Why he should have been again examined on the same day does not appear, and it is difficult to believe that he came forward voluntarily thrice on the same day, and that having twice denied participation in the affair he should on the third occasion have voluntarily gone a good deal further than admitting that he was present at the hut when it was burnt and when the Cheruma and his wife were killed; but even then he does not represent himself as a willing agent, or as taking any active part.

But in the third statement made by him that day he implicates among others appellants Nos. 2 and 3 not then in custody as having been present at a meeting at which he was called to go on the business in hand. It may well be doubted whether this

QUEEN-EMPRESS v. VIRAN.

appellant was not then under the impression that he was giving information against others, not confessing his own guilt, and it would be extremely difficult to hold that statements made in such circumstances could properly be held to be confessions voluntarily made.

This observation applies generally, and the appellants and others being in custody and presumably in immediate charge of the police are not likely to have been wholly uninfluenced by fear, or by a hope that by giving evidence against others they might possibly be taken as approvers.

On the 19th May the appellant No. 1 supplies further information against appellants Nos. 2 and 3: then the appellant No. 3 is described as one of the two leaders—he and two others (first and seventh rebels) are described as having actually cut the Cheruma's throat: appellant No. 1 does not speak of himself as having done any particular act towards killing, or in the burning of the hut: again on the 31st May he has to correct his former statements and gives further details.

Meanwhile the appellant No. 2, whose first statement made on the 16th May is perfectly compatible with the case of a man living in the vicinity when this terrible occurrence took place, and who, whether with or without reason, might be suspected of complicity, on the 19th *idem*, makes an extremely long statement implicating the appellants Nos. 1 and 3: in this he states that appellant No. 3 was one of those who held the Cheruma while his throat was cut, and says he himself and appellant No. 3 set fire to the hut.

The manner in which the appellant No. 3 is questioned when first produced before the Magistrate (D'Cruz) on the 25th May is open to very serious objection: but he states that at first he refused to go, and he does not admit that he was a voluntary participator in the affair. But the next day he is prepared to make a statement of very great length—he, however, would say that he was not, as the appellant No. 2 stated, one of those who actually went into the hut.

The appellants having on the 5th June confirmed these statements then and not till then evidence is taken; and it may safely be said that except in so far as that evidence goes to prove the facts that there was a previous conspiracy on the part of a certain number of men to commit the murder, that the murders were

QUEEN-EMPRESS v. VIRAN.

committed, and the movements and subsequent fate of those persons, it is as against the appellants insufficient and in some cases positively unsatisfactory.

The evidence of the first and second witnesses as to recognition of appellants Nos. 1 and 3 by their voices is clearly worthless; and that given by the sixth witness strikes me as equally so.

The evidence regarding the number of persons concerned and what became of them is moreover by no means clear or free from doubt. It is from the so-called confessions that the fact of the Mapilla youth having joined the company is taken: there is no other evidence as to this, and none as to the body of such a youth having been found among those killed. There is no evidence whatever as to who the other man or two men were; where they came from and when they joined; nor how the child aged 5 or 6 came to be there.

On most anxious consideration of the whole case it is impossible to avoid a strong suspicion that as regards the appellants Nos. 1 and 2 at all events their original and latest statements may be true; and that they may have been induced whether by fear or hope of pardon by implicating themselves and others to make the intermediate statements.

The Sessions Judge does not even notice the fact that all three appellants in December retracted the admissions, statements, or confessions made by them in May and June; nor that it would be by no means difficult for persons acquainted as these Mapillas may well have been with the general outlines of the outrage, and of the route taken by the gang afterwards, to give the details they did.

As regards the appellant No. 3 he did not in the first instance so distinctly deny willing participation in the affair, and his principal statement is made without the several variations appearing in those made by the others; but looking at the whole of the circumstances connected with the detention of these men in custody from May till December, and at the character of the evidence for the prosecution, I am not prepared to say that he could properly be convicted—as he must be, if convicted at all—entirely on the strength of the confession which he subsequently retracted, even if the making of that confession were proved.

I have written thus at considerable length to explain why, as it appears to me, we ought not to allow any further evidence to

QUEEN-EMPRESS v. VÍRAN.

be taken in this case. I have further to observe that there is nothing on the record to show that the appellants were questioned in the Sessions Court after the statements made by them before the committing Magistrate had been (as it is presumed) read out, with reference to their retractation of each and every statement incriminating themselves and one another and as to whether they had any evidence in support of their allegations that their confessions had been improperly obtained. They were no doubt defended by a pleader or vakíl, but this is not enough to explain the absence of any record showing that the requirements of ss. 287 and 289 read in connection with 342, Criminal Procedure Code, were complied with: and in such cases the nature at least of the defence entered on behalf of the prisoners should also be indicated, and shown to have been duly considered.

The result is that, in my opinion, the appellants should be acquitted, and my learned colleague agreeing in the result, they hereby are acquitted, the convictions being set aside, and it is ordered that they be forthwith set at liberty.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. October 5, 23.

MADHAVA (PLAINTIFF), APPELLANT,

and

NÁRÁYANA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, sch. II, art. 144—Adverse possession of limited interest in land.

The manager of a Nambudri family in Malabar having demised certain land on kánam in 1868, was removed from his position as manager in 1875.

In 1883 his successor sued to eject the kánam-holders:

Held, that the suit was barred by limitation.

THIS was an appeal from the decree of C. Gopalan Náyar, Subordinate Judge of North Malabar, reversing the decree of A. C. Kannan Nambiar, District Múnsif of Kavai, in suit No. 501 of 1882.

* Second Appeal 403 of 1885.

MADHAVA v. NÁRÁYANA.

The plaintiff, Parambathpalli Madhavan Nambudri, sued the defendants (1) Parambathpalli Madhavan Nambudri, (2) Maniyangatillath Appa, and (3) his brother, Náráyanan Nambudri, to recover "with future rent and free of incumbrance," two parcels of land belonging to the illam (family) of the plaintiff and defendant No. 1 and held by defendants Nos. 2 and 3 under an alleged demise derived from defendant No. 1.

Defendant No. 1 was *ex parte*. Defendants Nos. 2 and 3 pleaded that the land was demised on a kánam of 850 rupees to their ancestor in 1868 and that the plaintiff could not recover without redemption and that the suit was barred by limitation.

The Múnsif held that the suit was not barred by limitation and decreed the claim.

On appeal, this decree was reversed on the ground that, as the plaintiff treated the kánam as a nullity, the possession of the defendants Nos. 2 and 3 was adverse since 1868.

Plaintiff appealed on the ground, *inter alia*, that adverse possession began to run when defendant No. 1 was removed from his office of karnavan of the illam in 1875 and not before.

Anantan Náyar for appellant.

Sankaran Náyar for respondents.

The Court (Muttusámi Ayyar and Hutchins, JJ.) delivered the following judgments:—

MUTTUSÁMI AYYAR, J.—The appellant is the son of respondent No. 1, and they constitute together a Nambudri illam in North Malabar. In January 1868, the father demised to the ancestor of respondents Nos. 2 and 3 two items of family land on kánam for Rs. 850 and placed him in possession. Respondents Nos. 2 and 3 and their ancestor have since continued in possession; respondent No. 1 was lately (in 1875) removed from the management of his illam for misconduct, and the appellant instituted the present suit in September 1883 to recover the land free of all incumbrances, and alleged that the kánam was not granted under any family necessity, and that it was not binding upon his family. Respondents Nos. 2 and 3 contended that the appellant was entitled only to redeem the kánam, and pleaded limitation in bar of the right to eject them, on the ground that the kánam followed by possession extending now to more than twelve years was invalid.

MADHAVA v. NÁRÁYANA.

The District Múnsif held that the kánam was not granted under family necessity, and that possession under an invalid kánam could not support a plea of limitation though such possession extended to twelve years or more. On appeal, the Subordinate Judge considered that the right to eject without reference to the kánam was barred by limitation and that, as it was infringed at the date of the kánam, the statute began to run against such right from that date.

It is urged in second appeal that possession under an invalid kánam is not adverse possession and that the claim could not be barred. It is conceded that the appellant is entitled to redeem, and that the matter in contest is the validity of the kánam right created in 1868.

As regards an interest in immovable property, I take adverse possession to mean possession by a person claiming that interest against the true owner who is entitled to repudiate it and to recover immediate possession. In the case before us, the appellant's father granted the kánam in 1868, and if, as is now alleged, it was granted for a purpose not binding on the family, it was an alienation to its prejudice, and the appellant's claim to recover that interest back would be barred on the expiration of twelve years under art. 144, sch. II of the Limitation Act. If the kánam was legally inoperative and could be treated on that ground as non-existent, the respondents would have then been in possession as trespassers, and such possession would be a sufficient answer to a claim to eject them when it has extended to more than twelve years.

It is no doubt true that a karnavan may not be able to obtain a decree declaring that a kánam granted by his predecessor is invalid, and that he may yet be able to recover the property to which it relates by showing that the kánam is not binding on his tarwad, when it is pleaded in answer to a claim to eject. But this he can only do when the kánamdár's possession does not extend to more than twelve years and his kánam right is not perfected by such possession whatever defect there was in its inception. Under the Act of Limitation, sixty years is the statutory period for enforcing a right to redeem, whilst twelve years is the ordinary period for ejecting a person from immovable property or some interest in it when the right to redeem is admitted and the right to eject is denied. I consider that the latter right should be dealt with under the twelve years' rule. The cases of *Dinomoney Dabea* v. *Doorgapersad*

MADHAVA v. NÁRÁYANA.

Mozoomdar (1) and *Maidin Saiba* v. *Nágápá* (2) show that a party, who cannot by his admission plead prescriptive title in regard to general ownership, may rely on it in regard to a subsidiary interest claimed by him. We dismiss this second appeal with costs.

HUTCHINS, J.—I agree with my learned colleague that adverse possession for twelve years of a limited interest in immovable property is a good plea to a suit for ejectment to the extent of that interest. In this case, the kánamdárs have held the land under a kánam for more than twelve years, and it has not been alleged that the existence or terms of the kánam have been fraudulently concealed from the family. The transfer of possession put the family on enquiry as to the terms on which such possession was given: respondents Nos. 2 and 3 first came into possession under the demise on which they now rely. They are either trespassers or kánamdárs, and their possession for the statutory period in either capacity, adversely to the family, is a bar to their ejectment.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Hutchins.

RÁMAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

HASSAN (DEFENDANT No. 2) AND OTHERS, RESPONDENTS.*

1885. Nov. 4, 10.

Regulation IX of 1822, s. 5—Sale of land to recover fine imposed by Collector—Title of purchaser.

A sale of land, under the provisions of s. 5 of Regulation IX of 1822 does not convey to the purchaser a title free from prior incumbrances.

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, modifying the decree of J. A. deRozario, Acting District Múnsif of Vytheri, in suit 119 of 1883.

The plaintiffs, Ráman Náyakan and his brother, sued (1) Govindan Náyar and (2) Hassan Sahib Ravuthan for a decree, declaring that plaintiffs had a lien for Rs. 1,000 over certain land

(1) 12 B.L.R., 274. (2) I.L.R., 7 Bom., 96.

* Second Appeal 450 of 1885.

RÁMAN v. HASSAN.

under a panayam or mortgage-deed executed by defendant No. 1 in 1881 in favor of plaintiffs and to recover Rs. 555, interest due on the bond for two years.

Defendant No. 1 having been found guilty of malversation as a public servant (*Menon*) and a judgment having been passed against him by the Collector for payment of a fine imposed under s. 5 of Regulation IX of 1822, the land was sold at auction and purchased by defendant No. 2 on the 11th of October 1882 and he was in possession.

Defendant No. 1 admitting the bond denied plaintiffs' right to recover the debt, except by sale of the land hypothecated.

Defendant No. 2 pleaded that he purchased at a Government sale without notice of plaintiffs' claim.

The Múnsif decreed payment of Rs. 555 by defendant No. 1, and, in default of payment, that the land should be sold, and declared plaintiffs' right to a lien on the land for Rs. 1,000.

On appeal, the District Judge cancelled the decree so far as it directed the sale of the land and declared plaintiffs' lien.

Plaintiff appealed.

Sankaran Náyar for plaintiffs.

Sadagópáchárýár for defendant No. 2.

The facts appear sufficiently from the judgment of the Court (Kernan, Offg. C.J., and Hutchins, J.).

JUDGMENT.—We overrule the preliminary objection that the appeal is barred by limitation. The application for a review of judgment seems to have been a *bonâ fide* one and not at all designed to gain an extension of the appeal time. It was made and prosecuted with reasonable diligence, and the appeal presented as soon as possible after its rejection. The appeal is within time if the days during which the review petition was pending are deducted.

The hypothecation of the property in dispute to the appellants was made in 1881, and it has been found to have been granted *bonâ fide* and for valuable consideration. The question is whether it is not binding on defendant No. 2, the contesting respondent who purchased in 1882 at a sale ordered by the Collector for recovery of a fine imposed under Regulation IX of 1822 on the appellants' mortgagor. The District Judge held that defendant No. 2 bought free of the incumbrance because the Collector's judgments, under the Regulation, are to be executed in the same

RÁMAN v. HASSAN.

manner as decrees of Courts, because s. 287 of the Code expressly requires that every incumbrance shall be specified in the sale proclamation, and because the appellants' incumbrance was not so mentioned.

It is clear that this decision cannot be maintained. In the first place, all that the Regulation (s. 5, cl. 3) says is that the Collector's judgment shall be executed in the same *manner* as decrees: this merely settles the procedure to be followed. In the next place, although s. 287 requires every incumbrance to be stated as fully and accurately as possible, the non-mention of any incumbrance will not avoid it as against the auction-purchaser. The appellants had not the conduct of the sale and cannot be prejudiced by the Collector's omission or refusal to recognize and give notice of their hypothecation right.

It has been urged, on behalf of defendant No. 2, that the debt for which the Collector sold the property was due to the Crown and paramount to appellants' incumbrance. This matter was considered in the case of *Rámáchandra* v. *Pitchaikanni*,(1) but in this case as in that it is not necessary to decide the point. The Collector's judgment was one imposing a fine and not passed until the year after appellants obtained their hypothecation. It is not pretended that the Menon had executed any prior bond to Government, and, as observed in the case just quoted, "even in England the lien of the Crown attached only from the time when the owner of the land became a debtor to the Crown" and did not avoid prior incumbrances.

The only other point is with regard to interest, whether on the true construction of the deed of hypothecation the interest is charged upon the land pledged for the principal. The Judge held that the debtor was personally liable for the interest but not the property, and he was under the impression that the Múnsif had taken the same view. But neither before the Múnsif nor in his appeal did defendant No. 2 ever contend that the interest was not intended by the deed to be secured upon the property. The only contention on that point was one raised by the debtor who maintained that he was not personally liable.

The decree of the District Judge is reversed and that of the Múnsif restored, except so far as it directs the sale of the property

(1) I.L.R., 7 Mad., 434.

RÁMAN v. HASSAN.

for the payment of interest and costs. The principal was not due when the suit was brought, and if there is to be a sale under the mortgage, it should be for the entire debt. Defendant No. 2 must bear the costs of this appeal as well as of his own appeal to the District Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1885. Dec. 4, 9.

HARIHARA (DEFENDANT), PETITIONER,

and

SUBRAMANYA (PLAINTIFF), RESPONDENT.*

Small Cause Court—Act XI of 1865—Jurisdiction—Civil Procedure Code, s. 295—Suit for refund of assets paid in execution of decree.

A suit under s. 295 of the Code of Civil Procedure to compel refund of assets paid in execution of a decree to a person not entitled thereto is cognizable by a Court of Small Causes constituted under Act XI of 1865.

Shahi Ram v. *Shib Lal* (I.L.R., 7 All., 378) dissented from.

THIS was an application, under s. 622 of the Code of Civil Procedure, to set aside the decree of V. P. deRozario, Subordinate Judge at Palgat, in a Small Cause suit on the ground that the Court had no jurisdiction to entertain the suit.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

Srinivása Ráu for petitioner.

Rámachandra Ayyar for respondent.

JUDGMENT:—The question before us is whether a suit under the penultimate clause of s. 295 of the Code of Civil Procedure to compel the refund of assets paid to a person not entitled to receive the same is cognizable by a Court of Small Causes. It is pointed out to us that the Allahabad High Court has held that such a suit is not cognizable—*Shahi Ram* v. *Shib Lal.*(1)

Section 295 of the Civil Procedure Code has been made applicable to Courts of Small Causes so far as it relates to the distribution of assets in the execution of decrees, but the question here is whether a suit for the refund of such assets paid to a wrong

* Civil Revision Petition 290 of 1885.

(1) I.L.R., 7 All., 378.

HARIHARA v. SUBRAMANYA.

person will fall under any of the classes of suits made cognizable by a Small Cause Court under s. 6, Act XI of 1865.

The obligation to repay such money is declared by s. 72 of the Indian Contract Act, and a suit to enforce such obligation will be one of those which the law regards as *quasi ex contractú.*

It has already been held by a Full Bench of this Court that the words "claim for money due on contract" in s. 6, Act XI of 1865, were intended by the Legislature to include claims to enforce obligations *quasi ex contractú—Govinda Muneya Tiruyan* v. *Bapu.*(1)

That suit was a suit for contribution by a debtor against his co-debtors and was held cognizable by a Court of Small Causes. The present suit is one of a very similar character.

That the word "contract" in s. 6 also includes an implied contract to discharge an obligation was held by this Court in *Gopal Kistna Sástri* v. *Rámayyangár.*(2)

Notwithstanding the authority of the Allahabad case, we are concluded by the previous rulings of this Court upon the same point of law, and from these we do not differ.

The petition must be dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

1885. December 10.

KANDUNNI (PLAINTIFF), APPELLANT,

and

KATIAMMA (DEFENDANT), RESPONDENT.*

Res judicata.

In 1883, plaintiff sued to recover certain land from the defendant on a demise of 1856, which he alleged was a renewal of a prior demise of 1835. The suit was dismissed on the ground that the demise of 1856 was not proved. Plaintiff then sued to recover the same land on the demise of 1835 and on title:

Held, that the decree in the former suit was no bar to this suit.

(1) 5 M.H.C.R., 200. (2) I.L.R., 4 Mad., 236.

* Second Appeal 579 of 1885.

KANDUNNI v. KATIAMMA.

THIS was an appeal from the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palgat, reversing the decree of S. Subramanya Ayyar, District Múnsif of Chowgat.

The plaintiff, Padipurakel Kandunni Taragan, sued the defendant, Rayamarakkar Vittil Katiamma, to recover certain land, portion of which he claimed as his jenm, and the rest as kánamdár (mortgagee) from a devasam. He alleged that in 1835 the land was demised to the defendant's ancestor on kánam, and that this demise was renewed in 1856. In suit 215 of 1883, he sued defendant to recover the land under the demise of 1856. The defendant then denied its genuineness and the plaintiff's title and claimed to be owner. In that suit plaintiff obtained a decree, but on appeal, the decree was reversed on the ground that the demise of 1856 was not proved. The defendant pleaded that this suit was barred as being *res judicata*. The Múnsif held that as the present suit was based on title and not on contract, the plea was bad.

On appeal, the Subordinate Judge held that the claim to recover on the demise of 1835 alleged to have been renewed in 1856 was *res judicata*, and that plaintiff could not recover on title as defendant had been in possession for 50 years apparently without title.

Plaintiff appealed on the ground that his claim to recover on the demise of 1835 was not *res judicata*.

Sankaran Náyar for appellant.

Atkinson for respondent.

The Court (Collins, C.J., and Brandt, J.) delivered the following

JUDGMENT:—It is contended in appeal that all that was decided in the suit of 1883 was that the respondent at that date did not hold under the demise of 1856 then set up.

The appellant now sues on a demise of 1835, and we must hold that the question whether the defendant holds under that demise or in some other right has not been decided in the suit of 1883.

The second appeal 426 of 1881, to which we have been referred by Mr. Sankaran Náyar, appears to have been decided on the same principle.

We must set aside the decree of the Subordinate Judge and restore the decree of the Court of First Instance and desire the Subordinate Judge to pass a fresh decree. Costs to abide the result.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

ACHAYA (PLAINTIFF), APPELLANT,

and

RATNAVÉLU (DEFENDANT No. 2), RESPONDENT.*

1885. October 27.

Letters Patent, s. 15—Civil Procedure Code, ss. 629, 632—Indian Council's Act, 1861, s. 22—High Court's Act, s. 9.

Section 15 of the Letters Patent for the High Court of Judicature at Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by s. 629 of the Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final.

APPEAL from an order, dated 10th March 1885, made by Hutchins, J., in Civil Suit No. 139 of 1884, dismissing an application for review of judgment.

The facts necessary for the purpose of this report appear from the judgment.

Mr. *Norton* for appellant.

Anandáchárlu for respondent.

JUDGMENT:—The appellant instituted a suit on the Original Side of this Court upon a promissory note C, which purported to be executed by the respondent's father and another. Mr. Justice Hutchins, who tried that suit, found that the respondent's father did not execute the document and disallowed the claim against the respondent. The appellant then applied for review of judgment on the ground that, subsequently to the decree, he became aware of the existence of a ledger and an index kept by the respondent under the direction of his father, and that those accounts contained entries which afforded strong corroborative proof of his averment that the latter was indebted to him. This application was, however, rejected, and from the order of rejection this appeal is preferred. At the conclusion of the argument, we intimated to the learned Counsel for the appellant that, by the exercise of due diligence, the appellant might have acquired a

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* Appeal 7 of 1885.

ACHAYA v. RATNAVÉLU.

knowledge of the existence of the ledger and the index and produced them at the original trial and that on that ground, at all events, the appeal must fail. We reserved judgment, however, to consider the question whether an appeal lies and we are now satisfied that it does not. It is provided by s. 629 of Act XIV of 1882 that the order of a Civil Court rejecting an application for review of judgment shall be final, and this section is declared to be applicable to the High Court by s. 632 of the Code of Civil Procedure. It is then argued for the appellant that an appeal is allowed from the order of a single Judge of this Court by s. 15 of the Letters Patent of 1865 issued by Her Majesty pursuant to s. 9 of the High Court's Act, 24 & 25 Vict., c. 104, and that the right is saved by s. 22 of the Indian Council's Act of 1861, 24 & 25 Vict., c. 67. It is true that by s. 15 of the Letters Patent, Her Majesty directs that an appeal shall lie to the High Court from the judgment [not being the sentence or order passed or made in any Criminal trial] of one Judge of that Court. It is also true that, by s. 9 of the High Court's Act, the High Court has all such Civil Jurisdiction, Original and Appellate, and all such powers and authority for, and in relation to, the administration of justice as Her Majesty by Letters Patent may direct and grant, and that, save as by such Letters Patent is otherwise directed, the High Court has all the jurisdiction and every power and authority whatsoever in any manner vested in the late Supreme Court (which was abolished by that Act), at the time of the abolition. But it must be observed that in both s. 9 of the High Court's Act and s. 44 of the Letters Patent it is distinctly stated that the provisions of the Letters Patent and that the jurisdiction and authority of the late Supreme Court vesting in the High Court under s. 9 are subject to the Legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations. The question, therefore, is whether s. 629 and s. 632 were enacted in the due exercise of the legislative powers vesting in the Governor-General in Council. By s. 22 of the Indian Council's Act power is conferred upon the Governor-General subject to the provisions therein contained to repeal, amend, or alter any law or regulation in force in Her Majesty's Indian territories and to make laws and regulations for all persons, whether British or Native, foreigners or others, and for *all* Courts of justice whatever, &c. One of the provisions

ACHAYA v. RATNAVÉL.

contained in that statute is that the Governor-General in Council shall *not* have the power of making any laws or regulations, which shall repeal or in any way affect "any provisions of any Act passed in the then Session of Parliament or thereafter to be passed in any wise affecting Her Majesty's Indian territories or the inhabitants thereof."

As the High Court's Act was passed in the same Session of Parliament it was certainly not open to the Governor-General in Council to legislate so as to modify its provisions. But it should be remembered that it is open to the Imperial Legislature to subject any of its enactments in whole or in part specially to the legislative power of the Governor-General in Council. The general rule prescribed by s. 22 of the Indian Council's Act is that the Governor-General in Council shall have power to repeal or alter any law in force in regard to any Court of justice in Her Majesty's Indian territories, and the section then goes on to specify certain exceptions to that rule. The effect of the words in s. 9 of the High Court's Act "subject and without prejudice to the legislative powers of the Governor-General in Council" is to take the High Court's Act, so far as it relates to matters dealt with by that section, from the group of exceptions and to place it under the general rule contained in s. 22 of the Indian Council's Act. Unless those words are referred to the general rule they would be without meaning, for the combined effect of the general rule and the exception would be that the Governor-General in Council had no legislative power to affect the provisions of Acts passed in the same Session of Parliament or thereafter, and therefore there was no necessity for introducing a clause to save a power which did not exist. It will be noted that those words occur only in s. 9, and it follows that the other sections of the Act, which deal with several other matters relating to the High Court, are not subjected to the legislative power of the Governor-General in Council. Again, the words used are "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council." These words disclose an intention on the part of the Imperial Legislature to consider the general rule contained in the s. 22 of the Indian Council's Act apart from its exceptions and to treat it as unrestricted in regard to matters specified in s. 9. The true construction then is that those words amount to a special

ACHAYA v. RATNAVÉLU.

direction by the Imperial Legislature that the provisions of the High Court's Act in so far as they relate to matters dealt with by s. 9 shall be subject to the general rule regarding the Legislative power of the Governor-General in Council. This view is confirmed by the subsequent course of legislation in regard to the Criminal jurisdiction of Magistrates in the Mufassal over European British Subjects, which is fully explained in *Queen* v. *Meares*.(1) Here we may refer to 34 & 35 Vict., c. 62, s. 3, which, adverting to certain Acts passed by the Governors of Madras and Bombay in Council in regard to Criminal jurisdiction over European British Subjects, enacts that the said Acts shall be deemed to be as valid *as if they had been passed by* the Governor-General of India in Council at a meeting for the purpose of making laws and regulations. Even assuming that the words in s. 9 mentioned above cannot be so construed as to give a special power to the Governor-General in Council, then s. 15 of the Letters Patent cannot be treated, as observed in that case by Couch, C.J., as part of the High Court's Act within the meaning of s. 22 of the Indian Council's Act. We are, therefore, of opinion that s. 15 of the Letters Patent does not apply to the case provided for by s. 629 of Act XII of 1882 and that this appeal must be dismissed with costs.

Solicitor for appellant, Alasingacháryár.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar.

1886. February 22.

H. H. THE NIZAM OF HYDERABAD,

*In re.**

Civil Procedure Code, ss. 130, 387, 591, 622—*Interlocutory orders not subject to revision.*

Under s. 622 of the Code of Civil Procedure, interlocutory orders passed under s. 387 refusing applications for the issue of a commission to examine witnesses, or, under s. 130, directing the production of documents, cannot be revised.

THIS was a petition, under s. 622 of the Code of Civil Procedure,

(1) 14 B.L.R., 110.

* Civil Revision Petition 24 of 1886.

In re NIZAM OF HYDERABAD.

to set aside two interlocutory orders made by W. E. Clarke, Subordinate Judge, Nílgiris, in suit No. 57 of 1885.

The facts necessary, for the purpose of this report, appear from the judgment of the Court (Muttusámi Ayyar, J.).

Morgan for petitioner.

MUTTUSÁMI AYYAR, J.—It is stated in this petition that this Court should interfere under s. 622 to cancel two interlocutory orders made by the Subordinate Judge at Ootacamund. These orders were made in O.S. 57 of 1885 on the file of that Court. In one of them the Subordinate Judge declined to issue a commission for the examination of certain witnesses, and in the other he directed that certain documents, which were delivered to the plaintiff's solicitor for production in Court by certain persons cited as witnesses, and which still remained in the possession or power of the plaintiff, be produced. It is urged that these orders should be set aside by this Court as a Court of Revision on the ground that they were illegal, and made without jurisdiction. The order refusing the application for the issue of a commission purports to have been made under s. 387 of the Code of Civil Procedure which it is considered by the Subordinate Judge vested in him a discretion even when he was of opinion that the evidence desired to be taken was necessary. The order for the production of documents was made under s. 130 of the Code of Civil Procedure. No appeal is allowed by s. 588 from either of these orders, whilst s. 591 prescribes the course to be followed in regard to defective interlocutory orders. I do not consider that s. 622 is applicable to them and it pre-supposes a decision or an order in the nature of a decree and that no other remedy is provided for specially by the Code.

I must, therefore, decline to interfere, and I reject this application.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1886. Feb. 19, 20.

QUEEN-EMPRESS

against

LINGAYA.*

Limitation Act, s. 12, sch. II, art. 154 Criminal Procedure Code, ss. 419, 420—Appeal by prisoner Limitation—Time necessary to obtain copy of judgment—Presentation of petition to officer in charge of jail.

In computing the period of limitation prescribed for an appeal from a sentence of a Criminal Court by art. 154 of sch. II of the Indian Limitation Act, 1877, the time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded.

In the case of such appeals, presentation of the petition of appeal to the officer in charge of the jail is, for the purpose of the Limitation Act, equivalent to presentation to the Court.

THIS was a case referred to the High Court, under s. 438 of the Code of Criminal Procedure, by J. Grose, District Magistrate of Nellore.

The facts necessary, for the purpose of this report, appear from the judgment of the Court.

Counsel were not instructed.

The judgment of the Court (Muttusámi Ayyar and Brandt, JJ.) was delivered by

BRANDT, J.—Two questions present themselves for determination—

(1) Whether the time taken in forwarding applications for copies on behalf of intending appellants in jail and in transmission of such copies to the jail, as well as the time occupied in actual preparation of copies in the office of the Court by which the judgment or order was passed, is to be included in "the time requisite for obtaining a copy" within the meaning of s. 12 of the Limitation Act.

(2) Whether, for the purpose of computing the period of limitation for appeals under the Code of Criminal Procedure to any Court other than a High Court (Limitation Act, sch. II, art. 154), time is to be calculated, in the case of appeals preferred by appellants in jail, to date of presentation of the appeal to the officer in charge of the jail, or to date of presentation to the Court to which the appeal lies.

* Criminal Revision Case 681 of 1885.

As to the first question, the answer must be in the affirmative: the intention is to exclude the time taken up in obtaining the copy otherwise than through the appellant's *lâches*; and in the case of persons in jail, the officer in charge of the jail must be regarded as representing, for the purpose in hand, the Court establishment, which, in the case of appellants not in jail, is responsible for preparation and delivery of copies. Under the Jail Code convicts can obtain through the officer in charge of the jail copies of judgments and orders required by them with a view to presentation of their appeals, free of charge, and the said officer is responsible for forwarding such applications and for receiving and delivering to the applicants the copies when received.

But from the time when the copy is delivered to the applicant, the latter is responsible for presentation of his appeal, with the copy of the sentence or order appealed against, either to the Superintendent of the jail, or to the Court, at his option.

And we are of opinion that, under the provisions of s. 420, Criminal Procedure Code, presentation of the petition of appeal by an appellant in jail to the officer in charge of the jail is equivalent to presentation to the Court so far as the requirements of the Limitation Act are concerned.

Section 419 provides that "every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader;" s. 420, that in the case of an appellant in jail "he may present his petition of appeal to the officer in charge of the jail, who shall thereupon forward it to the proper Appellate Court;" and s. 421 that "on receiving the petition and copy under s. 419 or s. 420 the Appellate Court shall peruse the same" and proceed as thereinafter prescribed.

In the case in which this reference is made, the appeal would then appear to have been presented in time, and should therefore have been received and disposed of. The sentence has, it appears, expired, but if the appellant desires it, the appeal should now be admitted and disposed of in due course.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1886. January 4. February 26.

KUMARAN (PLAINTIFF), APPELLANT,

and

NÁRÁYANAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Nambudris—Inheritance—Sarvasvadhánam marriage—Rights of son.

Among Nambudris in Malabar the son of a daughter given in the Sarvasvadhánam form of marriage does not inherit in the family of his father so long as other heirs exist.

THIS was an appeal from the decree of H. J. Stokes, Acting District Judge of South Malabar, rejecting an appeal from the decree of E. K. Krishnan, Subordinate Judge at Calicut, in suit 14 of 1883.

The plaintiff, Sri Kumaran Mussad, sued for a declaration that he was a member of the Theyancheri illam (family), and as such equally entitled with the defendants—his paternal uncle (Cheria Náráyanan) and two cousins (Parameswaran and Náráyanan Mussad)—to participate in the enjoyment of the property of that illam.

The defendants contended that plaintiff, who was the son of Valia Naráyanan Mussad, elder brother of defendant No. 1, by his third wife, Savithri, was the issue of a Sarvasvadhánam marriage and consequently had no right of inheritance in the illam to which his father belonged, but only in the illam of his mother.

The plaintiff denied this, alleging that his mother was married in the ordinary form and that the properties of her illam of Kalliapurath and its appendage Annari were given to his father as stridhanam.

The Subordinate Judge dismissed the suit, finding that the marriage was in the Sarvasvadhánam form.

On appeal the District Judge, agreeing with the Subordinate

* Second Appeal 615 of 1885.

Judge on the facts, referred the following issue to the Subordinate Judge for trial:—

"Whether if plaintiff's father and mother were married in Sarvasvadhánam form, the incidents of such a marriage exclude plaintiff from inheritance in his father's illam."

This issue was found against the plaintiff.

The Acting District Judge, accepting this finding, rejected the appeal.

The plaintiff appealed, *inter alia*, on the ground that the custom was not legally established, and that under the ordinary Hindú law, he was entitled to inherit in his father's illam.

Gopalan Náyar for appellant.

Sadagopácháryár for respondents.

The facts necessary for the purpose of this report are set out in the judgments of the Court (Brandt and Parker, JJ.).

BRANDT, J.—There is evidence that the marriage was in the form known in Malabar as Sarvasvadhánam, the formula used being "I give unto thee this virgin who has no brother, decked with ornaments; the son who may be born of her shall be my son," and we must accept the concurrent findings of the Courts below on this point. Nor can it be said that there is no evidence that the transfer by Kalliapurath Sri Kumaran Mussad of his jenm right in the Annari and Kalliapurath illam properties was made in connection with and in consideration for the marriage, in the special form, of Valia Náráyanan Mussad, the father of the appellant, and Sri Kumaran's daughter Savithri: whether the transfer of the property was effected shortly before or after the marriage, the Courts below were at liberty to find on the evidence that it was made in consideration of the marriage, and the argument that, by reason of there being no property to transfer, there could not have been a Sarvasvadhánam marriage falls to the ground.

The question then which we have to determine is whether the conclusion arrived at, that the son of such a marriage does not inherit in the family of the natural father, is incorrect.

There was evidence as to practice, custom and general understanding on the subject, which the Subordinate Judge considered "overwhelmingly" in favour of the respondents' contention which the appellant here again assails, while the District Judge thought that of direct evidence as to the rights of such issue there was

KUMARAN v. NÁRÁYANAN.

little or none as distinguished from opinion, but that "the probabilities of the case and the best of what evidence there is are against the plaintiff."

On the question of law the Subordinate Judge held marriage in this peculiar form to be the same as marriage of an appointed daughter, and that the son of a daughter so appointed, inheriting the property of the sonless father of such daughter and offering the funeral cake to his mother, the second to her father, and the third to her paternal grandfather—(Manu, IX, 140)—"the issue of the appointed daughter is in fact consecrated to the use, spiritual and temporal, of the maternal grandfather," and that this being so "it is but logical to hold that he ceases to fill the same position to his natural father;" and reference is made to the work of a local authority cited in support of the respondents' contention that the son of such a marriage inherits property in the family of the natural father only in case of extinction of heirs, and then only as an Attaladakam heir.

The District Judge, on consideration of the authorities which appeared to bear on the subject, held that "there was no reason to suppose that the son of an appointed daughter inherited his father's property."

It is admitted that there is no decided case which can be cited as authority upon the particular question now before us; there have been incidental expressions of opinion in some of the cases which have been brought together in Mr. Rámachandrayyar's "Manual of Malabar Law," but the right now asserted has for the first time called for direct decision.

I am of opinion that the case of the son of an appointed daughter is closely analogous to that of an adopted son, and having regard to this principle, and to the form shown to have been used in this case "the son who may be born of thee shall be my son," I am not prepared to say that the decision arrived at by the Courts below is incorrect.

The weight of authority would appear to be in favour of the proposition that any brotherless daughter might become a "putrika" and her son a "putrika-putra" if "selected in thought," by the father, without any agreement or understanding at the time of marriage, "without compact, and merely by an act of the mind." (Hemadri).

But in the formula found to be recited at marriages in Sarvasvadhánam form in Malabar there is the express provision contained in the formula attributed in the Mitákshará to Vasishta: "the son of her who may be born of her shall be my son;" in Hemadri's Commentary we find the formula given in Manu (IX, 127) "the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies," and then a distinction is drawn between the son of an appointed daughter given in marriage in such form, and a child of a daughter given in marriage with a stipulation in the form, "the child who shall be born of her shall perform the obsequies of both."

KUMARAN v. NÁRÁYANAN.

And Balambhatta is authority for the son of the appointed daughter belonging in general only to the maternal grandfather and only by special compact to the natural father also. (Mitákshará, XI, and notes thereon, Stokes' Hindú Law Books.)

The term Sarvasvadhánam and the manner in which this case was argued and conducted would appear to imply that a provision is made for the issue of a marriage in this form; and the authority of the natural father to enter into an agreement of this sort whereby the first-born son shall be the son of the bride's father would appear to be as unquestionable on the authorities as the right to give in adoption, nor would the son so begotten appear to have any better right to inherit in the family of his natural father than an adopted son would have. The fact that it is the first-born son who is to be the son of the wife's father does not escape my notice, but however this may be, the position of such son would appear to me to be settled by authority: certainly no authority has been adduced to show that the conclusion come to by the local Courts is wrong.

I would then disallow the appeal and dismiss it with costs.

PARKER, J.—It was hardly disputed in the Lower Appellate Court that plaintiff was the issue of a Sarvasvadhánam marriage, and we are agreed that the District Judge has not overlooked any evidence which would lead to a contrary conclusion. The sole question, therefore, is whether the legal incidents of such a marriage exclude plaintiff from inheritance in his father's illam.

The matter is one of customary law, and there is no legal impediment to a person inheriting property under two different systems of succession (*vide* I.L.R., 8, Mad., 238), though such cases are naturally rare.

The marriage called Sarvasvadhánam is admittedly peculiar

KUMARAN v. NÁRÁYANAN

to Nambudris in Malabar, but it closely resembles, if it is not identical under another local name, with that called Putrikakaranam among other classes of Hindus. The object of both forms of marriage is to raise up issue to a father whose line is about to become extinct and to place the son to be begotten from a daughter in the place of a real son. The Subordinate Judge has found on the strength of a text book (exhibit VII) of a writer well versed in the customary laws of Malabar, and also on the evidence of the learned Fourth Rájá of the Zamorin's family, that Sarvasvadhánam or marriage with an appointed daughter is but another name for a Putrikakaranam marriage. It may be noted that the sloka recited at the Sarvasvadhánam marriage is identical with the text of Vasishta (XVI, 12) which declares an appointed daughter to come back as a son, and closely corresponds to the appointment of a daughter to raise up a son who shall perform obsequies—Manu IX, 127.

It is admitted that, in a Sarvasvadhánam marriage, the property of the bride does not pass to her husband, nor does he enter his wife's illam though their children do. He may hold his wife's or his wife's father's property in trust for the children to be born of the marriage, but in the event of his wife's death without issue, or by the failure of issue, such property would revert to the illam of his father-in-law.

In this respect Sarvasvadhánam is identical with Putrikakaranam marriage. The inheritance follows in the line of the funeral oblations. As pointed out by Mr. Mayne, the son of an appointed daughter offers the first funeral cake to his mother who is regarded as a son; the second to her father, and the third to her paternal grandfather.

In both cases then the father remains a member of his natural family, though he may be taken to live in the family of his wife. Among Nambudris in Malabar where partition is not allowed, such a separation would be almost complete, and whether or no the father continued entitled himself to share in the revenue of the illam which he left, it is clear that his son, who was born into and was the son of another illam, could never have a chance of succession in his father's illam unless the line of that illam became extinct—in which case he might come in as Attaladakam heir and would then perform the funeral ceremonies of his father's ancestors. As long as members of his father's illam lived, there

KUMARAN v. NÁRÁYANAN.

could be no question of inheritance for him, being a member of another illam.

The case of the plaintiff's ninth witness, Ramangiri Itteri Mussad, seems to bear out this view. He contracted a Sarvasvadhánam marriage with a girl of the Panikoti illam and had four sons by her. On the death of his younger brother without issue he established his eldest son as grihasta in his own illam, but leaves his second son established as grihasta in the family of his wife. This is also in accordance with text book (VII), though it is a deviation from the ordinary practice that the eldest son of such a marriage should remain in his mother's illam.

The father, though he may for most intents and purposes merge himself into his wife's illam, does not necessarily lose either his rights in his own family, or his parental rights. There seems nothing inconsistent in the son of such a father offering funeral oblations to him as well as to his maternal grandfather if his father's illam became extinct and he thus succeeded to the property belonging to the illam of his paternal uncles and cousins.

Applying these principles to the present case the plaintiff's suit must fail, for there are still several members of his father's illam which is by no means extinct. The circumstances of the present case would go far to show that Valia Naráyanan Mussad when he married plaintiff's mother in the Sarvasvadhánam form by no means intended to leave or did leave his own illam. He had two wives already in his illam married in the ordinary form, and exhibit I shows that he still remained heir to the office of adighári which was hereditary in his illam. Having begotten plaintiff, he would therefore be *functus officio* as far as the Kaliapuram illam was concerned.

The decision of the Courts below appears to me to be correct, and I would dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. October 23. November 10.

KALLIYANI (DEFENDANT No. 5), APPELLANT,

and

NÁRAYANA (PLAINTIFF), RESPONDENT.*

Malabar law—Sale of tarwad property—Powers of karnavan—Assent of members of tarwad, how far necessary.

There is no rule of Malabar law that the assent of every member of a tarwad is necessary to render valid the alienation of tarwad property.

THIS was an appeal from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, modifying the decree of the District Múnsif of Kavai in suit 378 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Hutchins, JJ.).

The Acting Advocate-General (Hon. Mr. *Shephard*) and *Anantan Náyar* for appellant.

Sankaran Náyár for respondent.

JUDGMENT.—This appeal relates to that part of the Subordinate Judge's decree which adjudges the sale evidenced by exhibit vii to be invalid. The doctrine on which the Subordinate Judge proceeded is that no karnavan or any number of anandravans "can permanently alienate tarwad property against the will of any single member of the family." If that rule holds good, a single factious anandravan may bring about the ruin of the whole family, for cases may occur in which an outright sale of part of the property may be by far the most prudent course, and indeed absolutely essential for the preservation of the remainder. It appears to us that the rule that every member of the family must assent is by no means an unqualified one. Section 379 of Strange's Manual has been referred to: after quoting an authority to the effect that the written assent of the chief anandravans is necessary, the learned author mentions a judgment of the Zila Court in which it was held that the absence of concurrence of one

* Second Appeal 512 of 1885.

living in discord with the karnavan would not vitiate the alienation. In the two cases *Kóndi Ménón* v. *Srángunreagatta Ahammada*,(1) *Kaipreta Ramen* v. *Makkaiyil Mutoren*,(2) Mr. Justice Holloway referred, in general terms, to the rule of law as one requiring the assent of all members of the tarwad, but in both the appeal of an alleged dissentient was dismissed, and we do not find that it has ever been determined that the rule is invariable. In our opinion the factious or capricious dissent of a single anandravan ought not to be allowed to invalidate a sale made in pursuance of the decision of a family conclave, and which was either absolutely necessary, or the most reasonable and prudent arrangement for the protection of the other family property. We will, therefore, ask the Subordinate Judge to find on the evidence already recorded—

(i) whether the sale to defendant No. 5 was necessary;

(ii) whether the plaintiff openly opposed it;

(iii) whether the plaintiff's opposition was reasonable or merely frivolous and factious.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1885. July 21. 1886. January 22.

PALANI (PLAINTIFF), APPELLANT,

and

SELAMBARA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Registration Act, s. 48—Constructive possession in pursuance of oral agreement to sell land.

Where a vendor in pursuance of an oral agreement to sell certain land directed the tenants of the land to pay, and the tenants agreed to pay, rent to the purchaser:

Held, that such possession was given to the purchaser as would satisfy the conditions of s. 48 of the Indian Registration Act and enable him to resist the claim of subsequent registered purchaser.

APPEAL from the decree of H. Wigram, District Judge of Coimbatore, modifying the decree of P. Náráyanasámi Ayyar, District Múnsif of Erode, in suit 100 of 1883.

The Acting Advocate-General (Hon. Mr. *Shephard*) and *Náráyana Ráu* for appellant.

(1) 1 M.H.C.R., 248. (2) 1 M.H.C.R., 359.

* Second Appeal 356 of 1884.

PALANI v. SELAMBARA.

Bháshyam Ayyangár for respondents.

The facts necessary for the purpose of this report appear from the judgments of the Court (Kernan and Brandt, JJ.).

KERNAN, J.—The appellant (plaintiff) filed suit No. 100 of 1883 against the two defendants and prayed that the defendant No. 1 should recover from plaintiff Rs. 1,400 and execute a deed of sale to him of certain lands, and that defendant No. 2 should surrender the lands to the plaintiff. The plaintiff relied on and proved exhibit A (1st March 1882), which was an agreement by defendant No. 1 to sell the land to him and execute a conveyance within the 30th of April 1882. It was proved that plaintiff paid to defendant No. 1 on the 1st of March 1882 Rs. 500, and Rs. 100 on the 10th of March. The stamped agreement A was registered in August 1882. Defendant No. 2 proved that defendant No. 1, on the 27th of February 1882, agreed orally to sell the same land to him, and got a decree against defendant No. 1 in suit 228 of 1882 for performance of the agreement and got a deed of sale, 12th December 1882, executed in that cause, in default of execution of conveyance by defendant No. 1.

Defendant No. 2 alleged that the agreement sued on by plaintiff was fraudulent and was subsequent to the sale to him and to the possession obtained by him.

The Múnsif dismissed the suit on the ground of misjoinder.

The plaintiff appealed, and the Judge relying partly on exhibits ii and iii (unregistered documents) found that so far as possession could be given by defendant No. 1 to the defendant No. 2, it was given on the 27th of February 1882, just three days before the agreement made with the plaintiff, and dismissed the suit as against defendant No. 2, but directed the defendant No. 1 to pay the plaintiff Rs. 600 and interest.

In this second appeal the plaintiff objected that exhibits ii and iii were inadmissible as not being registered, and therefore the Judge acted on inadmissible evidence as to the question of possession being given to defendant No. 2.

On hearing the second appeal, it appeared that the question of admissibility of exhibits ii and iii depended on the value or amount of the property to which they related, and that the question of when and how the defendant No. 2 obtained possession should be further inquired into.

By order, dated the 21st July 1885, we directed the following issues to be tried :—

(1) Are exhibits ii and iii admissible in evidence?

(2) If not, upon the other evidence already on record, did defendant No. 2 obtain possession before plaintiff's registered agreement?

The Judge has returned a finding that exhibits ii and iii were inadmissible, and no question is now made on this point.

He also finds that defendant No. 1 made over possession on the 17th of Masi, corresponding to 27th February 1882, and that he did so by asking the tenants of the lands in occupation thereof to pay their rents to the defendant No. 2, and he finds that defendant No. 2 obtained possession before the date of A, and long before the registration of it in August 1882.

In his return on the issue, the Judge referred to the evidence given by one of the witnesses for defendant No. 2, in which he says that before the day on which he signed exhibit iii he agreed to pay rent to the plaintiff. It was contended that the reference to the inadmissible exhibit iii rendered the evidence illegal. But we do not think so, as the exhibit was not thereby used in respect of any transaction therein referred to concerning the property in it. It was referred to merely to fix a date for another fact.

It was objected that on the evidence the Judge should have found that no possession either actual or constructive was given by defendant No. 1 to defendant No. 2 either accompanying or following the oral agreement with defendant No. 2. There was no evidence that actual possession of the lands was given to defendant No. 2 by delivery of the lands into his possession. The only possession alleged was constructive possession, that is, by defendant No. 1 directing the tenants in actual occupation to pay their rents in future to defendant No. 2 and by the tenants agreeing to do so.

The Judge believed that such constructive possession was so given on the 27th of February 1882, and that defendant No. 2 has since been in receipt of his share of the crop. No doubt defendant No. 1 denied that such constructive possession was given, and alleged that defendant No. 2 took possession forcibly, but the Judge disbelieved defendant No. 1. We accept the

PALANI v. SELAMBARA.

finding of the Judge that defendant No. 2 did receive such constructive possession.

The Registration Act in s. 48 refers to possession accompanying or following the oral agreement, but does not confine such possession to "actual possession" by delivery of possession of the land. The section would receive its full meaning if the possession intended thereby was possession according to the circumstances of the interest in the property sold and the agreement of the parties. If the vendor was at the time of sale in actual possession and sold the property with actual possession, such possession should accompany or follow the sale. If, however, the property was in actual possession of tenants, then as the tenants could not be put out so as to give the purchaser actual possession, the possession to be given should be constructive possession, by the vendor procuring the tenants to attorn to or accept new leases or agreements from the purchaser.

I would dismiss this second appeal with costs.

BRANDT, J.—There is evidence of attornment of the tenants under the defendant No. 1 to the defendant No. 2 at the request of the former, which evidence it was open to the Judge to accept as proving such attornment, irrespective of exhibits ii and iii, or at least having reference to those documents for purposes not directly affecting the right to the property in suit, and we must, I think, accept the finding of the Judge on this point.

Was there then such delivery of possession as is required by the Registration Act? That is to say, is such constructive possession as is held proved in this case insufficient for the purposes of that Act? Is physical delivery of possession alone sufficient?

I am of opinion that the words used in s. 48 of the Act do not exclude such constructive possession, and that oral agreements accompanied by such delivery of possession are sufficient to prevail against subsequent registered documents relating to the same property, when capable of proof by evidence accepted as sufficient to establish the fact of transfer of ownership and the reality of the transaction.

I would then confirm the decree appealed against and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1886. Feb. 15,

MACKENZIE AND OTHERS (PLAINTIFFS), APPELLANTS,

and

TIRUVENGADATHÁN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act, s. 20—Part-payment of principal of debt—Endorsement of cheque by debtor.

Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to the creditor:

Held, that such endorsement did not satisfy the conditions of s. 20 of the Indian Limitation Act so as to give rise to a new period of limitation from the date of such endorsement.

APPEAL from the decree of Parker, J., in civil suit No. 214 of 1885.

The Advocate-General (Hon. Mr. *Shephard*) for appellants.

Anandácharlu and *Sundaram Sastri* for respondents.

The facts of this case appear sufficiently from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

JUDGMENT.—On the 6th September 1881 the respondents (B. Tiruvengadathán Chetti and G. Venkaya Chetti) executed a promissory note in favour of the appellants (Arbuthnot & Co.) for Rs. 4,000. It provided that the debt was to be repaid by monthly instalments of Rs. 500 each, commencing on the 6th September 1881, and that in case any instalment was in arrear, the whole debt then due was to be paid on demand. The respondents paid on twelve different dates small sums aggregating Rs. 1,799-14-3, but these payments were not made according to the tenor of the bond either in respect of the amount of instalment or the date on which it was to be paid. The last of such payments was a sum of Rs. 100 paid on the 4th September 1882, and the other payments were made more than three years before suit.

But the last instalment payable according to the terms of the promissory note became due on the 6th April 1882, and the

* Appeal 27 of 1885.

MACKENZIE v. TIRUVENGADATHÁN.

appellants brought this suit in August 1885. The respondents pleaded, *inter alia*, limitation in bar of the claim. It was shown by the appellants that Rs. 100 was credited in their books on the 4th September 1882, and that it was a part-payment made on account of the principal, but the only writing which they produced in evidence was exhibit B. This document purports to be a cheque drawn on the Agra Bank by one Haji Mahomed in favour of G. Venkaya Chetti or order, and endorsed to Messrs. Arbuthnot & Co. by G. Venkaya Chetti. No evidence was, however, produced to show that the respondent No. 2 was the person who endorsed the cheque, or that the signature which the endorsement bore was his. It was contended before the learned Judge who tried the suit in the Court below that it was brought in time on the ground that the last payment was made in September 1882, whilst the plaint was presented in August 1885. Mr. Justice Parker held that three years ought to be reckoned from the date on which the last instalment fell due, and on this ground, and on the further ground that there was no evidence that the respondent No. 2 endorsed the cheque B, or that respondent No. 1 authorized him to do so, he dismissed the suit with costs. It is argued in appeal that the claim is not barred by limitation and that permission should be given to produce further evidence, in case we consider that the signature of respondent No. 2 to the endorsement on the cheque B is not sufficiently proved.

This case is governed by art. 75, sch. II of Act XV of 1877. It provides that the time shall run from the period when the first default is made, unless where the payee waives the benefit of the provision, and then when fresh default is made in respect of which there is no waiver. In effect it creates a case of election as each instalment becomes overdue, and after the last instalment becomes overdue, there can be no election for the obvious reason that there are no two obligations to elect between. The learned Judge was right in holding that time began to run under art. 75 from the 6th April 1882, after which there could be no waiver. As to the contention that permission should be given to produce further evidence, we do not consider that such evidence would save the limitation. Assuming that respondent No. 2 endorsed the cheque B, it does not satisfy the requirements of s. 20 of the Act of Limitations. The proviso to that section requires that the fact of the part-payment should appear in the handwriting of

MACKENZIE v. TIRUVENGADATHÁN.

the debtor or his agent. The cheque is only an order for payment, and it does not evidence any payment at all. Nor does it show for what purpose the payment was made. There is, no doubt, some parole evidence as to the payment, but the Act requires that the fact of payment, and that such payment was a part-payment, should appear in writing signed by the debtor or his agent authorized to make the payment.

It is not urged that there is such writing, and the appeal must therefore fail. It is next urged that no double set of costs should have been awarded, but the respondents had distinct defences in respect of the question of limitation and appeared by different pleaders, and we cannot say that they were not entitled to separate costs.

We dismiss the appeal with costs.

Solicitors for appellants, *Barclay & Morgan.*

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

PONNUSÁMI (PLAINTIFF), APPELLANT,

and

THATHA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. Feb. 1, 8.

Hindú law—Gift of undivided share by a coparcener invalid.

The rule of Hindú law which forbids voluntary alienations of the family estate by a Hindú coparcener applies as well to gifts to relatives as to gifts to strangers.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, in suit 9 of 1884.

The plaintiff, Ponnusámi Pillai, sued Thatha, Shanmugam, and Thangathammál, infant children of the daughter of plaintiff's deceased brother Chidambaram, to cancel a deed of gift executed by Chidambaram in favour of defendants and to recover possession of certain land held by virtue of such gift.

The plaintiff alleged that Chidambaram was his coparcener and died undivided, and that the land sued for was part of the family estate.

* Appeal 133 of 1885.

PONNUSÁMI v. THATHA.

The defendants pleaded, *inter alia*, that the gift was valid to the extent of the donor's half share.

The Court held that the plea was valid and decreed accordingly.

Plaintiff appealed.

Sadagópáchárýár for appellant.

Hon. *Rámá Ráu* for respondents.

The Court (Brandt and Parker, JJ.) delivered the following

JUDGMENT.—The question to be decided is whether a gift of joint family property by a deceased undivided coparcener can be supported as against the surviving coparcener, a brother. The gift was in favour of the sons of a daughter of the donor.

The case of *Baba* v. *Timma*,(1) a Full Bench case, was brought to the notice of the District Judge, but he distinguished it on the ground that in that case the gift was made by a father of ancestral estate to a stranger to the detriment of the son's right, while in this case the donor was the brother of the surviving coparcener, and that "an alienation by a brother of his own share in undivided property is," as he believes, "valid so long as the gift is complete, and is on the same footing as any other alienation," and moreover that "the donees in this case are not strangers, but persons for whom the donor might reasonably and fairly make provision."

In the Full Bench case the authorities were considered and the question was argued on the broad grounds that the Mitákshará did not allow alienations except for necessity, that alienations in favour of *boná fide* purchasers for value had been upheld in recent decisions as an exception to the rule, and that no such equity exists in favour of a volunteer claiming under a gift; that the doctrine should not be carried further nor the equity extended in favour of a volunteer under a deed or a will. On the other hand, it was asked why should not the principle of compelling an alienor, who could have himself obtained a partition, to give his creditors all the remedies to which he would be entitled be applied in favour of a donee also?

Reference was made by the late learned Chief Justice to observations made by him respecting the right of a coparcener to make an alienation of his share, which will be found in *Ponnappa*

(1) I.L.R., 7 Mad., 357.

PONNUSÁMI v. THATHA.

Pillai v. *Pappuváyyangár*.(1) It is there observed that with the exception of one case, *Vencatapathy Reddy* v. *Lutchmee Ammal* (2) there appears to be no case in which an alienation has been supported except where it might have been supported on the principle above stated; and as to the case of *Vencatapathy Reddy* it is pointed out that no authority is cited for the decision therein arrived at, and that it does not appear that the decision in *Atchama* v. *Ramanadha* (3) was brought to the notice of the Judges who decided it; again in *Baba* v. *Timma* (4) it is said that on the one side there is "the unanimous consensus of the commentators accepted in Southern India, and the opinions of the most eminent English writers on Hindú Law" against, on the other side, one decision of this Court, already held in *Ponnappa Pillai's* case to be no authority for the proposition stated in it; while "the principle on which alienation was permitted to satisfy a judgment-debt or to give effect to a contract made with a purchaser for value implies that ordinarily the power to alienate is absent," and that "what was intended as the justification for an exception to the rule cannot be recognized as a rule."

The validity of an alienation to a purchaser for value has been upheld "on the equity which such a purchaser has to stand in his vendor's shoes and to work out his rights by means of partition;" but with the exception of the case of *Vencatapathy* v. *Lutchmee* above referred to we are not aware of any instance in which a voluntary alienation by gift of joint family property by an undivided coparcener unless permitted by an express text—and it is not pretended that there is any such text to cover the case of this gift—or an alienation by will has been given effect to against an undivided coparcener. We entertain no doubt that that case decides the general question therein raised and considered, and is not to be restricted to the simple proposition that a gift to a stranger is ineffectual or that it is authority for the proposition that a gift of affection generally, to any relative, is effectual.

The appeal must be then allowed and decree made in the appellant's favour for the relief sought in the plaint together with costs in both Courts.

(1) I.L.R., 4 Mad., 56. (2) 6 Mad. Jur., 215. (3) 4 M.I.A., 1.
(4) I.L.R., 7 Mad., 357.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

1886. Feb. 22, 23.

JAGANÁDHAM (PLAINTIFF), APPELLANT,

and

RAGUNÁDHA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Contract—Instalment bond—Agreement to pay enhanced rate of interest on default, enforceable.

An agreement to pay the principal of a debt by instalments with interest, and on default of payment of each instalment to pay an enhanced rate of interest thereon from the date of default of payment, is not an agreement which should be relieved against.

Dictum of Wilson, J., in *Mackintosh* v. *Crow* (I.L.R., 9 Cal., 689) approved.

APPEAL from the decree of E. C. Johnson, Acting District Judge of Vizagapatam, in suit No. 18 of 1881.

The plaintiff, Thakum Jaganádham, sued the defendants (1) Ragunádha Panda and (2) Bálámukunda Panda to recover Rs. 3,798-15-6, principal and interest on a registered bond, dated 30th April 1878, executed by defendant No. 1.

Defendant No. 2 was sued as the undivided brother of defendant No. 1.

The District Judge held that the debt was binding on defendant No. 2 and decreed payment of the principal sum and interest at 9 per cent. to date of decree, and at 6 per cent. from date of decree to date of payment.

Against this decree plaintiff appealed on the ground that he was entitled by the terms of the bond to interest at 9 per cent. to the date when the first instalment of the bond became due (11th October 1878), and to interest at 24 per cent. from date of default till date of decree.

The bond, after reciting a promise to pay Rs. 1,500, proceeded as follows:—

"I will pay interest for this at the rate of Rs. ¾ per 100 per month; the fixed instalments are as follow:—the whole of interest

* Appeal 96 of 1885.

accruing and Rs. 500 for the principal on the 15th Asvayuja Suddha of this year; the whole of interest accruing and Rs. 500 for the principal on the 15th Asvayuja Suddhá of the year Pramadi; and the interest accruing and Rs. 500 for the principal on the 15th Asvayuja Suddha of the year Vikrama; I will pay the said three instalments in that manner, and get the payments entered on the back of this. In case of the amount of any one of the said instalments not being paid on the day of the instalment, the whole amount that may be due up to that time will be paid by me immediately in a lump with interest at the rate of Rs. 2 per cent. per month, without having anything do with the subsequent instalments."

Mr. *Branson* for appellant.

Mr. *Michell* for respondents.

The Court (Collins, C.J., and Brandt, J.) delivered the following

JUDGMENT:—Bonds providing for repayment of loans by instalments with condition that on failure to pay any one instalment the principal sum due on date of default so made shall be forthwith exigible, with interest at a rate or rates specified, are so common that at first we were inclined to think that the District Judge had hardly sufficient grounds for saying that the terms of the bond in this case are unintelligible. Our first impression was that not only was it here intended that the principal sum with interest thereon at an enhanced rate should be payable on default of payment of the first or any subsequent instalment, but that the language of the bond would fairly and naturally bear that construction. But it does not necessarily do so, and though we are still inclined to think that the intention may have been, as above indicated, the constructions which it is possible to put on the words are so various, the language so ambiguous that we cannot say the District Judge was wrong in refusing to hold that under the bond the principal sum, Rs. 1,500, was payable, with interest thereon at 24 per cent. per annum, on and from the 11th October 1878, and this is all that we are directly called upon to decide in this appeal.

Whatever other construction may be placed on the disputed passage in the bond, there is nothing in our opinion which can be held as indicating that the increased rate of interest is payable from the date of the contract, and we concur in the view taken by

JAGANÁDHAM v. RAGUNÁDHA.

Wilson, J., in *Mackintosh* v. *Crow* (1) in respect of contracts of loan where the condition is that "if the money be not paid at due date it shall *thenceforth* carry interest at an enhanced rate," that it is open to a debtor "to contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now and a higher or lower rate hereafter."

But in the present case it cannot, in our opinion, be held with sufficient certainty that the agreement in this case was that the principal sum with interest at the higher rate became forthwith payable on the 11th October 1878; and in the circumstances we are not prepared to say that the Judge was not justified in giving decree for the principal sum with interest thereon at 9 per cent. from the date of the loan.

The terms of the bond might perhaps be most properly taken to be that on and after default in payment of the sum of Rs. 500 on the 11th October 1878, together with interest on that sum at 9 per cent. from the date of the bond, viz., the 30th April 1878, that sum, principal and interest, was payable with interest thereon at 2 per cent. per mensem until date of payment; that on like default in October 1879 the second instalment of Rs. 500 with interest thereon at 9 per cent. was payable with interest thereon at the enhanced rate from that date, and so in respect of the third and last instalment: and we are of opinion that an agreement to this effect should not be relieved against.

But we do not consider that we are called upon to give effect to a construction of the terms of the bond which is at best doubtful and which was not put forward on behalf of the appellant, when the appeal cannot be allowed on the ground on which it was preferred and argued.

We shall then dismiss this appeal with costs.

(1) I.L.R., 9 Cal., 689.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1886. March 8.

APPASÁMI (DEFENDANT No. 1), APPELLANT,

and

RÁMASÁMI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43.

Upon a settlement of accounts between plaintiff and defendants, Rs. 3,985-6-9 was found due by the defendants, who agreed to pay the same. They gave to plaintiff an order on their agents to pay Rs. 2,500 from the profits of certain land, and promised to pay the balance within a month. Plaintiff filed two suits, one for Rs. 2,500 and the other for the balance of the debt.

Defendants pleaded that both suits should be dismissed, as brought in contravention of the requirements of s. 43 of the Code of Civil Procedure.

The Lower Courts held that there were two distinct causes of action, and decreed both claims.

Held, on second appeal, that plaintiff had only one cause of action, and that the decree in one of the suits must be reversed.

APPEALS against the decrees of T. Weir, Acting District Judge of Madura, confirming the decrees of S. Krishnasámi Ayyar, District Múnsif of Dindigul, in suits Nos. 640 and 642 of 1883.

The facts necessary for the purpose of this report are set out in the judgment of the Court (Brandt and Parker, JJ.).

Bháshyam Ayyangár and *Kaliánarámáyyar* for appellant.

Hon. *Subramanya Ayyar* for respondent.

JUDGMENT.—The only ground on which exception is taken in second appeal to the decrees of the Lower Appellate Court is the technical ground that the claims in these two suits represent in fact only one claim which the plaintiff is entitled to make in respect of one and the same cause of action, and that both cases ought to have been, and ought now to be, dismissed as brought in contravention of the requirements of s. 43 of the Civil Procedure Code, in which case the plaintiff can, if so advised, and must, in order to obtain decree for the whole amount sued for, bring a fresh suit in a Court having pecuniary jurisdiction.

The facts are that on a settlement of accounts between plaintiff and defendants a sum of Rs. 3,985-6-9 was found due by the latter to the former, and the debtors on the 16th August 1883

* Second Appeals 755 and 756 of 1885.

APPASÁMI v. RÁMASÁMI.

agreed to pay the amount found due, giving on that day an order on their officers or servants to pay the sum of Rs. 2,500 from the income received from two villages named for faslis 1291-92, and promising to pay the balance, Rs. 1,485-6-9, in a month.

The respondent (plaintiff) filed one of the two suits now before us for recovery of the sum of Rs. 2,500, and the other for the remainder, claiming also interest.

The appellant took in both of the Courts below the objection which we have now to consider.

The District Múnsif held that there are two distinct and separate causes of action by reason of the promise to pay at once part of the sum admitted to be due and the balance in a month; and that even if the two claims do arise out of one and the same cause of action, s. 43 is no bar, provided the suits be brought simultaneously, in support of which proposition he refers to *Kaleshar Prasad* v. *Jagan Nath.*(1)

The District Judge in confirming the decrees also expresses an opinion that the causes of action in the two suits are entirely distinct by reason of there being two distinct and separate contracts to pay.

We are compelled to differ from the Courts below and to allow the objection taken by the appellant; but it is evident that in no cases need both suits be dismissed: the decree in either may stand, provided the decree in the other be reversed, in which case it will not be open to the plaintiff to sue in respect of the sum claimed in such suit.

Two weeks' time was allowed to the plaintiff to decide what course he would adopt.

We proceeded to give our reasons for holding that it was not open to plaintiff, having regard to the provisions of s. 43 of the Code, to bring these two separate suits.

The two claims, or rather the claim in respect of which two separate suits have been brought, in our opinion arise out of one and the same cause of action, namely, an obligation on the part of the debtors to pay and a right in favour of the creditor to sue for payment of the sum which the debtors admitted as due on settlement of accounts and which they thereon promised to pay; and the fact that the debtors undertook to pay part of such sum at

(1) I.L.R., 1 All., 650.

APPASÁMI v. RÁMASÁMI.

once and part after expiry of a fixed time which had elapsed when these suits were brought cannot enable the creditor to split an entire demand in a manner which s. 43 was intended to prohibit.

One of the reasons for such prohibition is "that the defendant be not put to unnecessary vexation," and one test is whether the same evidence and the same arguments apply in the two cases: that this is so here appears from the fact that the evidence was by consent taken in one case only and held applicable for decision in the two.

The District Múnsif is not correct in saying that a different cause of action arises on each occasion when, in respect of a debt secured by an instrument providing for payment by instalments, there is failure to pay an instalment; under the terms of the agreement there accrues due to the creditor a part of his debt in respect of which he can sue, but the cause of action out of which the claim arises is the same, and the creditor is bound to include in his suit all that is then due in respect of his claim.

The case referred to by the District Múnsif was decided with reference to the provisions of s. 7 of Act VIII of 1859, and, moreover, one of the grounds on which the Appellate Court based its decision was that it was not clear that the same cause of action was disclosed in both cases. In the cases before us we have no doubt that the cause of action is the same. Nor is the present case the same as *Umed Dholchand* v. *Pir Sáheb Jivá Miyá*,(1) in which two separate bonds were given. It was contended that the giving of the order on the officers in charge of their treasury by the defendants, and its acceptance by the creditor, alters the case in respect of the claim for the Rs. 2,500, but the persons to whom the order was given were merely the servants of the debtors, and the payment not having been made, it is the debtors who have made default, and the creditor is in our opinion at liberty to sue for the whole amount agreed to be paid, and must sue in one and the same suit for the whole claim arising out of the cause of action which, as we hold, is one and indivisible.

At the request of the learned vakíl for the appellant the appeal is now allowed with costs in second appeal 756 and the original suit dismissed; and second appeal 755 is dismissed with costs.

(1) I.L.R., 7 Bom., 134.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1886. January 27.

SADAGOPÁCHÁRYÁR

against

RAGAVÁCHÁRYÁR AND OTHERS.*

Criminal Procedure Code, ss. 4, 202, 350.

A magistrate upon complaint made having issued process and examined witnesses in support of the complaint ceased to exercise jurisdiction. His successor on taking up the case referred the complaint to the police for inquiry and report, and upon receipt of the report discharged the accused:

Held, that this procedure was illegal.

A reference under s. 202 of the Code of Criminal Procedure cannot be made after evidence has been taken for the complainant and process issued.

THIS was a petition under ss. 435 and 439 of the Code of Criminal Procedure to revise the proceedings of Mr. Mullaly, Joint Magistrate of Chingleput, in case No. 62 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

Mr. *Subramanyam* and *Srirangácháryar* for complainant.

Mr. *Wedderburn* and *Rangácháryar* for accused.

JUDGMENT.—The procedure followed by the Joint Magistrate in this case is contrary to the provisions of s. 350 of the Code of Criminal Procedure. His predecessor accepted the petitioner's complaint, issued process upon it, and examined more than ten witnesses for the prosecution.

At this stage of the case, the present Joint Magistrate who succeeded the former was not entitled to ignore what the former Joint Magistrate had done and to refer the case to the police for inquiry and report, apparently under s. 202. He might under s. 350 have recommenced the inquiry, but the inquiry referred to by that section is defined by s. 4 and does not include a reference to the police, such as the original magistrate might direct. That reference under s. 202 is made before inquiry begins

* Criminal Revision Case 378 of 1885.

and cannot be made after evidence has been taken for the complainant and process issued. In order to make such reference, s. 202 provides that process may be postponed. We set aside the order of the Joint Magistrate and direct him to proceed according to law.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. March 4.

VENKAYYA (DEFENDANT No. 2), APPELLANT,

and

SUBBARÁYUDU (PLAINTIFF), RESPONDENT.*

Regulation XXIX of 1802, *s.* 7.

The office of karnam in a zamíndári village having been held by three brothers jointly in hereditary right, the zamíndár on the death of one brother didnot fill up the vacancy considering that the work could be well conducted by the two survivors.

On the death of the survivors their sons succeeded to the office. The zamíndár subsequently desiring to reappoint a third karnam nominated an outsider to the joint tenancy of the office:

Held, that as there were heirs of the last holders in existence, the appointment was invalid.

APPEAL from the decree of T. Rámaswámi Ayyangár, Subordinate Judge at Cocanada, confirming the decree of Y. Jánakirámáyyar, District Múnsif of Amalapúr, in suit 1074 of 1882.

The plaintiff, Nedunnuri Subbaráyudu, sued (1) the Rájá of Pittapúr and (2) Nedunnuri Venkayya to have the appointment made by defendant No. 1 of defendant No. 2 to the office of karnam in the village of Nedunnúr in the zamíndárí of Pittapúr cancelled, and to establish plaintiff's right to the said office.

The Lower Courts decreed the claim.

Defendant No. 2 appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Parker, J.).

Subba Ráu and *Appadorai Ayyar* for appellant.

Kristna Ráu for respondent.

* Second Appeal 757 of 1885.

VENKAYYA v. SUBBA-RÁYUDU.

JUDGMENT:—The office of karnam in this zamíndárí village was hereditary in the plaintiff's family. It was originally held by three brothers, but on the death of one of them without issue the rájá considered that the work could be well conducted by the remaining two, and that it was not necessary to appoint a third. These two were succeeded in due course by their sons, of whom one—the plaintiff's father, Buchanna—has now resigned in consequence of old age.

The plaintiff's elder brother was appointed to succeed his father.

The rájá now wishes to reappoint a third karnam and has nominated an outsider to the joint tenancy of this hereditary office.

Such a course is opposed to s. 7, Regulation XXIX of 1802, which provides that the heirs shall be chosen except in the case of incapacity. It has been held by this Court in *N. Krishnamma* v. *N. Papa* (1) that the word "heir" means "next of kin," and judged by this ruling plaintiff is the proper person to be nominated, since his brother and cousin are already karnams and his father has declared himself incapable from old age—*vide* also *Arumugám Pillai* v. *Vijayammál.* (2)

The appellant has no preferential claim as an heir, and the appeal must be dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1886. April 2.

QUEEN-EMPRESS

against

DORASÁMÍ.*

Penal Code, s. 75—Trial of prisoner of offence under ch. XII or XVII after previous conviction.

If a prisoner is to be tried for an offence punishable under s. 75 of the Indian Penal Code, a separate charge under that section must be framed and recorded.

APPEAL from the sentence of the Presidency Magistrate's Court, Black Town, in calendar case No. 20239 of 1885.

(1) 4 M.H.C.R., 234. (2) I.L.R., 4 Mad., 338.

* Criminal Appeal 71 of 1886.

QUEEN-EMPRESS v. DORASÁMÍ.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

Counsel were not instructed.

KERNAN, J.—We think that the practice of the Presidency Magistrates' Court is not consistent with the provisions of the Criminal Procedure Code.

The practice appears to be to charge the prisoner, say, of theft. No charge under s. 75 of the Indian Penal Code is placed on the record, but if the prisoner is convicted the Magistrate questions the prisoner whether he was convicted of the prior offence whatever it is. To this inquiry the prisoner replies either admitting or denying the fact; and, if he denies, the Magistrate without framing a charge tries him. If convicted then the Magistrate in his judgment, as in this case, refers to the prior conviction as a ground for increasing the punishment beyond what should be given for a first offence.

No doubt the sentence pronounced may be, and in this case was, within the competence of the Magistrate to inflict for the first offence.

But the object and direction of the Code are that for each offence there must in warrant cases be a separate charge. We will not interfere with the sentence, and we dismiss the appeal; and no doubt the Magistrate will in future cases follow the views of this Court and in such cases frame a charge under s. 75 and try on that charge.

APPELLATE CIVIL.

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

1884. July 21. 1885. April 30.

SIVASUBRAMANYA (PLAINTIFF), APPELLANT,

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

Forest land—Enjoyment—Adverse possession—Quasi possession—Prescription.

In a suit by a zamíndár to recover certain forest tracts from Government, the plaintiff relied on certain accounts called ayakut accounts as furnishing proof of the inclusion of the said tracts within the limits of his zamíndárí.

* Appeal 1882 of 1883.

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

The District Judge refused to accept these accounts as evidence of reputation, because no evidence was produced to show for what purpose, by whom and in what circumstances these accounts were prepared, and what guarantee existed to ensure their accuracy :

Held, that, inasmuch as they were from time to time prepared for administrative purposes by village officers and were produced from proper custody and otherwise sufficiently proved to be genuine they were admissible as evidence of reputation.

No distinction can be drawn between evidence of reputation to establish and to disparage a public right.

The plaintiff having proved that he and his ancestors had cut wood, pastured cattle, and gathered forest produce in certain forests for fifty years, the Lower Court held that such acts of enjoyment were only evidence of an easement and not of adverse possession :

Held, that these acts, as they had been done under the belief and assertion that the said tracts formed portion of the zamíndárí and that the plaintiff and his ancestors were owners of the said tracts, were evidence of adverse possession.

In principle, an act done is one of ownership or evidence of an easement according as the person doing it asserts general ownership or a particular right in another's property.

The enjoyment of any right of ownership over the soil is, *primâ facie*, proof of ownership of the soil.

Where, therefore, the Lower Court found such an enjoyment of a forest as proved title to the profits thereof and such enjoyment was accompanied with an assertion of ownership of the soil :

Held, that the Court was bound to find a title to the soil established.

Where a tract of land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done on various portions of it, such acts may be accepted as evidence of the possession of the whole tract.

Bháskarappá v. *Collector of North Canara* (I.L.R., 3 Bom., 452) distinguished.

APPEAL from the decree of J. C. Hughesdon, District Judge of Tinnevelly, in suit 2 of 1882.

The facts necessary for the purpose of this report appear from the Judgment of the Court (Turner, C.J., and Muttusámi Ayyar, J.).

Bháshyam Ayyangár for appellant.

The Government Pleader (Mr. *Shephard*) for respondent.

JUDGMENT :—This is an appeal from the decree of the District Court of Tinnevelly in so far as it dismisses the appellant's claim. The respondent has also objected to so much of the decree, as set aside the decision of the Assistant Superintendent, Revenue Survey, dated the 6th April 1880. The property in litigation consists of three hill tracts of forest land adjoining the zamíndárí of Singampatti and about 40 or 50 square miles in extent. The appellant's claim to the second tract as described in the schedule attached to the plaint was disallowed by the Judge. Of the other

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

two tracts, the first or eastern tract is said to be 12 square miles in extent, and it is bounded on the east by Karungaluttu, Vandal Odei, Kannimar Amman Kovil, and Panjantangi Mottai, on the west by Mulaikasam and Shenkatti Parambu, on the south by the Varattar, and on the north by arable lands which appertain to the appellant's zamíndárí. The third or western tract is, as described in the schedule, 35 square miles in extent, bounded on the east by the Manimuttar and Sellambu Odei, on the west by the territory of the Travancore Government and the Tambrapurni river, on the south by the Terkukakachi Malai and the Travancore territory, and on the north by the Tambrapurni and the Mylar. The second or middle tract lies to the north of the Terkukakachi Malai, to the south of the Vadakakachi Malai, to the east of the Manimuttar, and to the west of the Kossavenkuliyar, and it is about 1 square mile in extent. According to Mr. Baber, the Assistant Superintendent of the Revenue Survey, who personally visited the hills in dispute, they are 103 square miles in extent by map measurement, and consist of hill ranges rising over 6,000 feet above the level of the sea, and of which the upper hills are clothed with valuable virgin forest and the lower slopes with valuable jungle. The fact that the head waters of the Tambrapurni river, a river on which considerable revenue derived by Government depends, lie in these tracts, lends a special importance to the appellant's claim. The appellant is the zamíndár of Singampatti, which is one of the Tinnevelly palayams that were brought under Permanent Settlement in 1803. Before entering on the case, it is perhaps desirable to give a summary of the political history of Tinnevelly so far as it throws light on the origin and nature of these palayams, and on those events which may possibly have a bearing on the question of private property which is discussed by the Judge at some length. The history of Tinnevelly had no separate existence, but was bound up with that of Madura down to the time of the Muhammadan Government in the middle of the last century. Originally, it had formed part of the Pandiyan kingdom that extended from Cape Comorin on the south to the river Vellar on the north, which, rising in the district of Trichinopoly, takes a south-easterly course through the Pudukotta territory, and falls into the sea south of point Calimere. The Pandiyan kings ruled over this part of the country until 1063 A.D., about which time the king-

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

dom passed into the possession of a Chola king called Rajendra. The last king of this dynasty was Sundara Chola Pandiya Deva, a prince whose succession was disputed by his illegitimate brother Vira Pandiya and who fled to Delhi where he obtained the support of the Muhammadan Emperor Alla Uddin. Sundara Pandiya regained his territory with the aid of a Muhammadan force and was consequently obliged to yield the chief share of Government to Muhammadan ministers. After his death, and in 1311, one of Alla Uddin's Generals seized the country and held it for some time for the Emperor of Delhi. This Muhammadan interregnum is said in Taylor's Historical Manuscripts to have lasted for forty-seven years from 1323 to 1370. A new line of Pandiyan kings commencing with Parabramha Pandiya Deva recovered the kingdom from the Muhammadans with the assistance which they received from the Canarese kings of Dwara Samudram, who preceded the Vijayanagaram dynasty of Telugu kings. Throughout the reigns of this new series of Pandiyan kings, the rulers of the Canarese and the Vijayanagaram kingdoms appear to have exercised supreme authority over Madura and Tinnevelly, though without much ostensible interference. About the year 1520, however, the Pandiyan dynasty was ultimately deprived of all real power by the Náyaks, the Vijayanagaram Telugus, although some of the Pandiyan line retained nominal sovereignty for sometime longer. Nágama Náyak and his son Visvanádha Náyak were the actual conquerors, and they and their descendants held the kingdom for the Vijayanagaram princes for fifteen generations. The creation of the palayam tenure now represented by the present zamíndáries of Tinnevelly and Madura is assigned by tradition to Visvanádha Náyak, and it was the most important political event of his rule. It is, however, more likely that all the palayams were not erected at one time, but by the successive princes of the Náyak dynasty.

Speaking of these institutions, Bishop Caldwell observes that it can hardly be said that the idea of governing the country by an order of rude, rapicious feudal nobles such as the palayagárs generally were, was a happy one, for, down to the period of their final subjection to British authority in 1801, whenever they were not at war with the central authority, they were at war with one another, and it was rarely possible to collect from them the tribute due to the paramount power without a display of military

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

force. The last of the Náyaks, Vijaya Runganádha Chola, died in 1731, and in consequence of a disputed succession, the Nawab of Arcot sent an army under the command of his son, Safdar Ali, and Dewan Chanda Saheb. Chanda Saheb made himself master of Madura and of the countries under the rule of the Náyaks. In 1739 Reghuji Bhonslai, the great Mahratta General to whom one of the Náyak princes applied for assistance, defeated the Nawab of Arcot, and regained possession of Trichinopoly and Madura. But in 1743, the Nizam expelled the Mahrattas, and from that time the country formerly under the Náyaks was held by officers commissioned by Anwar Uddin, who was appointed Nawab of Arcot by the Nizam in 1744, and by his son and successor Muhammad Ali in 1749. In 1748 an expedition was sent by Muhammad Ali with a detachment of ninety Europeans under Lieutenant Innes, to establish firmly the Nawab's Government in the country to the south of the Coleroon, including Tinnevelly. In 1755 another expedition was sent to Madura and Tinnevelly by Muhammad Ali under Colonel Heron, in order to reduce those countries to obedience. At this time the palayagárs of Tinnevelly evaded payment of the tribute on various pretences. From 1756 to 1763, the palayagárs were in a constant state of rebellion against the authority of the Nawab which was supported by the East India Company, who kept a small force of sepoys and cavalry under the authority of Muhammad Usuf. In 1761 the fall of Pondicherry awed the palayagárs into submission and Muhammad Usuf made himself master of Madura and Tinnevelly. Until 1781 the country enjoyed tranquillity being administered on behalf of the Nawab by a succession of officers nominated by him from time to time. In 1791 the management of the country was made over under treaty by the Nawab of Arcot to the English. About 1793, all the palayagárs of Tinnevelly, being assisted by the Dutch, were again in rebellion and an expedition was sent under Colonel Fullarton; but when the palayagárs were on the point of submission, the war with Tippu distracted his attention and the country was not tranquilized until the fall of Seringapatam in 1799. As treasonable correspondence was found between Muhammad Ali and his son and Tippu Sultan, the Government of the Carnatic was assumed by the British under the treaty of 1801. Previous to the fall of Seringapatam, the palayagárs of Tinnevelly were growing more and more rebellious. In 1799

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

there was the first palayagár war, and the palayagárs were reduced to subjection by Major Bannerman. Again in 1801, the second and the last palayagár war broke out and the rebels were overthrown by the army under the command of Colonel Agnew, and the country was finally reduced to subjection. In 1802, the palayagárs were brought under the Permanent Settlement in the belief that it would operate to change these turbulant tributary chiefs into peaceful and contented land-holders. Thus it will be seen that the district was under the Pandiyan kings with a short Mahammadan interregnum of between forty and fifty years, till it passed under the rule of Náyaks who created the palayagárs as local chiefs subject to the payment of a tribute to the paramount power, that from 1731 to 1791 it was subject to the Nawab of Arcot, whose authority was often weak and resisted by the palayagárs, and that it was not until 1801, when it passed under the British rule, that the country was fully tranquilized.

The zamíndárí of Singampatti belongs to an old palayagár Maravar family. It was permanently settled in 1803 at a peshkash of Rs. 8,006-2-11. The sanad was issued in the name of Nallakutti Tévar. In 1830, when Periya Sámi Tévar held the zamíndárí the peshkash fell into arrears and the Collector of the district attached and held the zamíndárí until 1832. Periya Sámi died in 1834, and a dispute arising as to the right of succession, the estate came again under the management of the Collector who transferred it in 1836 to Palanai Achi Ammál. Under her management the peshkash again fell into arrears, and in 1842 the Collector attached the zamíndárí and kept it under attachment until 1844. In 1845 Sankara Vadivammál succeeded to the estate, but she died shortly after, and there was again a dispute as to succession. On this occasion, the Collector had the management of the estate for five years from 1846 to 1851. From 1852 to 1856 Sodala Muttu Ammál remained in possession, and in 1856, it passed into the possession of Siva Subramanya Tévar, the appellant's father, who died in 1860. In his time, the Collector was in possession in 1857 and 1858 on account of arrears of peshkash. In 1860, the Collector assumed the management owing to the appellant's minority for six months, on the expiration of which time Isvaravadivu Ammál, the appellant's mother, was appointed to manage the zamíndárí under the Collector's general supervision and control. She died in 1867, when the estate came under the

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

Court of Wards, and the Collector, as the agent of that Court, remained in possession until 1881, when the appellant attained his majority. From 1830 the zamíndárí has thus been under the management of officers of Government at different intervals of time for a period of about 25 years.

In 1864, the Government desired to bring all forests in the district of Tinnevelly, in view to their better protection, under the management and control of the Forest Conservancy Department. In 1865, they questioned for the first time since the Permanent Settlement the proprietary right claimed for the appellant with respect to the hill forests in suit. But nothing appears to have been done until 1870, when an enquiry was made as to the appellant's title in an informal manner, and a report was submitted by Major Campbell Walker. This report and the report on the titles of other zamíndárs of Tinnevelly, who claimed the hill forests which adjoin their estates on the plains, were referred to the Government Pleader for opinion. It was considered on this occasion that before any action could be taken further information was necessary on several points, and this the Collector was called upon to furnish. On the 31st October 1879 Government directed a Survey Officer, appointed to determine disputes under the Boundary Act, to ascertain whether the forests in suit were within the boundaries of the appellant's zamíndárí. The appellant being then a minor, the Collector, as the Agent of the Court of Wards, defended his title before the Survey Officer who decreed in April 1880 that the appellant was entitled by a decision of the Collector in 1857, to which we shall hereafter refer more particularly to one-half of that part of the hills which lie between the Tekkukachi Malai on the south and the Elgai Vengai on the north, and the Manimuttar on the west and Karampandi Amman Kovil on the east. He declared further that the boundary line fixed by him would, as shown in the map L, run from the Mulaikasam of the Pachiyar to Mothalati-junction and thence along the Kossavenkuliyar and across the ridge of Kakkachi Malai to the Manimuttar. He decided also that all the lower hill tracts to the north of the Mylar and Sellambu Odei and to the west of the Manimuttar and those to the east of the latter river and west of Kattadi ridge should be included within the limits of the zamíndári. Seeing that the appellant was a minor at the date of this decision, Government extended the time allowed by Act XXVIII of 1860

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

for appealing from it to six months from the day on which he should attain his majority. This he did on the 31st January 1881 and he instituted this suit on the 30th July 1881. He alleged that the hill tracts were his ancestral property, that they formed part of his zamíndárí, that they were known by the name of Singampatti hills, and that they had remained in his possession and that of his ancestors from time immemorial. He stated further that after the Survey Officer decided against him, the respondent entered on the hills and excluded him from possession. The respondent resisted the claim, contending that the suit was not properly valued, that the appellant was not entitled to the hills, that only some parts of those hills were called Singampatti hills, and that the appellant could acquire no legal title because people called them Singampatti hills. It was further asserted that the hills in dispute belonged to the Crown, and that the zamíndárí of Singampatti itself was bestowed upon the appellant's ancestor by the Crown. The title and immemorial enjoyment set up by the appellant were denied. Two issues were framed: (1) is the suit properly valued? (2) whether the right to, and possession of, the property in dispute is with plaintiff (appellant) or the Government? At the trial, however, the first issue was abandoned, and although the Judge considered that the second issue was not sufficiently specific, Counsel on both sides submitted that it was sufficient for their purpose.

The District Judge, Mr. Hughesdon, came to the conclusion that the appellant failed to prove his title and disallowed his claim to possession and other relief as proprietor, but he found that the appellant had certain exclusive rights in the nature of easements in the western tract and that he had similar rights in the eastern tracts though not exclusive, and he consequently set aside the decision of the Assistant Superintendent of Revenue Survey. He observed that it was clearly shown that the zamíndár had the exclusive right of pasture, wood-cutting and gathering of wild products in the western tract, and that he had perhaps a right of the same kind but of limited extent in the eastern tracts, but he added that in his opinion these rights did not render the zamíndár unqualified proprietor or owner of the land in fee simple, for such rights were in the nature of an easement and the officers of Government were shown to have interfered on frequent occasions with the zamíndár's full enjoyment of his rights and the zamíndár

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

was admittedly without title-deeds. In support of his conclusion he referred to *Clark* v. *Elphinstone*,(1) *Wilson* v. *Mackreth*,(2) *Bhás-karáppá* v. *The Collector of North Kánara* (3) and Sir Henry Maine's Village Communities, 4th edition, page 160, and finally formulated the grounds of his decision in these terms:—"The result of the various authorities I take to be, first, that the enjoyment of easements, even though such enjoyment is exclusive, is to be distinguished from possession and will not create a title by prescription or support an action of ejectment; secondly, that private property in forest land does not exist in India except by express grant from the State; and thirdly, that even if such proprietorship does exist, it has not the same incidents as private ownership in England." Before proceeding to consider how far these several propositions can be supported, it is desirable to see what is the evidence as to the appellant's enjoyment and as to interference with it by officers of Government. We may here observe that the sanad or deed of permanent settlement, which the zamíndár produces in appeal, contains no statement of boundaries. It does not, therefore, enable us to say whether or not the hill-tracts in question are included in the grant. It appears from the report of the Select Committee, Vol. II, 553, that certain accounts were submitted by the Collector, Mr. Lushington, in the year 1800 and that the Permanent Settlement of the palayagár revenue in Tinnevelly was founded upon them. These accounts are not produced in evidence on either side, and it is not possible for us to say whether any such account is still in existence in regard to the Singampatti palayam, and if so, whether any revenue derived by the zamíndár from the hills in dispute was part of the assets on which the permanent assessment was fixed in 1803. Such being the case, both the appellant and the respondent relied on what are called ayakut accounts as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the zamíndárí limits, or in the limits of Government villages. But because they produced no evidence to show for what purpose, by whom, and in what circumstances those accounts were prepared, and what guarantees existed to ensure their accuracy, the Judge refused to accept them as evidence of reputation. It appears to

(1) L.R., 6 App. Cas. 164. (2) 3 Burr., 1824.
(3) I.L.R., 3 Bom., 452.

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

us that, inasmuch as these accounts were from time to time prepared for administrative purposes by village officers, they are admissible as evidence of reputation provided they are produced from proper custody and otherwise sufficiently proved to be genuine. They are to some extent public documents, and, although it would be unsafe to attach much weight to them except in relation to the purpose for which they were specially prepared, they are not to be altogether disregarded. Exhibits D, NN and PP, produced by the appellant and exhibits, V, VI, VII and XXI which were relied upon for the respondent, purport to be Ayakut accounts. These accounts are accounts made for revenue purposes to show the sources of revenue in each village and they give the limits of the villages to which they refer. It is not material that the zamíndár claims the hills as his private property, for the real issue is whether they are State or private property, and no distinction could be drawn between the evidence of reputation to establish, and that to disparage, a public right, *Drinkwater* v. *Porter*. (1) On this point the Indian evidence Act is, we apprehend, in accordance with the rules accepted by the English Courts, s. 32, clause 4. As for the ayakut accounts produced by the appellant, they are produced from the respondent's custody and they are more than fifty years old, and this special circumstance also renders them admissible as evidence of reputation unless they are shown to be tainted with suspicion. Exhibit NN is the nanja ayakut account of the Government village of Vikrama Singapuram, dated 1803, and the southern boundary of that village is described to be the Tambrapurni river. A reference to the map will show that that river lies between the hills in dispute and the Government village and the account is therefore evidence that the hills were not reputed in 1803 to be within the limits of Vikrama Singapuram.

Exhibit PP purports to be the ayakut account prepared in 1825 according to that of 1818 for the village of Malayankulam.

Singampatti hills and the river Vandal Odei running from north to south are described to be the western boundary. This shows that the hill tracts in suit were not included in the limits of the Government village of Malayankulam which lies to the east.

(1) 7 C. & P., 181.

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

Exhibit D, which is mainly relied on by the appellant as supporting his case, purports to be the nanja ayakut of Singampatti for 1777 and to give its eight boundaries which are said to include the hills in dispute. For several reasons we regard this document with suspicion and deem it unsafe to act upon it. In 1856 the then zamíndár applied to the Collector for a copy of the ayakut and olugu accounts of 1211 for his zamíndári and the Collector then informed him that no ayakut and olugu account existed for the zamíndári (exhibit II). Again, there was an inquiry in 1868 whether any olugu account existed showing in what villages the hills in question were included and the result was a statement made by the zamíndári karnam Naráyana Pillai that there were no ayakut or olugu accounts for the zamíndári of Singampatti or for the hills in dispute either with him or in the zamín records (exhibit III). In 1859 or 1860 a list of the *congo* or old Mahratta records in the Collector's custody was prepared by a Revenue Officer named Konéri Ráu, but exhibit D does not bear his initials. The 14th witness for the appellant, who is the Collector's vernacular Head Clerk, deposed that exhibit D was entered in a list of records prepared in 1878 under his directions and those of the Assistant Recordkeeper Varada Ráu; that after Mr. Baber commenced his inquiry, the witness was asked for the Ayakut accounts, that when he made a report to the Collector on the 18th February, 1880, he had not found D, that he and the Assistant Recordkeeper then went through the Mahratta and Tamil records, that the Assistant Recordkeeper discovered D, and that the witness then sent it to Mr. Baber, and that there are no similar ayakut accounts of so early a date. His evidence as to the circumstances in which D was found and the mode in which it is entered in list IV are by no means satisfactory, and there are grounds for the suspicion that exhibit D was surreptitiously introduced into the Collector's records after Government questioned the zamíndár's title.

Exhibits V, VI and VII purport to be the ayakut accounts of 1777, 1799 and 1803 for Urkad, Tinnevelly and Kalladikuruchi, respectively, and though produced by the respondent do not greatly support his case. The conclusion we come to as to this part of the case is that while there is no proof of an express grant is regard to these hills, the ayakut accounts of the Government villages of Vikrama Singapuram and Malayankulam in the res-

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

pondent's possession show that the hills were not reputed to be within the limits of those villages in 1803 and 1825. The next document in date on which the appellant relies is exhibit AA, which shows that in 1818 he obtained from the Collector an order addressed to the tahsildár of Brahmadesam, in which sub-division the hills in suit are situated, directing him to inquire whether, as alleged by the zamíndár, the hill people residing in Ambasamúdram had obtained pattás from the zamíndár for hill produce and had made default in the payment of tirva and committed mischief by cutting large trees, and if found to have done so, to enforce payment of the tirva. Ambasamúdram lies on the north-east confines of the hills, and although the hills are only described as the hills attached to the zamíndári, the evidence does not show, nor was it suggested at the hearing, that there were any other hills in that part of the district to which the order might have applied.

We may next refer to documentary evidence which shows that these hills were claimed by the zamíndár as part of his estate in 1840 and 1852, and that the Sub-Collector then acted in the belief that the claim was true. In 1840 a dispute arose between the managers of the temple at Paupavinassam and the zamíndár as to whether a portion of the forest in the western tract called Puttankádu formed part of the zamíndári. Each party asserted an exclusive right to take the hill produce, and it was kept in deposit for sometime, and in 1842, the Sub-Collector directed the tahsildár to hand over the value of the produce in deposit to the zamíndár. On this occasion the Sub-Collector remarked that he should not interfere with the hills attached to the zamíndári, and that as the Puttankádu hill was not in the Sirkar (Government) ayakut, Government officers should not interfere with its produce (exhibits O to S).

Again, in 1852 there was a dispute between the zamíndár and the raiyats of the Government village of Kalakád. Exhibit IX, which is a copy of the Collector's order on the subject, dated February 1857, shows that it was a boundary dispute between Kalakattu hill and Singampatti zamín hill, that two tahsildárs were deputed to inquire into the matter, that after inquiry and local inspection, they suggested that the disputed locality should be divided equally between the two hills. The order directed that the spot in question should be divided equally, as suggested, between the said zamín and Kalakattu hills, that a permanent

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

boundary line should be set out, and that the contending parties should be informed that they should enjoy their respective portions as allotted at the division. Not satisfied with this order, the then zamíndár, Siva Subramanya Tévar, instituted Original Suit 747 of 1858 on the file of the District Múnsif of Brahmasamúdram, alleging that the moiety awarded to the Kalakád raiyats formed part of the hills attached to his zamíndári and praying for the cancellation of the Collector's order (exhibit XIa). Although he was not successful in this litigation, yet it is clear from what took place on this occasion that both the Collector, the zamíndár and Kalakattu raiyats believed that the eastern tract to which the moiety of the disputed locality was attached formed part of the Singampatti zamíndári. Again in July 1854 the tahsildár of Ambasamúdram, a Government taluk, called the attention of the then zamíndár of Singampatti to the fact that people used to assemble in Seri Muthaiyan Kovil and Vanatirtam during the new moon festival of the Adi month, and intimated to him that the duty of making arrangements for preserving the peace and preventing crime devolved on the zamíndár because those places (which are in the western part of the lower hills awarded by Mr. Baber to the appellant) were attached to the zamíndári (exhibit GG.)

Again in May 1864 the statement V was prepared by the Forest Conservator of Government and zamín forests, and the Singampati hills now in dispute were described in it as zamíndári. We find further that in October 1864, the Collector addressed the letter U to the appellant's mother acknowledging her to be the owner of the Singampatti hills, and inquiring, with reference to the Proceedings of Government, dated the 30th July 1864, whether he was willing to lease out the Singampatti hills *attached to her zamín* to Government for a long period at a reasonable sum. There can therefore be no doubt that between 1840 and 1865 the zamíndárs for the time believed and often openly asserted as against others who sought to interfere with the hills in dispute, that they formed part of their zamíndári and that the district officers were not only cognizant of the claim but invariably acquiesced in it, and at times even expressly acknowledged it.

Moreover, there is considerable oral and documentary evidence to show that the appellant and his ancestors enjoyed these hills for more than fifty years asserting that they were included in their

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

zamíndárí. The Judge finds that it has been clearly shown that the zamíndár has the right of pasture, wood-cutting and gathering of wild products. Whilst we adopt his finding, we would also draw attention to exhibits V and QQ1, of which V shows that the annual revenue derived by the zamíndár from the hill tracts was estimated in 1864 at Rs. 3,550, while QQ1 which was prepared in 1868, indicates that the articles which were produced on the hills were about forty-three in number, that their average annual income was Rs. 6,209-5-2, that eleven cereals were grown and assessed at 10 annas per kotta, that seventy-one descriptions of small trees and thirteen sorts of big trees used to be cut and utilized. There is also evidence that fees were levied by the zamíndár or his lessees for cutting wood, that a hedge was put up near Vandal Odei to prevent cattle from trespassing, and that there were zamín thánás at which strangers got permission to enter, and that timber depôts were maintained at Timilasapúram and Erasapúram. It appears further that a series of leases issued from 1831 show that the hill-produce and the right of cutting small trees were let by the zamíndárs or by Government officers on their behalf from time to time. Exhibit BB proves further that timber used to be felled in 1842. There is also evidence that the timber which passed through the zamín depôts bore at times the zamíndár's stamp, and that cultivation was carried on on the hills though it was to a small extent and in its nature *kumári* as observed by the Judge. It appears further that the hills have been enjoyed as indicated above from before 1818. In connection with the question of possession, the Judge has apparently omitted to notice the intention or belief with which the acts of enjoyment mentioned above were done from time to time, but it is one of the matters which ought to be considered in coming to a finding as to the nature of the appellant's possession. The effect of the evidence on this point is that the appellant's ancestors and Government officers when they managed the zamíndárí exercised these acts of enjoyment alleging that the hill-tracts formed part of the Singampatti zamíndárí. We may refer here to a few documents, which, in addition to the other evidence already discussed, tend to show that the acts we have referred to were done in the belief, whether it was well or ill-founded, that the zamíndár for the time being owned the hill-tracts as part of his zamíndárí.

Exhibit M, which is dated the 2nd August 1831, together with

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

exhibit N, show that the zamíndár leased out the hill for three years (from Fasli 1240 to 1243), that was designated Singampatti hill, and that the Collector, as manager for the time being, for arrears of peshkash called up the lessees of the hill and of a tope and confirmed the pattayams granted by the zamíndár. In document M, the hill is referred to as the Singampatti hill, and in document N, the lessees are described as being the lessees of *the hill and the tope of the zamíndárí*. This document shows that the hills had so long been enjoyed by the zamíndár that they had acquired a designation connecting them with the zamíndárí.

Exhibit T refers to similar leases granted in 1842 and 1843. Exhibit T1, which purports to be the pattá granted on the 2nd September 1843, not only designates the hill which was the subject of the lease as included in the Malaipattam of the Singampatti, but also proceeds to set out its boundaries which include the tracts now in dispute.

Exhibits BB and CC form part of the correspondence that took place between the Sub-Collector and his subordinates in regard to certain timber cut down by the lessee in contravention of the terms of his lease, and in CC, dated the 4th November 1842, the Sub-Collector refers to the timber as timber cut on the "Singampatti zamín hill."

Exhibit FF proves that in 1861 the Deputy Collector brought to the notice of the Collector that 'kulla marams' (small trees) were largely cut and carried from the "Singampatti zamín hill," and suggested that the timber cut from the Singampatti hill be sealed in order that there might be no ground for doubting whether such timber was of ayan (Government) hill. It will be seen from exhibit XVI that the Collector writing on the same subject in February 1862 referred to the hills as the hills of "the Singampatti zamín." As the Government questioned the zamíndár's title in 1865, we do not refer to acts done upon the hills and leases granted subsequently on behalf of the zamíndár. It may be that the local officers of Government who were also agents of the Court of Wards, considered themselves bound to act in regard to these hills on behalf of the appellant in the same manner in which his predecessors acted. However this may be, the acts done on either side subsequently to 1865 are not *ante litem motam*. Upon the whole evidence we see no reason to doubt that whilst on the one hand the hill-tracts in dispute were enjoyed by the appellant and

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

his ancestors for upwards of sixty years, and there is no evidence to show at what earlier period their enjoyment first commenced, successive zamíndárs, on the other hand, who held the zamíndárí and Government officers who managed it for them, believed and openly and frequently asserted that the hills were part of the zamíndárí which is the zamíndár's private property. We shall next consider to what extent and on what ground and with what effect Government is shown to have interfered with the zamíndár's enjoyment of his rights as owner. The Judge refers in para. 42 of his judgment to documents XII to XV and to the evidence of the appellant's 15th witness and to exhibit A, and remarks that not only were the appellant's rights in these hills-tracts limited in extent, but even within the sphere of their operation were exercised under the supervision and control maintained by officers of Government as paramount lord of the soil.

In 1837, the Collector issued an order (exhibit XII) to the Tenkasi tahsildár in connection with the Courtallom forests. He observed that the forests were destroyed by raiyats on the pretence of raising púnja crops on the slopes, and that such destruction affected the sarl (drizzle) and the rainfall, and then went on to direct that the people of two villages near Courtallom should be informed that no one should fell more forests and raise more púnja crops than what had already been done, either on the Courtallom hill or on the Vadakarai and other mountains which are adapted for producing sarl, and that if any raiyat disobeyed the order, four times the actual assessment should be collected from him. It refers also to similar objectionable practice among the owners of some nutmeg gardens in Melagaram and other places. But it has no reference to the hill tracts now in dispute or to the Singampatti zamíndár. Nor is there any allusion to the position of Government as lord paramount of the soil. Exhibit XIII is another order issued by the Collector in 1839 with reference to an application made by Tenkasi Sundram Ayyar for the grant of some waste land on kaul in Kasimapúram. By this document the Collector declined to grant the application until he had some further information, and observed that, on pretence of cultivating púnja crops, hill forests were destroyed and clouds were not attracted so as to moisten the soil. In this also there is no allusion to the hill-tracts now in dispute, and it only shows that the Collector refused to grant some waste land on a Government hill

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

for cultivation lest the applicant might destroy the hill forest and injure the annual rainfall. Exhibit XIV is another order, dated the 14th March 1842. It also purports to refuse an application for grant of waste land on a Government hill in Illuvakudi Irupu for reasons already stated. Exhibit XIX, dated 1844, refers to the orders passed on the subject of the destruction of hill forests, reiterates the effect of such destruction upon the collection of clouds on the hills, and directs the tahsildár to see that the hills in the taluk are never cleared of their trees. It has no special reference to the Singampatti zamíndárí hills. Exhibits XV and XVI, which are not mentioned by the Judge, purport to be orders issued by the Sub-Collector in 1862 in regard to the Singampatti hill. It was observed that the timber cut on the hills attached to the Singampatti zamíndárí might be sealed by the zamíndár instead of being taken to Ambasamúdram, and it was added that not more than 20 cubic yards of timber should be cut down every month lest too large a quantity should be felled from the hills of Singampatti. It was pointed out that these hills depended for their water-supply on the rainfall and that interference with that source of supply would impair the forest growth.

It must be remembered that about this time the zamíndárí was under the management of the appellant's mother under the Collector's superintendence. There is nothing in these documents to show that the Collector issued this order in the exercise of the right of the Crown as lord paramount of the soil. They, on the contrary, recognize the right of the zamíndár to the forests as fully as does the enquiry made by the Collector in 1864, whether the appellant's mother was prepared to grant the hills attached to her zamin to Government on a long lease in order that they might bring them under conservancy of the Forest Department. Exhibit XVII, dated the 16th August 1866, shows that the restriction that the zamíndár should not cut down more than 20 cubic yards of reserved wood in any month was then also in force. Exhibit XX shows that in 1868 the Collector set apart portions of the lower tracts of these hills for the use of certain Government villages accustomed to graze their cattle in these hills. It must be observed that this order was passed when the appellant was a minor under the Court of Wards and subsequently to 1865 when the Government questioned the zamíndár's title.

Again exhibit A is an engagement or a muchalká executed

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

in 1866 by a lessee in favor of the appellant's mother. It contains a clause to the effect that the lessee shall act up properly to the rules contained in the Regulations, Acts and Gazettes for the conservancy of the hills aforesaid. This shows no more than that the appellant's mother was willing to conform to the conservancy rules, but not that she recognized the Crown as entitled to interfere with the proprietary right. The 15th witness for the appellant to whom the Judge refers deposed that he was a lessee in 1868, that formerly any quantity of timber might be felled, and that during his lease the Collector would only allow twenty-five bandy-loads a month.

The foregoing evidence shows that the destruction of hill-forests was considered to affect the rainfall, that efforts were made to prevent such destruction on hills in Government villages in 1837, 1839, 1842 and 1844, that whilst the zamíndárí was under the Collector's superintendence during the appellant's minority, restrictions were placed by treating certain trees as reserved wood and fixing the maximum quantity of such wood as might be cut down within one month without injury to the hill-forests, and that the appellant's mother conformed to the wishes of the Collector in a matter in which the zamíndár as well as the public were interested. While we can discover no foundation for the suggestion made by the Judge that Government officers imposed these restrictions on the ground that the hills belonged to the Crown, on the other hand there is clear and strong evidence that they believed, rightly or wrongly, that the hills in question formed part of the zamíndárí.

Another question raised by the Judge is whether the acts of enjoyment which have been proved in this case are acts of ownership, and he comes to the conclusion that they are only evidence of an easement, and that such enjoyment is *not* real possession. By juridical possession we understand that a person stands in such relation to a particular thing that he has in fact dominion over it and when he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing, unless private ownership in it is forbidden by law and on that account is rendered legally impossible.

Physical possession is a pure matter of fact, and there is nothing peculiar about it, but in order that it may generate owner-

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

ship, it is necessary that the possessor should hold the thing exclusively, and *for himself as owner*.

The exclusive holding is a physical fact, and when it is united with the intention to hold for himself as owner, it becomes such as will generate a title by prescription. When we speak of actual possession, we refer to the physical fact, and when we speak of adverse possession we refer to the fact as in union with the intention to hold as owner. On the other hand, when a particular act is done upon a thing with the belief that another is its owner and not with the intention to hold as owner, and when the particular act has been continuously done for the period fixed by the law of prescription, the person doing the act acquires a legal right to do that act though the thing upon which it is done is in other respects under another's dominion. It should also be observed that, when there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient that some overt act is done upon the thing in the execution of such intention. In *Clark* v. *Elphinstone*(1) it was observed by the Privy Council that it was not necessary that some act should always be done upon the spot in dispute itself, but that it was enough if some overt acts of ownership were done in relation to that spot, as, for instance, enclosing it. In principle the act done is one of ownership or evidence of easement according as the person doing it asserts general ownership or a particular right in another's property, and in the first case the act of enjoyment is designated possession and in the latter case *quasi* possession. Such being the distinction in principle between acts of ownership and acts which are done in the exercise of easements, we are unable to support the conclusion at which the Judge has arrived, viz., that the appellant's rights are mere easements. It may be that specific portions of the hills were not regularly cultivated but such cultivation is not necessary when other acts of ownership are done upon them. As already observed, there is evidence of acts of enjoyment done in the open assertion of title as owner, and the ayakut accounts and the special circumstances of the case warrant the presumption that such acts were done for more than sixty years, if not from time immemorial. As to the interference by officers of Government with the enjoyment by the zamíndár of his rights

(1) L.R., 6 App. Cas. 164.

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

in full, there is no evidence to show that such interference was accompanied with a denial of the zamíndár's right as owner. The enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf or the gathering of produce, is *primâ facie* proof of ownership of the soil, and, when the District Judge found that there had been such an enjoyment of the forest as proved a title to the profits, he was logically bound to find a title established to the soil, seeing that the enjoyment had been throughout accompanied with an assertion of such ownership. We see no reason to doubt that all the hills to which the suit refers were included in, and formed part of, the zamíndári as it existed in 1803 and as it had been enjoyed by the appellant's family prior to the Permanent Settlement.

Again, according to Baber, the enjoyment in this case is evidence of ownership in regard to the lower hills which he recognized as part of the zamíndári, and the respondent has not appealed from this part of the decision, but the same enjoyment is shown of the whole area. Further, it is not denied by the Judge that the zamíndárs had the right not only to collect dues but to fell timber, and if in the exercise of this right they could destroy the hill forest, we do not see why the act of cultivating the hills with wet crops or laying out the hill regions into specific groups of fields permanently under cultivation should alone be accepted as proof of ownership. It may be that the parties in possession thought that such cultivation was unprofitable or impracticable. A defined boundary is no doubt an incident of private occupation, but the hills in dispute have defined boundaries and they have been enjoyed and at times expressly let with reference to those boundaries.

As for the cases cited by the Judge they either do not support his view or are not on all fours with the suit before us. The contest in *Clark* v. *Elphinstone* had reference to a plot of forest-land between two conterminous private estates of which one was obtained by grant from the Crown by Wilson and Ritchie and the other by Mackenzie. There was no evidence adduced to prove that *any* overt or physical act of ownership was done upon the specific plot. It was found as a fact that no defined boundary was established by agreement subsequently to the grant. The Judicial Committee observed that there was no doubt that in many cases acts done upon parts of a tract of land may be evidence of the possession of the whole, that if a large field were surrounded by

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

hedges, acts done in one part of it would be evidence of the possession of the whole; but that that case was not upon the facts one of that class. So far it is an authority in support of the view that when a tract of land with a defined boundary has been throughout claimed as owner and acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole. It is also an authority for the opinion that there may be private ownership in forest-land and that it may be lost by virtue of adverse possession for the period fixed by the law of prescription. The Lords of the Privy Council remarked further in their judgment that in the case before them there was no evidence of actual possession of the land then in question, nor of any overt or physical acts of ownership done upon it, and that it remained as it ever was in its forest and jungly state. The Judge seems to lay stress on this passage, but in the connection in which it occurs it imports not that any special form of cultivation is necessary but that some overt act evidencing an unequivocal intention to appropriate the land as owner is indispensable.

Another case relied upon is *Wilson* v. *Mackreth*(1) which was an action of trespass for entering on the plaintiff's land and digging and carrying away his turf and peat. The plaintiff was shown in that case to have an exclusive right to take the profit of the turf and to dig for that purpose. The question raised for decision was whether the plaintiff, who was not the owner of the soil, could maintain trespass *quare clausum fregit*. The Court of King's Bench held that he could, and observed that it was an exclusive right and not a mere right of common, that it must be taken to be a grant from the lord of the Manor who was the lord of the soil. This case certainly supports the view that the right to cut turf and the ownership of the soil may vest at one and the same time in different persons but it does not warrant any *á priori* assumption that ownership in the soil may not be acquired by prescription. *Burt* v. *Moore*(2) likewise shows only that a right to separate herbage may vest in one who is not the owner of the soil. *Ex hypothesi* these cases related to particular exclusive rights in *alieno solo* or property of which the general ownership was admittedly in another, and they do not show that ownership in the soil may not be

(1) 3 Burr, 1824. (2) 5 T.R. 333.

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

acquired by prescription. *Bháskarappa* v. *The Collector of North Canara*(1) decided in substance that there could be no grant, no acquiescence in a possession unless the essential elements of possession, a fixed, a definable boundary and an exclusive possession, exist and are present to the perception of the parties, and that the *kumári* cultivation proved in that case was so precarious and unequivocal that no grant could be presumed. In this and the other Bombay cases, there are general observations as to the control which the State exercised in regard to waste land in mirási districts prior to the British rule, and which it is still entitled to exercise in protection of its right to the revenue from land. There are also observations as to the theory of State property under Hindú and Muhammadan rule. To these we shall presently refer, but they do not show that no grant ought to be presumed when adverse possession has been proved for sixty years and when it has been during that period repeatedly and openly alleged and even at times acknowledged to have been exercised as owner. Under the Muhammadan rule it was no doubt asserted (and it was part of the Muhammadan law as applied to infidels) that the property in the soil was in the State, but the influence of this rule was not felt practically in Tinnevelly as is shown by the fact that Tinnevelly is one of the mirási districts in this Presidency. It is further shown that owing probably to the distance from the captial of the Nawab of the Carnatic his authority was often ignored and even set at defiance, as will appear from the political history of the district, and detachments of troops had frequently to be sent under British officers to enforce the payment of tribute due by the turbulent Tinnevelly palayagárs of that time. The probability is that the Muhammadan rule never materially influenced the notion of property which prevailed in this district during the rule of the Pandiyan Kings and of the Náyaks. At their inception these palagayárs were feudatory chieftains, but practically they were petty chiefs who paid a tribute to the central power at Madura. The Hindú traditions as shown by the immemorial existence of mirási rights in the district have been in favour of the proposition that property is acquired by occupation as owner. Manu and other Hindú writers have rested private property on such occupation. We desire not to be understood as denying the right of the Crown to exercise a

(1) I.LR., 3 Bom., 452.

SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA.

control over the mirásidár's claim to waste land in order to protect its claim to the revenue which it may derive from it, and we do not think that the Crown was entitled to eject persons who had acquired a right by occupation.

The conclusion we come to is that the propositions formulated by the Judge are not warranted by the circumstances of this case.

We are of opinion that the acts of enjoyment proved in this case are acts of ownership done adversely to the respondent, and that as the adverse possession has extended to more than sixty years, the appellant has acquired a title by prescription. The appeal is allowed and the objections overruled and so much of the decree of the Judge as dismissed the claim is reversed and the claim decreed with costs in all Courts. Mesne profits will be ascertained in execution and it is to be understood that the rights of vicinage enjoyed by any raiyats are unaffected by this decree.

PRIVY COUNCIL.

VIZIANAGARAM MAHÁRÁJÁ

and

SURYANÁRÁYANA AND OTHERS (DEFENDANTS).

P.C.* 1885. Dec. 10th. 1886. Feb. 6th.

[On appeal from the High Court at Madras.]

Regulation XXV of 1802, *s.* 3—*Inám—Grant by zamíndár—Tenancy not determinable at will of grantor's successor—Admission.*

Regulation XXV of 1802, s. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zamíndár has no power to disturb grants otherwise valid made by his predecessor, or titles to ináms acquired by prescription.(1)

An inám, existing under grant made in 1811, became in 1863 the subject of arrangement between the zamíndár, who had succeeded the grantor in the zamín-

* *Present*: Lord MONKSWELL, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.

(1) See the judgment in *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*, I.L.R., 3 Mad., 290, at p. 307; L.R., 8 I.A., 99. It is there stated that this Regulation was framed with a view to the land revenue, and not otherwise to infringe on, or limit, the rights of anybody; and that in Regulation IV of 1822, there is a declaration to this effect. See also *Collector of Trichinopoly* v. *Lekkamani and others*, L.R. 1, I.A., 283. As to s. 8, that it applies only to questions between the zamíndár and the Government, see *Venkataswara Yettiapah Naicker* v. *Alagoo Mootoo Servagaren*, 8 M.I.A., 327.

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

dári, and the inámdárs. This resulted in what was either a confirmation of the original grant on terms more favorable to the zamíndár, or a new grant of an estate in all respects, save as to the rent, similar to the previously existing estate, which was a tenancy in perpetuity.

To a suit brought by certain mortgagees against the inámdárs, to enforce mortgage rights existing since 1842, the defence was made that possession taken of the inám lands by the Collector in 1845 had determined the original inám rights therein, as well as the lien of the mortgagees.

The present zamíndár, son and successor of the grantor of 1863, now claiming that he had determined the tenancy by a notice to quit:

Held that the above did not operate as any estoppel as between the plaintiff and the inámdárs, the zamíndár not having been a party to the suit, but was only an admission, and not conclusive:

Held, also, that the tenancy was not determinable by such notice.

APPEAL from a decree (1st May 1883) of the High Court (Turner, C.J., and Muttusámi Ayyar, J.) reversing a decree (12th May 1882) of A. L. V. Ramanna, Subordinate Judge of Vizagapatam.

The question raised on this appeal was whether a zamíndár had power to determine the tenancy, as held at his will, of a village granted as an inám by one of his predecessors to a tenant, through whom the present tenants claimed.

The suit was brought by the appellant against thirty defendants, of whom the respondents were the first eight (the others being interested as mortgagees and sub-tenants under the respondents) to recover the village of Buradapeta as part of the jiráiti lands of his zamíndári, Vizianagaram. He also claimed balance of katubadi for the fasli years 1289 and 1290, the entire of that for fasli 1291, costs and interest.

It was alleged, among other defences, that the village had been granted to the defendants' ancestor as a permanent inám by the Mahárájá's predecessor in the zamíndári, and was so held by the present tenants.

Buradapeta was granted in 1811, by the Mahárájá of the day, in lieu of another village Malliada, which had been granted in 1802 in lieu of village Chetanapalli, granted as an inám by the Rájá Náráyana Gajapathi Ráz, in 1797, to Pidaparti Sitarámá Sástri, whose descendants were now shareholders in the tenancy of the village Buradapeta, principal defendants in this suit, and now respondents.

On Sitarámá's death in 1842 his sons effected a partition, and mortgaged parts of the village to persons styled Durivár on the record, who held the mortgaged lands in usufruct till the death in

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

1845 of the Mahárájá above-named. He was the present appellant's grandfather. On his death the Collector took possession of the zamíndári, including the lands subject to the inám in question, the succeeding zamíndár, appellant's father, being absent at Benares. The village remained zuft, or attached. In 1850 Appayya Díkshatar, the second son of Pidaparti Sitarámá, took a lease of it for three years at a rent, executing a kádápá to the Collector, who executed to him a kaul. Afterwards, in 1863, the petitions were presented and the documents executed, as set forth in their Lordships' judgment. The appellant succeeding to the zamíndári, on the death of his father in 1879, called on the respondents to execute fresh engagements, which they refused to do, with the result that notice to quit was given, and the present suit was brought. The Subordinate Judge found that at the permanent settlement the village, Buradapeta, was included in the assets of the Vizianagaram zamíndári, the ancestral estate of the plaintiff. He was of opinion that the grant of 1811 had come to an end in 1845, when the Collector took possession. The grant of 1863 was, according to his judgment, a new grant resumable at will; and at all events not binding on the plaintiff, whose rights were distinct from those of his father, at whose death in 1879 the cause of action accrued. A decree was accordingly made in favor of the plaintiff, with costs. This judgment was reversed, on appeal to the High Court, by a Divisional Bench. After stating the facts, which are repeated in their Lordships' judgment precisely as stated in that of the High Court, the judgment continued thus:—"The Subordinate Judge holds that the inámdárs were not in possession in virtue of their inám right from 1853—1863, that in 1863 a new grant was made to them and that, in view of their pleadings in the mortgage suit, they are not entitled to deny that it was a new grant. He also holds that the new grant was resumable at pleasure; that, if it was not so resumable, it was not made for any of the purposes recognized by Hindú law and the zamíndári regulations as rendering it binding on the zamíndár's successors; and that, if the original grant subsisted after 1863, the position of the respondent, similarly to that of the Zamorin, entitled him to repudiate grants made by his predecessor, unless it was shown that such grants were made for the benefit and improvement of the estate.

"We may deal first with the last reason assigned by the

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

Subordinate Judge in support of his decision. The Mahárájá is a nobleman whose family, prior to the introduction of British rule, no doubt exercised, from time to time, certain rights of sovereignty over more or less extensive territories. On the introduction of British rule the sovereignty over the territory, in which the estate of the Mahárájá's ancestors were situated, passed to the Crown. The difference between the respondent and the Zamorin is that the personal law of the former is Hindú and the latter Malayalam, and even under the Malayalam law the Zamorin would not be entitled to dispute grants made by his predecessors to which, if originally invalid, the holders had acquired a prescriptive title. This case falls to be decided in reference to the personal law of the parties—that is the Hindú law and the Common and Statute Law of British India.

"We may next dispose of the contention that the appellants, in view of their pleadings in 1866, have no right to assert that the arrangement in 1863 was other than they then alleged it to have been. The Subordinate Judge appears to have considered, though he does not say it distinctly, that the appellants are estopped from so doing. The allegations made by the appellants in 1866 in a suit to which the respondent was not a party, may, no doubt, be used as evidence of admissions made by the appellants, but they do not estop them from asserting as against the respondent that these admissions were inaccurate. We are then at liberty to consider what was the real nature of the arrangement in 1863. On this point, with all respect for the opinion of the learned Judges who decided the Appeal R. A., 22 of 1869, we find ourselves unable to agree with the view they expressed. The ináms had been arbitrarily attached as resumable in 1845 under a misapprehension of the law. The right of resumption was questioned; the revenues of the ináms had been applied to satisfy the arrears of revenue due on the zamíndárí, on the understanding that the amount appropriated would be repaid if the attachment was released. In 1853, a temporary concession was made to the inámdárs with which they were not satisfied: the village was still held zuft or attached, pending the settlement of the dispute, until in 1863 the Mahárájá finally came to an arrangement with the inámdárs. Reading the petitions and orders together, it appears that the inámdárs on their part offered not indeed to forego their claim on the misappropriated income but to consent that it should

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

be set off against such gifts as were ordinarily made to noblemen in India by their tenants and dependents and to pay an increased quit-rent, and this surrender of rights asserted by them they offered on condition that the grant should be reinstated.

"They subsequently offered to pay quit-rent at the rate at which it had been paid from 1853 to 1863, and there can be little doubt this was the result of a negotiation. Possibly, the inámdárs were influenced to offer these terms by reason that a decision, unfavorable to certain grantees in the same zamíndárí, had been then recently pronounced on an erroneous view of Regulation XXV of 1802.

"On the other hand, the late Mahárájá, reciting the grant by his father and the attachment of the village and the terms of the adjustment at which the parties had arrived, accepted the terms offered and directed his officer to put the zuft lands in possession of the inámdárs—in other words, to take off the attachment which had so long subsisted, for the lands were at the time in the possession of the inámdárs or of their tenants. It is true that in accordance with a common practice in this country, the applications were made by the leading members only of the two branches of the family of the original inámdár; but it would be unsafe to infer from this circumstance that the right was recognised as abiding only in the petitioners, or that it was intended that they, and not the other members of their respective families, should be benefited. The terms 'be bound to obey the orders of the Circar,' from which the Subordinate Judge infers a tenancy at will, are no more than the common words in which a tenant professes his respect for his superior lord.

"It is noticeable as suggesting that the zamíndár's agents may have had some part in negotiations before the presentation of the first petitions in 1863 that both in those petitions and in the Mahárájá's orders the grant of Buradapeta is expressly declared to have been made after the permanent settlement. It has now been shown that the grant in 1811 was but an exchange of lands for lands granted in February 1802, and the grant of 1802 an exchange for lands granted in 1797 and 1800, so that the right to resume might fairly have been questioned even on the view then taken of the Regulation. However this may be, it cannot be denied that the parties to the documents of 1863 intended thereby to effect a settlement of the then long-pending dispute, and we

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

feel constrained to hold, on the construction of those documents, that the arrangement resulted in a confirmation of the original grant, on terms more favorable to the zamíndár. If, however, the arrangement is to be regarded as a new grant, construing the documents in the light of surrounding circumstances, we hold that it was intended to be the grant of an estate in all respects, save the amount of quit-rent, similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity. Such an arrangement, made by a Hindú father to put an end to a *bonâ fide* dispute, would be equally binding on a Hindú son, whether the estate of which the land granted formed part, was of the tenure known as Ráj or an ordinary tenure. The appeal must be decreed, the decree of the Court of First Instance reversed, and suit dismissed with costs."

On this appeal, Mr. *J. D. Mayne* and *Mr. G. P. Johnstone* for the appellant. The questions are whether (1) the High Court has taken a correct view of the state of things subsisting between the zamíndár and the lessee in 1863; and whether (2) assuming that view to be correct, and the lease given in 1863 to have been a new transaction, it is binding on the present Mahárájá, who was then alive, and whose interest, as a son, could not be alienated by his father. The grants of 1792, of 1802, and of 1811 were not pious grants; and, as to the first question, the effect both of the acts of the parties, and of the proceedings of the revenue officers, before 1863, was that the estate granted in 1811 had, in 1863, been brought to an end. In 1845 the Collector had taken possession of the inám lands and the lease made in 1863 was neither by way of compromise, nor made in terms of the prior grant. It is not to be construed as continuing the former grant, and what its words do not involve cannot be understood from the circumstances.

It was made and accepted as a new grant, of a purely voluntary kind, for purposes which did not give rise to any obligation on the succeeding Mahárájá to abide by it. So that considering that those who had originally been inámdárs were out of possession between 1845 and 1863, coming in at the end of that time after the direct management of the Collector, they must have come in under a title different from their old one. And on this part of the case, the point of limitation, or the accrual of a title in the zamíndár by non-claim on the part of the inámdárs, might have

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

been taken for the plaintiff. [Their Lordships intimated that this latter contention was not now open to the appellant.] Still it may be contended that acceptance of the lease, which might have been refused in 1863, altered the tenure, the other circumstances also showing that the parties had got rid of the grant of 1811, which they treated as non-existent. Besides other acts which should estop them from setting up the original inám, the tenants came in under a right which absolutely contravened their old title. They are not now in a position to set it up.

As regards the second point, all that the grantor in 1863 was capable of transferring could not carry with it the alienation of the interest already, under the Mitákshará law, vested in his son. The arrangement of 1863 is, therefore, not binding on the appellant, besides, on its true construction, creating no more than a tenancy at will. Reference was made to Madras Regulation XXV of 1802, s. 3—*Bilasmoni Dasi* v. *Raja Sheopersad Singh*.(1)

The respondents did not appear.

On a subsequent day (6th February 1886), their Lordships' judgment was delivered by

Sir RICHARD COUCH.—The question in this case is whether the respondents are entitled to hold the village of Buradapeta, in the principality of the appellant, as tenants in perpetuity at a rent of Rs. 253-6-7, under a grant made by the appellant's father in 1863, a suit to recover the village having been brought by the appellant on the ground that he had, after his father's death, determined the tenancy by a notice to quit. The facts of the case, as proved by the evidence in the suit, are stated in the judgment of the High Court.

In 1794 Viziaram Ráz, zamíndár of Vizianagaram, the ancestor of the appellant, took up arms against the Government, and was defeated and slain at Padmanabham. His son, Náráyana Gajapathi, then a youth of sixteen years of age, fled to the hills; but in 1797 came in and surrendered himself, and, on payment of a heavy fine, was allowed to resume possession of his ráj. Probably, out of his gratitude for his good fortune, Náráyana Gajapathi at once created several inams in favor of Bráhmans and his dependents. Among others, one Pidaparti Sitarámá Sástri, the ancestor of the respondents, received in 1797 a lease, expressed in the terms of a

(1) L.R., 9 I.A., 33; I.L.R., 8 Cal., 664.

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

pious gift, of certain lands at Chetanapalli to be held by him and his heirs from generation to generation, subject to an annual quit-rent of Rs. 50, and in 1800 the same grantee also received other lands in the same village to be held with the lands formerly granted on payment of a quit-rent increased by Rs. 100, which was reduced shortly afterwards to the extent of Rs. 50.

In 1802 the permanent settlement was introduced, and the villages of Chetanapalli, Malliada, and Buradapeta, were included in the assets of the zamíndárí.

Early in 1802 Náráyana Gajapathi Ráz conferred on Sitarámá lands in Malliada in lieu of those held by him in Chetanapalli, and in 1811 he conferred on him the village of Buradapeta, to be held in lieu of the lands in Malliada at a quit-rent of Rs. 45 by the grantee and his heirs from generation to generation "for the satisfaction of Sri," the expression usual in cases of pious gift.

On Sitarámá's death, his sons Seshadri and Appayya made a partition of the village in March 1842, and, to discharge outstanding debts due by the family, each of the brothers made a usufructuary mortgage of his share for Rs. 4,000 to the Durivár family. Náráyana Gajapathi Ráz was unable to live within his means, and, on more than one occasion, it was necessary for the Government to take charge of his revenues. Eventually he died at Benares, leaving large debts.

At that time, owing to a misconception of a provision in the Regulations, which was intended for the security of the land revenue, it was believed by some officers that grants made by a zamíndár were generally resumable by his successor.

It appears from Proceedings of the Government, dated 30th January 1853, that on receipt of the news of Náráyana Gajapathi Ráz's death, "the Board of Revenue directed the Governor's Agent, who was in charge of the zamíndárí, to adopt all measures in regard to resumptions of ináms and shrotriems to which it would be legal and proper for the late Rájá's successor to have recourse," and that the Agent, in anticipation of such instructions, had already issued orders for the attachment of all lands conferred by the late Rájá subsequently to the permanent settlement, whether agraháram (grants made to Bráhmans), mokhasas, or other ináms. It also appears that in 1848 the Agent "requested permission to employ the collections derived from the attached lands for the liquidation of the public debt of the

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

zamíndárí, and offered suggestions for the settlement of the claims of the ousted inámdárs," and "that the Government while considering this money available for the purpose agreed with the Board of Revenue that the claims of the parties who had been dispossessed called for further inquiry, and only permitted the Agent to employ the collections as a present recourse on the distinct understanding that the sums appertaining to such of the ináms as might be eventually restored should be repaid from the zamíndár's treasury." It further appears that it was reported to the Government in 1852 that the lands attached in 1845 consisted of 87 villages and 184 detached plots bearing a gross assessment of Rs. 83,312, from which sum quit-rents of Rs. 6,839 being deducted, a sum of Rs. 76,473 represented the net income of which the grantees were deprived. It was also reported that the zamíndár wished to resume the whole of the lands attached indiscriminately, and to grant compensation in certain cases by money allowances, and that the collections derived from the attached lands up to the end of fasli 1261 (1851-52) amounted to 3 lakhs, of which Rs. 2,40,000 had been devoted to the liquidation of the public debt.

The condition of the dispossessed mokhasadárs and inámdárs, in the opinion of the Commissioner for the Northern Circars, Mr. Walter Elliot, demanded great consideration, and, while he believed the zamíndár was empowered, under Regulation XXV of 1802, s. 3, to resume lands alienated by his father, he urged him to deal liberally with the inámdárs. The Governor in Council, in Minutes of Consultation recorded on Mr. Elliot's report, said the Government felt "themselves bound to express their disapproval of resumptions and the substitutions of money allowances (except with the full consent of parties interested) when there has been long possession such as gives all persons a legal title by prescription. It would be an injustice such as they could not sanction where such prescriptive right as is recognized by Hindú law may have been in existence by an unquestioned and undisturbed enjoyment for many generations. The Governor in Council could not view such resumptions as other than a spoliation, which should not be carried out, as interfering with the peace of the country for which the Government are responsible." The Governor in Council also expressed doubts as to the soundness of Mr. Elliot's opinion as to the effect of Regulation XXV of 1802, s. 3,

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

and intimated that the true construction of the Regulations was probably that which has been since adopted by this Committee, namely, that it imposed restrictions on alienations only to secure the interests of the public revenue, and that the zamíndár would have no power to disturb grants, otherwise valid, made by his predecessor, or titles to ináms acquired by prescription. Considering the prompt and liberal settlement of the claims of the dispossessed grantees essential to the tranquillity of the country, and having been informed that the zamíndár was willing to abide by the opinion of the Government, the Governor in Council desired the Commissioner and Special Agent at Vizagapatam to consider themselves empowered to use the name and authority of the Government in impressing upon him the absolute necessity of at once entering into a liberal and just settlement of all the claims. It was ordered that the views entertained by the Government should be communicated to the zamíndár.

It appears that in 1850, during the dispossession, Appayya, one of the sons of Sitarámá, took a lease of Buradapeta for three years at an annual rent of Rs. 650. On the termination of this lease, the late Mahárájá directed his agent to collect from the Buradapeta raiyats the quit-rents then existing, and a quarter of the gudikattu daul (the entire assessment), and payments were made on that footing up to 1863, the village still being regarded as attached. The dispute relating to the propriety of the resumption was still subsisting, and it seems probable that a settlement was delayed by the provision which, in 1847, the Government had made for the protection of the inámdárs, that the income of any inám appropriated for the liquidation of arrears of revenue in the zamíndárí should be repaid from the treasury of the zamíndár on the restoration of the inám.

However this may be, in 1863, the eldest sons of Seshadri and Appayya each presented to the late Mahárájá a petition respecting the moiety of the village which had fallen to his branch of the family in the following terms :—

"Darkhást (application) presented by Pidaparti Suryanárayana, agraháramdár of Buradapeta, *alias* Lakshmináráyanapúram agraháram attached to Vizianagaram tháná.

"The said village which was granted to my paternal grandfather, Pidaparti Sitarámá Sastrulu, by Sri Náráyana Gajapathi Rázu Mahárázulungáru subsequent to the settlement, having been

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

after (the time of) the donor attached by the then Collector, still continues under attachment. The same not having been as yet released from attachment, I have been suffering much.

"I therefore humbly submit as follows :—

"In the event of Your Highness being graciously pleased to take all the money collected from the said agraháram during its attachment up to the end of fasli 1272 on account of your installation and other nazars (presents), and to grant me my share of lands in that agraháram from fasli 1273, I shall pay the katubadi fixed by Your Highness and enjoy the remaining income, and be bound by the Circar orders.

"I, therefore, pray that Your Highness will be graciously pleased to restore the said agraháram and protect (me).

"18th July 1863."

Upon these petitions, the Mahárájá issued an order to each of the petitioners which differed only in the amount of the rent. In one, it was Rs. 115-3-0 and in the other Rs. 138-3-7, the total rent of the village being Rs 253-6-7 instead of Rs. 45 under the grant made in 1811. The order is as follows :—

"Buradapeta, *alias* Lakshmináráyanapúram agraháram, attached to Vizianagaram tháná, which was favored by our father subsequent to the settlement, being under attachment, it was settled that you should for the 4½ vruttis of land in your holding in that village pay, out of Rs. 691-3-0, being the gudikattu daul (the entire revenue) thereof, Rs. 115-3-0 inclusive of Rs. 22½ katubadi in existence prior to the attachment, and enjoy the remaining income, and that the said village should be placed under the head of zuft villages. While such state of things continued, you submitted to our huzur on the 18th instant, a sanad (petition) requesting, among other matters, that the land might be restored to you, the said amount itself being fixed as katubadi, and that you will continue to enjoy the said 4½ vruttis of land, paying every year the said katubadi, and be bound by the Circar orders. Being moved to show you favor, we have issued orders this day to the tháná Amín to put the attached lands in your possession from the current fasli 1273, subject to the katubadi of Rs. 115-3-0 (Rupees one hundred and fifteen and Annas three). You shall accordingly take possession, pay the said katubadi of Rs. 115-3-0 duly every year, and be bound by the Circar orders."

Thereupon each of the petitioners executed sanads engaging

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

to pay the rent and "act up to the orders of the Circar," and they were put in possession of the village.

The Mahárájá died in 1879, and was succeeded by the appellant. In 1881 the appellant called on the respondents to execute fresh engagements, undertaking to pay such rent as he might fix, and on their refusal notice was given them to quit the village on the 1st July 1881, which they refused to do.

Before stating their opinion on the main question, their Lordships will dispose of another question which was raised. In 1866 the Durivár mortgagees sued the inámdárs to enforce the mortgages executed in 1842. The inámdárs pleaded that the mortgaged lands having been resumed in 1845 by the Collector, the original right possessed by them therein and the mortgage lien of the plaintiffs thereon had ceased to exist. The suit was dismissed by the First Court, and their decree was affirmed on appeal. As the Mahárájá was not a party to the suit, this plea does not operate as an estoppel, but is only an admission and not conclusive. This was so held in the present suit by the High Court, which then proceeded to consider the real nature of the arrangement in 1863, and held that it resulted in a confirmation of the original grant on terms more favorable to the zamíndár, that if the arrangement was to be regarded as a new grant, it was intended to be the grant of an estate in all respects, save the amount of quit-rent similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity.

Their Lordships think the latter is the correct view, but the difference is not material in this suit, where the question is whether the tenancy could be determined by the notice to quit. The circumstances under which the applications to the Mahárájá and his reply were made are to be considered. He was, doubtless, aware of the opinion of the Government. The inámdárs had not relinquished their rights under the grant of 1811. The effect of the attachment in 1845 and the subsequent transactions was at least doubtful, and the inámdárs had a claim to have the collections repaid to them from the zamíndár's treasury. In the application to the Mahárájá, the applicant is described as agraháramdár of Buradapeta, and it is proposed that the Mahárájá shall take all the money collected during the attachment on account of his installation and other presents. It is prayed that he will be pleased to restore the said agraháram. This meant more than becoming

VIZIANAGARAM MAHÁRÁJÁ v. SURYANÁRÁYANA.

yearly tenants, and when the Mahárájá replied that they were to take possession, and ordered it to be given to them, he, in their Lordships' opinion, intended that they should hold the agraháram at the increased rent, in the same manner as they had done before the attachment. And it was admitted by the appellant's counsel that the Mahárájá had power to do this. Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, and to affirm the decree of the High Court dismissing the suit.

Solicitor for the appellant—*R. T. Tasker.*

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. Jan. 14, 26.

GOMPERTZ (PLAINTIFF), APPELLANT,

and

GOLDINGHAM AND OTHERS (DEFENDANTS Nos. 1, 2, 4, 7, and 8), RESPONDENTS.*

Club—Expulsion of member by committee—Audi alteram partem.

G, having been expelled from a club by the committee on the ground that he had published a certain pamphlet which was considered to be a libel by the committee, sued the members of the committee for damages and to have his name replaced on the list of members. It was proved that, in considering G's conduct with reference to the publication of the pamphlet, the committee took into consideration certain letters which G had written to certain members of the committee and that his expulsion was partly for printing the pamphlet and partly for writing the letters:

Held, that as the decision of the committee was arrived at *bonâ fide*, the Court had no right to decide whether the pamphlet was or was not a libel.

Held, further, that as G had no opportunity for defending himself on the charge of writing the letters, his expulsion was illegal.

APPEAL from the decree of W. F. Grahame, Acting District Judge of Cuddapah, in Suit No. 12 of 1884.

The plaintiff sued the defendants for Rs. 500 damages for removing his name from the list of members of the Bellary Club, and to obtain an order that his name should be restored to the said list.

The defendants were the committee of management of the club.

* Appeal No. 82 of 1885.

GOMPERTZ v. GOLDINGHAM.

Defendants 2—7 pleaded, *inter alia*, that the plaintiff was expelled from the club for publishing and circulating, in the form of a printed pamphlet, correspondence between himself and the committee, prefaced by remarks of a very objectionable character, such conduct being, in the opinion of the committee, calculated to disturb the order and harmony of the club and injurious to its interests and character.

The suit was dismissed with costs.

Plaintiff appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.)

Mr. *Norton* for appellant.

Mr. *Branson* for respondents.

Judgment was delivered by

COLLINS, C.J.—After setting out the evidence in detail, the judgment proceeded as follows:—

At the hearing of this appeal, the counsel for the appellant abandoned the appellant's claim for damages and abandoned also the third, fourth and sixth grounds of appeal, and he rested his contention that this appeal ought to be allowed on four grounds—

(1) That the committee which expelled him from the club was not duly constituted as directed by Rule V.

(2) That the action of the committee was illegal and without reasonable and probable cause and otherwise than *bonâ fide*.

(3) That the appellant had no opportunity of explaining his conduct.

(4) That the committee expelled him, not for printing and publishing the pamphlet only, but for printing and publishing the pamphlet and for writing the letters of the 13th February to Major Chard and Colonel Smith.

Rule 5, s. 1, provided that the affairs of the club shall be managed by a committee of seven members, to be elected as vacancies occur, or annually at a general meeting held on the third Friday in February. Section 4 provides that immediately on a vacancy occurring in the committee, a general meeting shall be called by the Secretary to elect a fresh member. Reading the two sections together, we cannot say that the words in s. 1 may not bear the construction suggested for the respondents that the words "or annually at a general meeting held on the third Friday

GOMPERTZ v. GOLDINGHAM.

in February" suggest only an alternative. It must also be noted that there is no provision made for the re-election of out-going members as is usually the case when an annual election is made compulsory. Furthermore, the practice of the club has been in accordance with that construction, and, as the words are capable of bearing it, it must be accepted as the true construction. The first contention therefore cannot be supported. We have now to consider the other objections taken by the appellant, and it must be borne in mind that we have no right to sit as a Court of Appeal upon the decision of the members of a club duly assembled. We refrain from passing any opinion whether or not the preface of the pamphlet contained a libel. If two-thirds of the committee came honestly to the conclusion that the publication and circulation of that pamphlet was injurious to the character of the club or likely to disturb the harmony of the club, they had the power to decide whether the offender, *i.e.*, the publisher and circulator of that pamphlet, merited expulsion, and we are far from saying that it is impossible that reasonable men could not come to the conclusion at which the committee arrived in this case, and we have no doubt that they acted as they believed in the interest of the club and in perfect good faith. But before they could expel they must hear the accused. "No proceeding," says Lord Denman in the case of *Innes* v. *Wylie* (1), "in the nature of a judicial proceeding can be valid unless the party charged is told he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so."

The late Chief Baron Kelly, in *Wood* v. *Woad* (2), lays down this rule of law thus: "The committee are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem* that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence." This rule is not confined to strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate "upon matters involving civil consequences to individuals." And, again, in *Dawkins* v. *Antrobus* (3), Brett, L.J., says: "If a decision is come to depriving a gentleman of his position on such a charge

(1) 1 C. & K., 263. (2) L.R., 9 Ex., 196. (3) 17, Ch. D., 615.

GOMPERTZ v. GOLDINGHAM.

as must be made out here, viz., that he has been guilty of conduct injurious to the character and interests of the club, in my opinion there would be a denial of natural justice if a decision was come to without his having an opportunity of being heard." We are of opinion that Mr. Gompertz had ample notice of the charge made against him with regard to publishing and circulating the pamphlet. The proceedings at the meeting of the 23rd February 1884 made it clear to him that if he did not retract the statements contained in the pamphlet and apologise for the circulation of the same, the committee of the club would take action under Rule 6. There is also his statement to the Honorary Secretary that if he felt an apology was necessary, he would submit it to the Committee the following day. He did write a letter, dated 24th February 1884, which the committee decided to be insufficient. He had also the letter of the 25th February 1884 from the committee, which tells him in express terms that unless he retracts the libellous insinuations contained in the printed pamphlet and apologises for having made and circulated the same, his name will be removed from the club. He takes no notice of this communication and his name is accordingly removed. We are therefore of opinion that he had ample notice that the committee of the club objected to the publication of the pamphlet in question, and that if he did not withdraw the statement and apologise, they would exercise the powers conferred on them by the club under Rule 6. Mr. Gompertz says that he sent no answer to the letter from the committee, of the 25th February, because he thought that letter was extremely insolent and that silent contempt was the only possible reply. But it is urged that the appellant was not expelled for publishing and circulating the pamphlet only. It is said that the letter to Major Chard from the appellant, dated 15th February 1884, and also the letter to Colonel Smith, of the same date, had a great effect on the minds of the Committee and contributed materially to plaintiff's expulsion, and that appellant had no notice of that fact and was never called upon to explain or to withdraw those letters. We find that on the 18th February 1884 the Committee were considering two grounds of complaint against appellant—his conduct in relation to the letter put in by Major Chard complaining of the "gross rudeness" on the part of the Honorary Secretary, and also Mr. Gompertz's libel contained in the printed pamphlet.

GOMPERTZ v. GOLDINGHAM.

Mr. Goodrich, a member of the committee, says in his evidence that the letter written by plaintiff to Major Chard (Exhibit I) was a part of the whole case and was taken into consideration in dealing with appellant's conduct all through; "we considered on the 25th February that if any single member of the club persisted in any line of conduct when called upon to abandon that line of conduct by almost every other member present at the General Meeting of the club, his membership cannot conduce to the harmony of the institution." The effect of the appellant's letter to Colonel Smith was apparently very unfavourable to the appellant, for Colonel Smith says: "I see the paper shown me (the pamphlet). I received a similar one on my return from the camp of exercise on the 19th February this year, I received a letter from plaintiff along with this paper. I tore up the letter and the paper, as I thought it was such a damned piece of impertinence in the gentleman who sent it to me. I recollect I was addressed as then being a member of the committee. I do not recollect the contents of the letter. I thought it to be a piece of impertinence. The letter was impertinent in addressing me in that manner in connection with the pamphlet as regards the affairs of the club. The impression that the letter and pamphlet were calculated to produce on me was most unfavorable as regards the plaintiff's conduct in the first instance. I see Exhibit I. This is the letter to Major Chard. The committee took the letter into consideration before the General Meeting." And Major Chard says, in his evidence, "we took into consideration the libellous language especially in the preamble of this the appellant's pamphlet *and in the letter addressed to me*, and the two opportunities we had given him to retract and apologise." Major Chard was then asked what was the purpose of the letter, and the answer was to influence him as a member of the committee. "I consider (he says) the whole of plaintiff's conduct as against preserving the harmony of the club. The committee expelled the plaintiff after due consideration of the plaintiff's conduct." Surely the appellant ought to have been told the effect these letters were having upon the mind of some at least of the members of the committee. The evidence of these three gentlemen makes it clear to us that the appellant was expelled partly for printing and circulating the pamphlet and partly for writing these letters to Major Chard and Colonel Smith, and there is no evidence to show that his attention was directed to

GOMPERTZ v. GOLDINGHAM.

anything but the pamphlet. The learned counsel for the respondents drew our attention to the fact that the appellant knew that his letter to Major Chard was laid before the committee, but that is not enough. Now, bearing in mind the rule of law so clearly laid down in *Innes* v. *Wylie* (1) by Lord Denman, C.J., and in *Wood* v. *Woad* (2) by Kelly, C. B., we have come to the conclusion that the appellant had no opportunity of defending himself against this particular charge. Indeed, as far as we can judge, he did not know that the writing of these letters was a part of the charge against him. We believe that the committee were acting according to the best of their judgment, but they have made a mistake, and they have expelled the appellant from the Bellary Club partly on a charge which, if they had considered the matter, they would have found had never been brought to the appellant's notice. Upon this ground and this ground alone, we are of opinion that the appellant is entitled to succeed in his appeal. We therefore reverse the decision of the Lower Court and declare that the appellant was wrongfully expelled by the defendants and we order the defendants to restore his name to the list of members of the Bellary Club.

We have now to consider the question of costs, and we bear in mind that the third point taken by the counsel for the appellant and the only point on which he succeeds was taken for the first time at the hearing of this appeal. It does not seem to have been brought to the notice of the Officiating District Judge. We think it right under all the circumstances of the case to order that each party pay their own costs in the District Court, but, as the appellant has succeeded in the appeal, we give him the costs of the appeal.

(1) 1 C. & K., 263. (2) L.R., 9 Ex., 196.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KUMARASÁMI (PLAINTIFF), APPELLANT,

and

SUBBARÁYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. March 22, 30.

Will—Construction—Trust—Uncertainty.

A Hindú by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions :—

"You should give my brothers, their wives and children, according to your wishes":

Held, that no trust was created by these words.

APPEAL from the decree of Kernan, J., in civil suit No. 70 of 1884.

The facts are fully set out in the judgments of the Court (Brandt and Parker, JJ.).

Mr. *Grant* for appellant.

The Acting Advocate-General (Hon. Mr. *Shephard*) for respondents Nos. 3 and 4.

Mr. *Branson* for respondent No. 6.

Mr. *Shaw* for respondent No. 7.

PARKER, J.—The plaintiffs are two of the brothers of the late Krishnasámi Mudali, who died on 21st September 1882. His executors having renounced their office by a deed, dated 24th March 1883, administration with the will annexed was, with the plaintiff's consent, granted to the defendant No. 1 in British Burmah. The will bears date 11th September 1882, and the present suit is brought by the plaintiffs to have the trusts of the will carried out under the direction of the Court.

The testator made several bequests by his will and gave several directions as to his property, but there was no bequest to the executors, nor did they take any benefit under the will. The clause in the will which has led to the present litigation runs as follows :— "You should give my brothers Kumarasámi Mudaliar, "Subbaraya Mudaliar, and Vyapuri Mudaliar, their wives and

* Appeal No. 25 of 1885.

KUMARASÁMI v. SUBBARAYA.

"(sons) children according to your wishes. You should defray "the expenses of the marriages of Rámasámi Mudaliar's four "daughters. You should pay for the education, &c., of the "aforesaid person's two sons what may be required."

The learned Judge (Kernan, J.) held that as regards the residue of the estate after provision made for the marriage of Rámasámi's four daughters and the education of his two sons, a trust was created by the will for the three brothers of the deceased (plaintiffs Nos. 1 and 2 and defendant No. 1) and their wives and sons, and therefore declared them entitled to one-third each, but subject nevertheless as to plaintiff No. 1, to pay one-third of his share to his son and one-sixth to his wife; and subject as to defendant No. 1, to pay one-third of his share to his son. Plaintiff No. 2 being unmarried, was declared entitled to one-third absolutely.

The appeal against this decree is preferred by the plaintiff No. 1. It is contended for him by Mr. Grant that no precatory trust was created by the will; that the clause as to the gift to the three brothers, their wives and sons was void for uncertainty, and that the Court should have held there was an intestacy as regards the residue of the estate; and that even if there were a trust, the Court should have followed, in making the distribution, the principles of Hindú and not of English law, and divided the property equally among the three brothers for the benefit of whom and of their Hindú families the bequest was intended.

The Advocate-General for the wife and son of plaintiff No. 1 contended that the words were sufficiently definite to create a trust, and that English principles of distribution would apply even though s. 179 of the Indian Succession Act was not applicable. Though his clients did not appeal, they might, he urged, have been entitled to share equally all round, although the learned Judge had ordered distribution *per stirpes*.

Mr. Branson and Mr. Shaw for the two minor sons of the late Rámasámi supported the contention of plaintiff No. 1 that there was an intestacy as to the residue of the estate, but urged that in that case they were entitled to share as the representatives of a deceased brother as well as the three surviving brothers of Krishnasámi.

It appears to me that the words "You should give ..... according to your wishes" are not sufficiently imperative and too

uncertain and general to create an implied trust. The words express a wish only and not a command, and though they indicate the objects intended for the testator's benevolence, they are uncertain both as to the property and the way in which it shall go. (*Vide* Lewin on Trusts, 7th Ed., chapter VIII, s. 2, and notes.)

As the words stand, the only persons who could exercise the power given by this general direction are the executors named by the will; but they have not exercised it, and they have renounced the only character in which it was competent for them to exercise it. (*Vide* Williams on Executors and Administrators, Vol. I, page 290.) In such a case the Court will not take upon itself to execute the power (*Keates* v. *Burton*).(1) I would not attach importance to the omission of the will to bequeath the residue of the estate to the executors, for the same formalities cannot be looked for in a Hindú as in an English will. Had the executors proved, the estate would have vested in them, and they could have exercised the power. But they have not chosen to act, and the Court cannot act unless the power is coupled with a trust, (*Brown* v. *Higgs*)(2) and a trust is not created unless the words are imperative and the subject and objects are certain (*Knight* v. *Knight*).(3) Even had the estate been bequeathed to the executors and vested in them on probate, it seems very doubtful whether these words could have been construed as creating a trust for the benefit of the three brothers of the testator and their families over the whole of the residue of the estate (*Mussoorie Bank* v. *Raynor*).(4) If the words communicate a mere discretion no trust will arise (Lewin, 7th Ed., Ch. VIII, s. 2 (7) and notes), and in this case there is nothing whatever to show what would have been a sufficient compliance with the direction.

With all deference therefore to the learned Judge, I am of opinion that no trust is created by the words "You should give my brothers ..... their wives and sons according to your wishes;" and that there is consequently an intestacy as regards the residue of Krishnasámi's estate after the other directions of the will have been complied with.

The other directions of the decree, save as to costs, should be

(1) 14 Ves., 434.
(2) 8 Ves., 561, 569.
(3) 3 Beav., 148.
(4) I.L.R., 4 All., 500.

KUMARASÁMI v. SUBBARAYA.

confirmed and the costs of this appeal and of the suit should, I think, be paid out of the estate.

BRANDT, J.—The material portions of the will made by M. I. Krishnasámi Mudali on the 12th April 1879 are as follows: "I have appointed," three persons named, "executors for the purpose of conducting matters after my death according to what is mentioned hereunder in regard to all my self-acquired movable and immovable property."

"With the income from my landed property, food (boiled rice) should be given to ten persons daily in Kodumbaukum garden. I should be buried in the said garden."

"One day's Oobhayam or service in the year shall be performed during the Arunáchala Eswarar's Covil Vasantha Ootchavam in the place adjoining Chengah Bazaar within one hundred rupees."

"You should give my brothers Kumarasámi Mudaliar, Subbaraya Mudaliar, and Vyapuri Mudaliar, their wives and (sons) children according to your wishes. You should defray the expenses of the marriages of Rámasámi Mudaliar's four daughters. You should pay for the education, &c., of the aforesaid person's two sons what may be required."

"Rewards shall be given to servants, &c., according to what is mentioned in the list annexed hereto. The debts due to me shall be collected and recovered, and the debts due by me shall be paid off."

"In this manner do I write and leave the will, while in the enjoyment of good memory and in the presence of witnesses mentioned herein."

The executors having disclaimed probate of the will, did not exercise the powers given under the will, and letters of administration with copy of the will annexed were granted by this Court to the two plaintiffs and defendant No. 1 on the 7th January 1884; and the present suit was brought by the plaintiffs, who prayed that the estate of the testator and the trusts of the will be administered by this Court, and the rights of the plaintiffs and defendants be ascertained and declared, and for the taking of accounts, appointment of a receiver, &c.

The learned Judge (Kernan, J.), before whom the question which we are now called to consider, came for disposal, held that

KUMARASÁMI v. SUBBARAYA.

the executors having renounced and not exercised the powers given to them by the will, could not exercise the power given to them only as executors, though specially named as executors,—the power, that is to say, appearing to be expressed in the clause of the will "you should give my brothers ..... their wives and children according to your wishes;" but that a trust must be held to have been created by this clause in the will for the three brothers of the deceased and their wives and sons, and that the Court should carry out that trust.

The learned Judge then declared that the said three brothers, their wives and sons are entitled to the residue of the estate (after providing for the legacies, charities, debts, &c.); and ordered that the said residue be divided into three shares, one of which plaintiff No. 1, Kumarasámi, was to take subject to his giving or paying to his son, defendant No. 3, one-third of such one-third share, and to his wife, defendant No. 2, one-sixth of such third share; Vyapuri, defendant No. 1, to take one-third subject to his giving or paying to his son Krishnasámi, defendant No. 4, one-third of such one-third share; and plaintiff No. 2, Subbaraya, a one-third share.

Appeal is preferred on the grounds that it should have been held that the clause in the will in respect of which the said order was made should have been held void for uncertainty, and that no trust was created thereby; that there was a mere direction to executors to act according as they pleased; and that the persons named as executors having failed to act, effect cannot be given to the direction, and that the Court should have held that the testator died intestate as to the residue of his estate, and that the residue devolved on his heirs: that even if it be held that a trust was created to which the Court should give effect, regard should have been had, not to the manner in which according to English law or rules of equity distribution might have been made, but to the probable wishes and intentions of the testator and with reference to the Hindú law by which the latter was governed.

We have had the advantage of hearing the case ably argued by Mr. Grant for the appellant, by the Acting Advocate-General for the defendants Nos. 2 and 3 (third and fourth respondents), by Mr. Branson for defendant No. 5 (sixth respondent), and by Mr. Shaw for defendant No. 6 (seventh respondent).

I am of opinion that the terms of the disputed clause in the will are as regards the words of recommendation used not such as

KUMARASÁMI v. SUBBARAYA.

can be held to be imperative, and that they are too uncertain both as regards the subject and the objects of the recommendation or wish to be construed as a trust.

It cannot be said that there is certainty even as regards the objects of the recommendation, for it might or might not have been a sufficient compliance with the intention of the testator if some provision had been made for the testator's brothers, or for one or more of them, or for the wives only, or one or more of them, or for the children only, or for one or more of them; the words of recommendation are of the loosest description.

But there is still greater uncertainty as to the subject. The disputed clause occurs at the commencement of the will; there is no direction first to provide for specified charges and to pay specified legacies and to dispose of the residue according to discretion, among a class of persons or persons sufficiently indicated; and it appears to me to be a case in which a mere discretionary power was given, which in the absence of *mala fides* on the part of the executors, a Court would not have compelled the executors to exercise (*Brown* v. *Higgs*),(1) and that the words in dispute did not create a power in the nature of a trust.

The executors "did not exercise the power, but renounced the only character in which it was competent to exercise it," (*Keates* v. *Burton*,)(2) and even if it were open to the Court to give effect to the clause in dispute, the Court would, in my opinion, do well not to attempt to execute a power or a trust of such a character as this.

I think further that if the Court had to execute such a trust, it should have regard rather to what may have been the presumed wishes and intention of the testator than to apply principles which would be adopted if the rule to be followed were the rule of English law or equity; and if the English law were applicable all the class would take equally, which rule has not been here followed in its integrity. And I am of opinion that there was in fact an intestacy, and that in any case we could not better follow what may be taken to have been the intention and wishes of the testator than by treating this as a case of intestacy, in respect of the residue of the estate.

It has been well put by the learned counsel for the appellant

(1) 8 Ves., 569. (2) 14 Ves., 437.

KUMARASÁMI v. SUBBARAYA.

that the testator could hardly have contemplated a distribution, which it may be assumed was intended in the first place for the benefit of his brothers, the result of which is to give an absolute estate in respect of a very considerable portion thereof to the widows of two of those brothers. A distribution under which the brothers would have taken equal shares would have been to that extent provision for the widows and children. There is moreover very considerable force in the argument that the Legislature expressly refrained from making applicable to Hindús the provisions of s. 77 of the Succession Act, and the following sections. The Privy Council case(1) is authority for the proposition "that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be certain and well defined." In my opinion neither of these conditions exist in the present case. Their Lordships further expressed an opinion that "the current of decisions now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended."

On the whole, and with all deference to the learned Judge from whose decision this appeal lies, I am of opinion that the testator must be held to have died intestate in respect of the residue of his estate now in dispute; and that the decree should be amended accordingly; and that in other respects, and as to reference to take an account except in respect of costs in the original suit from decree in which this appeal is preferred, it should be confirmed, and that the costs in the original suit and in this appeal also be paid out of the estate.

Solicitors for appellant—*Grant & Laing.*

Solicitors for respondents Nos. 3 and 4—*Branson & Branson.*

Solicitors for respondent No. 6—*Grant & Laing.*

Solicitors for respondent No. 7—*Grant & Short.*

(1) I.L.R., 4 All., 500.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. Feb. 19, 27.

VELLI PERIYA MIRA RAVUTHAN, PETITIONER *

and

MOIDIN PADSHA RAVUTHAN AND ANOTHER, RESPONDENTS. *

Rent Recovery Act, ss. 35, 76—Civil Procedure Code, ss. 4, 622.

A sale of the tenants' interest in certain land having taken place under ss. 39 and 40, of the Rent Recovery Act, the Deputy Collector refused to issue a sale certificate to the purchaser on the ground that the sale had been irregularly conducted:

Held, that under s. 35 of the Rent Recovery Act the purchaser was entitled to a sale certificate.

Held, further, that the High Court had no power to revise the proceedings of the Deputy Collector under s. 622 of the Code of Civil Procedure.

THIS was an application to the High Court under s. 622 of the Code of Civil Procedure.

The facts necessary for the purpose of this report appear from the Judgment of the Court (Collins, C.J., and Parker, J.).

Krishna Ráu and *Appadorai Ayyar* for petitioner.

Hon. *Subramanya Ayyar* and *Rámáchandra Ráu Saheb* for respondents.

JUDGMENT.—In this case the tenants' interest in certain lands was brought to sale under ss. 39 and 40 of the Rent Recovery Act. The petitioner became the auction-purchaser and paid up the purchase-money, but the Deputy Collector afterwards refused to allow the usual sale-certificate under s. 35 to be issued to him, on the ground that certain irregularities in the procedure had been brought to light. The Deputy Collector thereupon on May 20th, 1884, passed an order by which he purported to set aside the sale and "decreed" that it was invalid.

The petitioner presented appeals both to the District Court and afterwards to the Collector, but both appeals were rejected for want of jurisdiction. It is not now contended that these orders

* Civil Revision Petition 275 of 1885.

were not right, but the petitioner prays that the High Court will exercise its powers of revision under s. 622 of the Code of Civil Procedure, and set aside the Deputy Collector's order of May 20th, 1884, as made without jurisdiction.

There is no provision in the Rent Recovery Act which enables a Collector to set aside a sale once completed, and s. 35 is imperative that a sale-certificate shall be given to the purchaser.

The tenants' remedy, if any, under the Rent Recovery Act was restricted to a suit for damages under s. 49, and the Deputy Collector clearly assumed a jurisdiction not vested in him by law when he decreed the cancelment of the sale.

The question remains whether the order of May 20th, 1884, is amenable to revision by the High Court under s. 622, of the Code of Civil Procedure. It may be conceded that the Deputy Collector purported to act "as a Revenue Court," and in so acting, assumed a jurisdiction not vested in him by law. But s. 4 of the Code of Civil Procedure enacts that, save as provided in the second paragraph of s. 3, nothing in the Code shall affect any law passed by a local Government prescribing a special procedure for suits between landholders and their tenants. The Rent Recovery Act (Madras Act VIII of 1865) is such a law, and it follows that the special revisional powers given to the High Court in s. 622 will not affect the provisions of Madras Act VIII of 1865. Section 76 of the latter Act enacts that "in proceedings under that Act" no judgment of a Collector or order in execution shall be liable to revision otherwise than by appeal to the Zila Court; and although the Deputy Collector's proceedings were not strictly speaking "proceedings under the Act," but rather "proceedings taken under colour of the Act" (for which a suit for damages might be brought under s. 49), that circumstance alone will not give a jurisdiction which s. 4 of the Code of Civil Procedure was designed to exclude.

The remedy is by suit in the ordinary Courts and we must dismiss this petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1886. March 22, April 5.

SUNDARAM AND ANOTHER (REPRESENTATIVES OF DEFENDANTS Nos. 45 AND 46), APPELLANTS,

and

SANKARA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 503—Receiver—Powers—Limitation—Cause of action.

A zamíndárí was attached in execution of certain decrees against the zamíndár, and the plaintiff was appointed receiver with full powers, under s. 503 of the Code of Civil Procedure, to manage the zamíndárí. Before the appointment of the receiver, the zamíndár had expended certain sums at the defendants' request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended.

It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zamíndár nor property attached in execution of a decree against him:

Held, that the receiver could maintain the suit.

It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zamíndár more than three years before the suit; and further, that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed:

Held, that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for.

APPEAL from the decree of C. Rámáchandra Ayyar, Subordinate Judge of Madura (East), in suit No. 5 of 1884.

The facts of the case are set out in the judgments of the Court (Brandt and Parker, JJ.).

Bháshyam Ayyangár for appellants.

Hon. *Subramanya Ayyar* for respondent.

BRANDT, J.—This suit was instituted by the receiver of the Sivaganga zamíndárí. The receiver was appointed on the 9th March 1882; the zamíndárí was attached in January 1881 in execution of original suit 35 of 1879, and the plaintiff was

* Appeal 33 of 1885.

appointed receiver of the property under attachment, with full powers under s. 503, Civil Procedure Code.

The suit was instituted on the 25th January 1884.

The defendants are the proprietors of, or sharers in, a dharmasanam (inám) village, Vembathúr, in the zamíndárí; the inám is held in 128 shares, of which 109 and a fraction belong to the defendants, and the remaining 18 and a fraction belong to the zamíndár, by purchase. The village of Vembathúr is irrigated from a kanmoi or tank in the zamíndárí ayyan village, Kall-urani; this tank receives its supply from the Vaigai river by means of a channel; and from the tank an ayyan zamíndárí village, as well as the defendants' dharmasanam village, receives its supply, the water passing to the former through five sluices, and to the latter through two sluices. The zamíndár, as such, is entitled only to collect poruppu (a light assessment) on the inám lands.

There appears to be no question that the inámdárs are entitled to the water flowing through the two sluices, which irrigate about the same quantity of lands as the other five sluices.

The plaintiff's case is that, owing to heavy floods in 1877, the plaint kanmoi or tank, and the channel that supplies it were so much damaged as to make cultivation impossible; that "the cost of repairing the said common kanmoi and its channel was usually paid by the zamíndár and the said dharmasanam villagers;" that the zamíndár obtained a loan from Government of Rs. 1,50,000, and with part of this repaired the plaint tank; that in September 1878 an estimate for Rupees 13,990 for this purpose was prepared and sanctioned, and the work finally completed at a cost of Rs. 13,934-14-0, completion certificates having been given by the Special Supervisor on the 9th June and 1st September 1881: that the defendants "consented to pay their shares as usual in the amount which might be spent for the repairs of the said kanmoi and channel," and that, at the request of Muttayyar, the father of defendant No. 1, and of Krishnayyar, defendant No. 4, "who were the chief among them" (the dharmasanamdárs), the contract for the work was given to those two persons jointly with two contractors, Mahadevayyar and Palaniyandia Pillai, and that the money paid as aforesaid was paid to the said four persons. That the sum of Rs. 5,972-5-7, that is, one-half of the whole less the proportionate share payable by the zamíndár as one of the dharmasanam co-sharers, is due from the defendants; that though

SUNDARAM v. SANKARA.

pressed for payment they have not paid; that interest at 12 per cent. per mensem on the sum claimed should be allowed from the completion of the work; that "the cause of action is the non-payment of money by the defendants;" and that it arose on the 1st March 1881, the date of the completion of the tank work, and on the 1st September 1881, the date of the completion of the channel work.

Twenty-five out of the 55 defendants contested the claim; of these the appellants, defendants Nos. 45 and 46, whose defence was adopted by the other contending defendants, pleaded that the plaintiff, as receiver, could not maintain the suit;

that the claim is barred by limitation in respect of any moneys paid by the zamíndár more than three years prior to suit, *i.e.*, prior to 25th January 1884; that a decree cannot be given for the whole sum claimed, or against the defendants jointly and severally; that, as the zamíndár is a co-sharer with the defendants in the dharmasanam village, he cannot sue for contribution in respect of the money said to have been expended without stating the specific liability of each co-sharer.

The custom alleged by the plaintiff was denied; and the allegations as to the loan of money from Government and the expenditure of part of it on the repair of the plaint channel and tank were denied; and it was denied that the contesting defendants consented or agreed to pay their proportionate share of the cost, prior to execution of the work; they further said that they are not bound by the agreements, if any, which any other co-sharers may have entered into in the matter; that the tank and channel in question had always been treated by the zamíndárs as their exclusive property, and the maintenance and repairs thereof have been at the exclusive cost of the zamíndárs, who have an exclusive right of fishery in and over the tank when full, and of cultivating the bed of the tank when dry; and that the repairs set out in the plaint were not urgent nor necessary.

Among the other issues framed by the Subordinate Judge was this, the 3rd, "whether the suit is maintainable?" but in disposing of this, the Lower Court appears to have had regard only to the objections that the zamíndár, being a co-sharer, could not sue the other co-sharers for contribution jointly, and that the defendants cannot be held jointly and severally liable for the whole amount. The 2nd issue is framed specially with reference to this latter

SUNDARAM v. SANKARA.

contention, and the 2nd and 3rd issues were disposed of together. The Subordinate Judge does not appear to have considered or disposed of the objection that the receiver is not capable of maintaining the suit.

The Subordinate Judge held that the objections raised and considered in reference to the 2nd and 3rd issues were not maintainable.

As to whether the defendants agreed to contribute their share towards the cost of the repairs in this case (5th issue), it was held that though there was no proof that all the co-sharers agreed, it was proved that the father of defendant No. 1 and defendants Nos. 4 and 8 as leading men among them, and representing the shareholders, several of whom also were then present, requested that the tank and channel might be repaired, and they must be taken to have duly represented the whole body of shareholders, and that they agreed to pay a moiety of the cost. As to whether the custom set up on the zamíndár's behalf was proved (6th issue), the evidence, oral and documentary, was held to establish that the defendants on all occasions of repairs being made contributed a moiety of the cost and that in some instances they paid their shares after the repairs were completed.

It was held that there was not misjoinder of parties nor of causes of action, and a decree was given against "the defendants" for the principal sum sued for, with interest at 6 per cent. per annum, from the 15th December 1883 and proportionate costs.

The appellants contest all the findings on the facts and again raise the points of law taken in their written statement and which they contend were wrongly decided or not decided in the Lower Court.

The first question to be determined in appeal is whether the suit, brought by the receiver, is maintainable.

A receiver does not represent the estate for all purposes; he would have none of the powers which may be conferred under s. 503, of the Code of Civil Procedure, in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made; but in the present case, the whole zamíndári was attached, and in order to determine whether the receiver can sue, it is necessary to ascertain what the real cause of action is, and on what right or rights it is based. The cause of action is stated in the plaint to be "non-payment of the money by the defendants;"

SUNDARAM v. SANKARA.

but the customary repair of the dharmasanam tank at the joint cost of the zamíndár and the defendants and the necessity for the repairs in the present instance were set out, as well as the alleged consent of the defendants to pay their share 'as usual.' And it is contended on behalf of the respondent, and must in my opinion be held proved, that the respondent is under an obligation, whether enforcible by common law, or created by the terms of the original grant of the inám, or by custom to make necessary repairs, and that the dharmasanamdárs are bound to contribute towards such repairs: indeed, these facts were in the event hardly denied on behalf of the appellants. If the suit had been for recovery of the money on the alleged agreement to pay alone, the suit would not, in my opinion, have been maintainable by the receiver; but after considerable doubt, I agree with my learned colleague that the right of the zamíndár to be recouped to the extent of one-half of the cost of the repairs, if otherwise established, is maintainable in a suit by the receiver. The obligation to repair is one which the defendants might no doubt sue to compel a receiver in charge of the estate to fulfil; and the money sued for, which I find was in the result paid by the zamíndár only because it was not paid before or at the time of making the repairs, as it should have been, was money not belonging to the zamíndár personally, but advanced, it may be assumed, on the security of his estate and certainly for the purpose, among others, of making necessary repairs to irrigation works in the estate; and if now recovered will be available not for the personal use of the zamíndár, but of the creditors on whose behalf the estate has been attached.

The statement in the plaint that "the defendants consented to pay their shares as usual in the amount which may be spent for the repairs;" coupled with exhibit R in which the intended repairs and the amount of the sanctioned estimate are notified to the mahájanams, and the latter are "previously warned" that they should forthwith pay Rs. 7,362-8-0, the half share due by them; as well what appears in exhibits K, M, N, and A, afford some grounds for the contention that the custom was for the dharmasanamdárs' share to be paid, if at all, in advance: but the latter and other documents and the oral evidence in my opinion establish the fact that even if this was the proper course, when payment in advance could not be obtained, the repairs were done at the expense of the zamíndár and the defendants' share recovered afterwards.

SUNDARAM v. SANKARA.

And in the instance now in dispute, I have no doubt, and I think it is established by the evidence, that the dharmasanamdárs, as a body, represented by their headmen, expressed a wish to have the repairs done, admitted the necessity, and agreed to pay their share. The contract was not signed till December 1878, and as no dates are given as to when the alleged consent was actually given, it is quite possible it was after the date of R, September 1878, that the defendants asked the zamíndár to expend the money which they knew he had, and promised to recoup him afterwards. That this is so, is borne out to some extent by the fact that defendant No. 45, one of the appellants here, appears from exhibit V to have stated to the receiver that he was willing to pay his share if informed how much was due.

It is true that two months afterwards his son in exhibit IV [2] objected to pay this share; but the objections are put on grounds which cannot be supported, as that the repairs were done without notice, that more was done than was necessary, and that the zamíndár was bound to make the repairs in return for the exclusive rights of fishery enjoyed by him in the tank, and for the use of the bed of the tank when dry. This latter contention is supported by no evidence deserving of credit, and the liability to pay a share in the expenses of repair is not denied. And the findings as the obligation on the part of the zamíndár and of the defendants and as to the promise on the part of the latter being what they are, I am of opinion that the finding of the Lower Court, namely, that the obligation on the part of the defendants to make good their share did not arise until the work was completed, is correct, and that the claim therefore is not barred by time.

As to the objection that the suit is not maintainable by reason of the zamíndár being by purchase a co-sharer with the defendants, I think this is clearly untenable: he sues for the balance due after deducting the amount due by him as such co-sharer, and the fact of his having such interest in the dharmasanam village can in no way affect his right to sue in the capacity of a landlord under an obligation to repair the tank.

As regards the joint and several liability of the defendants on the other hand, I have had no little doubt. The fact that each sharer is jointly and severally liable for the poruppu does not appear to me conclusive as to their joint and several liability for the half

SUNDARAM v. SANKARA.

of these repairs; while the fact that the pattá for the whole village stands in the name of one person only appears to me to raise some doubt whether the suit should not have been brought either against that person alone, or against all the sharers for their respective shares severally: but, it is to be observed that in the notice R demand is made on the whole body of shareholders for the lump sum, and that not only is there no evidence that objection to this was taken by any of the share-holders, but that, as I find, the latter consented to and indeed urged, the carrying out of the repairs with moneys to be advanced by the zamíndár and, it must be presumed, on the conditions therein specified, save that they were not to be called on to pay their share in advance.

It is true that exhibits IV and V would seem to show that the receiver was prepared to accept the separate shares due from individual sharers; but this he might well do suing only those who refused to pay for the balance due, without admitting that no joint and several liability existed; and the only conclusion to which I can come is that by custom or otherwise such joint and several liability attaches in this case to each sharer.

I agree then in the result that this appeal should be dismissed with costs.

PARKER, J.—The first point is whether the plaintiff, as a receiver, appointed under s. 503 of the Code of Civil Procedure, is competent to maintain this suit. The whole zamíndárí is under attachment, and the receiver has, under s. 503, all such powers as to bringing suits, . . . and for the realization, management, protection, preservation and improvement of the property as the owner himself has.

Granted that there is upon the zamíndár as the holder of the estate, a common law obligation to maintain the tank with the right to recover half of the expense thereof from the inámdárs, I think there can be no doubt that in the event of necessity, the obligation would rest upon the receiver to spend such sum as might be requisite for the due maintenance of the tank, and that he would be at liberty to sue to recover from the inámdárs the half of such sum as he might have paid out of the treasury of the estate. Why then should he not sue to recover for the estate monies so expended before the date of his appointment as receiver?

If the estate be an impartible zamíndárí, it would descend at the death of the holder to his eldest son. Let us assume that the

SUNDARAM v. SANKARA

zamíndár left by will to his second son all his personal property and outstanding debts; upon which of the two would the right to collect these sums from the inámdárs devolve? It appears to me that the right would devolve upon the eldest son as zamíndár; and that the obligation and the right to be recouped cannot be dissevered. Inasmuch as the obligation passes with the estate, so also does the right to be recouped. I think therefore that the plaintiff, as receiver, can maintain this action.

The next point is whether the suit is based on an agreement, or upon custom. It is contended for the appellants that in the first case no binding agreement is proved, and in the second that the plaintiff cannot recover upon the suit as framed, and that no custom having the force of law is made out.

The custom that the mahájanams of Vembathúr should contribute half the expenses of the repairs of this tank can be traced back to 1833 (exhibit K); to 1838 (exhibit M); to 1840 (exhibit L); to 1842 (exhibit N); to 1856 (exhibit VI); to 1862 (exhibit A); and to 1872 (exhibit D). There is abundant oral evidence to the same effect, including that of the karnam's gumasta (plaintiff's first witness) who speaks from an official experience of 33 years. I gather that the custom has been to collect the mahájanams' half share for the repairs beforehand, if possible, but that when this has not been found practicable it has been afterwards collected by more or less of compulsion. As the tank is not in a common village, but in one belonging to the zamíndár only, it may well be that he has been under an obligation to keep it in repair and that the mahájanams could not actually interfere in its up-keep, though they were liable for half the expenses thereof, getting as they did half the supply. Upon the whole, therefore, I am of opinion that plaintiff has succeeded in showing the existence of a custom which is ancient, certain and reasonable, these being the necessary requisites of a valid custom.

The Subordinate Judge has found that the defendants agreed to pay their half share as usual, and exhibit R shows that the usual attempt was made to collect beforehand the half share due from the mahájanams. There is to my mind no objection which can be fairly taken to the form of the suit. The plaintiff does not base his claim upon agreement as distinguished from custom, but upon both combined—upon agreement made in accordance with custom. I agree with the Subordinate Judge that the agreement

SUNDARAM v. SANKARA.

was made by the leading men among the mahájanams as representing and binding the rest.

The question of limitation comes next. Being of opinion that the obligation rested upon the zamíndár to do the work for the joint benefit of himself and the mahájanams, and that there was no time *absolutely* fixed for the re-payment to him of the sums so expended, the article of the Limitation Act which will govern the suit will be article 56 of schedule II, and the law will imply under the circumstances that the work was done at the defendants' request. The time will therefore, run from the date when the work was done. The work was carried out under Government supervision, and the completion certificates are dated 1st March and 1st September 1881. The suit was brought on 25th January 1884 and is in time.

Lastly, it is contended that the defendants are not jointly liable to the plaintiff for this claim, but are only severally liable, each to the extent of his respective holding.

The plaintiff in this case holds a double character:—1st as zamíndár, 2ndly as inámdár for 18·46 shares out of 128. He sues, however, as zamíndár, to recover from all the sharers jointly, half the expenses incurred by him less the amount for which he himself is liable for his 18·46 shares.

Putting aside for the moment the fact that the zamíndár is himself a part sharer, the question is, are all the sharers jointly liable to him as zamíndár for the monies spent on their joint behalf? The pattá stands in the name of one mahájanam only, and all the sharers are jointly and severally liable for the poruppu. The fact that the lands are periodically distributed according to their proportionate shares, is a matter which affects them only *inter se*. Whatever piece of land each may be holding at any given time, and whatever be the number of shares into which the village is divided at any given time, all alike are liable to the zamíndár for the poruppu due to him on the entire village. This of course does not detract from the right of any one sharer to contribution from the rest, should he be made to pay the whole poruppu. These repairs are made by the zamíndár to the tank as landlord for the common good of the whole village held in the name of one mahájanam, and it seems to me therefore that all the sharers will be jointly and severally liable.

SUNDARAM v. SANKARA.

Nor can it in my opinion make any difference that the zamíndár is himself a sharer. As a sharer he would no doubt be liable in a suit for contribution, if he had not paid up the full amount due on his own shares. But he has done this, and the suit is only brought as zamíndár for the balance jointly and severally due from those sharers who have not paid up. If he recovers from any one of them, that sharer will be able to claim contribution from any one of the rest who has not paid up the full amount due on his share.

Upon these grounds, I have come to the conclusion that the decree of the Lower Court was correct, and I can see no reason why interest should not be allowed. I would dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Muttusámi Ayyar.

1885. April 24.

PONNAPPA PILLAI (PLAINTIFF), APPELLANT,

and

PAPPUVAYYANGÁR AND ANOTHER (DEFENDANTS Nos. 2 AND 3), RESPONDENTS.*

Hindú Law—Liability of ancestral estate for father's debt—Effect of sale in execution of mortgage decree and of money decree against the father—Transfer of Property Act, s. 85.

Where the property of an undivided Hindú family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the debt. It is otherwise if the decree in execution of which the sale takes place is a mere money decree.

Per Kernan, J.—It will still be necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit.

Girdharee Lall v. *Kantoo Lall* (L.R., 1, I.A., 321).

Muddun Thakoor v. *Kantoo Lall* (L.R., 1, I.A., 321).

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* Second Appeals, 703, 704, and 705 of 1878.

PONNAPPA v. PAPPU-VAYYANGÁR.

Deendyal Lall v. *Jugdeep Narain Singh* (L.R., 4, I.A., 247), discussed.
Hardi Narain Sahu v. *Ruder Perkash Misser* (I.L.R., 10, Cal., 626), followed.
Ponnappa Pillai v. *Pappuvayyangár* (I.L.R., 4, Mad., 1), modified.

THIS case came before a full bench on 1st April 1881.

The facts will be found reported at I.L.R., 4, Mad., 1.

In pursuance of the order made by the full bench (Turner, C.J., Innes, Kernan, Kindersley, and Muttusámi Ayyar, JJ.), on the 1st April 1881, the Múnsif reported that the sale of the ancestral estate of plaintiff and defendant No. 1 took place under a decree which directed that the land should be sold to realize the amount due on a mortgage.

Appellant did not appear.

Hon. *Rámá Ráu* and *Báláji Ráu* for respondents.

The Court (Turner, C.J., Kernan and Muttusámi Ayyar, JJ.), delivered the following judgments :—

TURNER, C.J.—Since these cases were formerly before the Court two decisions have been passed by the Privy Council in reference to the questions which call for decision. In *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar*,(1) our ruling that the principles laid down in *Girdharee Lall* v. *Kantoo Lall*(2) apply to cases in this presidency has been approved. On the other hand, in *Hardi Narain Sahu* v. *Ruder Perkash Misser*,(3) decided as recently as the 5th December 1883, it has been held affirming *Deendyal Lall* v. *Jugdeep Narain Singh*(4) that where the right, title and interest of the father has been held liable in execution of a mere money decree, the interests of the son will not pass to the decree-holder, being the auction purchaser, although he may have also held a mortgage on the property. At the same time the case is distinguished from those in which the father, being a member of a joint family governed by the Mitákshará law, had mortgaged the family property to secure a debt and the decree had been obtained upon the mortgage and for the realization of the debt by means of a sale of the mortgaged property.

This decision, it must be admitted, corrects the view expressed by me as to the effect of the decision of the Privy Council in *Muddun Thakoor's case*,(5) and which had also been expressed by Sir Michael Westropp and Mr. Justice Melville in *Nárâyanâcharya*

(1) I.L.R., 6 Mad. 1.
(2) L.R., 1, I.A., 321.
(3) I.L.R., 10, Cal., 626.
(4) L.R., 4, I.A., 247.
(5) L.R., 1, I.A., 321.

PONNAPPA v. PAPPU-VAYYANGÁR.

v. *Narso Krishna* (1) and by Mr. Justice Mitter and Mr. Justice Maclean in *Umbica Prasad Tewary* v. *Ram Sahay Lall*, (2) and again in *Sheo Proshad* v. *Jung Bahadoor*.(3)

It is necessary, therefore, that I should again consider the rulings by which we are to be guided and give effect to what may be collected as the intention of the august forum to whose rulings our decision must conform.

In *Girdharee Lall* v. *Kantoo Lall* (4) their Lordships held that among Hindús governed by the Mitákshará ancestral property in which the son, as the son of his father, acquires an interest by birth is liable to the father's debts, and that a son is not at liberty to contest a sale of ancestral estate made by a father to discharge a debt contracted for purposes which were not immoral. These rulings are unaffected so far as I know by any subsequent decision.

The report of the case of *Muddun Thakoor* v. *Kantoo Lall* (4) not being sufficiently full to enable me to ascertain under what circumstances the sale impugned was made and what was the interest which the Court executing the decree against the father professed to sell, I obtained through the courtesy of the Chief Justice of Bengal a copy of the transcript. It appears that on February 11th, 1855, the two sons of Kunhya Lall, deceased, Bhikharee Lall, the father of Kantoo Lall, and Bujrung Sahye, the father of Mahabir Pershad, in consideration of a loan of Rs. 3,540, executed in favor of Mussamat Bibi Asmatunisa and others a bond undertaking to pay the principal and interest at 12 per cent. per annum at a time named; and, as security, they thereby hypothecated Mouzah Rajpore Usli Alinugger, Mouzahs Khuma Munjulpore Subrampore, Chuck Durcon Dhoodula Dakhili Anundpore Usli Shapore Dakhili Balasandut and Mouzah Assamudpore (see pp. 131, 132).

On November 23rd, 1857, the bond-holders obtained judgment on the bond in the Court of the Principal Sadr Amín of Bhagulpore against Bhikharee Lall and Bujrung Sahye in the following terms:—

"Plaintiffs sue defendants for the recovery of Company's Rs. 3,540, principal under a bond duly registered, dated 11th

(1) I.L.R., 1, Bom., 262.
(2) I.L.R., 8, Cal., 898.
(3) I.L.R., 9, Cal., 389.
(4) L.R., 1, I.A, 321.

PONNAPPA v. PAPPU-VAYYANGÁR.

February 1855, and Company's Rs. 1,189-7-1, interest thereon from date of bond to date of present suit at one per cent. aggregating Company's Rs. 4,729-7-0.

Statement as to evidence.

Read the cause of action, dated the 11th February 1855 A.D., No. 2.

Whereas after the filing of pleadings and recordings of proceedings under Regulation XXVI of 1814 and adducing of witnesses on the part of plaintiffs in this suit, the defendants presented a petition to the presence on the 2nd June 1858, acknowledging the plaintiffs' claim, stating, *inter alia*, that the plaintiffs do not agree to being sworn in this suit; therefore, having presented this petition to the presence, they pray that, according to our answer acknowledging claim, the said suit be decreed to the plaintiffs, and as in this suit an answer acknowledging claim has been filed on the part of defendants consequently,

ORDERED.—That this suit be decreed to plaintiffs according to acknowledgment filed by defendants. The plaintiffs do recover from defendants the money claimed with costs and interests from the date of suit to that of realization.

DETAIL OF COSTS."

The plaint is not in the transcript, nor is there any other decree. I apprehend the order I have set out was regarded as the final proceeding. There is nothing in this proceeding to show that the plaintiffs sought to obtain the enforcement of the hypothecation.

All that appears is that the plaintiffs sued to recover the amount of the bond from the obligees, and that the defendants acknowledged the claim and prayed that a decree might be passed in favor of the plaintiffs, and that it was ordered that the suit should be decreed according to the acknowledgment filed by defendants, and that the plaintiffs should recover from defendants the money claimed with costs and interest from the date of suit to that of realization (pp. 133, 134). In terms this decree was what is termed a money decree. It appears from the proceeding of the Principal Sadr Amín, dated February 2nd, 1859, that "the right, title and interest" of the judgment-debtors in Mouzahs Rajpore Alinugger Usli and Dakhili and three Mouzahs included in

PONNAPPA v. PAPPU-VAYYANGÁR.

Mouzah Anundpore together with Buniyadpore *alias* Manikpore Usli and Dakhili was brought to sale in execution of the decree of Mussamat Asmatunisa on 6th September 1858 and that the mahâyats were purchased by Muddan Chand Doss. The Principal Sadr Amín overruling an objection taken by the judgment-debtors to the sale of Anundpore, ordered that the auction sale should be confirmed and that a bill of sale should be given to the auction purchaser (p. 38). The sale was held under the provisions of Act IV of 1846, s. 10, which declared that sales in execution of decrees should be of the nature of private transfers. The sale certificate is not in the transcript. Its purport may, however, be inferred from the proceedings of the Deputy Collector of Bhaugalpore, April 9th, 1860, on a petition addressed to him by the auction purchaser which commences as follows:—

"The petitioner states that in execution of decree in the suit of Mussumat Asmatunisa on the 6th September 1858, I purchased the right, title and interest of Bhikharee Lall and Bujrung Sahye, proprietors in a share of Mouzah Rajpore Alinugger, including the Mouzahs appertaining thereto in Purgunnah Bhaugulpore, the whole of Mouzah Anundpore including Buniyadpore *alias* Manikpore together with the Mouzahs appertaining thereto in Purgunnah Bhaugulpore at the auction sale held in the Civil Court of the Principal Sadr Amín, &c."

The Deputy Collector ordered that the name of the auction-purchaser should be enrolled instead of Bhikharee Lall and Bujrung Sahye in respect of Mouzah Rajpore Alinugger; and by another proceeding also dated April 9th, 1860, in which the date of the auction sale is given accurately as 6th September 1858, he also ordered the substitution of the auction-purchaser's name for that of Bhikharee Lall, the then registered holder of Anundpore (pp. 104–106).

In order to confirm the title to the properties purchased, the auction-purchaser allowed the revenue to fall into arrear, and before the orders last mentioned were passed, the properties were brought to sale for arrears and purchased by Muddun Thakoor (pp. 109, 110).

It was found by the High Court that Muddun Thakoor was in fact the auction-purchaser and that Muddun Chand Doss had only purchased as a benámidár, and it was held that the revenue sale

PONNAPPA v. PAPPU-VAYYANGÁR.

under the circumstances gave Muddun Thakoor no new title (p. 264).

On these facts the Principal Sadr Amín supported the title of the auction-purchaser. The High Court considered that the claim of Mahabir Pershad could not be sustained, as he had not been born till November 1858 and, therefore, subsequently to the sale in September 1858; but it reversed the decree of the Principal Sadr Amín in respect of the share of Kantoo Lall in Mouzahs Rajpore Alinugger and Anundpore.

This part of the decree of the High Court formed the subject of the appeal preferred to the Privy Council by Muddun Thakoor; and their Lordships, applying the rule they had declared in *Girdharee Lall's case* that the interests of sons as well as of their fathers in property although ancestral were liable for the payment of the fathers' debts, held that the sale conveyed the interest of Kantoo Lall to the purchaser and that the purchaser having found that there was a decree against the fathers, and that the property was liable to satisfy the decree if it had been properly given against them, and having inquired into that, and *bonâ fide* paid a valuable consideration for the property, was not bound to go further back. Their Lordships did not hold that the decree was a mortgage decree. The order for sale was a mortgage decree. The order for sale was not contained in the decree, but as is usual in execution of money decrees, passed after decree.

It appeared to me then that the following points were established by this decision.

That fathers may for the satisfaction of those debts which it is the duty of their sons to discharge out of ancestral estate render available the interests of their sons as well as their own; that the Court has the same power when it is called upon to execute a decree for money obtained against the fathers; that though the property be described as the right, title and interest of the judgment-debtors, a sale in execution of a money decree would pass the interests of the sons as well as of the fathers; and that a bidder is not bound to inquire whether the debt was contracted for a proper purpose: that he has only to see that the decree has been properly passed, and if he purchases without notice that the debt has been contracted for purposes which do not bind the son, he will be protected.

PONNAPPA v. PAPPU-VAYYANGÁR

In *Deendyal Lall* v. *Jugdeep Narain Singh*,(1) Toofani Singh being indebted to a creditor executed in his favor a Bengali mortgage bond: on this the creditor sued and obtained a decree in the ordinary form of a decree for money. In September 1870 he caused to be brought to sale the rights and proprietary and mokurriri title and share of Toofani Singh, the judgment-debtor. Their Lordships held that there passed by the sale only such a share as would have fallen to the father on a partition, and that it was immaterial whether the debt on which the decree was obtained had been contracted for a purpose binding on the family. The sale was held under Act VIII of 1859, which did not declare a sale in execution to have the effect of a private transfer, but declared that the purchaser should obtain a certificate that he had purchased the right, title and interest of the judgment-debtor. It does not appear whether it was then argued that the father had not only a right to secure to himself his own share on a partition, but also a right in certain circumstances, *e.g.*, for the payment of his debts when not immoral, a right to sell the interest of his sons. This decision was in this country regarded as inconsistent with the decision in *Muddun Thakoor's case*(2) and various suggestions were made to reconcile them. Mr. Mayne seems to have been of the same opinion, for he suggested as a possible explanation that the execution creditor had expressly attached the *share* of the father Toofani Singh. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*,(3) their Lordships summarized their rulings in terms which have been frequently cited in this Court, and which are to the effect that the interests of the sons as well as of the father in joint ancestral estate pass under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, and that the sons cannot recover the property unless they show that the debts were contracted for immoral purposes; and, secondly, that the purchasers at an execution sale being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. In that case the father, Adit Sahai, had inherited Mouzah Bissambhurpore and, after two sons had been born to him, mortgaged the estate. On this

(1) L.R., 4, I.A., 247. (2) L.R., 1, I.A., 321. (3) L.R., 6, I.A., 88.

PONNAPPA v. PAPPU-VAYYANGÁR.

mortgage the creditor sued and obtained a decree for the recovery of the amount from the judgment-debtor and for a sale of the estate in default. A sale was ordered in execution of this decree, when the widow of the judgment-debtor, who had died, filed a petition of objections on behalf of her minor sons setting forth their claims as co-parceners. She was referred to a regular suit, and the sale took place. A suit was then instituted by the minors through their mother as guardian, and it being proved that the debt had not been contracted under such circumstances that it would be binding on the minors, and that the purchaser had previously to the sale had notice of the minors' claim, it was held that interests of the minors did not pass by the sale. These are the grounds on which the case was distinguished by their Lordships from that of *Kantoo Lall*, the authority of which they expressly declared they desire to leave unimpaired :—

"The respondents must be taken to have had notice, actual or constructive, of the plaintiffs' objections and with the order made upon them, and therefore to have purchased with the knowledge of the plaintiffs' claim and subject to the result of this suit.

"It follows then that as against them as well as against Bolaki Choudri (the decree-holder) the plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt."

The following conclusions I drew from this judgment :—firstly, that unless the plaintiffs had proved that the debts were not of such a nature as would have justified an alienation of ancestral property by a father, the sale would have conveyed their interests to a purchaser; that, if they had even established that point, they could not have recovered their interests from the purchaser unless they had proved he had had notice that the debt was not one in which the sons' interests would be bound; and that if the points mentioned had not been proved, the sale, whether under the order in the decree or under an order in execution of the decree as a money decree, would have passed the interests of the sons to the purchaser.

In re-affirming their ruling in *Kantoo Lall's case*,(1) their Lordships, I may observe, drew no distinction between a sale

(1) L.R., 1, I.A., 321.

PONNAPPA v. PAPPU-VAYYANGÁR.

in execution of a mortgage and a sale in execution of a money decree.

Such were the decisions of the highest Court of Appeal when these cases formerly came before this Court. As I had understood them, I thought they warranted the opinion that inasmuch as a father has a right to sell ancestral estate including the interests of his sons in order to free himself from a debt, provided he had not contracted it for a purpose which relieved the sons of their obligation, the Court executing a decree could, by a sale, make the same disposition as the father, that the father having a disposing power to discharge proper debts, the Court would exercise that power in favor of a creditor; that the father had a right independently of his right to a share on a partition; and that a sale of his right, title and interest would, therefore, transfer the estate to a *bonâ fide* purchaser without notice as effectually as the father could have done. I also thought where a father had thought fit to deal with a limited interest in the estate by creating a mortgage, and the creditor desired to enforce the mortgage, it was the duty of the creditor to make all persons interested in the right to redeem parties to the suit according to the rule which is recognized in s. 85 of the Transfer of Property Act, and that, in consequence, if the sons were not parties to, nor represented in, the suit, they could not be foreclosed of their right to redeem. On both points my conclusions are overruled by the latest decisions of the Privy Council, and though I do not see that the arguments I have advanced were fully put to their Lordships, I daresay it was because they are open to objections which do not at present present themselves to my mind. However this may be, we have now only to follow the exposition of the law contained in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1) and to ascertain whether in the cases before the Court the sale was made in execution of mortgage or money decrees.

The decree in second appeal 703 of 1878 ordered a sale of the hypothecated property, and the Judge has found that although the decree was both a money and a mortgage decree, the property was sold in execution of the mortgage decree.

The sale must be sustained. The appeal fails and is dismissed with costs.

(1) I.L.R., 10, Cal., 626.

PONNAPPA v. PAPPU-VAYYANGÁR.

KERNAN, J :—These cases having been referred to a Full Bench, the majority of the Court, on the 1st April 1881, held that the principle established by the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) as to the liability of a son's share of ancestral property to pay the debts of his father, not contracted for illegal or immoral purposes, applied to this Presidency. That decision has since been approved of by the Privy Council in *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2).

By order of the 1st April 1881, issues were directed to be tried whether the ancestral lands of the plaintiff and defendant No. 1 sold in the Suits Nos. 35 of 1876 and 193 of 1876 were sold under so much of the decree in these suits as was personal, or in execution of the decree for enforcement of the mortgage. The Múnsif returned that the sales took place under decrees, which were both personal and directed sale of the lands to realize the amounts due on the mortgages.

This was in effect a finding that the sales were made under the decrees directing sale of these identical ancestral lands for payment of the debts due by defendant No. 1, the plaintiff's father. It was found in the original suit that those debts were not incurred by defendant No. 1 for an illegal or immoral consideration.

The plaintiff no doubt was not party to the mortgages or to the suits in which the decrees for sale were made. But following the decision of *Muddun Thakoor* v. *Kantoo Lall*(3) and the several subsequent cases in the Privy Council to the same effect, *Suraj Bunsi Koer's case*,(4) &c., we are bound to hold that, though the plaintiff was not a party to those suits, yet, as they were suits in which the sale of the mortgaged ancestral lands was prayed for, and in which decrees for sale of the specified lands were made, the plaintiff is bound by such sales, as he has not shown that the mortgage debts of his father were contracted for illegal or immoral consideration. The principle decided by the Privy Council does not conflict with the general rule, viz., that all persons whose interests are sought to be prejudicially affected by a suit should be made parties, unless their interests are sufficiently represented

(1) L.R., 1, I.A., 321.
(2) L.R., 9, I.A., 128.
(3) L.R., 1, I.A., 321.
(4) L.R., 6, I. A., 88.

and protected by other parties to the suit (*see* the rule—Mitford on Pleadings, pp. 163-4).

It was because the son was not a party to the suits against his father in each of the cases before the Privy Council and, therefore, not bound thereby as if he was a party, that an opportunity was given him by the Privy Council to show that the debt due by his father was not in its nature one which bound the son.

It will, therefore, be still necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property, for a debt incurred by his father and not by him, that the son should be made party to the suit. The son can then raise all proper defences, and if a decree for sale shall be made, a purchaser will be protected without any prejudice being done to the son.

The decision in the present cases following *Muddun Thakoor's case* (1) and *Bunsi Koer's case* (2) and several other cases of sales under decrees made for sale of the property mortgaged is in no way inconsistent with the recent decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(3), in which it was held that a sale under a money decree against a father of his right, title and interest in ancestral property did not pass the interest of his son in the ancestral property sold. That case affirmed the decision in *Deendyal Lal* v. *Jugdeep Narain Singh* (4). The case of *Muddun Thakoor* was apparently believed by the Privy Council to be the case of a mortgage and a decree thereon directing sale of the lands mortgaged—see the judgment of the Court referring to the decree for sale. *Suraj Bunsi Koer's case* was certainly one of mortgage, and in it *Deendyal's case* was referred to. *Hardi Narain Sahu's case*(3) explains the distinction between sales under the two classes of cases, and the different result of the sales under the different decrees.

MUTTUSÁMI AYYAR, J :—I assent to the order, as it is in accordance with the recent ruling of the Privy Council.

(1) L.R., 1, I.A., 321.
(2) L.R., 6, I.A., 88.
(3) I.L.R., 10, Cal., 626.
(4) L.R., 4, I.A., 247.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. March 12.

SUNDARA (DEFENDANT No. 1) PETITIONER

and

SUBBANNA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 206—Jurisdiction of Court to amend its decree after appeal.

Under s. 206 of the Code of Civil Procedure a Court has power to amend its decree by bringing it into conformity with the judgment after the said decree has been confirmed on appeal.

THIS was a petition under s. 622 of the Code of Civil Procedure against an order of T. Rangácháryar, District Múnsif of Tiruvarúr in the Tanjore district.

The petitioner, Sundara Ayyan, defendant No. 1 in suit No. 39 of 1883, sought to have the decree in the suit amended under s. 206 of the Code of Civil Procedure. The decree declared that the person of defendant No. 1 and his property generally should be liable for the sum decreed; whereas the prayer in the plaint was that certain property hypothecated by him to secure payment of the sum claimed should be held liable; and in the judgment it was decided that the property hypothecated should be sold for the amount of the decree. Upon this petition the Múnsif delivered the following judgment:—

"The decree in question was appealed against and reversed by the District Court of North Tanjore. The matter was taken up before the High Court in second appeal. The High Court reversing the decree of the Lower Appellate Court, confirmed the decree of this Court. The ground stated in the petition for correcting the decree was a ground of appeal from the decree of this Court. The matter has gone up for consideration before the higher Courts, and for some reason or other the relief expressly prayed for by the petitioner was *not* granted. I consider that s. 206 applies only to final decrees and such decrees as have not ceased to be final by an appeal having been preferred against them. The decree between the parties as it now exists is not a mere

* Civil Revision Petition 318 of 1885.

decree of this Court, but one approved by the High Court on second appeal; and this Court has no power, in my opinion, to alter such decree; and more so, as the petitioner failed to have it set right, though one of his appeal grounds expressly referred to this relief. Petition is dismissed."

The ground upon which this petition was based was that the Múnsif had failed to exercise jurisdiction in refusing to amend his decree by bringing it into conformity with the judgment.

Parthasaradi Ayyangár for petitioner.

Respondent did not appear.

JUDGMENT:—We do not agree with the District Múnsif that his jurisdiction to amend the decree under s. 206 is affected by that decree being approved on second appeal by the High Court. Section 206, Civil Procedure Code, enacts that the decree must agree with the judgment, and, if there is an error, the Court shall amend the decree so as to bring it into conformity with the judgment. We set aside with the order of the District Múnsif and direct him to pass fresh orders.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1886. March 17.

AMMA (DEFENDANT No. 1), APPELLANT,

and

KUNHUNNI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 562, 565, 566—Illegal order of remand.

A District Múnsif having taken all the evidence offered on the issues in a suit, disposed of the suit upon his finding on one of the issues without deciding the rest.

On appeal the District Judge reversed the decree and remanded the suit for the trial of the issues left untried:

Held that under s. 562 of the Code of Civil Procedure, the order of remand was illegal.

APPEAL against an order of H. J. Stokes, Acting District Judge of South Malabar, in appeal No. 1 of 1885, remanding suit No. 68 of 1884 on the file of the District Múnsif of Calicut for trial of certain issues left untried by the said Court.

* Appeal against Order 116 of 1885.

AMMA v. KUNHUNNI.

The facts appear from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.)

Sankara Menon for appellant.

Sankara Náyar for respondent.

JUDGMENT:—The Court of first instance tried all the issues, that is, the Múnsif took evidence on them all. But the Múnsif thought that his finding on the third issue would render unnecessary any finding on the other issues.

On appeal the District Judge reversed the finding on the third issue and ordered the case to be remanded for trial by the Court of first instance of the issues untried.

This order was supposed to be justified by s. 562 of the Code of Civil Procedure, but it was not legally justifiable under that section. That section provides that if a Lower Court has disposed of the suit on a preliminary point so as to exclude evidence of fact which appears to the Appellate Court essential to the determination of the case, and if the decision on that preliminary point is reversed on appeal, then the Appellate Court may *remand*. But in this case no evidence appears to have been excluded, as evidence was given on the issue which the Judge has directed to be tried. The Judge should have acted either on s. 565 or 566.

We set aside the order of the District Judge and direct him to restore the case to his file and proceed according to law.

Costs of this appeal to be provided for in the decree.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1886. April 9.

SCOTT against RICKETTS.*

Criminal Procedure Code, s. 526—District Magistrate and Civil and Sessions Judge (quâ Magistrate) of Bangalore subordinate to High Court.

The District Magistrate and the Civil and Sessions Judge of the civil and military station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of s. 506 of the Code of Criminal Procedure.

IN petition No. 19 of 1886 James Scott prayed that the High Court would withdraw case No. 97 of 1886 on the file of the District

* Criminal Miscellaneous Petitions 19 and 23 of 1886.

SCOTT v. RICKETTS.

Magistrate of Bangalore, as well as case No. 1 of 1886 on the file of the Civil and Sessions Judge of Bangalore, and try them, or transfer them for trial to a Presidency Magistrate of Madras, or transfer the former case to the file of the Civil and Sessions Judge of Bangalore.

In petition No. 23 of 1886 Lancelot Ricketts prayed that case No. 1 of 1886 on the file of the Civil and Sessions Judge of Bangalore might be transferred to the file of the District Magistrate of the said station to be tried with case No. 97 of 1886 on the file of that Magistrate.

Mr. *Branson* and Mr. *Grant* for Scott.

Mr. *Shaw* for Ricketts.

JUDGMENT:—We think we have jurisdiction to transfer these cases, as the Courts of both Magistrates are as Courts of Magistrates of the First Class subordinate to this Court within the meaning of s. 526 of the Code of Criminal Procedure.

We think that, under the circumstances stated in the affidavits on both sides, it is necessary for the ends of justice to transfer these two cases from the Courts of Colonel Hill and Major Maltby, respectively, to be heard and inquired into by another competent Magistrate. The cases are case and cross-case, and it will conduce to convenience that they should be heard by the same Magistrate. There is no other Magistrate at Bangalore to whom the cases can be transferred. Mr. Scott states he intends to summon Major Maltby as a witness, and that he and Mr. Ricketts are very intimate friends. We do not say that Major Maltby would be influenced in his decision by that fact, but we think we are justified in removing the case under the circumstances from his Court.

As to Colonel Hill's jurisdiction, counsel for Mr. Ricketts contends that no offence was committed outside the civil and military station, and that Colonel Hill has no jurisdiction to try either case. We should then either allow the two cases to proceed in separate Courts, or remove the cases to be inquired into by a Magistrate in Madras.

We think the latter is the course we ought to pursue, although some inconvenience may follow.

We order accordingly both cases be transferred to the file of Colonel Smith, the Chief Presidency Magistrate of Madras.

Solicitors for Ricketts *Barclay & Morgan*.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

1886. March 9.

REFERENCE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, sch. I, art. 50, cl. (b)—Court Fees Act, sch. II, art. 10 (a)—Vakálatnáma —Power-of-attorney.

A document was given to P by thirty-six persons jointly interested in a certain sum of money authorizing him to appear before a certain officer and receive payment thereof:

Held, that the document was a power-of-attorney, and that consequently the proper stamp duty was one rupee, leviable under the Indian Stamp Act, 1879, sch. I, art. 50 (*b*).

THIS was a reference by the Board of Revenue under s. 46 of the Indian Stamp Act, 1879.

The case was stated as follows:—

"Certain sums of money had been ordered to be refunded to thirty-six raiyats in respect of thirty-seven pattás, thirty-six being sole pattás and the thirty-seventh a joint pattá, in the names of all the raiyats. On the 31st August 1885 these raiyats executed a joint document bearing a Court Fee adhesive stamp of the value of 8 annas, authorizing one Pitchu Ayyan to receive the money on their behalf and sign the refund bill. The question then for consideration is, whether the document is properly stamped as a vakálatnáma with a Court Fee stamp of the value of 8 annas under art. 10 (*a*), sch. II of Act VII of 1870, or whether it should be stamped with a stamp of the value of one rupee as a power-of-attorney under art. 50, cl. (*b*) of the schedule to the General Stamp Act I of 1879."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker JJ.) delivered the following

JUDGMENT:—We are of opinion that the instrument should bear a stamp of the value of one rupee under art. 50, cl. (*b*), sch. I of the Stamp Act.

* Referred Case 1 of 1886.

REFERENCE UNDER STAMP ACT, s. 46.

This instrument under which Pitchu Ayyan is authorized to receive payment of the money to which the raiyats are entitled is a power on behalf of thirty-six persons jointly interested in a particular fund authorizing him to do a single act, and there is nothing before us to show that the persons entitled to the refund would be required to do more than appear in person or by a person duly authorized by them before the officers directed to refund the money and to receive it.

This decision in no way conflicts the decision of this Court in referred case No. 4 of 1885. *Reference under Stamp Act*, s. 46.(1)

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. February 26. March 19.

SIMSON AND OTHERS (PLAINTIFFS), APPELLANTS,

and

VÍRAYYA (DEFENDANT), RESPONDENT.*

Contract—Breach—Rescision—Reciprocal promises—Condition precedent —Damages—Measure of.

On 6th March 1883 V promised to sell 5,000 bags of gingelly seed at Rs. 7 As. 11 a bag to S. Two-thirds of the price was paid in advance. V agreed to deliver the 5,000 bags at the end of April and to give S notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and S promised to pay V the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract.

3,000 bags were delivered by V, but S did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May V declined to deliver these bags, on the ground that S had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and, subsequently, repaid to S the balance due to him of the money advanced.

In a suit by S against V for damages for non-delivery of 2,000 bags:

Held, that V was not excused from performance of his promise by the failure of S to pay the balance due for the bags delivered, and that S was entitled to recover the difference between the market and the contract price on the day the contract was broken by V.

APPEAL from the decree of K. Krishnasámi Ráu, Subordinate Judge at Cocanáda, in suit 17 of 1883.

(1) *Ante* p. 146. * Appeal 12 of 1885.

SIMSON v. VÍRAYYA.

The plaintiffs, Messrs. Simson Brothers, sued the defendant, Golla Vírayya, for Rs. 6,821-13-0, damages for breach of a contract to supply 5,000 bags of gingelly seed.

The Subordinate Judge gave plaintiffs a decree for Rs. 500.

Plaintiffs appealed against this decree so far as it dismissed their claim for Rs. 6,321-13-0, and the defendant objected to the decree for Rs. 500.

The facts and arguments appear from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

The *Acting Advocate-General* (Mr. *Shephard*) for appellants.

Mr. *Shaw* for the respondent.

JUDGMENT.—The appellants and the respondent are merchants residing in Cocanáda, and on the 6th March 1883 the latter contracted to sell to the former 5,000 bags of white gingelly seed at Rs. 7 As. 11 per bag. The contract price amounted to Rs. 38,457-8-0, of which two-thirds, the sum of Rs. 25,625, was paid in advance. The respondent agreed to deliver the 5,000 bags on board the appellants' ship at the end of April 1883, and to give them notice as instalments of 1,000 bags each were made ready for delivery within the stipulated time; and the appellants engaged to pay him one-third of the contract price on each instalment when it was ready for delivery. There was neither delivery nor payment in the terms of the contract. But it is admitted that 2,995 bags were delivered at Masulipatam on board the *Macedonia* on the 15th May 1883, and that Rs. 125 were paid on account of the balance of price. No claim is, however, now made either by the appellants in respect of the bags so delivered with reference to the delay in their delivery, or by the respondent on account of the appellants' failure to pay the remainder of the proportionate price; and the present litigation is confined to the bags of gingelly seed which the appellants asserted were short delivered. Their case was that 2,995 bags were alone delivered on the 15th May; that the remainder was never delivered at all, though the time for delivery was extended to the 20th June in regard to 2,000 bags; that Rs. 11 a bag was the market price on that date, and that the respondent was further liable to pay a sum of Rs. 68-2-0, which represented the charges incurred on re-shipment of 342 bags. The respondent's contention was that 3,000 bags were delivered on the 15th May; that on the appellants' refusal to pay the balance of the

SIMSON v. VÍRAYYA.

proportionate price on 2,000 bags, which were reported to be ready for delivery, he rescinded the rest of the contract, and that he was not responsible for the cost of re-shipment.

As to the five bags, this appeal is not pressed at the hearing, and as to Rs. 68-2-0, we consider that the decision of the Subordinate Judge is right. The learned Advocate-General drew our attention to the evidence of the respondent's witness Rámamurti, who deposed that some of the bags got wet when they were taken to the steamer and were consequently returned by the captain of the vessel. We cannot accept this evidence without more as sufficient to show that the seeds were materially damaged, or that there was any negligence on the part of the respondent in respect of those bags. The substantial claim we have to consider is that which relates to 2,000 bags, and the questions raised for our decision in connection with it are:— (1) whether the time for their delivery was extended to the 20th June, and, if so, whether the market price on that day was Rs. 11 a bag; (2) whether the appellants broke their part of the contract by refusing payment of the balance of price due on 2,000 bags; (3) whether the respondent became entitled by such breach to rescind the rest of the contract; and (4) whether any, and what, compensation was due to the appellants, if not the amount claimed by them. The correspondence which took place between the parties clears the way to a correct decision to a considerable extent, and we shall proceed to refer to such portions of it as are material. On the 25th March the respondent's brother sent him a telegram to the effect that gingelly seeds were not procurable at Jaggaiyapet, and it was desirable to settle, though at some loss (Exhibit A). This shows that so early as in March the respondent experienced difficulty in procuring the seeds, and that they were scarce in the market. On the 18th April, however, the respondent wrote to the appellants the letter marked D, stating that 2,000 bags were ready for delivery and that the rest were expected from Jaggaiyapet, and requesting that Rs. 125, the balance of price due for 2,000 bags, might be remitted to him. We may observe here that the balance really due was Rs. 5,125, and that Rs. 125 was mentioned instead by mistake. On the 20th April the appellants inquired by telegram whether the respondent was sure that 5,000 bags could be delivered on the 20th May, and he replied on the same day by his letter F that he was waiting for information from Jaggaiyapet. He also

SIMSON v. VIRAYYA.

sent the telegram G that he would reply as soon as he got the information. On the 21st April the appellants acknowledged the receipt of letter D and forwarded a cheque for Rs. 125, which they also described as the balance due on 2,000 bags. They further inquired whether the remaining 3,000 bags would be delivered or not, as they desired to buy them elsewhere if the respondent could not deliver them, and added that of course 3,000 bags at least would be ready, as he had bought that quantity (Exhibit IV). Thus, it appears that on the 21st April, 2,000 bags were ready for delivery, that 1,000 bags more were expected to be ready soon, and that the parties were in doubt whether the remaining 2,000 bags could be procured. On the 24th April 1883, the respondent pointed out that Rs. 125 was inserted in his letter D by mistake for Rs. 5,125, and that the appellants should remit the balance of Rs. 5,000 (Exhibit H). To this, however, the appellants did not send a reply, but Mr. Simson admitted in his evidence that he declined to pay. The reason which he gave for this refusal was by no means satisfactory. He said he did not know that a clause was inserted in the contract in regard to the payment of proportionate price as instalments of 1,000 bags were made ready for delivery, and that the respondent never told him of it; but that when he discovered that it was part of the contract, he made no objection to it. He added that he told the respondent that he had no right to put in such a clause.

On the 26th April the respondent sent to the appellants letter E, in which he explained that 3,000 bags could be delivered on the 20th May, and that the remaining 2,000 bags might be delivered on the 20th June, and he earnestly requested that the time fixed for their delivery might be extended to the 20th June. The appellants' contention as to this part of the case was that they extended the time accordingly and sent a verbal message to that effect by one Venkata Reddi. It is strange that they did not call Venkata Reddi as a witness, though assuming that the message was sent, it may well be that it was never delivered to the respondent.

It is not denied for the appellants that, as observed by the Subordinate Judge, Exhibit E contains an endorsement that they received the letter on the 28th April, and sent a reply to it on the 1st May. Exhibit I is a letter from the appellants to the respondent of 1st May, and after acknowledging two letters from

SIMSON v. VIRAYYA.

the respondent, dated the 24th and 25th April, and referring to the telegram already sent that the steamer would arrive at Masulipatam on the 15th May, it proceeded to state as follows :— "You must borrow gingelly for the steamer, as we cannot fill her "without your seed, and the claim for dead freight, which we shall "have to pay if we leave space in her for 2,000 bags, will amount "to Rs. 6,000. Please, therefore, do your utmost to get the seed "somehow or other and avoid such disastrous loss. We note you "have already purchased 3,000 bags, but for the balance 2,000 bags "you must also arrange and ship them by the said steamer in time, "either by borrowing or by purchasing from other people." It is not possible to reconcile this letter with the appellants' contention that they extended the time for delivery to the 20th June; but it shows on the contrary that they were most anxious that the 2,000 bags should be delivered on the 15th May, and that they insisted on the respondent borrowing or purchasing them in time for shipping them on that date if he desired to avoid the penalty of paying Rs. 6,000 as dead freight. The letter of the 25th April, which is acknowledged in Exhibit I, was not produced by the appellants. They stated that that letter was mislaid, but beyond their statement, there was no other evidence. Seeing how inconsistent their account of the extension of time by a verbal message is with their own letter, we are not prepared to hold that the Subordinate Judge was in error in finding that, instead of extending the time, they refused all extension beyond the 15th May. In May the price began to rise, and one Mahomed Kasim wrote to the respondent on the 3rd idem that gingelly seed sold at Jaggaiyapet on 1st May at Rs. 803 per putti (Exhibit III). On the 1st May the appellants sent to the respondent a telegram requiring him to borrow 2,000 bags and to ship all the 5,000 bags on the 15th idem. The respondent stated in reply on the 3rd May, that the appellants did not fulfil their part of the contract in regard to payment of proportionate price on the bags which were ready for delivery; that he incurred a great loss in purchasing 3,000 bags; that in consequence of the breach of contract on their part to pay the balance of proportionate price he lost many opportunities of purchasing gingelly seed at once, and that therefore he was not to blame for it. On the 5th May he sent a reply (Exhibit VIII) to the appellants' letter I. In this he noted the contents of that letter and remarked, "Had you sent

SIMSON v. VIRAYYA.

"the balance as soon as I informed you that gingelly seed had "been made ready in obedience to the terms of the contract, I would "have completely fulfilled my contract in due time, as I did for the "money you had given me in advance. But you did not act up to "the terms of the contract. So it is evident that it is not at all a "fault of mine, and so I am not responsible to make arrangements "for the delivery of the remaining bags." On the 7th May the appellants wrote to the respondent to the effect that, though they were most anxious to help the respondent, they could not do more than what they had already done. They then proceeded to state in justification of non-payment of proportionate price that the amount already advanced was Rs. 10,375 in excess of the full value of 2,000 bags, and that the dead freight and the penalty they might have to pay for short shipment was Rs. 10,000. In this letter only 2,000 bags are spoken of as ready for delivery, though it had previously been intimated to them that 3,000 bags were ready; but it must be borne in mind that this letter was written in answer to the respondent's complaint that the balance of proportionate price on 2,000 bags was not paid as required by him. In their letter the appellants further said, "You "say you will deliver the remaining 2,000 bags by the 20th June. "Is this quite certain, and can we rely on your doing so without "doubt? It is most important to know this positively so that we "may arrange matters for the best," (Exhibit V). Mr. Simson states in his evidence that the respondent declined on the 7th May to undertake to deliver 2,000 bags on the 20th June. Again, the appellants addressed to the respondent letter II on the 12th May and inquired, after stating that he had no cause for complaint in regard to payment of balances, whether he would ship 2,000 bags of castor seed instead of gingelly seed to save dead freight, and whether he would make ready for shipment the remaining 2,000 bags of gingelly seed by the 20th June if the balance of price were paid. The respondent did not accede to the appellants' suggestion, and intimated to them on the 19th May that he would neither lend them 2,000 castor bags nor supply the remaining 2,000 gingelly bags by the 20th June (Exhibit IX). In advertence to this letter, the appellants sent letter VI on the 24th May, stating that the respondent had got into the hands of some unscrupulous person who was trying to stir up a difference of opinion between them, and that if he saw their agent, Mr. Hay,

SIMSON v. VIRAYYA.

the latter would point out that he took an erroneous view of his liability as a contractor. Though a hope was expressed that the difference might thus be settled, no further correspondence took place until the 25th June. When the respondent made up an account of what was due to him in respect of 3,000 bags delivered out of 5,000 bags, and remitted to the appellants the balance due to them out of the money advanced and of the subsequent payment of Rs. 125 (Exhibit K) on the 27th June, the appellants wrote to the respondent letter VII in which they acknowledged receipt of letter K and said "we are sending a steamer to Masulipatam, "due there about the 15th July next, for the balance of 5,000 "bags gingelly seed you sold us. We trust, having given you so "long a time to deliver and assist you in completing your contract, "that you will have no difficulty in effecting a shipment under "Mr. Hay's instructions. Please telegraph us as soon as you "receive the present, whether you will be ready to ship by that "time."

As already observed, the appellants' contention, that they extended the time for delivery from 30th April to 20th June in regard to 2,000 bags, cannot be supported. The oral evidence is not only incomplete, but it is also inconsistent with their letters of the 1st, the 7th, and the 12th May, and with Simson's evidence as to what the respondent said on the 7th May. In the first they told the respondent that he must deliver all the 5,000 bags on the 15th May, and in the other two they inquired whether he would be able to deliver the 2,000 bags by the 20th June.

The respondent repudiated his liability to deliver them at all on the 3rd, the 7th, and the 19th May; we must accept the Subordinate Judge's finding on this point. It is argued for the appellants that the time for delivery must then be taken to have been extended at least to the 15th May. The appellants were no doubt inclined to extend the time until the day on which the steamer chartered by them was expected to arrive at Masulipatam. It was probably for that purpose they inquired on the 20th April whether 5,000 bags could be delivered on the 20th May, and the respondent's reply, dated the 26th April, was that he could get them ready if they extended the time to the 20th June. On the 1st May they refused such extension, and told him to get the 2,000 bags ready by the 15th May, on which day they had information that the steamer would touch at Masulipatam. On the 3rd May the respondent

SIMSON v. VÍRAYYA.

charged them with breach of contract in regard to the payment of balances, and on the 5th May he distinctly repudiated his liability for future performance, and he since continued to do so whenever he was asked to deliver the 2,000 bags. The evidence discloses no trace of mutual understanding that 2,000 bags were to have been delivered on the 15th May, and on this ground we are unable to hold that there was an extension of time as a matter of mutual agreement up to 15th May either.

Though the time fixed by the contract was the 30th April, it was considered by neither party as of its essence; and when the contract time expired, the respondent's application for an extension was pending. Though the extension which the respondent sought was refused on the 1st May, a fresh extension was offered instead, till the 15th May. The appellants demurred to it on the 3rd and 5th May, and it was finally known on the 7th May that it was the respondent's fixed resolution to stand upon the right asserted by him to rescind the contract. It would therefore be fair to assess the damages, if any, with reference to the market price on that day, for, the appellants could not reasonably be expected to go into the market to buy the bags of gingelly seed which the respondent refused to deliver until the negotiations for an extension were finally at an end. As to the market price, the Subordinate Judge takes it to have been Rs. 7-15-0 on the day of the breach. The evidence is conflicting and vague as to the quality of the gingelly seed to which the witnesses referred. We should ordinarily hesitate to come to a different finding, but in the present case the Subordinate Judge has overlooked the respondent's admission contained in his written statement, viz., that the market price was Rs. 8-2-0 a bag on 3rd May. It is also in evidence that the price was steadily rising in the month of May, and we must therefore find that the difference between the contract and the market price on the day the contract was broken was 7 instead of 4 annas per bag. It remains for us to decide the question whether the respondent was entitled to rescind the contract on the ground that the appellants failed to pay the proportionate price on the 3,000 bags which were ready for delivery. There is no doubt that the proportionate price was not paid, and that such non-payment was in contravention of the terms of the contract. It is argued by the learned counsel for the respondent that the promise to prepare for delivery instalments of 1,000 bags

SIMSON v. VÍRAYYA.

and the promise to pay the balance of price due for each of those instalments, are reciprocal promises, and that the refusal by one party to perform his promise gives a right to the other to put an end to the rest of the contract. In dealing with cases like the present, it is necessary to keep in view the rule stated by Coleridge, C.J., in *Freeth* v. *Burr*,(1) and the rules of law applicable to conditions precedent. We cannot adopt the argument for the respondent that the payment for each instalment of bags which were made ready for delivery, was a condition precedent to the preparation of the remainder for delivery. If it were so, there would be an end of the case. The contract was for the purchase of 5,000 bags of gingelly seed, and upon its true construction there was but one contract for that quantity. It was in this view that two-thirds of the price fixed for 5,000 bags was paid in advance, and the receipt E contains a distinct recital that the advance was on the entire contract. The words in this document are "Rs. 25,625, being the advance due for the 5,000 bags of "white gingelly which was contracted with you this day to be deli-"vered on board the ship at Masulipatam at the rate of Rs. 7-11-0 "per bag, was paid by you and received by me." They contemplate one entire contract and one delivery, and a part-payment in advance in respect of the whole. It appears to us to be plain that the primary or general intention was that the contract should be single and indivisible. A default in payment of the balance of proportionate price in respect of one or more instalments cannot, and does not, go to the whole root of the contract. Nor is this a contract which, like the one in *Withers* v. *Reynolds*,(2) is capable of being divided into as many independent contracts as there are instalments to be prepared for delivery; such a division would be at variance with the primary intention of the contracting parties. According to general principles we think that whenever the primary or general intention is unmistakably clear from the terms of a contract, the subsidiary provisions which it contains must be construed with reference and in subordination to that intention. There is therefore no foundation for the argument that the payment of the balance of price for each instalment was a condition precedent with respect to any part of the obligation to deliver 5,000 bags. Nor does this case fall under the rule that

(1) L.R., 9 C.P., 208. (2) 2 B. & Ad., 882.

SIMSON v. VIRAYYA.

where one party refuses to perform his part of the contract, such refusal may be treated by the other party as setting him free or releasing him from the future performance of his part of the contract. It is argued that in connection with this rule the fact that there was a part-payment made in advance is immaterial, since a party may refuse to perform his part of the agreement either in its entirety or in respect of so much of it as may still remain to be performed. However this may be, we do not consider it necessary to decide this question for the purposes of this appeal. Adverting to the rule, Coleridge, C.J., said, in *Freeth* v. *Burr*,(1) "It is in "substance, as we understand it, that you must look at all the "circumstances of the case in order to see whether the one party to "the contract is relieved from its future performance by the other; "you must examine what that conduct is so as to see whether it "amounts to a renunciation, to an absolute refusal to perform the "contract such as would amount to a rescision if he had the power "to rescind, and whether the other party may accept it as a reason "for not performing his part." This rule was adopted by Selborne, L.C., in the *Mersey Steel and Iron Company* v. *Naylor Benson and Co.*(2)

Having regard then to the circumstances of the present case, it is not possible to hold that the appellants' conduct amounted to a *renunciation* of the contract or to an *absolute* refusal of future performance. Several of their letters, those of the 1st, 7th, and 25th May, and of the 27th June, show that they were most anxious that the entire contract should be performed. It was only natural that they should have so desired, seeing that the market was steadily rising. They were at first averse to granting an extension of time, but in this they did not go beyond their rights under the contract. It is no doubt true that they broke the contract in withholding payment of proportionate price on 3,000 bags, but the respondent intimated to them that he could not arrange for the purchase of 2,000 bags unless the time was extended to the 20th June. This extension they were not bound to grant, and the failure to purchase them gave them reason to apprehend that they might sustain loss by having to pay dead freight and penalty. Exhibit V shows that they hesitated to pay only because the respondent had not bought 2,000 bags. As matters then stood, the

(1) L.R., 9 C.P., 208. (2) L.R., 9 App., Ca., 434.

SIMSON v. VIRAYYA.

respondent had over Rs. 2,000 with him in excess of the value of the 3,000 bags purchased by him. He stated in his letter of the 3rd May that he would have purchased the 2,000 bags if he had been paid. Why did he then ask for an extension of time only seven days before? The correspondence conveys the impression that, on the one hand, the appellants intended to withhold payment of the balance of price until the respondent was in a position to assure them that he could purchase the 2,000 bags in time for their shipment on board the *Macedonia*, and that no heavy loss would be entailed on them; while the appellants, who were unable to arrange for their purchase owing to the then state of the market, took advantage of the postponement of payment for which his own conduct gave occasion, to set himself free from the remainder of the obligation, especially when the letter of the 1st May suggested disastrous loss as the probable consequence of his failure to arrange for the purchase of 2,000 bags. Whatever counter-claim the respondent might then have had for the delay in payment, and for breach of that portion of the contract which relates to it, the appellants' conduct does not amount to a renunciation of the contract or to an absolute refusal of future performance. The result then is that the decree will be varied so as to award Rs. 875 instead of Rs. 500 as damages, that the appeal will be allowed to this extent only, and that the memorandum of objections and the rest of the appellants' claim will be dismissed.

We give the appellants the costs of this appeal.

Attorney for plaintiffs—*Wilson.*

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

QUEEN-EMPRESS

against

ADEMMA.*

1886. March 29.

Penal Code, s. 312—Miscarriage—With child—Stage of pregnancy immaterial.

A woman is with child within the meaning of s. 312 of the Indian Penal Code as soon as she is pregnant.

* Criminal Revision Case 43 of 1886.

QUEEN-EMPRESS v. ADEMMA.

Held, therefore, where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month and that there was nothing which could be called even a rudimentary fœtus or child, that the acquittal was bad in law.

IN criminal case 80 of 1885, on the file of the Sessions Court of North Arcot, the prisoner Bandi Ademma was acquitted on a charge of causing miscarriage under s. 312 of the Indian Penal Code.

The Sessions Judge (H. T. Knox) held that, as the prisoner had only been pregnant for one month, she could not be said to have been with child within the meaning of s. 312.

The record having been called for and notice given to the accused, who did not appear, the Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—The Sessions Judge finds that the accused, Ademma, being pregnant, used artificial means to cause herself to miscarry, and that she did in consequence get rid of the contents of her uterus; but he acquitted her on the grounds that she had been pregnant, according to her own statement, for only a month, and cannot be said to have been with child, for, according to the evidence, what came away was only a mass of blood.

"There was nothing which could be called even a rudimentary fœtus or child."

The term miscarriage is not defined in the Penal Code. In its popular sense it is synonymous with abortion, and consists in the expulsion of the embryo or fœtus, *i.e.*, the immature product of conception. The stage to which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial.

Section 312 requires proof that the woman is "with child," but it is enough if the fact of pregnancy and the intentional expulsion of the immature contents of the uterus are established. The words "with child" mean pregnant, and it is not necessary to show that "quickening," *i.e.*, perception by the mother of the movements of the fœtus has taken place or that the embryo has assumed a fœtal form.

Having regard to the requirements of the law in this respect, we must and do set aside the acquittal in this case and direct a re-trial.

QUEEN-EMPRESS v. ADEMMA.

If the accused be convicted, the Judge will no doubt take into consideration, among other things, the former trial and the time which has elapsed since the offence was committed.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

AMBU (PLAINTIFF), APPELLANT,

and

RÁMAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1886. April 1, 14.

Malabar law—Otti tenure—Right to make further advance—Second mortgage to stranger without notice to otti holder invalid.

R having conveyed certain land to P on otti tenure (mortgage) in 1852 executed a deed of further charge (ottikampuram) in 1873 to P's widow, and, in 1879, conveyed the jenm (equity of redemption) to her.

Between 1873 and 1879, R mortgaged the same land to A by jenm panayam deed.

In a suit by A to enforce his mortgage:

Held, that inasmuch as R had not given notice to the otti holder, nor given her the option of making the further advance made by A, A had no claim against the land.

APPEAL from the decree of H. J. Stokes, Acting District Judge of South Malabar, confirming the decree of O. Chandu Menon, District Múnsif of Calicut.

Plaintiff, Ambu Náyar, alleged that in 1881 he obtained a decree upon mortgage (panayam) against defendant No. 1, and attached the land mortgaged in execution of the decree; that defendant No. 2 intervened, claiming to be the owner of the land by purchase from defendant No. 1 in 1879.

The claim was allowed.

Plaintiff now sued to enforce his mortgage against the land.

Defendant No. 2, Annamma, pleaded that the land had been demised on otti to her husband in 1852, that she had since that date made a further advance, and in 1879 purchased the equity of redemption.

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* Second Appeal No. 803 of 1885.

AMBU v. RÁMAN.

The District Múnsif upon the evidence of one witness found that according to custom no jenm panayam can be raised by a jenmi from a third party on land held on otti tenure, and dismissed the suit.

On appeal the District Judge confirmed the decree on the ground that as long as an otti is unredeemed, the otti holder's right to make further advances subsists.

Both Courts found that defendant No. 2 had no notice of and had not consented to the advance made to defendant No. 1 by plaintiff.

Plaintiff appealed on the grounds, *inter alia*, that the right of an otti holder to make further advances was no bar to the sale of the land by a subsequent mortgagee, and that the effect of the right of pre-emption which vested in defendant No. 2 was not to nullify plaintiff's mortgage but only to give her the option to purchase that right also.

Sankara Náyar for appellant.

Sankara Menon for respondent No. 2.

The Court (Collins, CJ., and Parker, J.) delivered the following

JUDGMENT:—Defendant No. 1 demised the paramba on otti to the late husband of defendant No. 2 in 1852, and in 1873 having received a further advance, executed an ottikampuram deed to defendant No. 2. He further conveyed the jenm right to defendant No. 2 in 1879.

Between 1873 and 1879, however, the defendant No. 1 executed a jenm panayam deed in favor of plaintiff, who now sues to establish his right to sell the paramba to cover the panayam amount.

Both the Lower Courts have dismissed the plaintiff's claim.

For the plaintiff it is contended that the paramba is liable for his lien unless defendant No. 2 likes to pay him the amount, in which case the amount so paid will be a further charge upon the paramba in addition to the claim already held by her on otti and ottikampuram.

For defendant No. 2 it is urged that the property cannot be made liable for plaintiff's panayam amount, that deed having been executed without notice to her and without giving her the option of making a further advance.

The District Múnsif found that defendant No. 2 had no notice of plaintiff's jenm panayam and did not consent to it, and the District Judge adopts this finding. There was, therefore, no valid opportunity for making a further advance, and the suit was rightly dismissed. *Cheria Krishnan* v. *Vishnu.* (1) *Vasudevan* v. *Keshavan* (2) is not in conflict with this view, since in that case the veppu holder and his karnavan had the chance of purchasing at the price offered by the highest bidder at an auction.

AMBU v. RÁMAN.

The issue referred in *K. T. P. Kunhali* v. *V. V. Kinathe* (3) is not necessary here since the Courts have found that defendant No. 2 had no notice of the panayam.

The second appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS

against

KETHIGADU.*

1886. April 16, 28.

Madras Forest Act, ss. 2, 43, Rules 10, 13, 23—Logs permanently fastened to a building cease to be timber.

The accused were convicted of removing 'timber' vested in the Forest Department, and the convicting Magistrate ordered it to be confiscated:

Held, that having been already permanently fastened to a building it had ceased to be timber within the meaning of s. 2 of the Forest Act, and the order for confiscation was illegal.

THIS was a case referred for the orders of the High Court by C. A. Bird, District Magistrate of Cuddapah.

In case No. 190 of 1885, the Second-class Magistrate of Budvel convicted Kethigadu and two others of an offence punishable under s. 26 of the Madras Forest Act, 1882, (viz., breach of Rule 12 of the Forest Rules passed by the Governor in Council) in cutting "reserved" trees without license and removing the timber.

The Magistrate found that the accused had cut sandal-wood and other logs and built huts therewith.

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(1) I.L.R., 5 Mad., 198. (2) I.L.R., 7 Mad., 309. (3) I.L.R., 3 Mad., 74.

* Criminal Revision Case 680 of 1885.

QUEEN-EMPRESS v. KETHIGADU.

Under s. 43 of Act, the Magistrate confiscated the "materials" and directed the Forest Ranger to take possession of them.

The Deputy Magistrate, at whose instance the case was referred, was of opinion that as the timber had been converted into huts and was no longer movable property, the order under s. 43 was bad in law.

Counsel were not instructed.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following

JUDGMENT:—We are of opinion that logs of wood, when they have become part of a house and permanently fastened to a building attached to the earth, have ceased to be timber within the meaning of s. 2 of the Forest Act, and are therefore not liable to attachment under s. 43 of that Act.

The order for confiscation must be set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1886, April 16.

KOTTALANÁDA, PETITIONER,

against

MUTHAYA AND OTHERS, RESPONDENTS.*

Cattle Trespass Act, s. 20—Criminal Procedure Code, s. 4 (a), s. 250—Illegal seizure of cattle under the Cattle Trespass Act, not an offence within the meaning of the Code of Criminal Procedure.

In a case instituted upon complaint made under s. 20 of the Cattle Trespass Act, the Magistrate acquitted the accused, and being of opinion that the complaint was vexatious, directed the complainant to pay compensation to the accused as under s. 250 of the Code of Criminal Procedure:

Held, that the act complained of was not an offence within the meaning of the Code of Criminal Procedure, and that the order awarding compensation was illegal.

APPLICATION under ss. 435, 439 of the Code of Criminal Procedure to quash an order of the Second-class Magistrate of Tenkasi awarding compensation under s. 250 of the Code of Criminal Procedure to the defendant in case No. 70 of 1885. In that case Kottalanáda Pillai preferred a complaint against

* Criminal Revision Case 21 of 1886.

KOTTALANÁDA v. MUTHAYYA.

Muthaya Pillai and others, under s. 20 of the Cattle Trespass Act, of illegal seizure of cattle.

The Magistrate having acquitted the defendants, directed the complainant to pay them compensation as for a frivolous complaint.

Mr. *Wedderburn* for the petitioner referred to *Pitchi* v. *Ankappa*.(1)

Subramanya Ayyar for respondents.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following

JUDGMENT:—We are of opinion that the illegal seizure of cattle is not an offence within the meaning of the Criminal Procedure Code, and therefore set aside the order awarding compensation, and direct the refund of the money.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. April 2, 8.

RÁMÁ (PLAINTIFF), PETITIONER,

and

KUNJI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Legal Practitioners' Act, ss. 27, 28, 30—Suit by Pleader to recover fee from client—Contract Act, s. 70—Civil Procedure Code, s. 622.

The Legal Practitioners' Act does not debar a pleader from recovering a fee from his client when no contract in writing is made.

A Small Cause Court having dismissed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a suit, on the ground, that such a suit would not lie, because it was based on an oral contract and such contract could not be enforced by reason of the provisions of the Legal Practitioners' Act, the High Court under s. 622 of the Code of Civil Procedure reversed the decree of the Small Cause Court.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside the decree of V. P. DeRozario, Subordinate Judge of South Malabar at Palgat, in Small Cause Suit No. 596 of 1885.

(1) I.L.R. 9., Mad., 102.

* Civil Revision Petition 30 of 1886.

RÁMÁ v. KUNJI.

The facts are set out in the judgment of the High Court (Collins, CJ., and Parker, J.)

Gopálan Náyar for petitioner.

Respondents did not appear.

JUDGMENT.—The plaintiff sues to recover from his clients Rs. 82-8-5, balance of the "regular fees" as remuneration for his services as defendants' vakíl in a certain suit. There was no agreement in writing made between the parties. It is however stated in the judgment that defendants' agent promised plaintiff the "regular fee," *i.e.*, the fee prescribed by the High Court as payable to one party by the adverse party.

The Subordinate Judge dismissed the suit, holding the agreement invalid under s. 28 of the Legal Practitioners' Act, not being made in writing or filed in Court.

It is urged upon us that the Subordinate Judge declined a jurisdiction vested in him by law since the Legal Practitioners' Act does not prevent the practitioner recovering a fee from his client when no agreement in writing is made. The plaintiff, it is said, bases his suit upon s. 70 of the Contract Act, as it was never intended that the service should be rendered gratuitously.

The plaint does not show that the cause of action is based on an oral agreement to pay the "regular fees." Nothing is said about any agreement at all; the suit as framed is for work and labour done, and may be brought under s. 70 of the Contract Act. It may be however that, at the hearing, the plaintiff set up an oral agreement to pay the regular fees.

The fees fixed by the High Court under s. 27 of the Legal Practitioners' Act relate only to fees payable by one party in respect of the fees of his adversary's advocate and not to the fees payable between a pleader and his own client; ss. 28 and 30 would appear to refer to agreements to pay more than such fees.

The Subordinate Judge has jurisdiction to hear the suit and must determine on the evidence whether the amount claimed is fair and reasonable.

We set aside the decree and direct the Subordinate Judge to try the cause on its merits. The respondent must pay the costs of this proceeding.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

QUEEN-EMPRESS

against

VÍRANNA.*

1886. April 20.

Criminal Procedure Code, s. 349.

A Second-class Magistrate having convicted a person of theft and sent him to a First-class Magistrate for enhanced punishment as an old offender under s. 349 of the Code of Criminal Procedure, the First-class Magistrate returned the prisoner to the Second-class Magistrate and directed that officer to commit the case to sessions.

On a reference by the Sessions Judge, the High Court, while allowing the committal to stand, directed that in all cases referred under s. 349 of the Code of Criminal Procedure, the Court to which the case is referred should dispose of the case itself and not send it back to the Court by which the reference is made for committal to sessions.

CASE referred to the High Court by A. L. Lister, Sessions Judge of Godávari, on 30th March 1886.

The material portion of the letter of reference was as follows:—

"The accused was placed before the Sub-Magistrate of Rajahmandri on a charge of theft in a building and convicted, and, as he was an old offender, the proceedings were submitted to the Joint Magistrate under s. 349 of the Code of Criminal Procedure.

The Joint Magistrate by proceedings, No. 16 of the 10th March, referred the case back again to the same Sub-Magistrate with a direction that he should commit the case to the Sessions Court, and in obedience to that order, the Sub-Magistrate committed the case.

I submit that the order of the Joint Magistrate directing another Magistrate to commit is not according to law, and is *ultrâ vires;* in Criminal Revision Case 501 of 1882 it was held that such an order is *ultrâ vires*, and the commitment was quashed."

Counsel were not instructed.

The Court (Kernan and Muttusámi Ayyar, JJ.) delivered the following

* Criminal Revision Case 195 of 1886.

QUEEN-EMPRESS v. VÍRANNA.

JUDGMENT :—It has been many times ruled by this Court that a Magistrate, to whom proceedings are submitted under s. 349 of the Code of Criminal Procedure, is not at liberty to return the case to the submitting Magistrate, but must dispose of it himself. He has the power to commit to sessions if necessary.

Very serious inconvenience is the result of the Magistrate's order returning the prisoner and directing committal to sessions.

We think that we may allow the committal to the sessions to stand.

We desire, however, that in all cases referred under s. 349, the Magistrate, to whom reference is made, shall himself dispose of the case and shall not return it and the prisoner to the Magistrate by whom the reference is made.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

1886. March 9. April 21.

KALANDAN (PETITIONER) and PAKRICHI (RESPONDENT).*

THAMMAYYA (PLAINTIFF) and VENKANNA (DEFENDANT).†

Regulation IV of 1816, s. 30—Personal property only liable to attachment in execution of Village Múnsif's decree.

Under Regulation IV of 1816 the decrees of Village Múnsifs cannot be executed against other than personal property. Such decrees can be executed by a transferee of the decree and against the representative of a deceased judgment-debtor.

THESE cases were heard together. The facts in *Kalandan* v. *Pakrichi* were as follows :—

One Mayan having obtained a decree for Rs. 19-5-10 against the assets of Keloth Kunhi Paki, deceased, in suit 237 of 1885 on the file of the Village Múnsif of Tellicherry Amsham on 27th April 1885, the Village Múnsif, on the 25th June, attached a valuable house in Tellicherry in execution of this decree. On

* Civil Revision Petition 288 of 1885.
† Civil Revision Petition 307 of 1885.

KALANDAN v. PAKRICHI. THAMMAYYA v. VENKANNA.

the 29th June Acharath Pakrichi objected to the attachment on the ground that she had a kánam (mortgage) on the house of Rs. 500, and that the equity of redemption had been sold in execution of a decree of the Subordinate Judge of Tellicherry. She produced a summary decision of the District Múnsif's Court allowing her kánam claim and a registered kánam deed, but the Village Múnsif disregarded both and rejected her claim. On the 30th June the Village Múnsif allowed Mayan to assign his decree to Kunji Kalandan Háji. On the 27th August notice of the attachment was given to the District Múnsif's Court, and on the 28th August Pakrichi applied to that Court to refuse execution of the Village Múnsif's decree.

The District Múnsif, having sent notice to the assignee of the decree, refused execution, holding both the decree and the procedure in execution thereof to be illegal—

(1) because decree was passed against the assets of a deceased debtor;

(2) because valuable immovable property had been attached;

(3) because the validity of a kánam for Rs. 500 had been adjudicated on and the order of a District Múnsif declared invalid;

(4) because the assignment of the decree had been recognised.

On the 22nd September 1885, Kunji Kalandan Háji presented a petition to the High Court against the order of the District Múnsif of Tellicherry refusing to execute the decree on the ground that the District Múnsif was bound by law to send a peon to sell the property attached in execution of the decree of the Village Múnsif, and that the District Múnsif had misconstrued the provisions of Regulation IV of 1816.

This petition was styled a Civil Revision Petition (No. 288 of 1885), but under what provisions of law it was presented was not stated therein.

Mr. *Michell* for petitioner.

The case was referred to a Full Bench on 3rd November 1885.

In *Thammayya* v. *Venkanna*, the facts were as follows :—

In suit 11 of 1881 on the file of the Village Múnsif of Thamarapalli (near Cocanada) the defendant Venkanna agreed to pay to the plaintiff Thammayya Rs. 7-10-0 and prayed the Court

KALANDAN v. PAKRICHI. THAMMAYYA v. VENKANNA.

to pass a decree in accordance with this agreement. On the 24th January 1883 plaintiff applied for execution of this decree by attachment of the defendant's movable property. No such property having been found, the plaintiff applied on the 11th July 1884 for attachment of 1·29 acres of defendant's land. On the same day the Village Múnsif applied to the District Court for orders as to whether he could attach and sell land, and the District Court, on the 29th July, replied that the Village Múnsif had power to sell land, referring to *Rámasámi* v. *Angappa*.(1)

On 2nd October 1884 the Village Múnsif applied to the District Múnsif to send a peon to sell the land under the provisions of Regulation IV of 1816. The District Múnsif did not send a peon, but referred the matter to the District Court.

On the 17th of July 1885 the District Judge of Godávari (A. L. Lister), in a letter to the Registrar of the High Court, asked whether the rules regarding the proclamation and conduct of sales which came into force on 1st July 1885 applied to sales of immovable property conducted by Village Múnsifs and referred to the case of *Thammayya* v. *Venkanna*.

The High Court called for the records in this case, and on 3rd September 1885 the Court (Muttusámi Ayyar, Hutchins, Parker and Handley, JJ.) delivered the following Judgments :—

MUTTUSÁMI AYYAR, J.—I doubt if the decision in *Rámasámi* v. *Angappa* (1) is correct. The words used in s. 30, cl. 1 of Regulation IV of 1816, are "the property of the party cast," and appear to include immovable as well as movable property. But s. 5 and s. 27 limit the Village Múnsif's jurisdiction to personal property, and the procedure prescribed for the attachment and sale is not what is usually prescribed in regard to immovable property. The absence of a provision for the investigation of claims has also to be noted. The general scope of the Act is a matter which ought to be kept in view, I think, in construing particular sections. The reasonable construction, it seems to me, is that the expression 'the property of the party cast' means such property as the Village Múnsif has jurisdiction to deal with under the Act. Though the Regulation was passed in 1816, I do not understand that it was usual for Village Múnsifs to sell immovable property until recently.

(1) I.L.R., 7 Mad., 220.

KALANDAN v. PAKRICHI. THAMMAYYA v. VENKANNA.

HUTCHINS, J.—Mr. Lister is of course mistaken in asserting that Mr. Webster had placed no construction on the Regulation; he had set aside a Village Múnsif's refusal to proceed against immovable property; whether, as District Judge, he had power to make such an order is of course quite another matter. I cannot see that any inference can be drawn from the concluding words of cl. 5, s. 30. The whole question seems to turn on this as pointed out in our judgment. Can we say that 'property' means movable property only? If any of my learned colleagues can see their way to say that it does, I shall be only too glad to withdraw the decision and agree with Messrs. Lister and Weir.

Neither this Court nor Government can deprive the Múnsifs of their legal powers. The only remedy (supposing one to be necessary which is by no means proved by anything beyond Mr. Lister's apprehension) would be a legislative enactment.

PARKER, J.—I also, with Mr. Justice Muttusámi Ayyar, am inclined to doubt whether the decision in *Rámasámi* v. *Angappa* was correct. Unfortunately the case was not argued, but it is certainly arguable that a Regulation which, by its preamble and every other section, gave a Village Múnsif power to deal with personal property only, did not intend any other kind of property to be attachable under s. 30.

HANDLEY, J.—I agree with Mr. Justice Muttusámi Ayyar and Mr. Justice Parker in doubting the soundness of the decision in referred case 8 of 1883.

Looking at the whole scope of the Regulation, the wording of s. 30 and the absence of any of the usual provisions relating to sales of immovable property, it seems to me a not unreasonable construction to put upon the Regulation to hold that the word 'property' in the sections relating to execution of decrees does not include immovable property.

And the fact, if it be so as I understand, that the power to attach and sell immovable property has not been exercised until recently by Village Múnsifs would go to show that such was the view formerly taken by the Courts of the Presidency.

On the 19th of September the case was referred to a Full Bench by Kernan, Officiating CJ.

On 9th March 1886 these cases were argued before the Full Bench (Collins, CJ., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.)

KALANDAN v. PAKRICHI. THAMMAYYA v. VENKANNA.

Mr. *Michell* for petitioner in C.R.P. 288.

The *Acting Advocate-General* (Mr. *Shephard*) for respondent.

In C.R.P. 307 the *Acting Advocate-General* (as *amicus curiæ*) argued the case.

The judgment of the Full Bench (Collins, CJ., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) was delivered by

KERNAN, J.—There is one question common to these cases, and that is, whether the decree of a Village Múnsif passed under Regulation IV of 1816 can be carried out by attachment of any property except personal property, or by attachment of property in land or houses. This depends on what is the proper construction of the Regulation in respect of the word 'property' mentioned in s. 30. That section provides that, if the decree amount be not paid, the Village Múnsif shall attach the property of the party cast, and fix a day for the sale, and shall send notice thereof to the District Múnsif, who shall send a peon to sell the attached property, and parts 2, 3 and 4 of s. 30 provide that the peon so sent shall sell the property and receive the purchase money and pay the creditor, and the balance, after deducting expenses, to the party cast.

There is no doubt that the word 'property' is a generic term, of which personal or movable property and real or immovable property are species, and, therefore, under the word property all sorts of property might be included; but whether the word property was used in its general sense or as meaning personal or movable property only must depend upon the intention of the Legislature, to be discovered from the language used, having regard to the subject legislated for. Section 5 empowers Village Múnsifs to hear and determine, of their own authority, suits without appeal for sums of money or other *personal property* not exceeding 10 Arcot rupees against persons resident within their jurisdiction. Section 11 prescribes that the plaint shall describe, amongst other things, the "total amount or value of the property" claimed. It is clear that under s. 5 'property' in s. 11 must mean *personal* property and cannot mean real or immovable property, as no other than sums of money or other personal property can be claimed. It is an ordinary canon of construction that, whenever a particular word is used, having in an Act a defined meaning, and is used afterwards in the Act, the same meaning shall be given to it all through, unless from the context or otherwise the word,

when elsewhere used, appears to have been used in a different sense from that in which it was formerly used. Why then should the word 'property' in s. 30 have a different meaning from the same word in s. 11?

This view receives strong corroboration when it is recollected that, under s. 5, a suit before the Village Múnsif can only be brought for money or for personal property.

Now, if a suit cannot be brought for real or immovable property, would it not be quite inconsistent to allow execution to be issued against such real or immovable property? To allow this to be done would be to effect indirectly what could not be done directly. Assuming the case of an attachment of immovable property and that any person not the defendant was *bonâ fide* entitled to and in possesion of it, could the Múnsif determine that claim? If he could, would not that power be inconsistent with s. 5, as he would practically determine a suit *not* for personal property but for real property; but no provision is made in the Regulation in such circumstances. Again, suppose the Village Múnsif had no power to entertain the claim of such a *bonâ fide* owner, could it be supposed that the Regulation contemplated that such claim was to be disregarded and the property of the wrong person sold without enquiry?

No doubt if personal property, say, a cow, not belonging to the debtor, is seized, the true owner, it might be contended, would have no right to stop the sale; but this seems to us a wrong view because the Village Múnsif has power to determine as to personal property. In the case of personal property, the enquiry is in most cases simple; generally the right of property is accompanied by possession, and such possession is not subject to mortgage or assignment to another person. In the case of land, the possession may be in one man and the right of property in that land may be in another. The Regulation was suitable to the recovery of very small claims by remedy against personal property, but is wholly unsuited for the recovery of claims against immovable property. Could it be reasonably contended that an interest in immovable property is to be sold by a peon who is to receive the produce of the sale and pay the debt to the creditor and the balance to the debtor? What interest in the immovable property should be sold, and how is the peon to know what such interest was?

KALANDAN v. PAKRICHI. THAMMAYYA v. VENKANNA.

The contemporaneous legislation shows that, when the Legislature intended that real or immovable property should be liable to be sold by District Múnsifs, express power to that effect was given. See Regulation VI of 1816 (passed on the same day as No. IV), s. 45. From the District Múnsifs' Courts appeal lay to other Courts as provided by the Regulation. There is neither express power to sell land nor is there an appeal given by the Regulation IV of 1816. There appears therefore very good reason to believe that the Legislature did not intend, by the use of the word 'property' in Regulation IV of 1816, to authorize the sale of real or immovable property under a decree by a Village Múnsif. If, therefore, such was not the intention of the Legislature, then the power is not given by the regulation.

Long usage, save in only one case, so far as the High Court knows, from 1816 up to within the last two or three years, has been to treat the Regulation as not conferring this power—see also the Circular Orders of 1829 prohibiting Village Múnsifs from executing decrees against land.

Mr. Webster, when Judge of Coimbatore, stated in a case before him that the word 'property' was large enough to include land. The case of *Rámasámi* v. *Angappa* (1) was not argued, and the Court merely say they are not prepared to say that Mr. Webster's judgment was incorrect, and observe that the word 'property' without qualification applies to property of all kinds.

The several Procedure Codes never were applicable to the Village Múnsifs' Courts. The Code provides for all cases of seizure and sale of lands and for adjudication of claims to land and appeals in respect thereof so as to do complete justice between suitors. In the absence of such powers from Regulation IV, is it not therefore possible to hold the law has vested in Courts exercising such limited and petty jurisdiction the power of executing decrees against land which may be subject to mortgage, lien, charges and limitations of interest, without appeal.

We hold therefore that the Village Múnsif's decree could not be levied by seizure or sale of land in C.R.P. No. 288 and dismiss it.

As to the suit No. 11 of 1881, so far as it sought a decree

(1) I.L.R., 7 Mad., 220.

against a personal representative, we do not see why a decree should not lie under the Regulation, nor do we see any objection to a transferee of a decree obtaining execution of it. Both the above cases, so far as they are for small sums, are within the object and intention of the Regulation.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

RÁMAN, PETITIONER,
and
PAKRICHI, RESPONDENT.*

1886. March 9, 31.

Regulation IV of 1816, *ss.* 29, 35—*Remedy confined to parties to Suit.*

The remedies provided by s. 35 of Regulation IV of 1816 against Village Múnsifs are confined to persons who are parties to suits before such Village Múnsifs.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order of the Subordinate Judge of North Malabar passed on a petition presented by Acharath Pakrichi under ss. 29 and 35 of Regulation IV of 1816, complaining against the Village Múnsif of Tellicherry Amsham, Kunhi Ráman Náyar.

The Subordinate Judge (K. Kunjan Menon) awarded Rs. 25 damages and costs against the Village Múnsif.

This case being connected with Civil Revision Petition 288 of 1885 (1) was heard with it and disposed of by the Full Bench.

The facts necessary for the purpose of this report are as follows:—

The Village Múnsif (petitioner) having attached a house in execution of a decree passed by him in a suit to which Acharath Pakrichi (the respondent) was no party, she objected to the attachment on various grounds which were overruled by the Village Múnsif.

She thereupon complained to the Subordinate Judge that she had been injured by the conduct of the Village Múnsif.

* Civil Revision Petition 355 of 1885.

(1) See *ante* p. 378.

RÁMAN v. PAKRICHI.

The Subordinate Judge held that she could not come in under s. 29 (1) of the Regulation, not being a party to the suit, but that she could complain under s. 35 (2) as being a party injured by an oppressive and unwarranted act within the meaning of that section.

Mr. *Michell* for petitioner.

The Acting Advocate-General (Mr. *Shephard*) for respondent.

The Full Bench (Collins, CJ., Kernan, Muttusámi Ayyar, Brandt and Parker, JJ). delivered the following

JUDGMENT:—We are of opinion that the words in s. 35 of Regulation IV of 1816 "by the party injured" must be restricted to parties to the suit, and cannot be applied, as they have been by the Subordinate Judge, to any and every person alleging that he has been injured by proceedings of a Village Múnsif under the Regulation.

Village Múnsifs are liable to prosecution "for corruption in the discharge of their trust," "by either party to the suit," and

(1) The decisions of Village Múnsif's, either as Múnsif or arbitrator, shall not be carried into execution by them in less than thirty days after the date on which copies of the decrees may have been furnished or tendered to the parties or to their vakils; should either party present a petition to the Zila Judge within that period, charging the Village Múnsif with corruption or gross partiality, the Zila Judge shall order execution of the decree to be stayed, and if the charge of corruption or partiality be proved to the full satisfaction of the Zila Judge by the oaths of two credible witnesses at the least, he shall annul the decision.

(2) *First.*—Village Múnsifs shall be liable to prosecution in the Zila Court for corruption in the discharge of their trust by either party in the suit, and for any oppressive and unwarranted act of authority by the party injured, and upon proof of the charge to the satisfaction of the Judge, he shall in the first-mentioned case adjudge the offender to pay the prosecutor three times the amount or value of the money or property corruptly received, with all costs of suit; and in the second, award such damages and costs to the party injured as may appear to him equitable; but no Village Múnsif shall be liable to be prosecuted for want of form or for error in his proceedings or judgment; nor shall any process whatever be issued against a Village Múnsif who may be charged with corruption, or any oppressive and unwarranted act of authority, unless the Judge shall be previously satisfied by sufficient evidence that there is probable cause to believe that the charge is well founded, and unless the charge shall be preferred within three months from the date of the act complained of.

Second.—The Zila Judge shall, on charges of corruption, fine the party by whom or for whom the corruption may have been practised in the suit, provided he shall have assented to such corruption, in a sum equal to the value of the thing or sum of money which the Village Múnsif may be proved to have so corruptly received.

Third.—If the corruption charged against any Village Múnsif shall not be proved to the satisfaction of the Zila Judge, he shall award full costs and such damages to the Village Múnsif as may appear to him equitable, and he shall levy a fine from the party making such groundless charge, not exceeding the value of the thing or sum of money charged to have been corruptly received.

RÁMAN v. PAKRICHI.

"for any oppressive and unwarranted act of authority by the party injured."

To a successful prosecutor on a charge of corruption three times the value of the money or property corruptly received may be awarded, and "to the party injured" damages and costs may be awarded: and not only may a Village Múnsif be mulcted for corruption, but also "the party by whom or for whom the corruption may have been practised," if privy to such corruption; in each instance in which the words are used in the section they appear to be used with reference to a party to the suit.

The Subordinate Judge had then no jurisdiction to award damages against the Village Múnsif in this case at the instance of a person who came in with a claim in respect of certain property attached by the former.

We should, moreover, have felt in any case constrained to hold that the Village Múnsif is not shown to have acted in an oppressive manner, even if his action was not warranted by law.

We must set aside the order and direct repayment to the Village Múnsif of the sum levied from him. We shall, however, allow no costs as it is stated that the Village Múnsif treated the representations of the claimant and the order of the District Múnsif with a want of due consideration.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusáwmi Ayyar.

RA'MASA'MI

AGAINST

LOKANA'DA.*

1885. March 11. 1886. April 12.

Penal Code, s. 500, Defamation—Newspaper libel—Act XXV of 1867, ss. 5, 7—Burden of proof—Statutes—38 Geo. III, c. 78, s. 14—6 & 7, Vict. c. 96, s. 7.

On the prosecution of the editor of a newspaper for defamation under s. 500 of the Indian Penal Code by publishing a libel in his paper, an attested copy of a declaration made by the editor under s. 5 of Act XXV of 1867 to the effect that he was the printer and publisher of the newspaper, was produced in evidence by the com-

* Criminal Revision Case 438 of 1885.

RÁMASÁMI v. LOKANÁDA.

plainant. The editor having been convicted by the Magistrate, the Sessions Court on appeal quashed the conviction on the ground that there was no evidence that the editor was the writer of the libel or permitted its publication:

Held, that in the absence of proof to the contrary, the declaration was *primâ facie* proof of publication by the editor.

Held also, that it would be a sufficient answer to the charge if the editor proved that the libel was published in his absence and without his knowledge and that he had in good faith entrusted the temporary management of the newspaper during his absence to a competent person.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to revise the proceedings of J. A. Davies, Sessions Judge at Tanjore, in Appeal 13 of 1885 quashing the conviction of Lokanáda Nádan under s. 500 of the Indian Penal Code by Krishnasámi Ayyar, Sub-Divisional Magistrate of Tanjore.

The facts necessary for the purpose of this report are set out in the judgment of the High Court (Collins, CJ., and Muttusámi Ayyar, J.)

Bháshyam Ayyangár and *Désikácháryar* for the complainant Rámasámi Pillai.

If a man employs an agent to publish a newspaper he is responsible criminally for any libel published by such agent.

The publication of the agent is that of his principal who must be held to intend the consequences of the act. Hawkins Pleas of the Crown, Vol. II, p. 131. Roscoe Crim. Ev., p. 977. *Queen* v. *Holbrook*,(1) *Empress of India* v. *McLeod* (2) and other cases were referred to in argument.

Lokanáda Nádan did not appear.

JUDGMENT.—On the 29th December 1884, a defamatory article appeared in the *Kshattriyanubalani*, a newspaper published once a week at Porayar in the district of Tanjore. The accused admitted that he was the Editor and Proprietor of that newspaper, and an attested copy of the declaration made by him under s. 5 of Act XXV of 1867 to the effect that he was its printer and publisher was also produced in evidence for the prosecution. The First-class Magistrate of the Tanjore Division convicted him of defamation and sentenced him to four months' simple imprisonment and to pay a fine of Rs. 100.

On appeal, the Sessions Judge set aside the conviction and acquitted the accused. The Judge agreed with the Magistrate

(1) 4 Q.B.D., 42. (2) I.L.R., 3 All., 342.

RÁMASÁMI v. LOKANÁDA.

that the matter published was defamatory, and that it referred to the petitioner; but he observed that there was no evidence that the accused was its writer, and that there was no proof whatever that he was personally aware of the publication and permitted it. He further remarked that the Criminal law aimed at individual responsibility, and that in order to support a conviction of a criminal offence, it was necessary to show that there was guilty knowledge or intention. The accused stated in his defence that he was absent from Porayar in December 1884, that by his desire one Martanda Nádan managed the paper during his absence, that the defamatory article was contributed by one Náráyanasámi Pillai, the 4th witness for the defence, and that Martanda Nádan published it without the accused's knowledge or privity. The Magistrate considered that the evidence produced by the accused to prove his absence from Porayar was *not* trustworthy, that Náráyanasámi Pillai was *not* the person who wrote the defamatory matter, and that the *accused himself wrote the article or that it was written at his instigation by some one else*. The Judge did not discuss the evidence or record a distinct finding as to the weight due to it, probably on the ground that there was no evidence for the prosecution that the accused was the real publisher, or that the publication was made with his privity or knowledge. He states in his judgment that "all that is alleged is that the accused was technically the publisher for the purposes of Act XXV of 1867, not that he actually knew of the publication."

It is no doubt true that in order to sustain a conviction for defamation it must be shown that there was a publication by the accused in fact, for by section 499 of the Indian Penal Code the offence is thus defined—"Whoever by words spoken or intended to be read makes or publishes any imputation concerning any person *intending* to harm or knowing or having reason to believe that such imputation will harm the reputation of such person (except in certain specified cases) is guilty of defamation." But the Judge has apparently overlooked the provisions of section 7 of Act XXV of 1867, which enacts that "in any legal proceeding whatever, as well civil as criminal, the production of an authenticated copy of the declaration shall be held [unless the contrary be proved] to be sufficient evidence as against the person whose name shall be subscribed to such declaration that the said person was printer or publisher [according as the words of the declaration may be] of

RÁMASÁMI v. LOKANÁDA.

every portion of every periodical work, whereof the title shall correspond with the title of the periodical work mentioned in the declaration."

This Act was passed like 38 Geo. III, c. 78, s. 14, for the purpose of preventing the mischief arising from printing and publishing newspapers by persons not known, and it was intended to facilitate proceedings, civil and criminal, against the persons concerned in such publications. For this purpose, as was observed by Justice Bailey in *The King* v. *Hart* (1) with reference to the English Statute, the Act required that a declaration be made and subscribed before a Magistrate, and directed that the production of an attested copy of that declaration shall be sufficient evidence as against every person who subscribed to it, that he was the *printer* or *publisher* or *printer* and *publisher* (according as the words of the declaration may be) of the paper containing the libel, provided that its title corresponded to the title of the paper mentioned in the declaration, and provided also that the contrary was not proved.

The intention was to constitute the declaration into *primâ facie* evidence of publication and thereby to throw on the accused the burden of showing that the actual publisher of the libel was *not* the person mentioned in the declaration. The declaration was then *primâ facie* evidence of publication by the accused, and if no contrary evidence was produced, or if the contrary evidence produced by him was *not true*, as held by the Magistrate in this case, it became conclusive so as to sustain the conviction.

It was then urged for the petitioner, that it was not sufficient for the accused to show that the libel was published without his knowledge or privity, but that he must go further and prove that the publication did not also arise from want of *due care* or *caution* on his part, and our attention was called to the provisions of 6 & 7 Vict., c. 96, s. 7. It was pointed out by Lush, J., in *The Queen* v. *Holbrook*, that under the Common Law of England, the proprietor of a newspaper was criminally responsible for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge, that the intention of the Legislature in passing the Statute 6 & 7 Vict. c. 96, was to mitigate the rigor of the Common Law, and to give the proprietor the benefit of the presumption that when one person employs another to do a lawful

( ) 10 East, 98.

RÁMASÁMI v. LOKANÁDA.

act, he is to be taken to authorize him to do it in a lawful and not in an unlawful manner, and that the Statute declared for that purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent or knowledge, that the publication did not arise from want of due care or caution on his part.

In substance, the Statute modified the grounds on which the proprietor was criminally liable for a libel published in his paper according to the Common Law of England. But we cannot hold that the provisions of that Statute are applicable to this country, and we must determine whether the accused is or is not guilty of defamation with reference to the provisions of the Indian Penal Code. We consider that it would be a sufficient answer to the charge in this country if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his absence, and that the libel was published without his authority, knowledge or consent. As the Judge has however misapprehended the effect of Act XXV of 1867, we shall set aside the order of acquittal made by him and direct him to restore the appeal to his file, to consider the evidence produced by the accused and then to dispose of the appeal with reference to the foregoing observations.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

READE (DEFENDANT), APPELLANT,

and

KRISHNA (PLAINTIFF), RESPONDENT.*

1886. February 4. March 5.

Guardian—Custody of minor—Change of religion—Act IX of 1875, *s.* 2., *cl.* (*b*).

A Bráhman boy, 16 years of age, having left his father's house went to and resided in the house of a Missionary, where he embraced Christianity and was baptized.

In a suit by the father to recover possession of his son from the Missionary:

Held, that the question whether the boy was a minor, was to be decided not according to Hindú law, but by Act IX of 1875;

* Second Appeal 701 of 1885.

READE v. KRISHNA.

(2) that the claim was not affected by s. 2, cl. (*b*) of that Act;

(3) and that the father was entitled to a decree that his son should be delivered into his custody.

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of the District Múnsif of Cuddalore in suit No. 21 of 1884.

This case came before the High Court on Second Appeal in March 1885, and is reported at p. 31 of the Indian Law Reports 9, Madras Series.

The facts and arguments so far as they are necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

The Acting Advocate-General (Mr. *Shephard*) for appellant.

Rámá Ráu for respondent.

JUDGMENT.—The respondent Krishnáchári is a native of Cuddalore and has a minor son named Subba Ráu. Subba Ráu joined the Mission School in New Town in July 1881, and continued to study in it till 1883. In the latter part of that year he went often to the appellant's house and attended the religious meetings and class which she used to hold. In January 1884, he renounced his father's religion and embraced Christianity, and at his request the appellant caused him to be baptized. Prior to his baptism, he left his father's home and protection, and he since lived in the appellant's house and under her care. Thereupon, the respondent sued in the Court of the District Múnsif of Cuddalore, to recover possession of the minor, alleging that, as the minor's father, he was the legal guardian, and that the appellant unlawfully took the boy out of his protection and detained him against his (father's) will. He stated also that the appellant caused damage to the minor's religion and person and claimed Rupees 100 as compensation for the expenses of expiatory ceremonies which it was necessary to incur in order to take the boy back into the Hindú religion. But both the Courts below dismissed this claim, and the respondent has not appealed from so much of the decree as related to it. As to the right to the custody and control of the minor, the appellant asserted that Subba Ráu was not a minor, and that he had sufficient discretion to act for himself in matters of religion. She denied that she either took him wrongfully out of his father's protection or unlawfully detained him, and relying

on Act IX of 1871, contended that the District Múnsif had no jurisdiction to entertain the suit. The District Judge at first upheld the plea to the jurisdiction, and his decision on this point came under our consideration in *Krishna* v. *Reade*.(1)

We then held that according to the true construction of Act IX of 1871, it merely provided a special and prompt remedy by application on petition, and that it was not the intention, and that there were no words of which the effect was to take away the ordinary remedy by regular suit, in cases in which the special procedure prescribed by the Act was not availed of. Though in connection with the petition of Second Appeal now before us, it was again urged as an additional ground that the District Múnsif had no jurisdiction, the learned Advocate-General did not press it upon us at the hearing. As to the plea that Subba Ráu was not a minor, the Judge considered that it was not proved, and observed that the utmost use he could make of Doctor Robertson's professional evidence was to accept the minimum fixed by him, viz., 16, as the probable age in 1884. We are bound to accept this finding on a question of fact in Second Appeal. Adverting to the contention that the question raised in the suit was not one of Subba Ráu's majority or minority, but substantially one of religion in regard to which he was entitled to make a free choice, the Judge observed that the case before him was not that of interfering with any one's religion, and even supposing that the father would make efforts to bring about a change in the son's religious views, it could not be accepted as a sufficient ground for taking away the right of the former to the custody and control of the latter. With reference to the argument that the appellant did not actually detain the minor, the Judge remarked that the boy had in law no will of his own, and that there was improper detention because the appellant kept him in her house contrary to his father's will. In the result, the Judge confirmed the decree of the District Múnsif which directed "that defendant do deliver to plaintiff the minor Subba Ráu."

It is urged in the petition of Second Appeal—

(I) That Act IX of 1875 does not apply to a case where religion is in question, and that under Hindú law Subba Ráu was not a minor;

(1) I.L.R., 9 Mad., 31.

READE v. KRISHNA.

(II) Even if he were a minor, the respondent would not be entitled to his custody unconditionally and absolutely;

(III) That the appellant did not actually detain the minor and there is no evidence of such detention; and

(IV) That at any rate no decree ought to have been passed in the form in which it has been made.

At the hearing, the learned Advocate-General strongly objected to the form of the decree, and argued that guardianship for nurture ceased at 14, that a minor who had attained the age of discretion was not liable to be compelled to return to his father against his will, and that though there may be a decree to release him from improper custody, there ought to be no decree for his delivery to the respondent. He drew our attention to *The King* v. *Greenhill*,(1) *The Queen* v. *Clarke*,(2) *in re Shannon*,(3) *in re Connor*,(4) and *The Queen* v. *Vaughan*.(5)

On the other hand it was contended for the respondent that the rule as to discretion has no application in this case, and reliance was placed on *The Queen* v. *Nesbitt*,(6) *in re Hemnath Bose*,(7) and *in re Calloor Narainsawmy*,(8) *R.* v. *De Manneville*,(9) *in re Clarke*,(2) *in re Elizabeth Daley*,(10) and *The Queen* v. *Howes*.(11)

There can be no doubt that a minor under 14 years of age has no will of his own, or that his detention against his father's will is unlawful. In *Ratcliff's case* (12) it was held that guardianship for nurture continues until the child attains the age of 14. In *Howe's case*(13) however, it was considered by analogy to penal enactments to extend to 16 years in the case of girls.

With reference to the offence of kidnapping from lawful guardianship, the Indian Penal Code, s. 361, fixes the age at 14 in the case of a boy, and 16 in the case of a girl. As observed by Lord Campbell in *The Queen* v. *Clarke* (2) the guardian for nurture has by law a right to the custody of the child and may maintain an action of trespass against a stranger who takes the child. With reference to such child brought up on a writ of *habeas corpus*, the learned Chief Justice said:—"the child is

(1) 4 A. & E., 624. (2) 7 E. & B., 186. (3) 20 L. T., 183.
(4) 16 Ir. C.L.R., 112. (5) 5 B.L.R., 418. (6) Perry, O.C., 103.
(7) 1 Hyde, 111. (8) Mayne's P.C., s. 361, notes. (9) 5 East, 220.
(10) 2 F. & F., 258. (11) 30 L.J. (M.C.), 47.
(12) 3 Rep. 38: vol. 2, p. 105 of *Thomas & Fraser's* edition. (13) 3 E. & E., 332.

READE v. KRISHNA.

supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian, and when it is delivered to him the child is supposed to be set at liberty." He deprecates the contention, that the capacity of the child to make a choice for itself should be tested by the Judge, and observes that "the consequences which would follow from allowing such a choice would be most alarming." Nor is there room for doubt that when the father is entitled to the custody of the child, the proper mode of enforcing his right consists in a decree for its delivery. The order usually made on a *habeas corpus* when the child is too young to elect its own custody, is a direction that the child be delivered to its lawful guardian. The same is the case when the Court of Chancery interferes on petition for the possession of a child. The substantial question then for decision is, what is the law of guardianship applicable in a civil suit in respect of the right to the custody and control of minors. There may be guardianship by nature, by nurture, and by personal or statute law. The English cases cited by the learned Advocate-General no doubt show that a child over 14 is allowed to choose his residence when he is brought up on a writ of *habeas corpus*. But they show also that the *ratio decidendi* is the limited purpose for which the writ is designed. To quote from Coleridge, J., in *The King* v. *Greenhill* (1) "*a habeas corpus* proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, viz., the individual who has been under the restraint is declared at liberty, and the Court will even direct that the party shall be attended home by an officer to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists; and where the child is in the hands of a third person, that presumption is in favor of the father. But although the first presumption is that the right custody according to law is also the free custody, yet if it be shown that cruelty or corruption is to be apprehended from the father, a counter-presumption arises." Again in *The Queen* v. *Vaughan* (2) which is the leading Calcutta case cited on the appellant's behalf, Phear, J.,

(1) 4 A. & E., 643. (2) 5 B.L.R., 427.

says, "The writ of *habeas corpus ad subjiciendum* is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen is illegally confined against his will. It is issued on behalf of the person illegally confined, and not issued for the purpose of lending the arm of law to any person claiming authority over him. It is only where the person confined is under any personal disqualification the guardian or protector is looked to, and in such a case the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian." He also remarks in his judgment that he was not adjudicating upon a question of civil right between party and party. On the other hand, Rawlinson, C.J., and Bittleston, J., held in September 1858 in *Calloor Narainsawmy's case*,(1) that a Hindú youth of the age of 14 who had gone to the Scotch Missionaries should be given up to his father, though he had become a convert to Christianity and desired to remain with his new protectors. A similar decision was passed in Calcutta by Sir Mordaunt Wells in regard to a boy over 15 and under 16 years of age (*in re Hemnath Bose*).(2) Though in *Nesbitt's case*(3) the boy brought up on *habeas corpus* was only 12 years of age, the learned Judges pointed out the extreme undesirability of emancipating a minor from parental control on the ground of discretion in this country. In the note subjoined to that case, reference is made to the Code Civil, and the practice on the Continent being in accord with Hindú law which recognizes no such choice as is contended for on behalf of the appellant. In passing, we may also state that Lord Campbell refers to this case and to the opinion thereon of Patterson, J. That eminent Judge observed to Sir Erskine Perry: "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *habeas corpus*. The general rule is clearly so, and even after the age of 14, whereas this boy (Shripat) was only 12." The result then of the examination of the authorities to which we were referred is, that according to the latest decision in this Presidency and Bombay, a minor though over 14 is not at liberty to choose his own custody as against the father, even when brought up on the writ of *habeas corpus*, that the decisions to the

(1) Mayne's P.C., sec. 361, notes. (2) 1 Hyde, 111. (3) Perry, O.C., 103.

contrary proceed on the view that the writ is not the appropriate remedy prescribed for enforcing the authority of the father over his son, and that when the son is over 14 and competent to make a choice, its purpose is satisfied by allowing him to choose his own custody, and leaving it to the father to vindicate his right by a civil suit. It follows then that the contention that according to general principles the father's guardianship ceases (*quoad* his right to custody) when the son completes his 14th year, cannot be supported. It may cease for the purpose of visiting third parties with penal consequences, and for the purpose of a writ of *habeas corpus*, but that cannot preclude a father from asserting his right by a civil suit even against the son's choice to his lawful custody and control.

It is regarded by the Court of Chancery acting as *parens patriæ* as a settled rule that except under special circumstances a minor must be brought up in his father's religion. As to what are to be recognized as special circumstances warranting a departure from the general rule, James, L.J., says in *Hawksworth* v. *Hawksworth*(1) that the Court will be reluctant to depart from the general rule unless the impressions produced on the child's mind by the course of education which he is receiving, are so great and permanent as to induce the Court to fear lest any attempt at altering them would do more harm than good, and would end in unsettling the child's faith altogether and so produce a fatal result in that respect. Again, in *Curtis* v. *Curtis*(2) Kindersley, V.C., says, "After hearing so much about the father's religious principles it is proper for me to say that I cannot act on those principles unless they are such as are contrary to the law of the land. The only view in which they are material is that a father may permit his child to be brought up by other persons of a particular profession so as to make it difficult for the Court not to see that the happiness of the children must be affected in the course of their education in those principles."

Nor do we see our way to uphold the contention that it is the Hindú law and not Act IX of 1875 that governs this case in regard to the age at which minority ceases. It is no doubt true that under Hindú law a boy or girl was *sui juris* on the completion of his or her 16th year, but Act IX of 1875 altered this. The

(1) L.R., 6 Ch., 539. (2) 5 Jur., N.S., 1147.

READE v. KRISHNA.

Act is applicable to all persons domiciled in British India, and it provides (s. 3, paragraph 2) that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before. The suit before us is one brought by the father to enforce his parental right to the custody and control of his minor son, and as that right is an incident of guardianship, and as it is not excepted from the operation of the Act, we cannot say that the case falls to be decided under Hindú law as to the age of majority. The personal law applicable to Hindús has been repealed, and a territorial law has been substituted for it, and our decision must be in accordance with the latter.

As a minor may be *sui juris* for some purposes, though not for others, the next question for decision is, whether the father's right is specially taken away by the Act in any case. It is provided by s. 2 "that nothing contained in the Act shall affect (*a*) the capacity of any person to act on the following matters viz.: marriage, dower, divorce and adoption; (*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or (*c*) the capacity of any person, who, before this Act comes into force has attained majority under the law applicable to him." The construction suggested for the appellant is that when a Hindú youth of 16 changes his religion, his father's right to custody ceases; and adopting as we must do, the finding of the District Judge that the youth had completed his 16th year, he was according to Hindú law *sui juris* and therefore competent to change it; still this would not affect the right of the father to the custody and control of his minor son, and that right is not taken away by the Act; and in this suit the question with which we have to deal is, as the District Judge very properly remarks, not a question of interference with the right of a Hindú son to change his religious persuasion, but whether a Hindú father is entitled to the custody of his son and to such control over him as he may lawfully be entitled to exercise.

On these grounds we are of opinion that this appeal fails, and we dismiss it with costs.

We think, however, that the decree may be more appropriately worded by directing "that the son be delivered into the *custody* of the plaintiff;" and we direct that it be amended accordingly.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Officiating Chief Justice, Mr. Justice Muttusámi Ayyar, Mr. Justice Hutchins, Mr. Justice Parker, and Mr. Justice Handley.

CHRISTÁCHÁRLU (PLAINTIFF), APPELLANT,

and

KARIBASAYYA (DEFENDANT), RESPONDENT.*

1885. November 6. December 1.

Fraudulent alteration of document, Effect of—English Law how far applicable in Mufassal.

Rámasámy Kón's case (3, *M.H.C.R.*, 247) *discussed.*

In a suit brought to recover Rs. 815, principal and interest due according to the terms of a registered mortgage bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registration (1) by inserting a condition, making the whole sum payable upon default of payment of any instalment, and (2) by doubling the rate of interest.

The defendant admitted in his written statement that he had received a certain portion of the consideration for the bond from the plaintiff.

At the trial the plaintiff claimed to amend the plaint and recover the first instalment according to the terms of the bond as executed by defendant:

Held, by the Full Bench (Kernan, Offg. C.J., Muttusámi Ayyar, Hutchins, Parker and Handley, JJ.) that the suit must be dismissed.

Per Kernan and Muttusámi Ayyar, JJ. The decision in *Rámasámy Kón's case* is in conformity with the law of England.

Per Kernan, Hutchins, Parker and Handley, JJ. The rule in *Master* v. *Miller* is in consonance with equity and good conscience and applicable to the Mufassal.

Per Muttusámi Ayyar, J. That rule is more penal than equitable, but having been adopted by the Courts since 1866 must be followed.

APPEAL from the decree of J. D. Goldingham, District Judge of Bellary, confirming the decree of B. Rámasámi Náyudu, District Múnsif of Bellary, in suit 272 of 1883.

The plaintiff, Penukonda Christáchárlu, sued the defendant, Pasupati Mattam Karibasayya, for Rs. 815, principal and interest due by him according to the terms of a registered mortgage bond, dated 7th April 1883.

According to the terms of the bond defendant promised to pay Rs. 750 with interest at 12 per cent. by annual instalments, of which the first, Rs. 200, was unpaid at date of suit.

* Second Appeal 370 of 1885.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

The bond contained a proviso that on default of payment of any instalment, the whole sum with interest at 12 per cent. became exigible.

Defendant pleaded that the bond had been altered materially after execution and before registration (1) by the insertion of the proviso that on default of payment of any instalment the whole sum became due, (2) by alteration of the rate of interest from 6 per cent. to 12 per cent.

The District Múnsif found that the defendant's plea was proved, and dismissed the suit on the ground that the bond became void by reason of the alterations.

He was of opinion that the plaintiff could not be allowed to amend the plaint, and claim the amount payable according to the original terms of the bond—*Gogun Chunder Ghose* v. *Dhuronidhur Mundul.*(1)

On appeal it was contended that the plaintiff was entitled at all events to recover Rs. 230, which the defendant alleged in the written statement was all the consideration to which plaintiff was entitled, the rest of the sum secured by the bond being due to two other persons.

The District Judge held that there was no admission that this sum was then due to plaintiff and confirmed the decree on the ground that the bond had been altered in a material manner with fraudulent intent.

Plaintiff appealed on the grounds—

1. That the altered bond could be used as evidence of the transaction between the parties.
2. That plaintiff was entitled to a decree for the first instalment with interest under the contract according to the bond in its original state.
3. That the ruling in *Gogun Chunder Ghose's case* was not in conformity with the ruling in *Rámasámy Kón's case.*
4. That plaintiff was entitled to Rs. 52 paid by him to Government for arrears of revenue on the mortgaged property.

The case was argued before a Divisional Bench (Hutchins and Parker, JJ.) on August 20th, 1885.

Bháshyam Ayyangár for appellant.

(1) I.L.R., 7 Cal., 616.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

Rámá Ráu for respondent.

On the 24th August the following judgments were delivered :—

HUTCHINS, J.—The appellant brought this suit to recover the whole principal of a mortgage bond together with interest. The plaint set out the several provisions of the bond, and among them that it was payable by instalments, but that, on default of any instalment, the whole was to become due at once with interest at 1 per cent. per mensem. The whole sum was claimed in consequence of the time for payment of the first instalment having expired.

The respondent pleaded, and both the Courts below have found, that the bond has been fraudulently altered by, or with the connivance of the appellant in two material particulars. The stipulation making the whole payable at once on default of a single instalment has been interlined. The rate of interest has been altered from ½ to 1 per cent.

According to the contract executed by the respondent the first instalment only could have been recovered with interest at ½ per cent. at the date the suit was instituted. The question raised for our determination is, whether the Courts below were right in dismissing the whole claim on the ground that the fraudulent alterations vitiated the entire contract, or whether a decree should not have been given for whatever amount might be due according to the true contract, and the appellant punished by such order as the Court may think fit to make as to costs.

The Courts below have acted on the authority of *Gogun Chunder Ghose* v. *Dhuronidhur Mundul.*(1) The bond in that case, originally executed by one of three brothers, had been altered by the addition of the two others as obligors. The learned Chief Justice [Field, J., concurring] held that the instrument was vitiated as against even the first brother; that this was the rule of English law (*Davidson* v. *Cooper*) (2); and that the rule was consistent with the principles of equity and good conscience and ought to be applied in this country; and he referred to the case of *Gardner* v. *Walsh* (3) in which Campbell, C.J., held a promissory note to be wholly vitiated by another party being added. Like the leading of *Master* v. *Miller*,(4) *Gardner* v. *Walsh* was a case of a negotiable instrument as to which the law has always been very

(1) I.L.R., 7 Cal., 616. (2) 11 M. & W., 778; s.c., 13 M. & W., 343.
(3) 24 L.J. Q.B., 285; s.c., 5 E. & B., 83. (4) I. Smith's L.C., 871 (Ed. VII.)

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

strict. There has never been any doubt as to the effect of an alteration on a negotiable instrument since the case of *Master* v. *Miller*, and the Indian law relating to such cases is now contained in ss. 87-89 of the Negotiable Instruments Act, 1881.

Garth, C.J., added that, looking at the question as one of proof merely, the plaintiff must fail, because he had not proved the instrument on which he founded his claim; he had, in fact, alleged a joint contract by three, but had attempted to prove an entirely different agreement. This point may prove of importance, but it is of course impossible to deny that the rule in *Master* v. *Miller* is in accordance with equity and good conscience.

And the same view seems to have been taken in other High Courts also. In *Sitárám Krishna* v. *Dáji Deváji* (1) the plaintiff had not altered the contract itself, but merely added the name of an attestor with the view apparently to call him as a witness if the bond was denied. The Bombay Court held that the suit on the bond so altered was rightly dismissed. The case was not argued, and I observe that here there was no alteration of the contract itself.

Ganga Ram v. *Chandan Singh* (2) was a case before the Allahabad Court. That was a suit on a hypothecation bond, and the relief sought was to recover the amount by sale of the property hypothecated. It was found that the extent of the property had been fraudulently increased: the plaintiff sought to bring 5 *biswas* to sale when only 5 *biswansis* had been pledged. The Court declined to allow him to revert to the true contract. "It seems to us," it was said, "that on all grounds of equity and good conscience the bond now produced by the plaintiff should be discarded as evidence of the hypothecation of land, and this being so, the claim as brought falls to the ground." But the learned Judges declined to consider whether the plaintiff might not recover his money debt due on the same bond: they contented themselves with rejecting the bond as evidence of the hypothecation of land.

In this Court the English doctrine has not as yet been pressed so far. On the contrary it was held in *Rámasámy Kón* v. *Chinna Bhávani Ayyar* (3) that, notwithstanding alterations in a very material part, viz., the date fixed for payment the documents might

(1) I.L.R., 7 Bom., 418. (2) I.L.R., 4 All., 62.
(3) 3 M.H.C.R., 247.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

be used as evidence of the debt between the parties and also of the creation of a charge upon the property hypothecated. And in one of the suits, actually brought to enforce the terms of a document so altered, a decree was passed for the full amount due against the property: according to the true date the personal remedy was barred, and that part of the claim was of course disallowed.

I am not aware that the correctness of that decision has ever been impugned in this Presidency. I find it quoted without disapproval in *Paramma* v. *Rámáchandra* (1) and it seems to have been followed in Second Appeal 696 of 1878 (not reported, but see *Valiappá* v. *Mahommed Khásim*, *in arguendo*).(2) As a decision of this Court it is of course binding on all the Courts of the Madras Presidency whatever opinions may have been expressed by other High Courts, and the course adopted by the Lower Courts in this case can only be justified by assuming that they overlooked it. I also note that in none of the cases from other Presidencies was this authority cited or considered, and it is impossible to say how it might have affected the decision if it had been brought to notice. The fact, however, that all the other High Courts have taken a different view of the law has led me to examine the grounds of the decision closely, and I cannot but admit that the Court seems to have supposed that it was keeping within the rule established by the English cases, although it actually gave a decree to enforce the terms of the instrument on which the suit was based, and ignored the fraudulent alteration. It seems clear that no English Court would have passed such a decree.

It has, however, occurred to me that it may be possible to reconcile the decision with the English cases and the notes to *Master* v. *Miller* on which it professes to be based, by assuming that the Court intended to decide that after all the matter is more one of pleading than anything else—except perhaps in the case of negotiable instruments and possibly other contracts which the law requires to be in writing—and the strict rules of English law relating to pleading have never been enforced in this country. Bittleston, J., in his judgment quoted and relied on the words of Lord Abinger in *Davidson* v. *Cooper* that the altered document may be used "as a proof of some right or title created

(1) I.L.R., 7 Mad., 302. (2) I.L.R., 5 Mad., 168.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

by, or resulting from, its execution"—a distinction subsequently adopted in *Green* v. *Attenborough*.(1) So very careful a Judge can hardly have overlooked the fact that the decision in *Davidson* v. *Cooper* itself was that no relief could be given in a suit based on the altered instrument, and that the saving clause which he quoted related only to collateral purposes. The earlier case of the *Earl of Falmouth* v. *Roberts*(2) is a good example of the extent to which the English Courts allowed an altered document to be used by a plaintiff. An altered lease was then admitted to prove the terms on which the tenant was holding over as a tenant from year to year, on the express ground that it did not contain the subsisting contract which the plaintiff was seeking to enforce, but only the contract relating to the term which had expired.

It is, however, the concluding part of the note to *Master* v. *Miller* which may have suggested to Bittleston, J., that the rule is really one of pleading. I quote from the 5th edition of Smith's leading cases where the learned author refers to several cases, "from which it is clear that, where the count is framed upon the instrument in its original state, an alteration which does not render a new stamp necessary cannot be taken advantage of under a plea denying the contract.—Where, on the other hand, the plaintiff declares upon the instrument as altered, then the defendant may raise any available defence arising out of the alteration under a plea denying the contract; for he has not authorised the alteration and so, never having made any such contract as that declared upon, must succeed in substance."

In this country it is not necessary that the whole of the contract sued on should be proved to entitle a plaintiff to recover a part. If the contract alleged in this plaint had been an oral one, and if the appellant had established a promise to pay by instalments with interest at 6 per cent., but not the penal condition nor the higher rate of interest, he would have been entitled to recover the first instalment. The parts of the contract declared upon, essential to show that the first instalment was due, would have been proved, and not any other contract, although other parts of the contract alleged had not been proved. And perhaps the same result should follow, though the contract be in writing, if the alteration does not change the essential nature of

(1) 3 H. & C., 468. (2) 9 M. & W., 469.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

the contract, and if it be once admitted that the writing is not wholly vitiated and avoided by the alteration but is still admissible to prove what the contract really was.

The decision in the Calcutta case might still be supported on the ground that the contract proved was essentially different from that alleged. That, however, is not the only, or even the chief, ground on which it has been put. As it stands, it is directly opposed to *Rámasámy Kón's case* and the latter is also in conflict with the Allahabad and Bombay authorities to which I have referred, as well as with the rule of the English Courts which it professes to follow.

In these circumstances, it seems right to refer to a Full Bench the question how far the decision of this Court in *Rámasámy Kón's case* should be followed.

PARKER, J.—I take it there is no doubt that according to the English doctrine the plaintiff could not recover upon the bond now sued on, it having been altered by the plaintiff without the knowledge of the defendant in a material part. There is also no doubt that according to the doctrine laid down by the High Courts at Calcutta, Allahabad and Bombay,(1) the plaintiff could not recover. The Bombay case was not argued, and it might perhaps be argued that the alteration there under consideration was not a material alteration. But from the observations of the learned Judges I gather they would certainly have followed the English doctrine with regard to an alteration so material as the present one.

The Madras High Court in *Rámasámy Kón's case* did, however, allow a plaintiff to recover upon an hypothecation bond in which a material alteration, viz., as to the due date, had been made. In that case the plaintiff sued upon two documents executed on the same date: one a simple bond and the other an hypothecation bond. The alteration was made for the purpose of avoiding the law of limitation, the personal remedy having become barred. There had been fraudulent conduct on both sides, and the Court allowed the plaintiff a decree upon the second bond against the hypothecated property only. A suit as against that property would not have been barred had no alteration been made at all.

The judgment in that case was given by Bittleston, J., who, referring to the leading case of *Master* v. *Miller*, held that the

(1) See cases above cited.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

rule of English law, if applicable to the Mufassal, "does not go beyond this, that the alteration of an instrument renders it invalid as the foundation of a suit by the party who has altered it, or in whose custody it was when altered. It does not render it void for all purposes; and the altered document may be used as proof of some right or title created by, or resulting from its having been executed (per Lord Abinger in *Davidson* v. *Cooper*)."

I gather from this that the learned Judge intended to follow the English rule, and considered that he was doing so in holding that the altered document might be used as evidence of the debt between the parties and also of the creation of a charge upon the property hypothecated.

With all deference I cannot but think that the English Courts would have decided otherwise. In *Master* v. *Miller* it was most distinctly held that no action could be sustained upon the altered document, and that the principle applied equally to bills of exchange as to deeds. Kenyon, C.J., observed that "no man shall be permitted to take the chance of committing a fraud, without "running any risk of losing by the event when it is detected." And Ashurst, J., says to the same effect: "A man shall not take the chance of committing a fraud, and when that fraud is detected, "recover on the instrument as it was originally made." The notes to *Master* v. *Miller* show that alteration in the date, sum, or time of payment have always been held material alterations; and the only cases in which such altered deeds have been admitted in evidence are cases in which they have not been sued on as the foundation of the contract, but are merely produced in proof of some right or title created by, or resulting from, their having been executed. If the plaintiff claims upon the contract in its original state, the defendant cannot take advantage of the alteration under a plea of denying the contract, but if, as in the present case, the plaintiff declares upon the instrument as altered, the defendant may raise any available defence arising out of the alteration under a plea of denying the contract.

Seeing then that every other High Court in India has adopted the English doctrine, and that in the only case in point in the Madras Reports the learned Judges apparently intended to follow the same doctrine, though interpreting it differently in the particular case before them, I think that the question before us should be referred to a Full Bench.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

On the 6th of November 1885 the case was argued before a Full Bench (Kernán, Offg. C.J., Muttusámi Ayyar, Hutchins, Parker, Handley, JJ.)

Bháshyam Ayyangár and *Désikácháryár* for appellant.

The question is whether the English decisions as to alteration of documents are applicable in India. *Rámasámy Kón's case* is said to be a deviation from the English Law. The Division Bench did not attach much weight to it. It is in conformity with English Law. If so, I am entitled to a decree.

The English decisions fall under three heads—

(1.) Where title passes on execution of a document, subsequent alteration of the document does not divest an estate. The document is mere evidence of the title.

(2.) Where evidence as to a contract sued on is by reference contained in a document which has been altered, such alteration will not prevent that document being used in evidence.

(3.) Those which refer to questions of pleading, *e.g.*, where a party brings a suit on an altered document and defendant pleads—non-assumpsit.

The cases cited in the notes to *Master* v. *Miller* were referred to *in extenso*. Also Taylor on Evidence, Vol. 2, 1621. Bullen and Leake, p. 486. The Legislature has adopted the English rule in the Negotiable Instruments Act, but not in the Contract Act.

An attempt to support a claim by perjury or forgery does not differ in principle. A just claim supported by false witnesses is decreed, without objection. The punishment for both is provided by the Penal Code.

Civil Courts should recognise the rights of parties and leave the Criminal Courts to punish crime.

Alteration of a document is said to be a discharge by some writers on English Law. The Contract Act does not adopt this view.

On the question of pleading there is no reason why the plaintiff should not recover the first instalment.

Suppose there had been a power of sale, the plaintiff could have used the altered bond as evidence that a certain estate had vested in him according to the English Law.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

Rámá Ráu for respondent.

The Transfer of Property Act requires this bond to be in writing and registered. A hypothecation deed in India creates no title in the property, it only gives a right to get the property sold.

The decision in *Davidson* v. *Cooper* is not applicable to this case. In *Rámasámy Kón's case* the suit ought to have been dismissed.

Bháshyam Ayyangár in reply.

The Transfer of Property Act is satisfied by the conveyance having been reduced to writing. There is nothing in the Code of Civil Procedure or Contract Act to support the defendant's contention.

KERNAN, OFFG. C.J.—It is stated in the plaint that the defendant executed a hypothecation bond to the plaintiff, dated the 7th April 1883, for Rs. 750, payable by instalments as follows:—

June 1883, Rs. 200	June 1885, Rs. 200
Do. 1884 ,, 200	Do. 1886 ,, 150

with a proviso that in default of payment of any instalment, the whole amount of the bond should be paid at once with interest at 12 per cent. per annum.

It has been found by both the Lower Courts that the original bond was altered without the assent of the defendant in the following material paticulars, viz.:—

(1) by inserting the proviso that on a default the whole sum should be paid at once;

(2) by changing the rate of interest from 6 per cent. to 12 per cent.

The alterations are visible.

Default was made in payment of the first instalment. The plaint was filed on the 20th of December 1883, and prays for payment of Rs. 815, the whole sum due for principal and at the altered rate of interest. This action was brought to recover the whole sum, as payable under the *altered* provision for default and for interest and for relief against the hypothecated property and by personal decree against the defendant.

It is clear that there was no contract by parol or otherwise in the terms of the altered instrument. The action is founded solely on the altered bond as altered. An application was made to the Múnsif to amend the plaint, to enable the plaintiff to sue on the bond in its original state, but that application was refused.

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

The Lower Courts dismissed the suit on the ground that the alteration had been made, and that the cause of action alleged was not proved and referred to—*Gogun Chunder Ghose* v. *Dhuronidhur Mundul.*

In second appeal it was contended that, though the plaintiff stated in his plaint and relied solely on the contract as altered, yet that relief should be given for one instalment on the admitted contract, which plaintiff did not sue on. This contention violates the fixed rule that a party can only recover or defend—*secundum allegata et probata.* Section 50 of the Code requires the circumstances constituting cause of action to be stated. When a plaint or defence is inartificially drawn and not in very clear language, Courts have to examine and find out what the substance of the plaint or defence is, and if in this case it appeared on the plaint that the plaintiff's cause of action was the debt as created by the original bond, even though the plaintiff might also have claimed to sue on the altered bond, then the plaintiff would be entitled to relief for the first instalment.

In this case the plaint is very clear, and it is plain that the plaintiff neither stated in the plaint the original contract nor did he claim the debt as created thereby; nor did he intend to do so. He sued on the instrument as altered, and on it alone. When that bond was held to be invalid on the ground that it was altered, his entire case failed in *this* action.

The third ground of appeal is that the decision in *Gogun Chundar Ghose* v. *Dhuronidhar Mundul* is not in conformity with the decisions of this Court and the plaintiff relied on the decision in *Rámasámy Kón's case* as an authority to justify his appeal to be declared entitled to a decree for payment of the first instalment due before suit. This hearing arises from a reference by a Division Bench to have a decision whether that case was decided in conformity with the English authorities and those in the three other Presidencies. The judgment in *Rámasámy Kón's case* was pronounced in two appeal cases relating to the same point. One was Appeal 331 in Original Suit 100 and other Appeal 333 in Original Suit 95. In Suit 100 the plaintiff sued, as the report states, for recovery of Rs. 1,217 and odd. In Suit 97 the plaintiff sued to recover Rs. 1,253 and odd from the defendant personally and also from property hypothecated. Decrees were made by the Court of Principal Sadr Amín for the plaintiff. The

CHRISTÁCHÁRLU v. KARIBASAYYA.

Civil Judge in appeal discovered that in each bond the day of payment had been altered by changing the date from 1854 to 1861 with the apparent object of getting rid of the effect of the Limitation Act, and dismissed both suits on the ground, that the bond had been altered, following the decision in *Master* v. *Miller*.

This Court in appeal admitting the principle of the decision of *Master* v. *Miller* stated "that the alteration of the instrument rendered it invalid as the foundation of a suit by a party who altered it, but that the alteration did not render the instrument void for all purposes and that the altered document might be used as proof of some right or title created by, or resulting from, its having been executed," and referred to *Davidson* v. *Cooper*. This Court held that the document in its original state might be evidence of the *debt* between the parties, and of the creation of a charge upon the property hypothecated, and so using them the personal demands were barred by limitation. But as Suit No. 97 [Appeal 333] was to recover the principal debt and interest from the immovable property hypothecated, this Court held the execution of the instrument created a charge upon the property which the subsequent alteration of it did not destroy, and that the suit, so far as it sought to enforce that charge, and to render the property available to discharge the debt, was not barred by limitation, which was 12 years. A decree was made accordingly.

It will be observed that this Court in appeal considered that the suit was not one founded on the instrument as altered but was to enforce a debt which was created by, and resulted from, the execution of the instrument as it was when originally executed. On this view the Court appears to me to have decided exactly according to the rule established by *Davidson* v. *Cooper*, which has been followed ever since that decision was made.

The exact frame of the plaint in *Rámasáwmy Kón's case* is not stated in the report, and whether the Court was right in holding that the suit was, as the plaint was framed, not founded on the altered instrument, we cannot now tell. But no doubt the plaint was before the Court and they considered that the plaint was founded on the debt created by, and resulting from the execution of the instrument as it originally stood. This suit is not founded on the debt created by, or resulting from the execution of the instrument as it originally stood, but is founded on the instrument as altered and on nothing else. The debt in the form now

CHRISTÁCHÁRLU v. KARIBASAYYA.

sued for was not created by, and did not result from the execution of the original instrument. In this suit the plaint not being framed on any debt, right or title, created by, or resulting from the execution of the original instrument, the material circumstances of that case and of this case are entirely different. The decision in that case is therefore no authority for the plaintiff, but is an authority against him. This case comes within the decision in *Master* v. *Miller* as a suit on an altered agreement, and on it alone.

The case of *Master* v. *Miller* was an action on a promissory note by an endorsee against the acceptor.

After the note in that case was made, it was altered by the holder, who endorsed it to the plaintiff. Lord Kenyon says, "the question is whether this action can be sustained on this instrument, *i.e.*, as altered."

The case of *Davidson* v. *Cooper* was action on a guarantee required by the Statute of Frauds to be in writing, which had been altered after it was made without the assent of the defendant.

Gogun Chunder Ghose v. *Dhuronidhur Mundul* was an action against three defendants on a bond, to which, it was found, the names of two of the defendants were forged, and that those names were not in the bond when it was originally executed by the defendant, who admittedly executed it. The Court decided: 1st, that the addition of the two forged names was an alteration in a material particular and that the bond was thereby invalidated, and that no action could be maintained on *it* even against the defendant who executed it; 2ndly, that the English Law stated in *Master* v. *Miller*, was a rule of equity and good conscience, which was applicable in this country; 3rdly, that an amendment could not in such a case be allowed; and 4thly, that the plaintiff had not proved the instrument on which he founded his claim.

Sitárám Krishna v. *Dáji Deváji* was an action on an instrument required by law to be attested, and the obligee of the bond, the plaintiff, without the assent of the defendant, got a person to attest it who had not in fact witnessed the execution of it, and the action was on that bond and not on the consideration of it, or supposed to be created by, or resulting from its execution in its original state. The Court held that the plaintiff could not sue upon the bond.

Rámasáwmy Kón's case as reported, and in the view which

CHRISTÁCHÁRLU v. KARIBASAYYA.

this Court took of the plaintiff's cause of action, was quite in conformity with the English decisions, all collected in *Master* v. *Miller*, and also with the Calcutta and Bombay cases, and is in my judgment right.

Ganga Ram v. *Chandar Singh* was an action on a bond hypothecating certain portion of land and claiming Rs. 607 and interest to be recovered by sale of the hypothecated lands. It was proved that the bond as originally executed, hypothecated only a portion of the lands alleged in the plaint to have been hypothecated, and that the bond had been altered without the consent of the defendant, by altering the statement of the original quantity of land to a greater quantity. The defendant admitted he owed Rs. 352 and odd on the bond, *i.e.*, as originally executed. The suit was dismissed by the two Lower Courts, and the plaintiff appealed on the ground that the alteration of the bond did not justify the dismissal of the suit *altogether*, and that the suit as regards the claim for money due should have been decided on the merits. On appeal, the Court decided that on the form of his claim, the plaintiff, appellant, should not be allowed to succeed, as his suit was "instituted upon an instrument which had been intentionally altered in a material particular by the plaintiff or with his knowledge, for his advantage and to the detriment of the defendant, and that the plaintiff could not be allowed to revert to the contract that originally was made." The decision so far is in accordance with the cases already cited. But the Court of Appeal then decided that the bond "should be discarded as evidence of the hypothecation of land." If the Court meant to decide that the bond in its unaltered form should not be admitted in evidence of the hypothecation of land, such decision appears to me inconsistent with the decision in *Davidson* v. *Cooper*, because, by the execution of the original bond, the hypothecation was a right and interest created by, and resulted from the execution of the original instrument, and that right and interest was not destroyed or divested by the alteration of the bond. See *Davidson* v. *Cooper*. That case was not cited to the Allahabad Court, and the Court apparently did not consider it, or any of the authorities in which it has been followed, or the principle upon which it is founded. In my judgment *Rámasámy Kón's* case is not in conflict with the decision in I.L.R., 7 Cal., 616, or the decision in I.L.R., 7 Bom., 418, or with the first point decided in I.L.R., 4 All., 62, though it is in

CHRISTÁCHÁRLU v. KARIBASAYYA.

conflict with the second point decided in that case, assuming the Allahabad Court held that the bond as originally executed could not be admitted as evidence of the hypothecation. In this conflict, I think the decision of the Madras Court followed exactly the rule laid down in *Davidson* v. *Cooper*, and the Allahabad Court did not do so. But *Davidson* v. *Cooper* was not cited to and apparently was not considered by the Allahabad Court, and it cannot be held that the Court declined to follow *Davidson* v. *Cooper*. I think, however, that the real ground on which the Allahabad Court decided the case was that the shape in which the plaintiff framed his plaint was such that his action was brought upon the bond as *altered*, and as that bond was not only not proved but was proved to be false, therefore his case failed.

The correctness of that view, if such was the view of the Court, cannot be questioned. In this case, the plaint is framed and the action brought solely on the altered bond, and therefore plaintiff's case failed.

I do not doubt that the principle of the decision in *Master* v. *Miller* is a rule of equity and good conscience which applies in this country, and that the rule in *Davidson* v. *Cooper* equally applies.

MUTTUSÁMI AYYAR, J.—This reference arises from a suit instituted by the appellant to recover the debt due under a mortgage bond together with interest. The debt was payable by instalments and the interest stipulated was 6 per cent. per annum. The bond was since altered without the privity of the obligor. A stipulation that on default of any instalment the whole sum was to become due at once with interest at 12 per cent. per annum was interlined and the rate of interest was altered from ½ to 1 per cent. per mensem. According to the instrument, as it stood originally, the first instalment was due at the date of the suit together with interest at 6 per cent. per annum. The Lower Courts dismissed the whole claim on the ground that the fraudulent alteration rendered the entire contract void *ab initio*. The alteration was made before the instrument was registered, and under s. 59 of the Transfer of Property Act there can be no valid mortgage or charge for more than Rs. 100, unless the instrument is registered. There was no valid charge before registration, because registration is of the essence of the transaction, and there was no valid charge after the document was registered, because the registered document was not the one which was executed by the respondent. There is no

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

doubt that the suit was properly dismissed in so far as it sought relief against the hypothecated property. Nor could it be maintained in its present form as a suit to recover the debt due at the date of the plaint under the instrument as it stood prior to the alteration. The only ground of action disclosed by the plaint is that which is founded on the altered instrument. The principal and interest claimed are what are due upon it, and the plaint contains no averments which can be accepted as disclosing a ground of action independent of the instrument. In all the English cases in which there was judgment for the plaintiff upon the instrument in its original condition, there was a separate count which did not refer to the instrument in its altered condition as the cause of the obligation which it was desired to enforce. On the ground that the only case disclosed by the plaint is the one resting on the altered instrument, the suit must also be held to have been properly dismissed in so far as it sought to recover the debt. Though in this view it is not necessary to determine the question referred to the Full Bench, still it is desirable to do so. The question is one of importance, it is likely to arise often, and the observations of the Division Bench tend to throw doubt upon the soundness of the decision in *Rámasámy Kón's case* which has hitherto been regarded as a leading decision. The law as to the effect of a fraudulent or negligent alteration of an instrument in a material point is stated in that case in the following terms: "The rule, assuming it to be applicable to a case in the Mufassal between Hindús does not go beyond this, that the altered instrument renders it invalid as the foundation of a suit by a party who has altered the instrument or in whose custody it was when it was altered. It does not render it void for all purposes and the altered instrument may be used as proof of some right or title created by or resulting from its having been executed. * * The document may be used as evidence of the debt between the parties and also of the creation of a charge upon the land hypothecated."

Now, the first part of the rule is that the altered instrument cannot be relied on as the foundation of the right or liability which is sought to be enforced. It bars a suit, (I) where the instrument is of the essence of transaction as under the Registration Act, or (II) where the instrument is the only mode of proof prescribed by any legislative enactment such as the Statute of Frauds, or (III) where the right sought to be enforced is one resting in

contract or covenant and not a vested interest. In the first case, the right or duty arises on the instrument itself, and this is the ground on which the Court of Exchequer Chamber rested the rule in *Master* v. *Miller* and to which Lord Abinger called attention in *Davidson* v. *Cooper*. In the second case, the ground of decision is that the writing is the only evidence declared admissible by a statute. *Davidson* v. *Cooper*, in which the transaction sued upon was a guarantee, and *Powell* v. *Divett* (1) which was an action brought on a bought-and-sold note, are cases in point. In the third case, the ground is that the document could have no future operation after it was altered and the covenant could not be proved without the instrument. Lord Abinger mentions as an instance in *Davidson* v. *Cooper* a covenant in an altered lease and release.

It is also necessary to see to what cases the rule was considered not to be applicable. It does not apply (I) when the suit is based on some antecedent transaction for which the instrument was given as a security, (II) when a right or title or legal relation or character is created and becomes a vested interest from the instrument having been executed, and the duty sought to be enforced attaches to it either from operation of law or a legislative enactment as an incident. In the first case, the ground is that the suit is not by reason of the instrument, and in the second case it is because the alteration of an instrument does not divest an estate or an interest or a legal character which has already vested or attached. *Earl of Falmouth* v. *Roberts*, in which a parole demise was the basis of the suit, *Gould* v. *Coombes* (2) in which the action was sustained upon an account stated, and *Sutton* v. *Toomer* (3) where the suit was rested upon deposit of money, may be referred to as cases which illustrate one class of exceptions to the rule. In *Davidson* v. *Cooper*, Lord Abinger refers to the transfer of ownership from the execution of lease and release, as an example of another class of exceptions. Thus, when property or some interest in property is actually transferred, the right to the possession of such property or to the recovery of such interest is an incident attaching to the vested estate or interest which the subsequent alteration cannot operate to divest. Again, in *The Agricultural Cattle Insurance Company* v. *Fitzgerald* (4) the legal relation or character of a shareholder was considered to have attached on the execution of the deed

(1) 15 East, 29. (2) 1 C.B., 543. (3) 7 B. & C., 416. (4) 16 Q.B., 432.

CHRISTÁCHÁRLU v. KARIBASAYYA.

of settlement which was since altered and the liability to pay calls was treated as an incident annexed by an Act of Parliament to such legal character. In that case, Lord Campbell said, "we must consider for what purpose the deed was offered in evidence. It was only to prove that the defendant was a shareholder. At all events, the erasure does not prevent the deed being given in evidence to show that the defendant who executed it is a shareholder. There is no ground for saying that if a deed is altered in a material part, it is rendered void from the beginning. It ceases to have any new operation and no action can be brought in respect of any pending obligation which would have arisen from it if it had remained entire. It may still be given in evidence to prove a right or title created by its having been executed or to prove any collateral fact." Another question which is necessary to consider in connection with this rule is to what extent the altered instrument is admissible in evidence and what is meant by a collateral fact. In the *Earl of Falmouth* v. *Roberts*, it was used as evidence of the stipulation in regard to the mode of tillage. In *Gould* v. *Coombes* it was admitted to prove that the person who stated the account was the principal debtor. In *Sutton* v. *Toomes*, it was used as evidence to prove the terms of the deposit of money. The terms "collateral fact" must be taken to refer to any material fact other than the cause of the liability sought to be enforced. In this view, if the liability is deduced either from an antecedent transaction or from some property or some legal character which vested on the execution of the instrument, it may be used as evidence to show the collateral incidents which attached to that liability. In the *Earl of Falmouth* v. *Roberts*, when the altered instrument was admitted to prove the stipulation as to tillage which it contained, Parke, B., said, after explaining that the action was not by reason of the instrument but of a parol demise, "that the alteration of the instrument could not make the defendant hold according to the custom of the country instead of according to the terms of his agreement."

The observation then contained in *Rámasámy Kón's case*, it seems to me, is in accordance with English authorities. The legal character of debtor and creditor attaches to the parties concerned on the very execution of the instrument. Hence Bittleston, J., said that a debt was created from the instrument having been executed. The debt being once created the liability

CHRISTÁCHÁRLU v. KARIBASAYYA.

to pay it would attach from the operation of law. Thus the cause of the liability being *dehors* the instrument, the question is how far the instrument is admissible in evidence. As observed by Parke, B., in the *Earl of Falmouth* v. *Roberts*, the debtor cannot be treated as bound to pay the debt in any other manner than according to the real agreement between him and the creditor, and the instrument, though altered, is admissible in evidence to show what that agreement was. It seems to me therefore that *Rámasámy Kón's case* states the rule in accordance with English cases. The leading case in this Presidency was decided in 1866, and it has since been followed. I consider it too late now to begin to examine whether the rule is consistent with equity and good conscience, and whether the course of decisions should be unsettled. If we are, however, at liberty to consider the question, I should certainly say that the rule is rather penal than equitable, and we should seek a justification for it rather in considerations of public policy than of equity and good conscience. It was admitted by Lord Kenyon in *Master* v. *Miller* that when the rule was first laid down in *Pigott's case* (1) in regard to deeds, forgery was only a misdemeanour and that the punishment of the law might have been considered too little, unless the deed also was avoided. Buller, J., showed how the rule was inconsistent with equity and good conscience. The Court of error, Lord Abinger stated in *Davidson* v. *Cooper*, rested the decision in *Master* v. *Miller* not on the wider considerations of public policy, but on the fact that the duty arose on the instrument itself. He also observed that its extension to simple contracts created difficulties, but added that *Divett* v. *Powell* was decided more than 40 years before and that it must be followed. After the rules of the Hilary Term were framed, several cases were decided in which the obligation as it stood before the instrument was enforced on the technical ground that the fraudulent alteration was not specially pleaded. The Indian Legislature did not insert the rule in the Indian Contract Act, although it inserted it in the Negotiable Instruments Act. The general rule of Private Law is that fraud shall not be a source of gain, that no one shall be permitted to take advantage of his own fraud, and that it shall form a ground for compensating for any loss which may actually result from it to others. If the fraud

(1) 11 Co., 27.

CHRISTÁCHÁRLU v. KARIBASAYYA.

committed was flagrant and required to be punished, for the sake of example, it was the public law that stepped forward and punished the delinquent. The rule, in its practical operation, entails hardship in several ways. In the first place, it is unequal in its operation, for, the proportion between the gain which the fraud is practised to secure and the penalty inflicted by the rule varies in different cases. Secondly, it is certainly good policy to punish fraud, but it tends to encourage speculative litigation by making the fraud of one a means of enriching another. Thirdly, the rule operates with peculiar harshness in that it places negligence on the same footing with wilful fraud. If the question was *res integra* I should very much hesitate to advocate the introduction of the rule into this country on considerations of equity or good conscience as contradistinguished from those of public policy. As already observed, I consider it is too late to depart from *Rámasámy Kón's case*. On these grounds I would say in answer to the question referred to us that *Rámasámy Kón's case* was decided in accordance with English decisions.

HUTCHINS, J.—I shall deliver the judgment which I had prepared in this case, although, since writing it, I have had the advantage of reading the very lucid judgment which Mr. Justice Muttusámi Ayyar has just delivered, and, as I shall point out, I now feel some doubt whether I have not taken too narrow a view of the rights of a creditor who has altered the written instrument constituting the evidence of the debt.

All the English authorities quoted in the argument are collected in the notes to *Master* v. *Miller* in Smith's Leading Cases, and it seems unnecessary to refer to them in detail. They clearly establish the following propositions upon which the answer to this reference will be found to depend:—

(I) Where the effect of a document has been to transfer, and vest in the transferree, a right to property, such right will not be affected by any subsequent alteration of the document, and the document may be given in proof of the creation and extent of the right. In such a case, as stated by Lord Abinger in *Davidson* v. *Cooper*, the altered deed is not relied on as the foundation of the action, but the moment after execution it became valueless except as evidence of the fact that it had been executed and of the right resulting from its execution. But even in such a case the suit must be framed on the transferred right, not on the altered document.

CHRISTÁCHÁRLU v. KARIBASAYYA.

(II) Where the altered document is of such a character that no other evidence of the obligation sought to be enforced is legally admissible, the suit must be dismissed. As where the plaintiff sues on a guarantee or other contract which the Statute of Frauds requires to be in writing. To quote Lord Abinger again, written instruments constituting the evidence of contracts, are within the rule of law that a material alteration is fatal to validity.

(III) Where the obligation existed before the execution of the altered document and it is open to the obligee to sue on the original obligation, and he does so, the document may be adduced in proof of the nature and extent of the obligation. So in a suit on an account stated, an altered promissory note, given as security for the amount, is admissible to prove the settlement and the amount due, although it could not have been made the foundation of the action.

The present suit, it is quite clear, was brought on the written contract of the 7th April 1883, and upon that ground its total dismissal seems perfectly correct. By that contract the defendant acknowledged that he owed the plaintiff Rs. 650 on a decree, as well as Rs. 100, which the plaintiff then undertook to pay on his behalf to a third party: for these debts he pledged certain immovable property, and he agreed to pay in certain instalments; upon default of any instalment it was to carry interest at 6 per cent. But this clause has been altered since execution and now stipulates, that, on default of any instalment, the whole amount shall at once become due with interest at 12 per cent. It was upon this altered clause that the suit was brought for the whole amount.

The alteration was made before registration, and therefore the real contract has not been registered, but some other contract to which the defendant never assented. The contract bears date after the Transfer of Property Act came into force, which was on the 1st July 1882. This point was not brought to the notice of the Division Bench, but it has an important bearing on the plaintiff's right

CHRISTÁCHÁRLU v. KARIBASAYYA.

to recover, assuming that he could recover at all, on his present plaint. At the time the contract was made, a hypothecation, or simple mortgage as it should now be called, could only be effected by a registered instrument signed by the mortgagor and attested by two witnesses, s. 59. No instrument so signed and attested was registered, but some other contract which had not been signed and attested. There is therefore no valid mortgage at all and the question whether the plaintiff can have a decree against the land for the instalment overdue does not really arise.

If, however, the alteration had been made after registration, a mortgage interest would have become vested in the plaintiff directly the instrument had been registered. The case would then have fallen under the first proposition just enunciated, and, if the plaint could have been amended, a decree might have been made for the first instalment against the mortgaged property. To this extent the doctrine laid down in *Rámasámy Kón's case* is, I think, certainly correct. The actual decree in that case was against the mortgaged property only, and if it is open to any objection, it is only that it departed from the strict rule of pleading, or in other words, that it gave relief upon a right which had become vested, although the suit was apparently framed on the bond which had been fraudulently altered.

But the judgment of Bittleston, J., certainly goes much farther than the decree. It dealt with two cases, in the former of which there was only a personal bond for money, and it shows clearly that a personal decree would have been given but for the circumstance that the personal remedy had become barred by limitation. The report does not show the exact nature of the plaint or of the debt for which the bond was given, and it is impossible now to say whether it was open to the plaintiff to sue, although I think it can be gathered that he had not sued, upon a debt antecedent to, and independent of, the bond. The judgment states that, on the English cases, "the document might be used as evidence of the debt between the parties." According to my view this was quite correct, if the debt had any independent existence and was capable of being enforced by a suit, not based on the document itself, and since reading Mr. Justice Muttusámi Ayyar's judgment, I hesitate to say that the doctrine is inaccurate even when stated absolutely. I think this point may well be left open for consideration when a plaint has been framed by a creditor to enforce not

CHRISTÁCHÁRLU v. KARIBASAYYA.

his bond, but the liability attaching to the debtor by virtue of his legal character as such. It may be that there would be some difficulty in formulating and proving such a cause of action, and possibly it may be found as hinted in my remarks when making this reference, that after all it is a question of pleading, and that even a suit founded on the altered bond would succeed, if what is sought to be recovered is due on the contract as originally executed. It would seem that the present plaintiff is not in a position to sue at all, except upon the contract of April 1883. A suit on the judgment-debt for Rupees 650 would be barred by s. 244 of the Code, and the defendant was under no obligation to pay plaintiff the Rupees 100 except upon the promise contained in the altered document itself. It thus becomes unnecessary to consider whether the document is such that its execution would prevent the plaintiff from reverting to the original consideration, or whether the plaintiff should be allowed to amend the plaint and ask for the recovery of the first instalment; but he has taken his chance and failed, and I entirely agree that no amendment should be permitted.

I entertain no doubt that the doctrine established by the English authorities is in consonance with equity and good conscience and applicable to the Mufassal, unless it is proved that the alteration was made accidentally or innocently.

PARKER, J.—After hearing the argument, I remain of much the same opinion as when the case was first argued before the Division Bench. It was not on that occasion brought to our notice that the mortgage sought to be enforced was executed after the Transfer of Property Act came into force. The alteration was made before the registration of the document, and hence the real contract made has never been registered. The document therefore can have no force as a mortgage, but the question remains whether the alteration will vitiate the document as evidence of a debt, and disentitle plaintiff to a money decree for the first instalment.

The contract between the parties has been reduced to writing and the writing is the evidence of the contract. The debt has no existence independently of the document. It seems to me that if plaintiff recover at all upon the suit as framed, he must recover upon the writing.

But according to English law the plaintiff could not recover upon the written contract as it has been altered in a material part,

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

and the only cases quoted to us at the bar in which such altered deeds have been admitted in evidence are cases in which they have not been sued on as the foundation of the contract, but are merely produced in proof of some right or title created by, or resulting from, their having been executed.

The question therefore does not really arise in this suit whether the decision of Bittleston, J., in *Rámasámy Kón's case* is correct, and as it does not, I would hesitate to lay down that the doctrine of Lord Abinger in *Davidson v. Cooper* can be pushed so far as to allow a plaintiff to recover upon a conveyance altered by himself in a material part (declaring upon the document as altered) when the document must necessarily be proved to enable him to succeed at all. To push the doctrine so far would be practically to nullify, in the most important class of cases, the equitable doctrine laid down by Lord Abinger, that "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected." The English decisions have not carried Lord Abinger's *dictum* so far, and it may be doubted, if the point were to arise, whether the Courts would do so. I can see no reason why the rule of *Master* v. *Miller* should not apply to the Mufassal in India. It is consistent with equity and good conscience, and seems to me a just and wholesome rule to apply in a country in which such fraudulent practices are unhappily far from uncommon. I would confirm the decision of the Courts below, and dismiss this Second Appeal with costs.

HANDLEY, J.—As I understand *Rámasámy Kón's case* all that it was necessary to decide was that the hypothecation bonds though altered in a material part might be used as evidence of the charge on the land created by them. The personal remedy against the defendant for the debt was barred by limitation, and therefore it was unnecessary to consider whether it might have been inferred in that suit, notwithstanding the alteration in the bonds. The judgment therefore is only a binding decision, so far as it lays down that the rule of English law as to material alterations in documents, established by *Pigot's case* and extended to documents other than deeds, by *Master* v. *Miller*, and the subsequent cases, does not prevent an altered hypothecation bond from being given in evidence of the charge upon the hypothecated property created by its execution. So far I think the case may have been well decided upon the principle enunciated by Lord Abinger in

CHRISTÁ-CHÁRLU v. KARIBAS-AYYA.

Davidson v. *Cooper*, though even so far I think the decision pushes the exception to its extreme length in allowing a person who based his suit upon a fraudulently altered document as altered to succeed even in part in a suit so framed. I doubt whether any English case can be found which departed so far from the principle of *Pigot's case* and *Master* v. *Miller* as this. However, I am not prepared to say that, adopting the principle of the exception as laid down by Lord Abinger in *Davidson* v. *Cooper*, the decision in *Rámasámy Kón's case* was not logically correct. But in holding that the altered bonds might be used as evidence of the debt between the parties, it seems to me that the learned Judges who decided the Madras case were going far beyond the English cases and were practically setting aside the rule of *Pigot's case* and *Master* v. *Miller*. In doing so, they were, as I have before observed, deciding a point which it was not necessary for them to decide, and I think their decision is in that respect not good law and should not be followed.

As to the general question of the applicability of the rule of English law as to altered document to this country, the rule seems to me to be eminently in accordance with equity and good conscience so far as it relates to fraudulent alterations of documents and affects the parties to such frauds; and the reasons of public policy for maintaining the rule to that extent are to my mind of special application to this country. Whether the rule should be followed to the extent of the English cases in applying it to innocent or accidental alterations and to innocent parties is, I think, open to question. My own view is that it would be more in accordance with equity and good conscience to restrict the application of the rule to fraudulent alterations and to the parties to the fraud. The Legislature has no doubt carried the rule to its full extent as to negotiable instruments (s. 87 to 89 of Negotiable Instruments Act, 1881), but there are reasons for greater strictness as to such instruments which do not apply to other documents.

In the present case the hypothecation deed was registered as altered, the defendant protesting. Upon the facts as now found, therefore, the instrument of hypothecation as originally signed by the parties was never registered and therefore created no interest in the land. Plaintiff therefore cannot enforce his charge upon the land even if the decision in *Rámasámy Kón's case* is followed. And for the reasons I have before given I would not follow it so as

CHRISTÁCHÁRLU v. KARIDASAYYA.

to allow him to give the altered document in proof of the debt and to recover in this suit. I do not see how he could possibly in any view recover the first instalment, for the obligation to pay that and the other instalments at certain times was entirely created by, and depends upon the document. If *Rámasámy Kón's case* is to be followed as to the debt, it would seem that the document can only be used as evidence of a pre-existing debt (if any). But the parties having by contract in writing fixed the amount of debt and the periods for its payment, and that contract having become by the fraudulent act of one of the contracting parties incapable of being enforced, how can the Court now declare what is the debt, and when and how it is to be paid? Or if it can do so, shall it do so in this suit expressly framed for the enforcement of a contract found never to have existed between the parties? I think the suit was rightly dismissed by the Lower Courts, and I would dismiss the Second Appeal with costs.

Appeal dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. April 21. July 16.

NARASANNA (PLAINTIFF), APPELLANT,

and

GURAPPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Decree against father—Sale of ancestral estate in execution of money-decree—Son's liability and rights.

A sale of ancestral property in execution of a money-decree obtained against a Hindú father will, if the debt was neither immoral nor illegal, pass to the purchaser, the entire interest of which the father could dispose, *i.e.*, his son's as well as his own share provided the purchaser has bargained and paid for such interest.

The son not being bound by the decree against his father may contest the sale by suit, but unless he proves that the debt was not such as to justify the sale, he cannot succeed.

The revised ruling of the Full Bench in *Ponnappa* v. *Pappuvayyangár*, I.L.R., 9 Mad., 343, as to sales in execution of money-decrees against the Hindú father has been overruled by the decision of the Privy Council in *Mussamut Nanomi Babusin* v. *Modun Mohun*, L.R., 13 I.A. 1; s.c. I.L.R., 13 Cal., 21.

* Second Appeal 926 of 1885.

NARASANNA v. GURAPPA.

APPEAL against the decree of F. E. Gibson, Acting District Judge of Kurnul, reversing the decree of P. V. Rangáchárlu, District Múnsif of Nandyál, in suit 229 of 1884.

The facts of the case appear from the judgment.

Srirangácháryar for appellant.

Visvanáda Ayyar for respondent.

The Court (Collins, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—The appellant Narasanna resides in the district of Kurnul, and his family, which consists of himself, his two brothers and his father, is governed by the Mitákshará law. In original suit 125 of 1871 on the file of the District Múnsif of Nandyál, the respondent No. 1 obtained a decree for a sum of money against the father of the appellant. Neither the appellant nor his brothers were parties to that suit. The judgment-creditor brought to sale certain lands belonging to the joint family by execution proceedings instituted against the father, and the respondents Nos. 2 and 3 became the purchasers. The appellant then brought the present suit to have it declared that the lands which had been sold were his self-acquired property. He stated in his plaint that he had divided from his father about 20 years prior to the suit and that he had acquired the lands in dispute with his own funds.

Respondent No. 1, who alone resisted the claim, denied the alleged division and contended that the lands which he brought to sale were ancestral property. The District Múnsif upheld this contention and decided that the appellant was not entitled to the declaration that the lands were his exclusive property. The District Múnsif then proceeded to consider whether the appellant was entitled in part to the declaration he asked for on the respondent's own showing. The appellant did not allege that the decree was for a debt which a son would not be liable to pay under the special rule of Hindú law relating to the obligation of sons to pay their father's debts. The District Múnsif, however, considered himself bound to follow the Full Bench decision of this Court, in *Ponnappa* v. *Pappuvayyangár* (1) and held that the appellant's interest in ancestral estate did not pass by the Court sale, and that such interest was not liable to be sold in execution of a money-

(1) I.L.R., 9 Mad., 343.

NARASANNA v. GURAPPA.

decree against the father. Accordingly he made a decree declaring that the appellant was entitled to a quarter share, and that the Court sale did not affect the appellant's interest in ancestral estate. From this decree the respondent No. 1 appealed. The Judge reversed it on the grounds that he was not aware of the recent decision of this Court on which the District Múnsif relied, and that the son's interest also passed by the Court sale. He relied on the decision of the majority of the Judges of this Court in *Ponnappa Pillai* v. *Pappuvayyangár*.(1)

It is from this decree of the Lower Appellate Court that this second appeal is preferred.

It is urged on behalf of the appellant that his undivided interest in ancestral estate did not pass by the Court sale in execution of the money-decree against his father. The respondents support the decree not only on the ground that the son's interest passed by the sale but also on the further ground that the District Múnsif was not justified in decreeing in the appellant's favour on a case not disclosed by his plaint.

It is no doubt true, as alleged for the respondents, that the appellant stated in his plaint that the lands in dispute were his self-acquisition and that he failed to prove his averment. But this was certainly no ground for dismissing his suit altogether if he was entitled in part to the relief sued for on the facts admitted by respondent No. 1 himself. His admission is clearly evidence in favour of the appellant, and the latter is entitled to claim relief to the extent to which it may be lawfully adjudged by virtue of such admission. The question then on which our decision must depend is one of Hindú law as already stated. It is a question which frequently occurs in this country, and the decisions in regard to it are not on all points in harmony either in India or in the Privy Council. The leading case on this subject in this Presidency is *Ponnappa Pillai* v. *Pappuvayyangár*. It was decided on the 1st April 1881, and the judgments delivered in that case contain a full exposition of the Hindú law on the subject and of the course of decisions in India and before the Privy Council.

It was decided by the majority of the Court in that case (I) that the son was bound to pay his father's personal debt out of ancestral property derived through the father, and (II) that the

(1) I.L.R., 4 Mad., 1.

NARASANNA v. GURAPPA.

father was competent to sell ancestral property to pay his own antecedent debts provided they were such as the son would be bound to pay under the special rule of Hindú law. These two propositions of law were since approved by the Privy Council in *Muttayan* v. *Zamindár of Sivagiri*,(1) which was decided in May 1882.

As to the interest which passed by a Court-sale in execution proceedings, it was held that when the decree against the father was founded upon a mortgage and when it contained a direction that the mortgage property be sold on default of payment, the son's interest would not pass by the Court-sale, for, the right of redemption which the son had could not be foreclosed except by a decree to which he was made a party. In regard, however, to money-decrees against the father, it was decided that the entire ancestral property inclusive of the son's interest passed by the Court-sale. In appeal 71 of 1880 it was held by a Division Bench of this Court that when it appeared from the execution proceedings that the purchaser intended to buy only the father's interest, the son's interest did not pass. The course of decisions was in accordance with these propositions of law, until the decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*.(2) In that case the Judicial Committee held that the son's interest did not pass by a sale in execution of a money-decree and referred to their decision in *Deendyal* v. *Jugdeep Narain Singh*.(3) They further hinted that, if the decree were founded on a mortgage and contained a direction in regard to the sale of the mortgaged property, the son's interest might also pass by the execution sale. In advertence to this case, the decision of the Full Bench of this Court passed in 1881 was reconsidered in S.A. 703, 704 and 705.(4)

It was decided that when there was a money-decree the father's interest was alone liable to be sold in execution, and that when there was a mortgage-decree the entire estate was liable to be sold. It was considered that in the one case, the right, title and interest of the judgment-debtor was the right of the father as an individual co-parcener, and that in the other the Court by its decree executed the father's mortgage. But in December 1885 the

(1) I.L.R., 6 Mad., 16.
(2) I.L.R., 10 Cal., 626.
(3) L.R., 4 I.A., 247.
(4) I.L.R., 9 Mad., 343.

NARASANNA v. GURAPPA.

Privy Council laid down the law differently in *Mussamut Nanomi Babuasin* v. *Modun Mohun*. In that case, the question raised for decision was, as in this, whether anything passed by the sale except such share as the father would have taken on partition, and the Judicial Committee held that the entire ancestral estate passed though there was only a money-decree against the father. They observed as follows: "There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitákshará law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father." "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debtor against the creditors' remedies for their debts, if not tainted with immorality." The Judicial Committee do not think that the authority of the *Deendyal's case* bound the Court to hold that nothing but Girdhari's (the father's) coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might procure a sale of it by suit. All the sons can claim is that not being parties to the sale or execution proceedings, they ought not be barred from trying the facts or the nature of the debt in a suit of their own. Assuming that they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or the father's coparcenary interest alone (and in *Deendyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings. Thus, it is clear that the Courts are now first to ascertain whether the purchaser in fact bargained and paid for the entirety, and if it appears that he did so, then to inquire whether the decree debt is tainted with immorality or one which the son would not be liable to pay, and

NARASANNA v. GURAPPA.

if the debt is not immoral, to hold that the entire ancestral estate and not merely the father's coparcenary right passed by the sale.

In the case before us the plaint is framed on the view that the purchasers bought in fact the entire estate, and the appellants did not even allege that the decree debt was tainted with immorality. Though there was only a money-decree, the father could sell the entire ancestral estate to pay his antecedent debt, and by the execution sale, therefore, the entire interest over which he had disposing power passed to the purchasers.

For these reasons, we confirm the decree of the Judge, though the grounds on which he rested it cannot be supported and dismiss this appeal. Having regard, however, to the decision of this Court in *Ponnappa* v. *Pappuvayyangár*,(1) we direct each party to bear his costs of this appeal.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

QUEEN-EMPRESS

against

O'SHAUGHNESSY.*

1886. July 12.

Madras District Municipalities Act, 1884—*Procedure to compel payment of tax—Distress.*

Under s. 103 of Act IV of 1884 (Madras), a prosecution for default of payment of tax cannot be instituted unless the tax cannot be recovered by distress and sale of moveable property of the defaulter as provided in that section.

APPEAL under s. 417 of the Code of Criminal Procedure against the order of W. E. Clarke, First-class Magistrate of Nílgiris, in calendar case No. 11 of 1885, acquitting J. E. O'Shaughnessy charged under s. 62 of the Towns' Improvement Act, 1871 (Madras Act III of 1871) with having exercised his profession as Civil Engineer within the municipality of Ootacamund for more than two months in the official year 1884-85 without paying tax in respect thereof as required by s. 58 of the Act.

(1) I.L.R., 9 Mad., 343.

* Criminal Appeal 167 of 1885. See *ante*, p. 38.

QUEEN-EMPRESS v. O'SHAUGHNESSY.

The Acting Public Prosecutor (Mr. *Powell*) for the local Government.

Subramanya Ayyar for O'Shaughnessy.

The facts, necessary for the purpose of this report, appear from the judgment of the Court (Collins, C.J., and Brandt, J.).

JUDGMENT.—This case was argued before us on the assumption that it fell to be decided under Madras Act IV of 1884, and on that assumption we dispose of it.

Section 112 provides that all arrears of taxes or other payments due to the Municipal Council at the time when the Act comes into operation in any municipality where (as in the case of Ootacamund) the Towns' Improvement Act, 1871, was previously in force may be recovered as though they had accrued under Act IV of 1884; but under the latter Act the procedure prescribed for the recovery of such taxes and for infliction of a penalty for exercising a profession or trading without having paid profession or trade tax is different from that provided in Act III of 1871.

Section 103 of the present Act provides that, if the tax is not paid within fifteen days from presentation of service of a bill or notice prescribed, and if cause be not shown by the person called on to pay it to the satisfaction of the chairman why it should not be paid, the chairman may proceed to recover the amount together with costs (1) by distress and sale of the movable property of the defaulter, or if the defaulter be the occupier of any building or land, in respect of which such tax is due, by distress or sale of any property found in or on such building or land; (2) if the amount of such tax cannot be recovered by distress or sale of the moveable property of the defaulter by prosecuting the defaulter before a Magistrate; and s. 111 provides that any person bound to pay any tax, who shall be prosecuted under s. 103 before a Magistrate, shall, on conviction, be liable to pay a fine not exceeding twice the amount of the tax found to be due.

No proceedings having been taken under s. 103, and it not appearing that the tax could not be recovered by distress and sale of the moveable property of the defaulter, the prosecution before the Magistrate must fail, and on this ground we dismiss the appeal against the acquittal.

We refrain from expressing any opinion as to the Magistrate's interpretation of the 55th section of the Act.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

ROWTHAKONNI—*in re.**

1885. July 21 1886. July 27.

Act IV of 1842—*Act IX of* 1846—*Madras Out-ports Boat Rules of* 1*st October* 1867—*Jurisdiction of Magistrates—Liability of owner under Rule* 7—*Burden of proof.*

Under Act IX of 1846, the Madras Government is authorized to make in respect of ports in the presidency such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras Roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require.

Act IV of 1842, s. 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act:

Held, that it was competent to the Government of Madras to provide that cases cognizable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace.

Under rule 7 of the amended rules for the better management of boats, &c., plying for hire at the out-ports of the Madras Presidency, dated 1st October 1867, the owner of a boat is liable to fine on proof of his allowing his boat to ply without the requisite complement of men:

Held, that where it was proved that a boat was plying without its proper crew the absence of proof by the prosecutor that the owner was aware of the fact was no bar to his conviction.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to revise the proceedings of F. H. Hamnett, Acting Head Assistant Magistrate of Madura, confirming on appeal the finding and sentence of P. Venkatéswara Ayyar, Second-class Magistrate of Tiruvadanei, in case No. 849 of 1884.

The facts and arguments are fully set out in the judgment of the Court (BRANDT and PARKER, JJ.)

Mr. *Norton* and *Venkatarámayyar* for petitioner.

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The judgment of the Court (Brandt and Parker, JJ.) was delivered by

BRANDT, J.—The petitioner, Rowthakonni, owner of boat No. 2 at Thondi, has been convicted by the Second-class Magistrate

* Criminal Revision Case 218 of 1885.

In re ROWTHA-KONNI.

of Tiruvadanei of "plying a boat without the requisite complement of men (an offence) punishable under Boat Rule No. 7," and sentenced to pay a fine of Rupees 25, and in default to ten days' simple imprisonment.

Complaint was laid by a peon of the Sea Customs Office, and his evidence and that of the Assistant Superintendent of Sea Customs constituted the evidence for the prosecution. On this evidence, the Second-class Magistrate found it proved that on the 1st July 1884, when the petitioner's boat brought timber to the shore from a "dhoni," it was manned by one tindal and four lascars only, while under the license it should have been manned by one tindal and six lascars. On being questioned as to this, the tindal replied that the two absent men had gone to Colombo to earn a livelihood there.

The petitioner's defence was that his boat "always is" manned with the full complement of crew, and that this was a wholly false case brought in consequence of personal spite against him on the part of the Assistant Superintendent of Sea Customs. Three witnesses were called for the defence: one deposed to some incident connected with the landing of some cargo from the petitioner's boat on another occasion when the Assistant Superintendent had objected to its removal, and two, the tindal and a lascar of the petitioner's boat, deposed that the latter always has its full crew.

In appeal the Divisional Magistrate gave his reasons for refusing to believe that the charge was a false charge, and, giving credence to the evidence for the prosecution, dismissed the appeal.

The High Court is moved to exercise its powers of revision on the grounds that even admitting that the boat was undermanned, the owner ought not to have been convicted in the absence of proof of knowledge on his part that the requirements of the rule had not been complied with in this particular instance; and that he was entitled to acquittal on the general principle that a master is not criminally liable for criminal negligence on the part of his servant.

At the hearing it was further contended that the Second-class Magistrate not being a Justice of the Peace had no jurisdiction in this case.

No reference is given in the judgments of the Courts below to the rules under which the conviction was had. A summary of

In re ROWTHA-KONNI.

the boat rules for the out-ports of this presidency is given in the Standing Orders of the Board of Revenue, and search having been made we have found in the *Fort St. George Gazette* of the 15th October 1867 a notification, dated the 30th September 1867, containing "amended rules for the better management of boats and canoes plying for hire at the out-ports of the Madras Presidency." The notification does not specify the authority under which these rules are made, but it is recited that they have received the sanction of the Governor-General in Council and come into force on the 1st October 1867.

Act IV of 1842, "Madras Roads—Boat Regulations," an Act for the better management of boats and catamarans in the Madras Roads, and for the amendment of certain harbour regulations provides among other things that no person either as owner or servant shall use, &c., any boat or catamaran to carry passengers, goods or letters in the Madras Roads unless licensed; it provides for the licensing of boats under certain conditions; for penalties for breach of the conditions stated, on conviction before a Justice of the Peace.

Act IX of 1846 is an Act authorizing the Governor of Fort St. George to make from time to time in respect of each port or other place of anchorage in the presidency such regulations for the management of boats and catamarans, &c., and such other matters as are provided for by Act IV of 1842, in respect of the Madras Roads as shall seem to them expedient, "being similar in principle to the provisions contained in the said Act, but varying in detail as local circumstances require such variation."

It is contended by the learned Counsel for the petitioner that the qualification of the officers by whom cases involving questions as to breaches of the regulations or rules are to be tried is a matter of principle, and that it was not competent to the Local Government to provide that such cases shall be cognizable by Magistrates not being Justices of the Peace.

We do not think that the contention is sound. The local circumstances of the out-ports are very different from those of the presidency port. Had the jurisdiction of the Magistracy been considered a matter of first importance, it is reasonable to suppose that the Act would have contained clear words restricting the jurisdiction to Justices of the Peace. There is nothing in the matters made punishable by fine or otherwise which would appear

In re ROWTHA-KONNI.

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In re ROWTHA-KONNI.

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In re ROWTHA-KONNI.

to be of great intricacy or of such importance as to make it essential that they should be adjudicated on by Justices of the Peace alone; it cannot, we think, be said that there is anything in the regulations or rules dissimilar in principle to the provisions contained in the earlier Act. We must further assume that the amended rules of 1867 were made and sanctioned under the authority given in the Act of 1846.

There is more in the other objections urged, viz., that, having regard to the general rule which is that in civil actions a master is liable for the acts of his servants, but not in criminal matters for the negligence of his servants to which he has not personally contributed, the word "allow" in the rule for violation of which the petitioner has been convicted cannot be taken as meaning that the owner is liable for a breach of the rule by his servants, without more, but that there must be some proof of wilful, or intentional, or at least positive neglect to take precautions for compliance with the requirements of the rule, and that there is no proof of such in this case.

The general principle 'when penal consequences are made to follow acts of omission' is, as stated by Keating, J., in *Dickenson* v. *Fletcher*,(1) 'that when such consequences are to follow, there must be something in the nature of an actual neglect or default. That a person should be made liable to a penalty without any neglect or default on his part is contrary to the principle so well established by a great number of cases in which the Court, and especially this Court, have held that penalties are not incurred in the absence of *mens rea*,' and in that case Keating, Brett and Denman, JJ., were agreed, the second not however without considerable doubt, that, when the owner of a mine appointed a competent person to examine and lock the safety lamps required in the mine, but such person delivered out certain safety lamps for use in the mine unlocked, in the absence of personal default on the part of the owner he was not liable to a penalty in respect of the act of the person so employed.

The decision in the particular case was, however, to a great extent based upon the particular words in the 22nd section of the Statute, 23 and 24, Vict. c. 151, "if through the default of the owner or agent" of the mines "any of the general or special rules **

(1) L.R., 9 C.P., 5.

In re ROWTHA-KONNI.

be neglected or wilfully violated by any such owner or agent," and regard was also had to the provision contained in susbequent Statutes by which the Statute under consideration was repealed, and in which it was provided that in the event of any contravention of the provisions of the Act, the owner, agent and manager of the mine shall be guilty of an offence 'unless he proves that he had taken all reasonable means to prevent such contravention.'

It was moreover not unreasonably contended that the Legislature intentionally created an exception to the general rule, and did enact that the owner of a boat licensed under the special Act and Regulations should be personally liable to a money penalty and to imprisonment in default, as the only means of ensuring compliance with the requirements of the case; and the question cannot be disposed of with reference to the general principle of law only, without due regard being had to the actual words and general provisions of the rules, and to the particular subject-matter and intent of the Act.

No boats are allowed to ply without a license, and it is to be presumed that only so many are licensed as it is estimated will suffice for the requirements of the port; there is then, in some sense, a monopoly, and it may well be that in view of the advantages thereby secured, boat owners are willing to subject themselves to considerable liabilities.

Under rule 7 the owner alone is liable to fine on proof of his "allowing" his boat to ply without the requisite complement of men; while under rule 8 it is the tindal of any craft loaded with passengers or cargo in excess of the number or tonnage specified in the license who is primarily liable, "every other person who shall be guilty, either as principal or accessory, of the like offence, after having been duly warned by the tindal or owner" being liable to similar punishment.

Under rule 9, if any tindal, after due warning, plies to and from the shore, after notice given by any of the authorities named that is dangerous to do so, 'shall forfeit all hire,' *and the owner shall be subject to suspension of license.*

By rule 15 any owner of a licensed boat *or person deputed by him* who refuses to let such boat for hire without reasonable and satisfactory cause for such refusal is liable to a penalty.

It must be assumed then that the Legislature advisedly made the owner alone liable under the rule under which the petitioner

In re ROWTHA-KONNI.

has been convicted; and it only remains to decide, as a point of law, what effect is to be given to the word "allow."

The case is put of an owner being absent from the port in such circumstances that he could not possibly ensure compliance with the terms of the license; but there is no evidence that this was the case here; and there is no need to determine the hypothetical case put. The petitioner's defence was that his boat was fully manned. It is held proved that it was not. And taking the tindal's first statement as true, which it probably is, that the two missing lascars had gone away to Ceylon, there is no evidence that fact was not or might not have been communicated to the owner nor as to the length of time they had been gone.

It was suggested that a boat might leave the shore with a full complement, and that without default on the part of the tindal or possibility of prevention on the part of the master, some of them might leave the boat before it returned to shore; here again there is no evidence that this was so in this case, nor was it suggested as a defence at the trial.

We must then find that the boat was "plying" without a full crew.

Under rule 6, in the absence of registered tindals or lascars, others may be employed "on an emergency and with the permission of the registering officer," but it is not suggested that any notice had been given of the defection of two of the crew, or that any application had been made to register or employ temporarily others in their place.

Having regard to the provisions of the rules as a whole, and to the distinction that is made as to the liability of the owner, and of the tindal in some cases, we must hold that by the word "allow," the Legislature intended to create a liability more extensive than would be implied in such words as "if the owner neglects to ensure that the boat is fully manned," and thereby contravenes the provisions of the rules, he shall be guilty of an offence under the rules "unless he proves that he had taken all reasonable means to prevent such contravention."

We do not say that on proof of such means having been taken the merest nominal fine would not suffice, but we are not prepared to hold, having regard to the peculiar language used, and to rules read as a whole, that it was necessary for the prosecution in this

In re ROWTHA-KONNI.

case, to prove the *mens rea*, or that the conviction, on the special facts of this case, is bad in law.

Having regard, however, to the fact that it is not shown that this boat had been plying undermanned before this occasion, or if so, for how long, and in the absence of proof of any personal knowledge on the part of the owner that it had not its full complement, or that there were any special reasons for making an example in this case, we think that the fine, Rs. 25, being half of the maximum amount, is excessive, and we shall reduce the fine to Rs. 10, and direct that the difference be refunded, if the fine has been paid.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

KUNHAMED, PETITIONER,

and

CHATHU, RESPONDENT.*

1886. April 16.

Civil Procedure Code, ss. 315, 622.

Where an order was passed under s. 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court:

Held, that under s. 622 of the Code of Civil Procedure the High Court could set aside the order because, the judgment-debtor having been found to have a saleable interest, the Lower Court had no power to order a refund.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order passed by B. D'Rozario, District Múnsif of Cannanore, under s. 315 of the Code of Civil Procedure.

In execution of the decree in suit 354 of 1880, Chathu Kurup purchased the equity of redemption of certain land, the property of the judgment-debtor in that suit for Rs. 970.

In 1883 he brought suit No. 153, to redeem the mortgage (kánam). It was held, however, that he was not entitled to redeem if the mortgagees elected to exercise their right of purchasing the equity of redemption, inasmuch as they were found to be otti and not kánam holders.

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* Civil Revision Petition 16 of 1886.

KUNHAMED v. CHATHU.

In 1885 Chathu Kurup received from the mortgagees Rs. 600 under an order of the Court.

He now claimed under s. 315 of the Code to recover Rs. 370, the balance of the Rs. 970 he had paid in suit 354 of 1880, from Kunhamed, the decree-holder in that suit.

Kunhamed resisted the application on the ground that s. 315 of the Code did not apply to the case, inasmuch as the judgment-debtor had a saleable interest of Rs. 600 in the property sold.

The District Múnsif held that there was nothing to prevent Chathu Kurup from recovering the sum claimed and that the objections raised by Kunhamed were frivolous and directed payment of Rs. 370 with interest at 6 per cent. from the date of the purchase by Chathu Kurup.

To set aside this order the present application was made.

Anantan Náyar for petitioner, Kunhamed.

Mr. Wedderburn for respondent, Chathu Kurup.

This Court has no jurisdiction, under s. 622 of the Code of Civil Procedure, to revise the order of the District Múnsif. The order was passed in a suit in which an appeal lay to the High Court.

The word 'case' in s. 622 is a synonym for 'suit' (see ss. 617, 618, 619, 620, 621.)

The intention of Legislature apparently was that the High Court should have the power of revision in cases falling under s. 586 of the Code in which no second appeal is allowed.

Again, according to the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*,(1) the Múnsif had jurisdiction to determine whether a refund could be made. Bad law is not a material irregularity according to that decision.

Anantan Náyar.

This Court has interfered in similar cases.

Sivarâma v. *Rámá* (2) and C.R.P. 294 of 1885.

The Court (Collins, C.J., and Brandt, J.) delivered the following

JUDGMENT:—The respondent himself applied for refund of the sum of Rs. 370, being the difference between the value of the purchase-money paid by him and the sum of Rs. 600 paid to him under order of the Court by the otti-holder.

The District Múnsif made an order for the refund accordingly. That the judgment-debtor had some saleable interest in the property sold is then clear, and in that case the District Múnsif had no jurisdiction to make an order under s. 315 for refund of the purchase-money or any part thereof.

(1) I.L.R., 11 Cal., 6. (2) I.L.R., 8 Mad., 99.

KUNHAMED v. CHATHU.

No appeal lay against the order passed by the District Múnsif; and following the decisions of this Court in *Sivarâma* v. *Rámá*(1) and Civil Revision Petition 294 of 1885,(2) we deal with the case in revision and set aside the order of the District Múnsif, dated 3rd October 1885, with costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Parker.

GULAM MUHAMMAD SHARIF-ÚD-DAULAH, *in re.**

1886. January 8.

Criminal Procedure Code, s. 197—Sanction to prosecute Judge for words uttered on the bench.

Where a Judge was charged with using defamatory language to a witness during the trial of a suit:

Held that, under s. 197 of the Code of Criminal Procedure, the complaint could not be entertained by a Magistrate without sanction.

THE facts of this case are set out in the judgment of the Court (Parker, J.)

The Acting Advocate-General (*Mr. Shephard*) for petitioner.

PARKER, J.—This is an application to direct the Presidency Magistrate of Black Town to entertain the complaint of petitioner against Mr. Ponnusámi Pillai, 3rd Judge of the Madras Court of Small Causes, charging him with defamation and insult under ss. 500 and 504 of the Indian Penal Code. The Presidency Magistrate has refused to entertain the complaint in the absence of the sanction of Government or the High Court under s. 197 of the Criminal Procedure Code.

The petitioner was a witness before the Small Cause Judge in a case tried before him, and the expressions complained of are alleged to have been used by the Judge in addressing the witness in the course of the trial. It is contended by the Advocate-

(1) I.L.R., 8 Mad., 99. (2) Not reported.

* Criminal Miscellaneous Petition 105 of 1885.

In re GULAM MUHAMMAD SHARIF-UD-DAULAH.

General that the expressions were not used by the Judge as a public servant, and, therefore, that no sanction under s. 197 of the Code of Criminal Procedure is necessary, and *Imperatrix* v. *Lakshman Sakhárám Vaman Hari and Balaji Krishna* (1) was referred to show that the acts for which sanction to prosecute is required are only acts which would have no special signification except as done by a public servant. It is argued that the words complained of would be equally offensive if used by any one whether a public servant or not. The ruling quoted was one, given on s. 466 of the old Code (X of 1872), which, though the wording is different, is substantially the same as s. 197 of the present Code.

Reference was also made to the ruling of the Calcutta High Court that the corresponding section in the former Code related only to offences specified in chapter IX of the Penal Code, to which, however, the Bombay High Court has not assented, holding that the section at least applied equally to such offences as are specified in ss. 217—223, which are in chapter XI. These cases are alluded to in Prinsep's Criminal Procedure, 7th edition, page 126. The Bombay High Court agreed, however, in the principle that s. 197 related only to acts and omissions which were offences when committed by a public servant.

If defamatory language were used by a Judge to a person out of Court—when not sitting or actually officiating as a Judge—it seems quite clear that no sanction under s. 197 of the Code of Criminal Procedure would be required; but the case, as it seems to me, would be different if the same words were used by the Judge in the course of the trial of a suit. He is then acting in his official capacity and it seems impossible that the words used by him in the course of the trial can be uttered in his private capacity. The words uttered are then uttered as Judge and not as a private individual, and if any criminal offence has been committed in the uttering of them, the offence has been committed as a Judge.

That this is so is clear from the judgment of the Court of Exchequer in *Scott* v. *Stansfield*.(2) I must hold that the Presidency Magistrate had no jurisdiction to entertain the complaint without sanction and dismiss this application.

Solicitors for petitioner—*Branson & Branson.*

(1) I.L.R., 2 Bom., 481. (2) L.R., 3 Ex., 220.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

KRISHNAN AND OTHERS (DEFENDANTS), APPELLANTS,

and

SANKARA VARMA (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

1886. March 22. April 19.

Contract Act, ss. 21, 65—*Mistake of law—Agreement to secure repayment of loan, collateral, to primary obligation.*

By an agreement in writing, defendants, trustees of a temple, in consideration of an advance of money which they represented was required to pay off debts incurred for the benefit of the temple, granted to plaintiff a lease of the right to manage the temple lands, and plaintiff promised that he would repay himself out of the profits to be derived from the lands and that neither the defendants nor their family property should be made liable for the debt.

In a suit by plaintiff against a tenant of the temple lands, this lease was held to be void for illegality. Defendants subsequently resumed management and plaintiff sued them to recover the money advanced by him.

It was found that the agreement was entered into by both parties under a mistake as to the validity of the lease:

Held, that assuming s. 65 of the Contract Act was not intended to vary the rule that a mistake of law is no ground for relieving a party from his own contract, plaintiff was nevertheless entitled to recover on the ground that the agreement which provided for repayment was collateral and had failed.

An agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in suit 5 of 1884.

The plaintiff, Kadathanáh Ayanjeri Kovilagath Ráma Varma Rájá, sued Náráyana Mangalath Varieth Krishnan and nine others, members of a Malabar tarwad, to recover Rs. 4,000 lent to defendants under a registered agreement, dated 6th April 1879, with interest at 12 per cent.

The plaintiff prayed that this sum might be recovered by sale of temple properties mentioned in the plaint; 'out of the

* Appeal 69 of 1885.

KRISHNAN v. SANKARA VARMA.

defendants' pocket,' and by granting 'other reliefs which he might ask for as the Court might think fit to grant.'

The Subordinate Judge decreed payment of Rs. 3,000 with interest at 12 per cent. from February 28, 1882, and declared that the properties of defendants' tarwad were liable for the amount decreed and costs.

Defendants appealed and plaintiff filed a memorandum of objections against this decree.

Sankaran Nâyar for appellants.

Gopâlan Nâyar for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT :—The appellants are the hereditary urálars of the Polúr temple in the district of Malabar. They considered that their management was not efficient and they were unable to pay the debts which, as they alleged, they had contracted for the purposes of the devasam. On the 6th April 1879, they and their karnavan, Rámá Variar, induced the respondent to advance Rs. 8,000 to enable them to pay those debts. In return for this advance he accepted a lease of the right of management for a period of 96 years, and agreed to repay himself by demising properties belonging to the temple on kánam. The appellants undertook to afford him every facility for so doing, and the respondent agreed that neither they nor the property belonging to their family should be made liable for the debt. To this effect appellants executed document A in respondent's favor on the 6th April 1879. As stated by the respondent, he paid them Rs. 4,000 in cash and executed bond B for the balance of Rs. 4,000. Thereupon, he entered on the management of the temple as the assignee of the uráyama right (right of management), and instituted suit 373 of 1880 to eject one of the tenants of the institution who allowed the rent to fall into arrears. The tenant impeached the validity of the assignment or lease, but the representative of the appellant's family affirmed the document in that suit. In February 1882, the suit was, however, finally decided against the respondent on the ground that the trusteeship of a temple could not be assigned. After this, the appellants resumed the management, and the respondent brought the present suit to recover back Rs. 4,000 with interest at 12 per cent. per annum from the date of the

KRISHNAN v. SANKARA VARMA.

original transfer. The appellants resisted the claim on three grounds, viz., that the amount paid in cash was only Rs. 3,000, that the respondent accepted the transfer of the uráyama right with full knowledge of facts, and could not claim to recover back what he had paid with such knowledge, and that they did not repudiate the karár or otherwise act in contravention of its terms. The Subordinate Judge found that Rs. 3,000 only was paid in cash, and that the appellants applied Rs. 2,938 in liquidation of their tarwad debts, and that it was not shown that the money received was used for the benefit of the devasam. He placed reliance on Exhibit D which was an account particular filed by the appellants' karnavan in suit 509 of 1880 between the members of his family, in preference to the oral evidence adduced by the respondent, and considered that Rs. 1,000 was set apart for the expenses incurred in bringing about the assignment of the uráyama right for 96 years. The Subordinate Judge then referred to s. 65 of the Indian Contract Act, exonerated the properties of the temple from all liability for the claim, and decreed that the appellants do pay the respondent Rs. 3,000 together with interest at 12 per cent. from the date of the final decree in suit 373 of 1880 till the date of payment, and with costs and interest thereon at 6 per cent. per annum from the date of his decree. He declared also that the properties belonging to the appellants' tarwad were answerable for the debt.

Both parties object to this decree so far as it is unfavorable to them. It is urged for the appellants that no suit can be maintained to recover money paid with full knowledge of facts, on the ground that the interest transferred was not in law capable of being transferred, that they did not act contrary to the terms of document A, and that there was no prayer in the plaint that the properties belonging to their tarwad should be rendered liable for the claim. On the other hand, the respondent contends under s. 561 of the Code of Civil Procedure, that the finding as to the non-payment of Rs. 1,000 out of Rs. 4,000 is contrary to the weight of evidence, and that interest at 12 per cent. per annum should have been awarded from the date of document A, instead of from the date of the final decree in Original Suit 373 of 1880. It appears that document A was given and accepted under the erroneous belief that uráyama right was assignable in law on a lease of 96 years. We were referred to no evidence upon which

KRISHNAN v. SANKARA VARMA.

we could hold that either the appellants or the respondent knew that the assignment was invalid. The mistake then is a mutual mistake of law in regard to the transfer of a right which is in substance in the nature of a trust. But it was not necessary for the respondent to rely on the transfer for the purpose of showing that the appellants were under an obligation to repay the amount advanced. It is shown by document A that they represented to the respondent that they needed a loan to pay the devasam debts, and that the amount was advanced to them to pay those debts. If the representation was *bonâ fide* and they paid the devasam debts with the money obtained from the respondent, their obligation to repay the loan as urálars out of devasam properties would be complete. If, as disclosed by the facts found, they paid their own tarwad debts with the money advanced to enable them to pay devasam debts, still their obligation to repay the respondent for breach of their contract would be complete. The agreement in regard to the transfer of uráyama right on a lease of 96 years prescribed only a special mode of satisfying that obligation, and if that agreement could not take effect because of its being tainted with illegality, their obligation to repay cannot on that ground be taken to be satisfied. According to the rule laid down by Lord Cairns in *Elkington's case* (1) and in *Bridger's case* (2) an agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract. Assuming that s. 65 of the Contract Act is not intended to vary the rule that a mistake of law is no ground on which a party can be relieved from his own contract, we are still of opinion that the respondent is entitled to recover back the amount advanced, on the ground that the collateral agreement which provided for its re-payment failed. As to the contention that the Subordinate Judge is in error in declaring that the appellants' tarwad property is liable for the debt, we observe that the plaint contains a prayer for such other relief as the respondent may ask for and the Court may deem it fit to grant. The amount borrowed was not shown to have been applied to the payment of the devasam debts, and devasam properties cannot be made liable. On the other hand, Rs. 2,932 out of Rs. 3,000 was proved to have

(1) L.R., 2 Ch., 511. (2) L.R., 9 Eq., 75.

KRISHNAN v. SANKARA VARMA.

been used to pay the debts due by the appellants' tarwad, and such being the case, we consider the tarwad property was properly declared liable for the amount decreed. We accordingly dismiss the appeal with costs.

As to the objections filed by the respondent. There is a conflict of evidence in regard to the payment of Rs. 1,000 in addition to Rs. 3,000, and we cannot say that the Subordinate Judge has not come to a correct finding. As to the interest awarded to the respondent as damages, we see no reason to interfere on appeal. He stated in his plaint that he entered on the management of the temple upon the execution of document A, and the appellants, it appears, resumed the management after the date of the final decree in suit No. 373 of 1883. The Subordinate Judge then declined to allow interest for the period during which the respondent had presumably the benefit of managing the temple, and we do not consider that he was in error in doing so. We therefore disallow the objections also with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

KARUPPAN (PLAINTIFF), APPELLANT,

and

AYYATHORAI (DEFENDANT No. 1), RESPONDENT.*

1886. July 24.

Civil Procedure Code, ss. 100, 101, 108, 540—*Appeal from ex parte decree.*

A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by s. 108 of the Code of Civil Procedure can appeal from such decree under the general provisions of s. 540. *Lal Singh* v. *Kunjan* (I.L.R., 4 All., 387) dissented from.

APPEAL from the decree of R. Vasudeva Ráu, Subordinate Judge at Negapatam, modifying the decree of V. Mulhari Ráu, District Múnsif of Mannárgudi, in suit 20 of 1885.

The plaintiff, Karuppan Chetti, sued the defendants Ayyathorai and Subbu Mudali, father and son, to recover Rs. 1,369-2-6 due on a bond executed by Rámalinga Mudali, deceased son of

* Second Appeal 967 of 1885.

KARUPPAN v. AYYATHORAI.

defendant No. 1, and Rs. 163-11-0 due for money lent and goods supplied to Rámalinga Mudali, as manager of the defendants' family.

Defendant No. 1 did not appear.

The issues framed were (1) whether the debts sued for were binding on defendant No. 2; (2) whether the claim on account of goods supplied was barred.

The Múnsif decreed payment of Rs. 1,369-2-6 as against defendant No. 1, and dismissed the suit as against defendant No. 2.

Defendant No. 1 appealed.

Respondent objected that no appeal lay, citing the Full Bench decision of the High Court of Allahabad in *Lal Singh* v. *Kunjan.*(1)

The Subordinate Judge held that he was bound to follow *Anantharáma Patter* v. *Mádhava Paniker,*(2) and, finding that the debt was a mere personal debt of the son, he held that the father was not bound to pay, and dismissed the suit. Plaintiff appealed on the grounds—

(1) That the issues were not properly framed.

(2) That as defendant No. 1 did not appear and it was understood by the parties and the Court that a decree would be given against him, plaintiff, being content with such a decree, did not let in evidence as to the nature of the debt.

(3) That no appeal lay to the Lower Appellate Court.

Rámachandra Ráu Saheb for appellant.

Subramanya Ayyar for respondent.

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—Although the first issue was defective in form, still the appellant had to show, as against defendant No. 2, that the debt was incurred for purposes binding on the family and produced evidence for that purpose. We are not prepared to hold that he has been misled by the frame of the issue. As to the question whether an appeal lies from an *ex parte* decree, it has been held by this Court since 1881 that an appeal does lie, *Anantharáma Patter* v. *Mádhava Paniker.*(2) The same view appears to have been taken by the Bombay High Court, *Luckmidás*

(1) I.L.R., 4 All., 387. (2) I.L.R., 3 Mad., 264.

Vithaldás v. *Ebrahim Oosman.*(1) There is a Full Bench decision of the Allahabad High Court, *Lal Singh* v. *Kunjan,*(2) in which a majority of the Court held that no appeal would lie. We are, however, not prepared to dissent from the view taken by the Division Bench of this Court. This second appeal must therefore fail, and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RÁJAGOPÁL AND OTHERS, *in re.**.

1886. August 3.

Letters Patent, s. 15—Civil Procedure Code, ss. 588, 592.

Section 15 of the Letters Patent of the High Court at Madras being controlled by s. 588 of the Code of Civil Procedure, no appeal lies from the order of a single Judge of the High Court made under s. 592 of the Code of Civil Procedure rejecting an application for leave to appeal *in formâ pauperis.*

APPEAL under s. 15 of the Letters Patent against an order made by Brandt, J., dated 27th April 1885, rejecting an application for leave to appeal *in formâ pauperis* against the decree in Suit No. 74 on the Original Side of the Court.

Ammayi Ammál, next friend of the appellants, Rájagopál Pillai and others, her minor sons, appeared in person.

The facts necessary for the purpose this report appear from the judgment of the Court (Collins, C.J., and Parker, J).

JUDGMENT:—An order passed under s. 592 of the Code of Civil Procedure rejecting an appeal *in formâ pauperis* is not appealable under s. 588, which provides that no appeal shall lie from orders not specified in that section.

It has already been decided in *Achaya* v. *Ratnavélu*(3) that s. 15 of the Letters Patent is controlled by a similar section in the Civil Procedure Code which provided that an order shall be final, and that enactments to such effect are not beyond the legislative powers of the Governor-General in Council.

There is no appeal and this application must be rejected.

* Letters Patent Appeal 8 of 1886.

(1) I.L.R., 2 Bom., 644.
(2) I.L.R., 4 All., 387.
(3) I.L.R., 9 Mad., 253.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

1886. September 1.

QUEEN EMPRESS

v.

AHMED.*

Criminal Procedure Code, ss. 517, 520.

An order passed under s. 517 of the Code of Criminal Procedure may be revised by a Court of Appeal although no appeal has been preferred in the case in which such order was passed.

THIS was a case referred to the High Court by F. H. Wilkinson, Sessions Judge of South Malabar.

The facts of the case were stated by the Judge as follows :—

"One Ahmed was charged with the theft of a gold chain. The Magistrate being of opinion that the complainant gave the gold chain to Báva, her paramour, in order that a false case might be concocted against the accused who was also paying visits to the complainant, acquitted the accused but ordered the gold chain to be restored to complainant.

"His order was, I submit, contrary to the provisions of s. 517 of the Code of Criminal Procedure. There having been no appeal, I am doubtful if, under the provisions of s. 520, I can myself direct the order to be stayed and request the orders of the High Court on both points, viz., (1) the illegality of the Magistrate's order and (2) the power of a Court of Appeal to stay orders under s. 517 and to modify, alter or annul such order, no appeal having been presented."

Counsel were not instructed.

The Court (Brandt, J.) delivered the following

JUDGMENT :—There are decided cases : *Empress* v. *Joggessur Mochi*, (1) *Empress of India* v. *Nilambar Babu* (2) in which the question whether an appeal lies against an order passed under s. 517 of the Criminal Procedure Code, though there be no

* Criminal Revision Case 458 of 1886.

(1) I.L.R., 3 Cal., 379.

(2) I.L.R., 2 All., 276.

appeal against the finding in the case in which the order was passed, has been decided in the affirmative, on the ground that the words "Court of Appeal" in s. 520 are not to be read as restricted to "a Court of Appeal before which an appeal is pending;" and it seems to me that the wording of the section is sufficient to show that the Sessions Court, as the Court to which appeals ordinarily lie from the decisions of the 1st-class Magistrate by whom this case was tried, had power to dispose of the question. As to whether the order made by the 1st-class Magistrate should be set aside : here again there is an authority—*in re Annapurnábai* (1)—to the point, in which it is shown that on general principles Courts are bound to restore property to the possession of those from whom it is taken for purposes of justice, unless the Court is of opinion that an offence has been committed in respect of that property, or that it has been used for the commission of an offence.

In this case, the finding was that the accused person was innocent, no offence having been committed *by him*, in respect of the gold necklace produced, and it not having been in any way used by him.

The Magistrate however had, it appears, reason to suspect or believe that the necklace had been used by the woman Kálí, and one of the witnesses for the prosecution, her paramour, Báva, for the purpose of wrongfully obtaining a conviction of the accused; if that is so in fact, then an offence or offences would "appear to have been committed," and the necklace was used for the commission of an offence, and the Magistrate might perhaps on this ground—I do not decide the point—he might, I say, have made an order under s. 517; but if he had done so, an order restoring the necklace to the woman Kálí, the owner, would certainly not be the proper order.

There is however practically no doubt that he ordered it to be given back to the woman simply because he found it to be her's; and I am not prepared to say there are sufficient reasons for interference in revision. If the complainant, Kálí, and her paramour, Báva, really concocted a false case and used fabricated evidence against Ahmed, there are means of punishment other and more appropriate than the withholding of the necklace.

(1) I.L.R., 1 Bom., 630.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. July 15, 23.

VENKATRÁYUDU (PLAINTIFF), APPELLANT,

and

NÁGADU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, s. 5—Admission of appeal out of time—Order set aside at hearing.

An order made *ex parte*, under s. 5 of the Indian Limitation Act, 1877, admitting an appeal after the period prescribed therefor, may be set aside on proper cause being shown by the Court which made it.

APPEAL from the decree of W. J. H. LeFanu, Acting District Judge of Kistna, confirming the decision of V. A. Narasimharázu, District Múnsif of Karempudi, in suit 175 of 1883.

The plaintiff, Gudipádi Venkatráyudu, sued the defendants, Siddela Nágadu and three others, to establish his right to certain land.

On the 24th September 1883, judgment was given for plaintiff, on the ground that defendant "was not ready with his witnesses."

Defendants Nos. 1—3 then prayed for a review, which was granted.

The case was reheard and the suit dismissed.

Plaintiff appealed.

The appeal was presented out of time, but admitted.

At the hearing, defendants objected that the appeal had been wrongly admitted and plaintiff objected that the Múnsif had wrongly admitted the review.

The Judge held that the Múnsif was wrong in admitting the review, and that, on the merits, plaintiff was entitled to succeed; but dismissed the appeal without costs on the ground that it should not have been admitted.

Plaintiff appealed to the High Court on the ground, *inter alia*, that the District Judge had no power to cancel his original order, admitting the appeal, after the said appeal had been placed on the register.

* Second Appeal 995 of 1885.

Subbaráyadu and *Kaliánarámayyar* for appellant.

Venkatasubba Ráu for respondent.

The Court (Collins, C.J. and Parker, J.) delivered the following

JUDGMENT :—The District Judge has dismissed the appeal on the ground that it was presented out of time, and it is urged upon as that he had no power to review his previous *ex parte* order admitting the appeal.

We cannot agree in this contention and we are of opinion that an order made *ex parte* under s. 5 of the Limitation Act may, on proper cause shown, be set aside by the Court which made it —see *Jhotee Sahoo* v. *Omesh Chunder Sircar*,(1) *Dubey Sahai* v. *Ganeshi Lál*.(2) We do not see that the Judge exercised his discretion in an unreasonable or improper manner, and must dismiss this second appeal; but, under the circumstances, we will make no order as to costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

1886. July 12.

UNNIRAMAN (DEFENDANT No. 1), PETITIONER,

and

CHÁTHAN (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 622—Award—Error of Procedure—Relief refused on equitable grounds.

R.M., party to a suit, having authorised his agent to conduct the suit, the agent consented to the case being referred to arbitration by the court. The arbitration was carried on to the knowledge and with the assent of R.M.

On an application by R.M., under s. 622 of the Code of Civil Procedure, to set aside the award made by the arbitrators on the ground (1) that his pleader had not been authorised in writing, as required by s. 506 of the Code, to apply for arbitration, and (2) that he himself had not consented to the reference:

Held that, under the circumstances, R.M. was not entitled to relief.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order of P. J. Ittiyarah, District Múnsif of Angadipú-

(1) I.L.R., 5 Cal., 1. (2) I.L.R., 1 All., 34.

* Civil Revision Petition 21 of 1886.

Note.—See also I.L.R., 13 Cal., 78.

UNNIRAMAN v. CHÁTHAN.

ram, passed under s. 522 of the Code of Civil Procedure, in suit 176 of 1881.

The plaintiff, Patinjari Kovilagath Vallabhan Cháthan Rájá sued Kondipurambath Unniráman Mutha Panikar, defendant No. 1 and 12 others, his tenants, to recover certain land. The case was referred to arbitration and the award was given in favor of plaintiff.

Defendant No. 1 applied under s. 522 to set aside the award, and his application was rejected.

The facts appear sufficiently for the purpose of this report, from the judgment of the Court (Collins, C.J., and Brandt, J.).

Sankara Menón for petitioner.

Bháshyam Ayyangár for respondent.

JUDGMENT.—This is an application by the defendant No. 1 in suit 176 of 1881, under s. 622 of the Code of Civil Procedure, to set aside an award, and the grounds relied on by him are that the case was referred to arbitrators without his knowledge and consent, and that his pleader was not specially authorised in writing as required by s. 506 of the Code. It appears that he authorised his anandravan, Krishna Panikar, to conduct the suit in question for him, and there can be no doubt this man assented to the reference. There can also be no doubt but that defendant No. 1 knew that his agent had assented to the reference, that he ratified that assent and was fully aware that the arbitrators were conducting the reference, and it was not until the award was given against him that he asserted that the reference was without his knowledge or consent. A party applying under s. 622 to the High Court for relief must show that he has not contributed by his own conduct to his being placed in the position he finds himself in; and, we think, it would be inequitable, under all the circumstances of this case, to grant the relief sought. Regard is also to be had to the delay on the part of the petitioner. It is not necessary to say, and we expressly refrain from saying, anything as to the validity of the award.

This petition is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBRAMANYAN (DEFENDANT), APPELLANT,

and

MANDAYAN (PLAINTIFF), RESPONDENT.*

1886. March 4. July 12.

Mortgage of seven parcels of land—Sale of equity of redemption of two parcels—Second mortgage of six parcels and redemption of one by mortgagor—Transfer of Property Act, s. 60—Redemption by purchaser of two parcels on payment of proportionate amount of debt, decreed.

In 1873 R mortgaged to S seven parcels of land (items 1—7) for Rs. 300. In 1880, M purchased R's rights in items 1 and 2. In 1881 R redeemed item 5 on payment of Rs. 30 and executed a second mortgage of the rest to S for Rs. 200:

Held that M was entitled to redeem items 1 and 2 on payment of a proportionate amount of the first mortgage-debt.

APPEAL from the decree of S. Gopaláchári, Acting Subordinate Judge of Madura (East), confirming the decree of T. A. Krishnasámi Ayyar, District Múnsif of Sivaganga, in suit 67 of 1883. The facts were as follows:—

On the 25th October 1873, Muthu Ráman mortgaged to defendant, Subramanyan Chetti, seven parcels of land (items 1—7) for Rs. 300.

On the 14th April 1880, Mandayan, the plaintiff, purchased at a sale, under the Rent Recovery Act (Madras Act VIII of 1865), Muthu Ráman's interest in two of the said parcels of land (items 1 and 2).

On the 12th July 1881, Muthu Ráman executed a second mortgage to defendant for Rs. 200 of all the said parcels of land, except item 5, which he redeemed paying Rs. 30.

Plaintiff sued to redeem items 1 and 2, offering to pay Rs. 100 as the proportionate amount of the sum secured by the mortgage of 25th October 1873.

The Múnsif held that, as the defendant had himself "split" the security by allowing item 5 to be redeemed, he could not

* Second Appeal 774 of 1885.

SUBRAMANYAN v. MANDAYAN.

compel plaintiff to redeem items 3, 4, 6, 7, and that plaintiff was entitled to redeem items 1 and 2 on payment of Rs. 161, being the proportionate amount of Rs. 300 payable for their redemption according to the relative produce of the seven parcels of land.

The Subordinate Judge, referring to s. 60 of the Transfer of Property Act, held that it did not apply.

On the authority of *Marana Ammanna* v. *Pendyala Perubotulu* (1) and *Chandika Singh* v. *Pohkar Singh* (2) confirmed the decree of the Múnsif.

Defendant appealed.

Subramanya Ayyar for appellant.

Rangácháryár for respondent.

The Court (Collins, C.J. and Parker, J.) delivered the following

JUDGMENT:—The defendant, the mortgagee, on 12th July 1881, accepted Rs. 30 as the proportionate amount of the mortgage due on one item of land and lent a further sum upon the remaining six items.

By so doing he seems to us to have destroyed the indivisibility of the original contract. The plaintiff, on 14th April 1880, had become the purchaser of the equity of redemption of two items, and hence, we think, he is entitled to redeem those two upon payment of the proportionate amount due thereon—*Maranda Ammanna* v. *Pendyala Perubotulu.*(1)

We dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1886. July 30.

KOLLU SHETTATI (JUDGMENT-DEBTOR), APPELLANT,

and

MANJAYA (DECREE-HOLDER), RESPONDENT.*

Civil Procedure Code, s. 230—Limitation—12 years' rule—'Law in force' prior to that Code—Includes Act X of 1877.

In s. 230 of the Code of Civil Procedure, 1882, the words 'law in force' include the Civil Procedure Code, 1877, as well as the Limitation Act then in force:

(1) I.L.R., 3 Mad., 230. (2) I.L.R., 2 All., 906.

* Appeal against Appellate Order 5 of 1886.

KOLLU SHETTATI v. MANJAYA.

Held, therefore, where an application forexecution of a decree of 1872 had been made and granted in January 1882 and under s. 230 of the Code of Civil Procedure, 1877, further execution became barred, before the date on which Civil Procedure Code, 1882, came into force, that no application within three years from such date could be granted under s. 230 of that Code.

APPEAL against an order of H. M. Winterbotham, Acting District Judge of South Canara, confirming an order made by K. Krishna Ráu, District Múnsif of Udipi, in execution of the decree in suit 157 of 1871.

The decree-holder, Manjaya Shetti, applied on the 18th March 1885 for execution. The decree was passed on the 4th September 1872. The judgment-debtor, Kollu Shettati, pleaded that the application was barred by limitation.

The facts are set out in the judgment of the District Court as follows:—

"The decree (execution of which is sought) was for money, and bears date 4th September 1872.

"The application in question was presented on 18th March 1885. Admittedly the decree is one coming within the provisions of s. 230 of Act XIV of 1882, inasmuch as an application for execution was made and granted under that section in 1883; but this was before the expiry of twelve years from the date of the decree.

"The second application (now in question) was made after the lapse of twelve years from the date of decree, but within three years from the passing of Act XIV of 1882; and the Múnsif held that the application was not barred by the concluding proviso of s. 230, notwithstanding the fact that under the provisions of Act X of 1877 the decree was incapable of execution at the time when this application was made.

"That execution was barred under Act X of 1877, is clear from the fact that on January 26th, 1882, one application for execution was made and granted. I have referred to the record and find that the reason why that application failed was that the decree-holder neglected to deposit process-fees for the arrest of the judgment-debtor.

"Under Act X of 1877, no subsequent application could therefore be granted after the expiration of twelve years from the date of decree.

"The Múnsif's interpretation of the last paragraph of s. 230 of Act XIV of 1882 seems to me based on the extraordinary proposition that Act X of 1877 was not part of "the law in force

KOLLU SHETTATI v. MANJAYA.

immediately before the passing off" Act XIV of 1882, and I had drafted, but had not delivered a judgment setting aside his order.

"Respondent's vakíl has, however, drawn my attention to the ruling of Allahabad High Court reported in I.L.R. Allahabad, vol. 6, page 189, which is precisely to the point.

"In that case three Judges took the same view as the Múnsif, and two Judges (one of whom was the Chief Justice) took the view which I should have adopted if I had been left without a guide.

"The Múnsif's decision is in accordance with that of the majority of the Court, and under the circumstances I decline to pronounce it incorrect."

This appeal must be dismissed with costs.

Kollu Shettati appealed.

Srinivása Ráu for appellant.

Gopála Ráu for respondent.

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—The expression 'Law in force' as used in Act XIV of 1882, s. 230, must be taken to include all the rules of limitation which were in force immediately before the passing of that Act. In this view it would include Act X of 1877 as well as the general Act of limitation. In our judgment this is the natural result of the rules of grammatical interpretation which we are bound to follow. The expression as used in Act X of 1877 would, no doubt, refer only to the general Act of limitation, because the special rule in regard to twelve years was brought into operation for the first time by that enactment.

We agree with the learned Judges who decided *Goluck Chandra Mytee* v. *Harapriah Debi*,(1) and with the minority of the learned Judges who took part in *Musharraf Begam* v. *Ghalib Ali*.(2) It is conceded by the learned pleader for the respondent that, if the interpretation we are inclined to place on the last clause of s. 230 of Act XIV of 1882 were to prevail, the application for execution would be barred.

We set aside the orders of the Courts below and direct that the respondent's application for execution be dismissed with costs throughout.

(1) I.L.R., 12 Cal., 559. (2) I.L.R., 6 All., 189.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. April 14.

VENKATAPATHI AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

SUBRAMANYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, Sch. II, Arts. 12–95—Revenue Recovery Act (Madras), s. 59—Suit to set aside fraudulent revenue sale—Limitation.

Suit to set aside a sale of land, sold as if for arrears of revenue under Act II of 1864 (Madras), on the ground of fraud, and to recover possession of the land from the purchaser who was alleged to be party to the fraud:

Held, that the suit was governed by art. 95 of sch. II of the Indian Limitation Act, 1877.

Article 12 of that schedule which prescribes a period of one year for suits to set aside sales for arrears of revenue is intended to protect *bonâ fide* purchasers only.

APPEAL from the decree of S. Gopáláchari, Acting Subordinate Judge of Madura (East), confirming the decree of S. Krishnasámi Ayyar, District Múnsif of Dindigul, in suit 193 of 1883.

The plaintiffs, Venkatapathi and Lakshmana Náyakan, were brothers. They alleged that they bought certain land from Vírannan (defendant No. 4) in 1864, enjoyed it and paid revenue on it till September 1882; that in May 1882 they learnt that the village officers, Subramanya Ayyar (defendant No. 1), late karnam, and Minakshi Ayyan (defendant No. 2), late nattamgár, had fraudulently caused the land to be sold as if for arrears of revenue and to be purchased by Sundaramayyan (defendant No. 5), brother-in-law of the karnam, for Rs. 10, the real value being Rs. 320 and without first attaching the moveable property of plaintiffs or of the registered holder (defendant No. 4) as required by the Revenue Recovery Act; that they had obtained no redress from the Sub-Collector (defendant No. 6) and that the cause of action arose in May 1882 when defendant No. 1 prevented their servants from ploughing the land.

* Second Appeal 737 of 1885

VENKATA-PATHI v. SUBRAMANYA.

The plaintiff claimed to have the revenue sale set aside and to be put in possession of the land or to recover Rs. 320, the value of the land and damages. Defendant No. 4 was *ex-parte*. Defendant No. 5 denied that there was any fraud and pleaded limitation.

Defendant No. 6 pleaded that the sale was good and valid. Defendants 1 and 2 pleaded that there was no cause of action against them.

Defendant No. 3, the present nattamgár, pleaded ignorance of the sale.

The sale took place on the 8th October 1881 and the suit was brought in April 1883.

The Múnsif held that if the six months' limitation prescribed by sec. 59 of the Revenue Recovery Act did not apply, the plaintiffs not having been parties to the sale proceedings, the suit was barred by art. 12 of sch. II of the Limitation Act, 1877.

He found that the sale had been fraudulently connived in by defendants 1 and 2, that defendant No. 5 had been a party thereto, and that defendants 3, 4 and 6 were not shown to have incurred any liability.

Plaintiffs appealed, making all the defendants respondents to the appeal.

The Subordinate Judge did not consider it necessary to decide whether sec. 59 of the Revenue Recovery Act barred the suit. He held it was barred by art. 12 of sch. II of the Limitation Act. If art. 95 of that schedule was applicable, he was of opinion that plaintiffs were bound to prove that they discovered the fraud within three years of the date of suit and found that this was not proved.

The appeal was dismissed.

Plaintiffs appealed on the grounds—

(1) that defendant No. 5 having been found to have bought benami for defendant No. 1, plaintiffs were entitled to recover the land within 12 years;

(2) that if it was not so, art. 95 of sch. II of the Limitation Act applied;

(3) that no issue was raised as to when the plaintiffs first became aware of the fraud and that the Subordinate Judge ought to have allowed evidence to be let in on the point;

(4) that plaintiffs were at any rate entitled to damages.

VENKATA-PATHI v. SUBRAMANYA.

All the defendants were made respondents to this appeal.

Subramanya Ayyar for appellants.

The Acting Government Pleader (Mr. *Powell*) for respondent No. 6.

The other respondents did not appear.

The Court (Collins, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—This is a second appeal from the decree of the Subordinate Judge of Madura, who, on appeal, concurred in the opinion of the District Múnsif of Dindigul that the appellants' claim was barred by limitation. The land in dispute originally belonged to respondent No. 4. In March 1864 he sold it to appellant No. 2 and placed him in possession. The appellants, who are brothers, have continued to hold possession, but they did not get the pattá altered to their names. They paid the assessment due on the land for faslies 1289 and 1290 to respondents Nos. 1 and 2, who were the karnam and nattamgár of the village in which the land is situated. These village officers fraudulently omitted to remit the money to the taluk treasury and made it appear that there were arrears of revenue, the land was ordered to be sold and the notice of sale was served on the respondent No. 4, who was the registered holder. It was sold by public auction in October 1881 and respondent No. 5, who was the highest bidder, was accepted as the purchaser. It is found, however, by the District Múnsif, that respondent No. 5 is a relative of respondents Nos. 1 and 2, that he was also a party to the fraud and that he purchased it benami for respondents Nos. 1 and 2. But the Subordinate Judge does not distinctly record a finding on this point. He considers that, assuming that it was so, it could not save the limitation. Shortly after the sale, the appellant No. 1 endeavoured to induce the respondent No. 5 to give up the land; but as his attempt proved ineffectual, the present suit was instituted in April 1883. The Courts below relied on art. 12, sch. II of Act XV of 1877 and dismissed the suit with costs.

It is urged in appeal that the appellants had either twelve or three years to sue, and that at all events their claim to damages is not barred. The interest that was sold was the appellants' proprietary right and the sale was ordered on the supposition that the assessment due by them was in arrear. They are not entitled to a decree for possession, on the ground that the ownership was

VENKATA-PATHI v. SUBRAMANYA.

vested in them prior to the sale, unless they showed also that the sale was invalid. We must hold that the suit was properly held not to fall under the twelve years' rule. But we are of opinion that the suit is governed by art. 95. Art. 12 is intended to protect *bonâ fide* purchasers only, but when the purchaser is a party to the fraud, art. 95 will alone apply, otherwise the purchaser will be enabled to take advantage of his own fraud for the purposes of limitation. We shall therefore ask the Subordinate Judge to return a finding on the question whether the respondent No. 5 was a party to the fraud and whether he made the purchase really for the respondents Nos. 1 and 2. The issue will be tried on the evidence on the record and on such further evidence as the parties may adduce and the finding will be submitted within three months from this date when ten days will be allowed for filing objections.

We are satisfied, however, that respondents Nos. 3, 4 and 6 were unnecessarily made parties to this appeal and we dismiss the appeal as against them and direct the appellants to pay the costs of respondent No. 6 in this Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. July 21, 27.

NILAKANDAN (PLAINTIFF), APPELLANT,

and

THANDAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, sch. II, art. 12—Sale of land in execution of decree—Suit by third party to recover—Adverse possession—Burden of proof.

In a suit to redeem certain land demised on kánam in 1850 by A, to the predecessor of B, C, who was in possession of the land, was made a defendant. A proved his title to the land and possession up to 1850. C pleaded title to the land and denied that B had ever been in possession. Both pleas were found to be false. It was found, however, that C had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against C (to which A was not a party) and purchased by D who resold to C in 1879.

* Second Appeal 85 of 1886.

NILAKANDAN v. THANDAMMA.

The Lower Court held that C's possession must be taken to have been derived from B, till the contrary was proved; but that the suit was barred by art. 12 of sch. II of the Indian Limitation Act, 1877, because it had not been brought within one year from the date of the sale in 1876:

Held, that the suit was not barred by limitation, and that the burden of proving that his possession was not derived from B lay upon C.

APPEAL from the decree of V. P. de'Rozario, Subordinate Judge at Palgat, reversing the decree of P. Govinda Menon, District Múnsif of Chowgat, in suit 523 of 1884.

The plaintiff, Nilakandan Nambudri, sued Thandamma, defendant No. 1 and eleven others, the vicar, wardens and tenants of the Kotappadi church, to recover two plots of land demised on kánam to Tarathu, the deceased brother of defendant No. 1 in 1850. Defendant No. 1 pleaded that neither she nor Tarathu ever were in possession, and that the land belonged to the church.

Defendant No. 5, the vicar, Paranju Kathanar, pleaded that the land was the ancient jenm of the church, and had been in its possession for a very long time. The Múnsif found that only one plot had been demised to Tarathu and decreed redemption on payment of Rs. 331 for improvements.

The vicar and church wardens appealed, and the Subordinate Judge dismissed the suit.

Plaintiff appealed.

Gopálan Náyar for appellant.

Sankara Menon for respondents.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J).

JUDGMENT.—This second appeal relates to tak or tract No. 1 of the schedule attached to the plaint or to the plot marked A in the plan. It is found as a fact by both the courts below that the land in question was originally the appellant's jenm. It is also found that it was demised on kánam first to a Malabar family called Vettipara tarwad, and next to one Tarathu, the brother of respondent No. 1. This individual executed exhibit A in 1850 in favour of the appellant's brother, Sríman Nambudri, acknowledging that he held the land on the kánam which the appellant brought this suit to redeem. It is found that Tarathu was in possession in 1850 under the appellant's tarwad, and that the land passed into the possession of respondents 2 to 5, the trustees of the Kotappadi church about 17 years ago. It was not, however,

NILAKANDAN v. THANDAMMA.

shown how it passed from the possession of Tarathu's family into that of the trustees. The District Múnsif held, that after Tarathu's death the respondent No. 1 got into possession, and that she was evidently colluding with the other respondents.

On appeal, the Subordinate Judge adverted to the fact that the trustees did not show either that the land was their jenm or that they asserted their jenm title prior to 1877, and considered that their possession must be taken to have been derived from Tarathu unless they showed (which they did not) that it was hostile for more than 12 years before suit. But it was also in evidence that the land in suit was sold in execution of the decree in original suit 75 of 1876 on the file of the Subordinate Court as the jenm of the trustees, and that it was purchased by one Lazar prior to June 1877 and re-sold by him to the trustees in June 1879. Referring to these transactions, the Múnsif remarked that the sale and the re-sale were a mere contrivance resorted to by the trustees of the church in conjunction with those interested in the church, that the purchaser, Lazar, was one of the managers of the church, and that the appellant was not a party either to the suit or to the proceedings in execution. The Subordinate Judge, however, considered that the appellant adduced no evidence to show that the sale and re-sale were collusive, and that the suit which was not brought within one year from the date of the sale was barred by art. 12 of the second schedule of the Limitation Act. He relied on the decision of this Court. It is urged in second appeal that the appellant was not bound to set aside a sale in execution of a decree obtained by one stranger against another, and that their wrong can be no valid ground for dealing with his claim under the one year's rule.

We were referred to *Venkata Narasiah* v. *Subbamma*(1) *Sadagópa* v. *Jamuna Bhái*(2) *Suryanna* v. *Durgi*.(3) On the other hand it is contended for the respondents that even if the one year's rule did not apply, the Subordinate Judge was wrong in holding upon the facts found that the respondents got into possession under Tarathu.

In the case of *Suryanna* v. *Durgi*, the decision proceeded on the ground that what was sold was not the right, title and interest of the judgment-debtor, but the property on which the arrear of

(1) I.L.R., 4 Mad., 178. (2) I.L.R., 5 Mad., 54. (3) I.L.R., 7 Mad., 258.

revenue which was sought to be recovered was a charge. It is not shown in this case that anything more than the right, title and interest of the judgment-debtor in Original Suit 75 of 1866 was liable to be sold. This case falls, therefore, to be decided on the principle laid down in *Venkata Narasiah* v. *Subbamma*, and *Sadagópa* v. *Jamuna Bhái* which were not overruled by the decision in *Suryanna* v. *Durgi*.

We see no reason to think that the Subordinate Judge was in error in presuming that the respondents got into possession under the first respondent's father. The trustees, it must be observed, pleaded that Tarathu was never in possession, and that the land was the ancient jenm of the church and that both of those statements were found to be untrue.

We set aside the decree of the Subordinate Judge and restore that of the District Múnsif. The respondents will pay the appellant's costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

ADAMSON (DEFENDANT No. 1), APPELLANT,

and

ARUMUGAM AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1886. March 4. July 12.

Suit for obstruction of highway—Special damage—Civil Procedure Code, s. 30.

The rule of English law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage should be enforced in British India as a rule of "equity and good conscience."

Section 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having special interests to represent the rest of the class.

APPEAL from the decree of K. R. Krishna Menón, Subordinate Judge at Tinnevelly, reversing the decree of V. Srinivásácharlu, District Múnsif of Tuticorin, in Suit 188 of 1883.

The plaintiffs, Arumugam Pillai and 8 others, as representatives of the villagers of Podiamputhúr, sued the Revd. Thomas

* Second Appeal 792 of 1885.

ADAMSON v. ARUMUGAM.

Adamson, to obtain a declaration that certain land enclosed by him was public property, to recover possession thereof, and to remove an obstruction placed on a certain road. The plaintiffs alleged that the land was used by the villagers in common for a cartstand and other purposes.

The defendant pleaded that the land was the property of a Society called the 'Society for the Propagation of the Gospel in Foreign Parts.'

The Múnsif issued a proclamation under s. 30 of the Code of Civil Procedure to the villagers.

Upon this twelve persons appeared, opposed the claim and were made defendants.

The Múnsif found that the land belonged to a Zamindár, and that a road over it which had been obstructed was vested in the Local Fund Board under s. 8 of the Madras Act IV of 1871.

The suit was dismissed on the ground that the Court had no jurisdiction to entertain it, and to issue an injunction to defendant No. 1 to re-open the road for public use. The Múnsif held that the plaintiffs' remedy was by indictment only.

On appeal, the Subordinate Judge held that, as the plaintiffs were the major portion, if not the whole body of the public who have occasion to use the thoroughfare, they sustained special damage from the obstruction. As to the right to the land the Subordinate Judge held that plaintiffs claimed an easement and had not lost their right by non-possession for 20 years. A decree was passed directing defendant No. 1 to remove the obstruction he had raised on the road.

Defendant No. 1 appealed.

Mr. *Powell* for appellant.

Rámachandra Ráu Saheb for respondents.

The Court (Collins, C.J. and Parker, J.) delivered the following

JUDGMENT:—This was an action for the obstruction of a public highway, and the appeal is against the judgment of the Subordinate Judge in deciding that the plaintiffs had a cause of action and in ordering the removal of the obstruction. No proof of special damage was given by the plaintiffs.

The English law upon the subject is that no action can be maintained by an individual against another for obstruction to a highway without proof of special damage and it is founded on

ADAMSON v. ARUMUGAM.

adequate reasons of public policy. Though no Madras case has been cited at the bar, we find that the Indian Courts have generally adopted the English rule. The whole subject is exhaustively discussed in the judgment of the Bombay High Court in *Satku Valad Kadir Sausare* v. *Ibrahim Agá Valad Mirzá Agá*(1) with which we entirely agree, and we find that the High Courts at Calcutta and Allahabad have come to the same conclusion, *Raj Koomar Singh* v. *Sahebzada Roy*,(2) *Karim Baksh* v. *Budha*,(3) *Fazal Haq* v. *Maha Chand*,(4) per contra *Basaruddin Bhuiah* v. *Bahar Ali*,(5) *Askar Mea* v. *Sabdar Mea*,(6) have been quoted. We find, however, that in the first of these the Magistrate held that *primâ facie* the road was not a public road, but had been a road through private land and was given up by special arrangement.

In the latter case the Magistrate held it was doubtful whether there ever had been a public road in the place at all. These cases therefore do not really conflict with the earlier rulings of the Calcutta Benches, *Burcda, Pershad Moostafee* v. *Gora Chund Moostafee*,(7) *Raj Luckhee Debia* v. *Chunder Kant Chowdhry*,(8) *Trilochun Doss* v. *Gugun Chunder Dey*.(9) It may well be that when a Magistrate finds that it is doubtful whether there is or has been a public road at all, he may refuse to make an order under the Criminal Procedure Code until the complainant has established the fact by a suit in a Civil Court alleging special damages.

It was urged upon us that the Indian Courts should be chary of applying English common law doctrines to the very different society which exists in this country, and we were referred to the case of *Shama ChurnBose* v. *Bhola Nath Dutt*.(10) In that case the Court allowed a civil action for the seizure of a cow notwithstanding that the act amounted to theft, and it was urged that the party injured by the felonious act should first satisfy the justice of the country with respect to the public offence before seeking civil redress for himself. That objection was based upon the English law of felony which does not obtain in this country. The rule that a man who may have committed some public injury shall not

(1) I.L.R., 2 Bom., 457.
(2) I.L.R., 3 Cal., 26.
(3) I.L.R., 1 All., 249.
(4) I.L.R., 1 All., 557.
(5) I.L.R., 11 Cal., 8.
(6) I.L.R., 12 Cal., 137.
(7) 12 W.R., 160.
(8) 14 W.R., 173.
(9) 24 W.R., 413.
(10) 6 W.R., (C.R.) 9.

ADAMSON v. ARUMUGAM.

be harassed by innumerable actions by persons who have not sustained any damage embodies equitable doctrine and should, we think, be enforced in this country in whose Courts the rules of equity and good conscience apply.

Nor do we think that the observance of the formalities of s. 30 of the Code of Civil Procedure will enable the plaintiffs to bring this suit. That section is rather designed to allow one or more persons to represent a class having special interests than to allow such persons to sue on behalf of the general public to which the notices prescribed by that procedure would be inapplicable.

The plaintiffs' suit must therefore fail. Though we are constrained to dismiss it on this technical ground, we cannot but express our regret that the litigation should have been persisted in after the concurrent finding of two Courts that the road in dispute was a public road and that plaintiffs were entitled to use it. We must reverse the decree of the Lower Appellate Court and restore that of the District Múnsif, which dismisses the suit. But we will make no order as to costs.

ORIGINAL CIVIL.

Before Mr. Justice Parker.

1886. July 29.

ADMINISTRATOR-GENERAL OF MADRAS, and ANANDÁCHÁRI AND OTHERS.*

Hindú Law—Marriage—Consummation—Succession Act, 1865—Succession to estate of intestate Native Christian.

According to Hindú law, a marriage between Bráhmans is binding, although the consummation ceremony or consummation never takes place.

If a Hindú becomes a convert to Christianity and dies intestate, succession to his estate is governed by the Indian Succession Act, 1865.

A.K., a Bráhman, went through a Hindú marriage ceremony with S, a Bráhman girl of eight years of age, in 1850. The marriage was never consummated nor was the consummation ceremony performed.

In 1851, A.K. was converted to Christianity. S refused to live with him, because he was an outcaste, and in 1857 S renounced all claims on him or his estate.

In 1858, A.K. went through a Christian form of marriage with M. In 1881, A.K. died intestate, and possession was taken of his estate by the Administrator-General. S claimed the estate from the Administrator-General.

Her suit was dismissed on the ground that A.K. having died an outcaste and degraded, and his degradation not atoned for under Hindú law, no right of inheritance remained to her. Before judgment was delivered S died and the suit abated.

In a suit filed by the Administrator-General to have the estate administered by the Court, the claimants were (1) the father of A.K. (2) the brother of A.K. undivided from his father, and (3) the executor of M:

Held, that S was the wife of A.K. when he went through the form of marriage with M, and that, but for the fact that S had relinquished her rights, S would have been entitled on the death of A.K. to such portion of his estate as the law assigned to her as his widow:

Held, also that under s. 35 of the Indian Succession Act, 1865, the father of A.K. was entitled to the whole of the estate.

* Civil Suit No. 333 of 1885.

ADMINISTRATOR-GENERAL OF MADRAS v. ANANDÁCHÁRI.

THE facts appear from the judgment of the Court (Parker, J.)

Mr. *Norton* for plaintiff.

Mr. *Shaw* and Mr. *Grant* for defendant No. 1.

M. O. Parthasaradi Ayyangár for defendant No. 2.

Mr. *Branson* for defendant No. 3.

PARKER, J.—This is a suit by the Administrator-General to obtain the direction of the Court in administering the estate of the late Arthur Kristnama, who died in December 1881. The facts are as follow:—Arthur Kristnama was by birth a Bráhman, but was converted to Christianity in 1851, being then a young man, about sixteen years of age. Before his conversion he was married in 1849 or 1850 to one Sínammál, a Bráhman girl of about eight years old. The marriage was never consummated, since Sínammál refused, when she grew up, to live with Kristnama, because he was an outcaste. On the 26th January 1857 Sínammál gave to Kristnama a farikhut (deed of release), in which she stated that she had no intention of living with him, and renounced all claims whatever against him and those connected with him. About a year after this, viz., on January 14th, 1858, Kristnama was married to, or went through the ceremony of marriage with one Mangalam, according to the rites of the Presbyterian Church. This marriage appears to have been entered into by both parties, in the *bonâ fide* belief that it was a valid marriage. There was no issue of this union. Kristnama died as a Deputy Collector in Tanjore in December 1881, and the present plaintiff (the Administrator-General) on the 24th March 1882 took out letters of administration to the estate, which was

ADMINISTRATOR-GENERAL OF MADRAS v. ANANDÁ CHÁRI.

worth some Rs. 40,000, and had been acquired by Kristnama in Government service, and after his conversion to Christianity. About a year after Kristnama's death Sínammál brought a suit in *formâ pauperis* in this Court (C.S. No. 16 of 1883), in which she described herself as a Bráhman widow and laid claim to the whole of Kristnama's estate as his widow, or—in the event of his second marriage with Mangalam being also held valid—to a moiety of it. Mangalam was the second defendant in the suit, and maintained that she was legally married to Kristnama according to the forms of the Free Church of Scotland, and claimed the whole estate. The natural father of Kristnama—Anandáchári—the present defendant No. 1, was made a party to that suit at his own request, and claimed to be solely entitled to the estate, or jointly with Mangalam, should her marriage be held valid. The suit was heard by Kernan, J., in April 1883, and judgment was reserved. Before judgment was delivered, Mangalam died in September 1883, but the suit was revived, and the present defendant No. 3 included as Mangalam's representative and executor. Judgment was finally delivered on February 27th, 1885, the learned Judge evidently not being aware that the plaintiff Sínammál had died just a month previously, viz., on 2nd January 1885. In that judgment it was held that, according to Hindú law, Kristnama died an outcaste and degraded, and that as his degradation was unatoned for, the marriage became at his death absolutely dissolved, and no right of inheritance remained to Sínammál.(1)

The persons now contending for the estate are (1) defendant No. 1, the natural father of the late Kristnama, (2) defendant No. 2, his natural brother, who is undivided with defendant No. 1, and (3), defendant No. 3, the executor and representative of Mangalam. Defendant No. 1 contends that Kristnama's marriage with Mangalam was invalid, and that he is entitled to the whole estate, whether the succession is governed by the Succession Act or by Hindú law; and that, if Mangalam's marriage be held valid, he is at any rate entitled to a moiety. Defendant No. 2 denied the validity of Mangalam's marriage; maintained that Kristnama's education was received from family funds, and that Kristnama had in his life expressed his wish that defendants Nos. 1 and 2 should inherit his estate; that Kristnama had never

(1) See Sínammál v. The Administrator-General of Madras, I.L.R., 8 Mad., 169.

ADMINISTRATOR-GENERAL OF MADRAS v. ANANDÁ CHÁRI.

elected to become subject to the Succession Act, and therefore his property should be distributed, according to Hindú law, between his father and brother. No attempt was made to substantiate any of these pleas by evidence. Defendant No. 3 contended that Kristnama's marriage with Sínammál was never completed, and that by the former's conversion to Christianity he became, as a Hindú, civilly dead; hence, that his marriage with Mangalam was a valid marriage, and that she became entitled to the whole of his property at his death, since his Hindú relations were not capable of inheriting an estate to which the succession was governed by the Succession Act.

On the 13th April I settled the following issues:—(1) whether there was a valid subsisting marriage with the Hindú wife on the date of Kristnama's marriage with Mangalam; (2) whether the property left by the late Kristnama is governed by Hindú law or by the Succession Act; (3) who are entitled, and in what shares? At the hearing, the following additional issue was framed, in consequence of its having come to light that Sínammál had died before the delivery of the judgment in C.S. No. 16 of 1883, viz., whether it is *res judicata* in C.S. No. 16 of 1883 that Sínammál was the wife of Kristnama until his death? With regard to this, I may as well say at once that I think the death of the plaintiff before judgment was delivered caused that suit to abate, and therefore that nothing can be taken to be judiciously decided therein. The plaintiff was the sole plaintiff, with a personal cause of action, and the right to sue did not survive (sec. 361 of the Code of Civil Procedure.)

The first point then to be determined is whether the marriage of Kristnama with Sínammál in 1849 was ever a valid and completed marriage. Evidence has been called to prove that the usual ceremonies of a Bráhman marriage were performed, and the terms of the farikhut, in January 1857, show that Sínammál at any rate then regarded Kristnama as her husband. Some doubt was raised as to whether the ceremony of Saptapadi, or "seven steps" was observed. The evidence is not very precise on this point, but I should gather that the ceremony was probably duly performed, and in any case, the fact of the celebration of the marriage being admitted, the presumption would be that all necessary ceremonies were performed in the absence of evidence to

ADMINISTRATOR-GENERAL OF MADRAS v. ANANDÁCHÁRI.

the contrary--*Brindabun Chandra Kurmokar* v. *Chundra Kurmokar*.(1) It is admitted, however, that the consummation ceremony and consummation never took place, and it is therefore contended on behalf of defendant No. 3 that the marriage was never completed, since Sínammál never entered into her husband's gotram. In answer to the objection that the same plea might be urged in the case of the natural death of the husband before consummation, the learned counsel for defendant No. 3 argued that in that case there was no incapacity to complete the marriage tie, whereas in Kristnama's case there was incapacity by reason of his apostacy. At the moment of Kristnama's baptism he became—according to this argument—civilly dead, his Hindú relations might have divided his property and celebrated his funeral obsequies, he could no more inherit the property he might have inherited in their family since he had ceased to be a relative, or, as far as they were concerned—to exist, from the date of his conversion. His natural family, Mr. Branson argued, could have no more to do with his property than if he had died a sanyasi. I am not able to find any authority in support of this view, and it appears to me to be opposed to well-known principles of Hindú law. Had Kristnama died in 1851 without embracing Christianity no doubt would have been entertained regarding Sínammál's status as his widow. His conversion to Christianity, according to Hindú law, rendered him an outcaste and degraded. But according to that law, the degradation might have been atoned for, and the convert re-admitted to his status as a Bráhman, had he at any time during his life renounced Christianity and performed the rites of expiation enjoined by his caste. *The Government of Bombay* v. *Gangá*(2) and *Bisheshur* v. *Matá Gholam*(3) are authorities for the proposition that among Hindús the degradation of apostacy does not of itself dissolve the marriage tie. Nor could Sínammál—by refusal to cohabit with her husband and renouncing all material claims upon him—herself dissolve it. The passages from Vyavasthá Chandriká and Manu quoted by Kernan, J., in O.S. 16 of 1883 are authorities for holding that Sínammál was justified in her desertion of Kristnama without the dissolution of the marriage tie, and it was precisely to meet circumstances such as these, that the Native Converts' Marriage Dissolution Act (XXI of 1866) was

(1) I.L.R., 12 Cal., 140. (2) I.L.R., 4 Bom., 330. (3) 2 N.W.P., 300.

ADMINISTRATOR-GENERAL OF MADRAS v. ANANDÁCHÁRI.

passed by the Legislature. I am of opinion, therefore, that the marriage of Kristnama and Sínammál was valid and subsisting in 1858, and hence that the form of marriage celebrated between Kristnama and Mangalam in the Free Church of Scotland Mission Hall could not constitute a valid marriage.

The next point is whether the property left by Kristnama is to be governed by Hindú law or the Succession Act, and *Ponnusámi Nádan* v. *Dorasámi Ayyan* (1) is conclusive of the point, that Native Christian families are not at liberty to adhere to the Hindú Law of Succession since the passing of the Indian Succession Act. I do not think there is anything in the argument that Hindús are incapable of inheriting the property of a Christian under the Indian Succession Act. It does not follow that because Kristnama may have been incapable of inheriting to his father under Hindú law that his father is incapable of inheriting to him under the Succession Act, for in the one case the inheritance follows in the line of the funeral oblation, while in the other it is governed by blood relationship. Section 331 of the Succession Act exempts the property of Hindús from the operation of the Act, but there is no prohibition to a Hindú succeeding under the Act to the property of a Christian. When, therefore, Kristnama died in 1881 he left him surviving (1) Sínammál, to whom he had been legally married in 1849, which marriage had never been legally dissolved, (2) Anandáchári, his father (defendant No. 1), and (3) his brother, defendant No. 2. Obviously the brother has no claim at all, and the same would have been the case had the property been regarded as self-acquired property and governed by Hindú law. But had Sínammál still been living, I should have felt somewhat embarrassed by the judgment in O.S. 16 of 1883. In that case, however, the learned Judge based his opinion entirely upon the incapacity of Sínammál to inherit in the character of a Hindú widow. While I can understand the argument, it seems to me that there would be the further question whether Sínammál could not inherit under the Succession Act. There is no argument founded on the degradation of Kristnama—so it seems to me that would be valid for excluding her, which would not be valid for excluding his father also; and as far as the Succession Act is concerned it appears to me that if Sínammál was Kristnama's

(1) I.L.R., 2 Mad., 209.

ADMINISTRATOR-GENERAL OF MADRAS v. ANANDÁCHÁRI.

lawful wife up to the moment of his death, she must have become his widow at his decease, and entitled to such portion of his property, as his widow, as the law assigned to her. Had it not been for the farikhut which she gave Kristnama in 1858, I should have been inclined to think that half of Kristnama's estate had vested in her at his death. But the farikhut is an absolute renunciation of all claims, present and future, so that under s. 35 of the Succession Act the father becomes entitled to the whole. The direction to the plaintiff must be given in accordance with these findings.

With regard to costs, those of the plaintiff (the Administrator-General) will of course be paid out of the estate, and I do not think I should be wrong, at any rate in this suit, in making the same order with regard to the costs of defendant No. 3. The circumstances are very peculiar. Defendant No. 3 was bound to propound Mangalam's will and claim for her estate property which undoubtedly would have been hers had she been a wife. That for 25 years she believed herself to be a wife and her marriage a valid marriage, there is no reason to doubt, and had she been living she would, though not a wife—have had far stronger moral claims upon Kristnama for provision of support than the Hindú relatives, who discarded and outcasted him during his life, though they are now willing to benefit by his death. Defendant No. 2 must bear his own costs, and those of defendant No. 1 will necessarily be paid out of the estate which he now inherits.

By the decree it was declared that the marriage of Sínammál and Arthur Kristnama was valid and subsisting when the latter went through the form of marriage with Mangalam: that the marriage with Mangalam was invalid: that Sínammál had relinquished all right to the estate of Arthur Kristnama: that succession to the estate of Arthur Kristnama was governed by the Indian Succession Act, 1865: that Anandáchári, father of the intestate, was entitled to the whole of his estate in the hands of the Administrator-General subject to payment of costs, &c.: and that the residue should be paid to him accordingly.

Branson & Branson, Solicitors for plaintiff.

Grant & Laing, Solicitors for defendant No. 1.

Alagasingarachári, Solicitor for defendant No. 2.

Carr, Solicitor for defendant No. 3.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KELU (DEFENDANT No. 1), APPELLANT,

and

PAIDEL AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1886. March 29. April 5.

Malabar Law—Suit by anandravans to set aside sale in execution of decree against their karnavan, when maintainable.

The plaint lands being the jenm of a devasam were sold in execution of a decree obtained by defendant No. 1 against the urálars. Plaintiffs being the anandravans of the urálars sued to set aside the sale alleging that the debt was not contracted for devasam purposes and that the decree was collusive:

Held, that the decree was binding on the plaintiffs unless it had been obtained by fraud and collusion.

ORIGINAL suit 480 of 1876 was brought by defendant No. 1 against defendants Nos. 2, 4, 6 and 7. He obtained a decree in execution of which jenm properties of the devasam were attached. Defendants 3, 5 and 8, the remaining urálars, objected to the attachment. Their objection was allowed and the attachment released. Thereupon defendant No. 1 sued defendants Nos. 2–8 in O.S. 570 of 1881 for a declaration that the devasam properties were saleable in execution of the above decree, and obtained the declaration, and the properties were accordingly sold. The plaintiffs who are the anandravans of defendants Nos. 2, 3, 6, 7 and 8, respectively, brought this action, to set aside the sale.

The suit was dismissed by A. Annasámi Ayyar, District Múnsif of Pynád.

The plaintiffs appealed.

K. Kunjan Menon, Subordinate Judge of North Malabar, allowed the appeal on the ground that the debt on which the decree in O.S. No. 480 of 1876 was obtained was not contracted for devasam purposes.

Defendant No. 1 appealed to the High Court.

The Acting Advocate-General (Mr. *Shephard*) and *Náráyana Ráu* for appellant.

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* S.A. 682 of 1885.

KELU v. PAIDEL.

Bháshyam Ayyangár and *Srinivása Ráu* for respondents.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT :—The appellant in a suit to which all the urálars were parties obtained a decree declaring the lands of the devasam liable to his claim. In the urálars is vested the property of the devasam—*Patinharipat Krishnan Unni Nambiar* v. *Chekur Manakkal Nilakandan Bhattathiripad.*(1) The decree against them is binding on all future representatives of the devasam unless set aside on the ground of fraud and collusion in a suit properly framed for that purpose.

There is a considerable difference in the position of respondents as possible future urálars and as anandravans of the tarwads of which defendants 2–8 are karnavans, but we are not prepared to hold that their interest in the devasam is not sufficient to enable them to maintain the suit. The action, however, of their karnavans is binding upon them unless they can set it aside on the ground that the karnavans were in collusion with the appellant against the interests of the devasam.

The decree in O.S. 570 of 1881 was given on the merits on issues properly framed, and, if the contending defendant was absent at the final hearing, it is nowhere alleged in the present plaint that his absence was due to fraud or collusion with the appellant. There are, it is true, vague allegations of fraud made in the plaint, but no particulars of fraud are alleged, nor at the time of settlement of issues did respondents seek to have the decree set aside on any definite allegation of fraud.

The Subordinate Judge has disposed of the appeal upon a wrong issue; the point being not whether the debt was properly binding on devasam, but whether the decree, which declared that it was so binding, had been obtained by the fraud and collusion of the urálars with the appellant. On that ground alone would the respondents have been entitled to succeed.

We must set aside the decree of the Lower Appellate Court and restore that of the District Múnsif. The respondents must pay appellant's cost in this and in the Lower Appellate Court.

(1) I.L.R., 4 Mad., 141.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SIMSON AND OTHERS (PLAINTIFFS), PETITIONERS,

and

VENKATAGÓPALAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1886. April 2.

Civil Procedure Code, ss. 508, 521, 522, 622—*Act VIII of* 1859, *s.* 318—*Award made after time allowed by Court, invalid, when the time runs.*

An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May, the Court refused to give judgment in accordance with it under s. 522 of the Code of Civil Procedure on the ground that it was not valid.

The plaintiffs now petitioned High Court under s. 622 of the Code of Civil Procedure:

Held, that the award was invalid and the Court had not failed to exercise jurisdiction within the meaning of s. 622 of the Code of Civil Procedure.

IN O.S. No. 10 of 1884 on the file of the Subordinate Judge at Cocanada an order of reference to arbitration was made on 21st January 1885 returnable in six weeks. The arbitrators' fees were not paid till 31st March, and they made their award on 8th May. The Subordinate Judge set it aside as invalid and refused to give judgment in accordance with it under s. 522 of the Code of Civil Procedure.

The plaintiffs presented a petition praying the High Court to revise the proceedings of the Subordinate Judge under s. 622 of the Code of Civil Procedure, on the ground that it was open to him to enlarge the time even after the return of the award and that he had declined jurisdiction in refusing to do so.

Mr. *Grant* for petitioners.

Mr. *Norton* for respondents.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT :—The order of reference to arbitration under s. 508 of the Code of Civil Procedure was passed on January 21st, and

* Civil Revision Petition 344 of 1885.

SIMSON v. VENKATA-GÓPALAM.

the arbitrators were requested to return their awards within six weeks. The full fees were not received till March 31st, and the award was made on May 8th. We must hold that the six weeks began to run from the date of the order, viz., from January 21st.

As the fees were not at once paid, the proper course would have been for the parties to have applied or for the Court, on its own motion, to have enlarged the time allowed for the arbitration. Unfortunately this was not done, and under s. 521 of the Code of Civil Procedure, the award is invalid not having been made within the period allowed by the Court.

It was urged upon us that it was open to the Subordinate Judge to have enlarged the time even after the return of the award and that the Subordinate Judge virtually declined jurisdiction having ignored the prayer to that effect in the plaintiff's petition. It is on this ground that we are asked to exercise our power of revision under s. 622.

In England the power to enlarge after the expiry of the time allowed for an award rests upon an express Statute, and in India the old Code of Civil Procedure (Act VIII of 1859) enacted (section 318) that an award should not be liable to be set aside only by reason of its not having been completed within the time allowed by the Court unless the delay was caused by the misconduct or corruption of the arbitrator or the arbitration had in the meanwhile been superseded by the Court. That section was not, however, re-enacted in the present Code, and we must therefore take it that the Legislature deliberately intended to enact that in all cases no award should be valid unless made within the time allowed by the Court.

The Subordinate Judge therefore did not refuse to exercise a jurisdiction vested in him by law, and we cannot interfere under s. 622 of the Code of Civil Procedure.

We must dismiss this petition, but, under the circumstances, without costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. July 27.

SUBBAYYA (PLAINTIFF), APPELLANT,

and

CHELLAMMA (REPRESENTATIVE OF DEFENDANT No. 1) AND OTHERS, RESPONDENTS. *

Hindú Law—Self-acquisition—Burden of proof.

Where waste land was taken up and cultivated by the father of an undivided Hindú family and the question was whether it was family property or self-acquired:

Held that the burden of proof lay on those who asserted that it was self-acquired.

Quære, whether under Hindú Law a father has power by a nuncupative will to dispose of self-acquired immovable property to the complete disinherison of a son.

APPEAL against the decree of T. Rámasámi Ayyangár, Subordinate Judge at Cocanada, in suit 188 of 1883.

Plaintiff, Varidhinidhi Subbayya, alleged that Gundabogulu Putramma (defendant No. 3), junior widow of Chowdhri, gave him a lease of certain land in June 1881; that Ammirázu (defendant No. 2), son of Chowdhri by his senior wife, prevented him from taking possession, claiming title; that in October 1881 he obtained a sale-deed of the land from defendant No. 2 who acquired the land on partition with defendant No. 1; that defendant No. 3, at the instigation of Surayya, defendant No. 1, the divided brother of defendant No. 2, thereupon sued him for rent and obtained a decree. Plaintiff claimed to have the lease of June 1881 cancelled and the sale-deed of October 1881 confirmed. Defendants Nos. 1 and 3 pleaded that defendant No. 2 had been adopted into another family and had no title.

The Múnsif found that defendant No. 2 had not been given in adoption, that the land was the self-acquisition of Chowdhri, and that before his death he had made provision for his family by marrying defendant No. 2 into a family in which he was to be brought up as son and heir according to local custom (Menarikam) and by giving the property in suit to defendants Nos. 1 and 3.

* Second Appeal 703 of 1885.

SUBBAYYA v. CHELLAMMA.

The suit was dismissed.

On appeal the Subordinate Judge found that defendants Nos. 1 and 3 had divided Chowdhri's property after his death in accordance with directions given by him shortly before death, and that the effect of Chowdhri's direction was to transfer the property at once to defendants 1 and 3.

Plaintiff appealed, on the following among other grounds:—

(1) because, if the land was self-acquisition, Chowdhri could not dispose of the whole estate without making provision for defendant No. 2;

(2) because there was no evidence to rebut the presumption that the land was family property;

(3) because Chowdhri had not transferred the land to defendants 1 and 3.

Mr. *Norton* for appellant.

Mr. *Michell* for respondent No. 3.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The plaint land appears to have been taken up by Chowdhri at the request of the tahsildar when it was waste, and had been abandoned by other cultivators. We cannot infer from that fact alone that it is necessarily to be regarded as self-acquired property. The ordinary presumption would be that Chowdhri acquired it for the benefit of his family and brought it under cultivation by the aid of family funds in the absence of evidence that he had self-acquired funds which he utilized for that purpose.

The District Múnsif says that Chowdhri acquired the land without the use of any patrimony, and he might have said without the expenditure of any funds at all, since the land was taken up from the Revenue authorities when it was waste. The true test is whether it was brought under cultivation by family or self-acquired funds and the *onus probandi* lies upon those who allege the latter. The Subordinate Judge has clearly put the burden upon the wrong side.

We must ask the Subordinate Judge to re-try the 5th issue upon the evidence on record and upon any further evidence which the parties may adduce, and in the event of his again finding that the land was the self-acquired property of Chowdhri, he

will proceed to try the further issue whether according to Hindú Law a father has power by a nuncupative will to dispose of self-acquired immovable property as he pleases and to the complete disinheriting of an undivided son.

We are clearly of opinion that the evidence as to what took place the day before Chowdhri died—if it is true—would establish a bequest to take effect after the death of the testator, and not a gift *inter vivos*.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

PADSHA (DEFENDANT), APPELLANT,

and

TIRUVEMBALA (PLAINTIFF), RESPONDENT.*

1886. July 14, 30.

Rent Recovery Act (Madras Act VIII of 1865), ss. 39, 41, 43, 44—Delivery of possession—Appeal—Limitation.

A. obtained a warrant ejecting B. for arrears of rent under s. 41 of the Rent Recovery Act. B. appealed within fifteen days, but A. was put into possession on 13th May 1882, B.'s appeal came on for hearing and was dismissed on 30th June 1883. B. instituted this suit to recover possession of the land on 28th July 1883:

Held, that B.'s suit was not time-barred under s. 44 of the Rent Recovery Act.

APPEAL from the decree of C. W. W. Martin, District Judge of Salem, reversing the decree of S. Manavalayya, District Múnsif of Salem, in suit No. 339 of 1883.

The plaintiff being a tenant of land in a certain jaghir failed to pay rent for fasli 1290 and the defendant obtained a warrant from the Collector (see s. 41 of the Rent Recovery Act), "authorizing him to enter on, and take possession of, the premises." Within fifteen days after service of the warrant, the plaintiff appealed to the Deputy Collector under s. 43 of the above Act, but the appeal did not come on for disposal for a year, and in the meanwhile, on 13th May 1882, the police put the defendant in possession of the premises.

On 30th June 1883 the appeal was dismissed; and on the

* Second Appeal 936 of 1885.

PADSHA v. TIRUVEMBALA.

28th July 1883 the plaintiff instituted the present suit to recover possession of the land. The District Múnsif held that the plaintiff's claim was barred on the ground that he should have brought his action within one month from the date of his dispossession (see s. 44 of the Rent Recovery Act). The District Judge reversed this decision and also found that the plaintiff had a saleable interest in the land at the time of his ejectment.

Defendant appealed.

Mr. *Subramanyam* for appellant.

Bháshyam Ayyangár for respondent.

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following judgments:—

BRANDT, J.—The contention that the courts below were not warranted on the evidence before them in holding that the respondent had a saleable interest in the land cannot be supported.

The respondent in his plaint set out that the lands, of which he was dispossessed, were acquired by his father by purchase, and his title was not disputed by the appellant. Objection is taken to the finding of the District Judge on the issue, that he refers only to a decision in another suit, but the District Múnsif in his judgment states that "the oral and documentary evidence adduced by the plaintiff in this suit proves" that the raiyats in the jaghir have a saleable interest in their lands; the District Judge says that "the Múnsif's finding in the present case seems justified by the record;" and the depositions have not been printed to show that there was no evidence in support of this finding.

The only question then to be determined is whether the issue as to limitation has been erroneously decided by the District Judge.

Section 43 of Rent Act (Madras) provides that "the warrant shall be entrusted to some officer of police who shall serve it in the manner laid down in s. 39 of this Act. When no appeal shall be preferred to the Collector within fifteen days after service, or when an appeal has been preferred and decided against the defaulter, and when the amount named in the warrant is not discharged, the police officer shall place the person who has procured the warrant in possession," and s. 44 that "upon delivery of possession the tenancy existing between the defaulter and the landholder shall cease and determine, unless an action shall be brought in the proper Court of Civil Jurisdiction within one

PADSHA v. TIRUVEMBALA.

month to reverse such delivery of possession and shall be prosecuted to a successful determination." It is admitted that within fifteen days after service of the warrant, the respondent did appeal to the Deputy Collector; the appeal was not, it is stated, disposed for a year or more; in the meanwhile the police had placed the person who procured the warrant in possession.

It is contended for the appellant that the words "upon delivery of possession" in s. 44 must be construed to refer to, and to include delivery of possession, however wrongfully given. For the respondent it is urged that those words must be construed with reference to the preceding section, and that delivery of possession as provided therein was intended by the Legislature; that until the tenant's appeal was disposed of the police had no authority to give possession; that an Act of the Legislature must be construed reasonably, but that it would involve an absurdity if the tenant were to be compelled to have resort to a regular suit for which there would be no necessity if his appeal to the Collector were allowed.

The peculiar sense in which the words "upon delivery of possession" are used must be determined by the context; and having regard to this there can be no reasonable doubt that in using the first four words in s. 44, the Legislature had in view the possession to be given under the preceding section; the act of the Collector in issuing the warrants under s. 41 is a ministerial act on his part, and the appeal provided in s. 44 was clearly intended to afford the tenant an opportunity of contesting in a summary manner the right of the landlord to take proceedings under s. 39. If the tenant be successful, there would be, as the intention unquestionably was, an end of the proceedings.

One part of an Act should so be construed by another that the whole may, if possible, stand; whereas, if the construction contended for by the appellant be adopted, the tenant would, so far as recovery of his land is concerned, be without remedy, unless he instituted in a Civil Court a suit which the Legislature, it may be assumed, evidently contemplated only in the event of his appeal being disallowed and possession given as required under s. 43.

MUTTUSÁMI AYYAR, J.—I am of the same opinion. I desire to point out that, if the appellant's contention were to prevail, limitation would run against the tenant before he was in a position

PADSHA v. TIRUVEMBALA.

to sue. The shorter period of limitation is prescribed in cases in which the tenants appeal against the warrant for ejectment, because dispossession under s. 43 is the result of an adverse decision against the tenant, and until there is an adverse decision to which the tenant's dispossession can be referred, the one year rule can have no application.

This second appeal fails and is dismissed with costs.

PRIVY COUNCIL.

P.C.
J.C.*
1886.
June 23.
July 10.

RÁMALAKSHAMMA (DEFENDANT)

and

RAMANNA (PLAINTIFF).

[On appeal from the High Court at Madras.]

Limitation Act XV of 1877, *sch. II, art.* 144—*Adverse possession—An outside person claiming an interest in an estate together with an undivided family—Inheritance to such owners.*

In a family of three undivided brothers, an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter, even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family; and the members of it would not have had a right to succeed to his fourth share, which would have descended to his own heirs; the other three-fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the deaths of his father and uncles, sole possession of the whole estate:

Held that he did not take the one-fourth share above mentioned by any right of inheritance, and that, in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain from those claiming through the son, who was now dead, the one-fourth share, brought more than twelve years after possession taken by the son, by a purchase, relying on a title through the fourth co-proprietor, was barred by limitation under article 144 of the second schedule of Act XV of 1877.

APPEAL from a decree (26th February 1884) of the High Court, reversing a decree (22nd December 1882) of the District Judge of Godávari.

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* *Present:* Lord WATSON, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.

RÁMALAKSHAMMA v. RAMANNA.

The suit, out of which this appeal arose, was brought against the Collector of the Godávari district as Agent to the Court of Wards and, in that capacity, guardian of a minor widow, whose husband, Sarvarayya, deceased on 23rd July 1869, had in his lifetime possessed the estate claimed.

This was one-fourth of the mutta Kesanakurru, in the Godávari district. The whole mutta was purchased in 1848 by Balasu Buchchi Krishnayya, who had two brothers then joint with him, Pattabhiramayya and Adinaráyana, and a sister married to Anandarayya. In 1853 Krishnayya died, leaving one son, the above-mentioned Sarvarayya, and having made the will, dated 29th March 1853, which is set forth in their Lordships' judgment.

In his petition, dated 31st March 1853, forwarding his will to the Collector, Krishnayya stated that his brothers and Anandarayya had equal shares in the mutta, which he applied to have entered in their names, as well as that of his son, the management being in the hands of Pattabhiramayya. This was carried out. Both the surviving brothers having died—one in 1857 and the other in 1866—the management of the mutta devolved on Sarvarayya, who remained in possession till 1869, when he died without issue, leaving a widow under age. The mutta was then taken under charge of the Court of Wards.

Meantime, on the 26th May 1868, Anandarayya sold the one-fourth share to Kadavati Seshayya, who on the 8th March 1880 transferred his right to a purchaser, the plaintiff in this suit, Addanki Ramanna. Neither the latter nor Seshayya obtained entry of their names as proprietors. Failing to obtain the one-fourth share, Ramanna brought the present suit on the 24th May 1882, claiming possession with mesne profits for three years.

The Court of Wards answered on behalf of the minor widow, denying that Anandarayya had ever had possession or had made a valid sale of the property.

On issues raising these questions, and whether the suit was not barred by limitation, the District Judge decided in favour of the defendant, the Court of Wards. He held that, under the circumstances, the burden of proof was on the plaintiff to show that Anandarayya had the share claimed. There was, however, nothing to show what proportion of the profits Anandarayya had ever received, or whether he had received any at all or had ever paid money for his share in the necessary expenses of the mutta. His

RÁMALAKSHAMMA v. RAMANNA.

finding on the evidence was that Anandarayya was never in possession of the share, either actually or constructively, and had only had his name entered as a co-proprietor because he was a near relation. The District Judge concluded that, with regard to the failure to prove any kind of possession by, or on behalf of, Anandarayya down to 26th May 1868, and the absence of any possession delivered to his transferee on or after that date, the lapse of twelve years had barred the suit under article 144 of the second schedule of Act XV of 1877.

On appeal the High Court (Turner, C.J., and Muttusámi Ayyar, J.) reversed the decree of the District Court, giving judgment as follows :—

"There is evidence to show that the one-fourth share was acquired by Anandarayya, and that his title was recognized by Krishnayya, the managing member of his family, who, by the will of 29th March 1853, directed that thereafter the estate should be managed by Pattabhiramayya. This direction was complied with, and the other owners recognized the title of Anandarayya in December 1853. Pattabhiramayya remained in possession up to his death in 1866, when possession was taken by his nephew Sarvarayya of his own three shares as the surviving member of the joint family and of Anandarayya's undivided one-fourth share, presumably as heir to his uncle, the deceased manager. Until 6th August 1868, Sarvarayya did not set up a title hostile to Anandarayya. We are then of opinion that the suit is not barred by limitation. The seller, Anandarayya, died at the end of 1868, and the purchaser was deprived of the opportunity of examining him to ascertain in what manner, if any, he had enjoyed the share recorded in his name. We consider the better evidence indicates a *bonâ fide* intention on the part of Krishnayya and his brothers to admit the right of Anandarayya as a co-purchaser. If they had desired to make a gift to him, there is no reason why they should not have done so, for in 1848 the son of Krishnayya was not born; but however this may be, the survivors admitted his title and his possession.

"For these reasons we find the plaintiff has made out his case; and reversing the decree of the Court of first instance, we decree the claim with costs and future interest at six per cent. from the date of this decree. The amount of mesne profits will be determined in execution of decree."

RÁMALAKSHAMMA v. RAMANNA.

Mr. *J. D. Mayne* and Mr. *A. Phillips* for the appellant contended that Anandarayya transferred no title to Seshayya, not having any; and that, independently of question of title, the suit was barred by limitation, as the possession of those through whom the appellant claimed had been adverse for twelve years and more before the suit was brought as against Anandarayya and those claiming under him. If the testamentary disposition made by Krishnayya in 1853 was taken as the origin of Anandarayya's title, then that title failed; because, already, in that year Sarvarayya, son of Krishnayya, was living, and the right of survivorship in the brothers of Krishnayya and in Sarvarayya could not be defeated by a will attempting to confer a title upon Anandarayya and depriving the joint family to that extent. Reference was made to *Lakshman Dádá Naik* v. *Ramchandra Dádá Naik*,(1) in which it was held that the alienation of an undivided share could not take place by a father's will, as if by alienation in his lifetime. The bequest to Anandarayya, if relied on as a bequest, would be invalid as against Sarvarayya. On the other hand, if the will was not taken as such origin of title, it was for those who claimed through Anandarayya to show on what state of things and on what right of property in him they relied. This they had not shown. Nothing but evidence of the actual state of the facts would aid the plaintiff's case, for the presumption was against the husband of the sister having an interest in the estate of the undivided brothers, to whom he was no relation. The presumption was also against him in regard to the source of the purchase money, which, coming from Krishnayya, must be presumed to have belonged to the undivided family. To show the inferences that ought to be drawn in questions of ownership upon purchases in regard to the source of the purchase money and to presumptions of the Hindú law, reference was made to *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty*,(2) *Nawab Azimut Ali Khan* v. *Hurdwaree Mull*,(3) and *Faez Buksh Chowdry* v. *Fukeeroodeen Mahomed Ahassun Chowdry*.(4)

Again, the assignment by Seshayya was invalid. Lastly, in regard to limitation, the possession of Sarvarayya, after he had succeeded, on the death of his uncle, to the management of the estate, was not taken on behalf of Anandarayya as to the one-

(1) I.L.R., 5 Bom., 48; L.R., 7 I.A., 181.
(2) 11 M.I.A., 28.
(3) 13 M.I.A., 395.
(4) 14 M.I.A., 234.

RÁMALAKSHMMA v. RAMANNA.

fourth of the mutta, but was adverse to him, both before and after the date of the sale to Seshayya, an adverse possession for even two days before that date being sufficient to bring the case under article 144, a period which had been much exceeded.

Mr. *R. V. Doyne* and Mr. *G. P. Johnstone*, for the respondent argued that Anandarayya had a title to the one-fourth share upon the admission and recognition of the undivided family, his name having been entered in the Collectorate books at Krishnayya's request. The Court of Wards, though in a position to produce all the revenue records and papers relating to this estate, had not displaced the *primâ facie* title made out. It could not be argued that Sarvarayya's possession was adverse, in regard to the one-fourth share only, to the recorded co-proprietor of it without showing that some assertion of right to it had been made. But far from this having taken place, Sarvarayya had taken possession of the whole mutta as heir to his uncle Pattabhiramayya, who, in the capacity of manager, had held the whole estate as well on behalf of Anandarayya as on behalf of the others entitled.

Counsel for the appellant were not called upon to reply.

On a subsequent day, July 10th, their Lordships' judgment was delivered by

Sir BARNES PEACOCK:—This is an appeal from a decision of the High Court of Judicature at Madras, by which a decree of the District Court of Godávari in favour of the present appellant, the defendant in the suit, was reversed.

The suit was commenced on the 24th of May 1880. The plaintiff, now respondent, prayed that his right might be established to a fourth share in the mutta of Kesanakurru, in the district of Godávari, and that a fourth share might be divided and delivered over to him, with Rs. 3,000 on account of past profits for three years, at Rs. 1,000 a year, for his one-fourth share.

The suit was brought against the defendant, the Collector of the District of Godávari, as Agent to the Court of Wards and guardian of Rámalaksmamma, a minor, who was the widow of Sarvarayya, deceased. The plaintiff claimed as a purchaser of the undivided fourth share. He alleged that one Anandarayya, who, as the joint proprietor of the mutta, had been entitled to a fourth share thereof, and had been in enjoyment of the same on the 26th of May 1868 by a registered sale deed, sold his right, title, and interest therein for Rs. 10,000 to Seshayya, who, on the 8th of

RÁMALAKSHMMA v. RAMANNA.

March 1880, sold the same to him, the plaintiff, for Rs. 5,000. It appears that the estate, of which the plaintiff claimed an undivided fourth share, was originally purchased some time about the year 1848, before the birth of Sarvarayya, the deceased husband of Rámalakshmamma, by his father Krishnayya in his own name; that at that time Krishnayya and his two brothers, Pattabhiramayya and Adinaráyana, constituted a joint Hindú family governed by the Mitákshará law of inheritance. There was no direct evidence to show what funds were employed in the purchase of the estate. The presumption, therefore, in the absence of evidence to the contrary, would be that it was purchased with joint family funds, and that the estate so purchased became the joint estate of the family. However, on the 31st March in the year 1853, after the birth of Sarvarayya, Krishnayya his father presented to the District Collector of Godávari an arzi accompanied by a will, dated the 29th March 1853, which he stated that he had executed to his younger brothers, &c.

The following is a copy of the will:—

"Will executed on the 29th March 1853 by me, Balasu Buchchi Krishnayya, proprietor of kasba Kapileswarapúram, &c., in favour of my son, Buchchi Sarvarayya, and the joint proprietors with me of Kapileswarapúram, *i.e.*, my two undivided brothers, Pattabiramayya gáru and Adinaráyanaráyudu gáru.

"The illness I have been suffering from for the last two months having at present grown serious, I think that I cannot survive it any longer, and as, after my death, my son Buchchi Sarvarayya and both of you are the joint proprietors of our joint proprietary estate of kasba Kapileswarapúram, possessing equal rights, you three should jointly enjoy the said estate, and you Pattabhiramayya, who are capable of managing business, should manage the whole business from this day, until my son, who is now a minor, should enter into a partition of the estate with you on attaining his proper age. Further, as all of us possess equal rights to Kesanakurru mutta estate, which was purchased by means of our family funds and the funds of Kolupati Anandaráyudu, the husband of our sister, and which now stands registered in my name alone, you four persons, *i.e.*, my two undivided brothers, my son Buchchi Sarvarayya, and Kolupati Anandaráyudu, who is the husband of our sister, should jointly enjoy the produce of Kesanakurru mutta."

RÁMALAKSHAMMA v. RAMANNA.

This is the estate in dispute.

"You Pattabhiramayya should hold yourself also the management of the business of the said estate of Kesanakurru mutta from this day, and as your younger brother, Adinarayánaráyudu, my wife, and our brother-in-law, Kolupati Anandaráyudu, have all agreed to your taking the responsibility of managing the said Kesanarkurru mutta, you should protect the whole family, holding the management of the Kesanakurru mutta yourself. If you should think of dividing the said two muttas among yourselves, Kapileswarapuram should be divided into three shares among my son Buchchi Sarvarayya and you both who have been joint proprietors with me, and Kesanakurru mutta into four shares among you three and Kolupati Anandaráyudu, and each should get registered in his name his share and enjoy each his share. Until then you, Pattabhiramayya, should conduct the whole management of the two estates yourself, and until my son Buchchi Sarvarayya attains his proper age, you should protect him, his sister, and his wife, and celebrate the marriages, &c., of him and his sisters. Should it happen that you have to divide among yourselves each his share, before Buchchi Sarvarayya attains his proper age, you yourself should, until he attains his proper age, retain his share of the estate under you and manage it yourself, and hand over to him his estate on his attaining his proper age. Will executed of my full accord.

"(Signed) BUCHCHI KRISHNAYYA."

It is unnecessary in the view which their Lordships take of the case to determine what was the effect of the arzi and will of Krishnayya, or to consider the effect of the documentary and other evidence adduced in support of Anandarayya's title; for assuming that he had a title to an undivided fourth share in the estate, his right and the rights of those who claim under him appear to their Lordships to have been barred by limitation.

It was proved by Seshayya that he married a granddaughter of Anandarayya, that he made advances of money to him from time to time to the extent of Rs. 6,000, and that Anandarayya, being unable to discharge his debt, sold his share in discharge of the debt and for an additional sum of Rs. 4,000, which were paid to him by Seshayya; and that on the 8th of March 1880 Seshayya resold the share, together with past profits thereof, to the plaintiff

RÁMALAKSHAMMA v. RAMANNA.

for Rs. 5,000. It was proved that Seshayya, and admitted that the plaintiff never had possession of any part of the estate, and never received any portion of the profits thereof. In order to show what little confidence Seshayya had in his title, it may be observed that in the bill of sale from him to the plaintiff he stipulated that the plaintiff should not recover from him any costs which he might incur on account of suits that he might bring for the recovery of proprietorship, and of the past profits, or the amount paid for the purchase in case his suit for recovery of the property should be dismissed.

The absence of possession is carried as far back as the 26th May 1868, the date of the sale to Seshayya, a period of twelve years, *minus* two days, prior to the 24th May 1880, the date of the commencement of the suit.

One of the issues raised in the suit was whether the plaintiff, or those under whom he claims, ever had possession of the property in the suit, and whether the suit was barred by limitation. The only question to be considered is whether during the two days prior to the 26th May 1868 Anandarayya had an actual or constructive possession of a one-fourth share, or whether the possession of Sarvarayya was not adverse to him during that period.

Adinarayya, the younger brother of Krishnayya, died in 1857, and Pattabhiramayya, the elder brother, who appears to have acted as manager in accordance with the will of Krishnayya, died in 1866 or 1867, and on his death, Sarvarayya, who had no authority to act as manager of Anandarayya's fourth share, assuming him to have had one, entered into possession of the whole estate.

It does not appear upon any credible evidence that Anandarayya ever received any portion of the rents and profits of the estate, a fact which must have been capable of proof had it existed.

Their Lordships cannot believe the evidence of the plaintiff's witnesses, of whom the fifth, viz., Seshayya, the first purchaser of Anandarayya's fourth share, went to the extent of stating that Anandarayya managed the estate, and the first of whom stated that although the lease to his master was in the name of Pattabhiramayya, the rent was paid to Anandarayya and never to the other sharers. Their Lordships concur with the Subordinate Judge who heard the plaintiff's witnesses and saw their demeanour, and who stated that he was not satisfied with them. The High Court does not express an opinion at variance with the finding of the Sub-

RÁMALAKSHAMMA v. RAMANNA.

ordinate Judge that Anandarayya was never in possession or enjoyment of the one-fourth share. It is improbable that if Seshayya believed that Anandarayya was in the management of the estate or in the receipt of a fourth share of the rents and profits up to the time of his purchase, he having purchased that share for Rs. 10,000, would have allowed Sarvarayya to retain the exclusive possession of the whole estate and of the rents and profits thereof for a period of nearly twelve years without any attempt to recover his share. He says as the estate had been in the management of the Court of Wards for twelve years, he remained quiet, thinking he would have to incur much expense if he should institute a suit. Again he states that as the estate was made over to the Court of Wards he sold for Rs. 5,000 the share that he had bought for Rs. 10,000, not being able to file a suit. The High Court says: "The seller, Anandarayya, died at the end of 1868, and that the purchaser was deprived of the opportunity of examining him in what manner, if any, he had enjoyed the share recorded in his name." It must, however, be borne in mind that Anandarayya lived for eight or nine months, and Sarvarayya for upwards of twelve months after the sale to Seshayya, during which period the latter might have brought a suit against Sarvarayya and called Anandarayya as a witness to prove that he had received his share of the profits down to the time of the sale to Seshayya, if such had been the fact. The Subordinate Judge alludes to the delay on the part of Seshayya. He stated that he was confirmed in the view that Anandarayya was never in possession by the consideration that had he really been in possession his vendor would not have remained quiet for nearly twelve years. The High Court say that until the 6th of August 1868, Sarvarayya did not set up a title hostile to Anandarayya. But if Anandarayya never had possession of the one-fourth share from the time of Krishnayya's death in 1853, and Sarvarayya and his uncles, as a joint Hindú family, had the exclusive possession thereof without any claim on the part of Anandarayya, of which there is no proof, there seems to be no reason why Sarvarayya should set up any title hostile to Anandarayya. Their Lordships fail to see any reason why if no claim was made a hostile title should be set up. As soon, however, as Anandarayya presented his petition, on the 14th July 1868, more than fifteen years after the date of Krishnayya's will, to have Seshayya's name registered as the proprietor of the one-fourth

RÁMALAKSHAMMA v. RAMANNA.

share in consequence of his purchase, Sarvarayya did, on the 6th August following, object to such registration, disputed Anandarayya's title, and asserted that he had never shared in the profits of the estate. The Collector, in consequence of such objection, refused to register the one-fourth share in Seshayya's name. Yet even then Seshayya took no proceedings to enforce his claim, and allowed Sarvarayya to retain possession of the whole estate up to the time of his death, on the 23rd July 1869, shortly after which date the whole estate was taken under the care of the Court of Wards for the infant widow of Sarvarayya, and so remained until the commencement of the suit. The High Court say that Pattabhiramayya remained in possession up to his death in 1866, when possession was taken by his nephew Sarvarayya of his own three shares as the surviving member of the joint family, and of Anandarayya's undivided fourth share, presumably as heir to his uncle, the deceased manager. This, however, is clearly an error. If, as represented by Krishnayya by his will of 1853, the estate was purchased by means of the family funds and the funds of Anandarayya, and Anandarayya was entitled to an undivided fourth share, Anandarayya was not entitled to such share as a member of the joint family, for, as the husband of a sister or daughter of Krishnayya, he would not become a member of the joint family, nor would his share be inheritable by the members of the joint family according to the Mitákshará. His share would be inheritable by his own heirs, and the other three-fourths would pass to the surviving members of the joint family by survivorship. It was impossible, therefore, for Sarvarayya to succeed to Anandarayya's fourth share during Anandarayya's lifetime by inheritance from his uncle, the deceased manager. It appears to their Lordships that it must be presumed that at least from the time when Sarvarayya took possession after his uncle's death the possession was adverse to Anandarayya, and, consequently that the suit was barred by limitation by article 144, schedule 2, Act XV of 1877. If Sarvarayya claimed to take the one-fourth share as heir to his uncle, the possession was clearly adverse to Anandarayya within the meaning of article 144, and the suit would also be barred by limitation.

Upon the whole, their Lordships are of opinion that the decree of the Subordinate Judge was correct, and they will, therefore, humbly advise Her Majesty that the decree of the High Court be

RÁMALAKSHMMA v. RAMANNA.

reversed, that the decree of the First Court be affirmed, and that the respondent do pay the costs of the appellant in the High Court.

The respondent must also pay the costs of this appeal.

Solicitor for the appellant—*H. Treasure.*

C.B.

Solicitors for the respondent—*T. Luxmore Wilson & Co.*

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. July 14, 23.

RÁMÁSÁMÍ AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

KADAR BIBI (DEFENDANT No. 1), RESPONDENT.*

Contract Act, s. 264—Partnership—Notice of dissolution—Sleeping partner.

A, B and C traded together in partnership as B, C & Co., A being a sleeping partner. After the partnership was dissolved, B and C continued to trade together under the same name and incurred debts to the plaintiffs, who sued to recover the amounts from A, B and C. The plaintiffs had not dealt with the old partnership nor received notice of its dissolution, and it was not alleged that they knew of A's previous connection with it:

Held, that the suits did not lie against A.

THESE were appeals against the decrees of J. W. Reid, District Judge of Coimbatore, modifying the decrees of P. Náráyanasámi Ayyar, District Múnsif of Coimbatore, in original suits 325 and 490 of 1885.

The respondent (defendant No. 1) entered into partnership with defendants Nos. 2 and 3 on 21st June 1883 and traded with them as a sleeping partner. The names of defendants Nos. 2 and 3 alone appeared in the trade name of the firm. The partnership was dissolved on 30th June 1884 on the retirement of the respondent; defendants Nos. 2 and 3 however constituted a new firm and carried on the business under the old partnership name. The new firm dealt with the plaintiffs (appellants) for skins and bark, and then suits were brought against defendants Nos. 1, 2 and 3 to recover money due on accounts stated. The plaintiffs had not dealt with the old partnership and had not received notice of its dissolution, and it was not averred that they knew of respondent's

* Second Appeals 948 and 977 of 1885.

RÁMÁSÁMI v. KADAR BIBI.

previous connection with it. The Múnsif passed decrees for the sums claimed against all three defendants.

Defendant No. 1 appealed against these decrees, and the District Judge modified them by ordering the suits as against defendant No. 1 to be dismissed.

Plaintiffs appealed to the High Court, on the ground, *inter alia*, that the Lower Court was wrong in holding that in respect of a new customer no notice is necessary.

Sundaram Ayyar and *Krishna Ayyar* for appellants.

Bháshyam Ayyangár and *Desikácháryar* for respondent.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—Defendants 1–3 entered into partnership on 21st June 1883 to trade at Coimbatore under the name of "Padsha Rowten, Peer Muhammad Meracoyer and Co.," *i.e.*, the names of defendants 2 and 3 only appeared in the designation of the firm. The partnership was dissolved on 30th June 1884 by exhibit E, on which date defendant No. 1 retired, and defendants 2 and 3 continued to trade under the same designation as before. The two appellants are found by the District Judge to be "new customers" of the firm after the date of exhibit E; one of them lives at Annúr, near Mettupálaiyam, in the Coimbatore District, and about 40 miles from Coimbatore; the other in Madras, over 300 miles from Coimbatore; and the question in these appeals is whether the defendant No. 1 can be held liable to their claims against the firm.

From the judgment of the District Court we do not understand that it was denied on the appeal that these appellants were "new customers" of the firm, and we must accept the finding upon the question of fact.

It was then urged that the Judge had misconstrued s. 264 of the Indian Contract Act, and the judgment of Garth, C.J., in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*,(1) in holding that no notice of dissolution of partnership was necessary in respect of new customers.

Section 264 enacts that persons dealing with a firm will not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution. In the present case the firm with which appellants opened dealings con-

(1) I.L.R., 8 Cal., 678.

RÁMÁSÁMI v. KADAR BIBI.

sisted of defendants 2 and 3, and there has been no change in the firm since the dealings were commenced. It would certainly, therefore, lie upon appellants to aver and prove that they commenced dealings with the firm on the strength of their belief that defendant No. 1 was a partner. This they have not done, and the presumption would be against any such supposition, since the name of defendant No. 1 did not appear in the designation of the firm.

It appears, moreover, from paragraph 3 of the judgment of the Lower Appellate Court, that defendant No. 1 was never at any time more than a dormant partner, since the articles of agreement (A) stipulated that defendants Nos. 2 and 3 should conduct the business, and defendant No. 3 was specially employed to do many acts for her and represent her in dealing with third parties—an arrangement only natural and such as we should expect in the case of a Muhammadan lady. The retirement of a dormant partner is an exception to the usual rule that a partner's agency ends by notice (see Lindley on Partnership, 4th edition, pages 405–408), and it was not averred that appellants knew defendant No. 1 to be a dormant partner notwithstanding that her name did not appear in the designation of the firm. An old customer might possibly be supposed to have known the fact, but there would be no such presumption in the case of a new customer, and there is no evidence that appellants ever heard of defendant No. 1 being a partner. Under these circumstances, we dismiss these second appeals with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

1886. July 28. August 3.

RÁMACHANDRA AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

KRISHNA (DEFENDANT), RESPONDENT.*

Registration Act (Act III of 1877), s. 50.—Conflict between an unregistered hypothecation bond and a subsequently registered conveyance—Notice—Decree on hypothecation bond.

Land was hypothecated to plaintiff by an unregistered bond, dated 29th May 1878, and afterwards sold to the defendant by a registered conveyance, dated 29th June 1879, which recited the previous hypothecation. In a suit brought by the plaintiff to enforce his charge:

Held, that there was no conflict between the instruments, and the hypothecation bond was enforceable though unregistered.

THIS was an appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, confirming the decree of V. Srinivásáchárlu, District Múnsiff of Valangimán, in suit No. 164 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Brandt, J.).

Bhashyam Ayyangár for appellants.—The provisions of s. 50 of Act III of 1877 are not applicable. The conveyance to respondent conveying only the equity of redemption, no conflict arises between it and the unregistered hypohecation bond to appellants.

Ráma Ráu for respondent.

JUDGMENT.—The appellants sued upon an unregistered instrument of hypothecation securing Rs. 75 principal executed in favor of their father by one Kamakshi Ammál in May 1878. In June 1879 Kamakshi Ammál executed a deed of conveyance, dealing with the land hypothecated, to the father of the appellants among other lands and conveying them to the respondent: this deed of conveyance was registered.

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* Second Appeal of 1886.

RÁMACHANDRA v. KRISHNA.

The plaint contained a prayer for the principal and interest in accordance with the terms of the bond, "holding the plaint property liable," and asking that, if necessary, it be sold to realize the amount decreed.

The Court of First Instance found in favor of the appellants on the merits, and no appeal was preferred against that finding; but both Courts allowed the plea of the respondent, viz., that the sale-deed passed to him by Kamakshi Ammál, being a registered instrument, must prevail against the appellants' unregistered instrument, and, for the purposes of this appeal, it may be taken that this was so decided on the authority of *Madar* v. *Subbaráyalu*.(1)

It is contended in appeal that that case and the present are not on all fours: that the provisions of s. 50 of the Registration Act apply only in cases in which a registered and unregistered document are antagonistic, not where legal effect can be given to one without infringement of the other *Sobhágchand Gulábchand* v. *Bháichand*,(2) which is the case here, it is said. And our attention is also called to *Rámárájá* v. *Arunáchala*,(3) in which the principle of the decision in the Bombay case just above referred to was approved, and in which it is said that "an unregistered mortgage is not in itself unlawful, and a person who has bought subject to it cannot afterwards take advantage of the Registration Act to avoid it."

Madar's case is on all fours with the present case in the following respects: there, an unregistered insturment creating an incumbrance of prior date was set up in competition with a registered sale-deed of subsequent date, and it was found by the Lower Appellate Court that the purchaser and his vendors were well aware of the prior charge, and that the purchaser had retained a sum of Rs. 60 to pay it off.

The prior encumbrancer had obtained a decree upon his bond, but this fact is not material to our present decision, and on the question of notice, we are not prepared to reconsider the view of that doctrine taken by this Court in connexion with the Registration Act. But it does not appear that there was any reference to or acknowledgment of liability in respect of the prior encumbrance contained in the registered conveyance. In the present case, in the registered sale-deed, after recital of the sale the consider-

(1) I.L.R., 6 Mad., 68. (2) I.L.R., 6 Bom., 193. (3) I.L.R., 7 Mad., 248.

RÁMACHANDRA v. KRISHNA.

ation is set forth, and as part of this the sum of Rs. 90 then due on account of the appellants' hypothecation claim is set out: this sum being described as reserved with or retained by the purchaser to be paid by him to the appellant, and it is contended in the present case that the equity of redemption alone was sold, or in other words that the estate was sold subject to the charge. On the other side it is urged that the sale was absolute, not conditional, and that the mere recital of the manner in which the consideration was made up cannot avoid the consequence of non-registration of the appellants' instrument as regards the claim against the land; that though it is possible the purchaser might be held to stand in the position of a trustee of the money, and an action for money had and received for the appellants' use might be maintainable, the recital of the existence of a prior charge does not debar the respondent from relying on the exception arising out of s. 50 of the Registration Act, does not amount to a covenant on the part of the purchaser to pay the charge, and cannot be held to create a liability in respect of the charge as affecting the land conveyed.

We concur in the proposition stated by the learned Judges in *Sobhágchand Gulábchand* v. *Bháichand*,(1) and in *Rámárájá* v. *Arunáchala* (2) that the respondent's vendor could honestly sell subject to any equities arising out of prior charges created on the property sold, and that an unregistered mortgage is not itself invalid, and that a person who has bought subject to it cannot afterwards take advantage of the Registration Act to avoid it; and we do not see that there is any conflict between the decision in the latter case and that in *Madar's case*.

In the last-mentioned case the facts that the purchaser was aware of the prior incumbrance, and had retained a sum of money to pay off a prior charge were held to be of no avail to the incumbrancer holding an unregistered instrument, as against an absolute deed of sale registered, in which no mention was made of such incumbrance; but the retention of money by the purchaser to pay off the prior charge may have been treated by the Subordinate Judge and appears to have been referred to in argument only as evidence of notice. The question whether such retention had the effect of passing the estate to the purchaser subject to

(1) I.L.R., 6 Bom., 193. (2) I.L.R., 7 Mad., 248.

RÁMACHANDRA v. KRISHNA.

the prior charge does not appear to have been raised. We have to deal with a different case, viz., one in which in the registered instrument of sale itself the estate is sold with notice to the purchaser of the charge, and the sum then due to the incumbrancer is left with the purchaser under an express or implied agreement on his part to pay it over to the incumbrancer.

The question then is, whether having regard to the recital of the prior charge, and of the retention of the money due, the purchaser should be held to have purchased the land subject to the prior charge. If he did, we should hold that the fact of appellants' instrument of mortgage being unregistered does not debar the appellants from relying on the recital in the respondent's registered sale-deed, or from availing themselves of the legal consequences of that recital, and does not enable the purchaser, who bought subject to that charge, to avail himself of the Registration Act to avoid it.

There is, it is true, in the defendant's conveyance no covenant expressed on the respondent's part to pay the mortgage debt, but having regard to the ordinary manner in which conveyances are drawn in this country, we have no doubt that the vendor sold and the vendee purchased subject to the appellants' hypothecation lien. The vendor did not profess to sell, nor contract to convey more than the estate which remained to him subject to that charge.

Nor can the purchaser succeed unless he puts in proof an instrument which itself discloses these facts.

There is then no conflict between the two documents, and we consider that the appellants are entitled to decree for the sum claimed with interest and costs throughout and interest rom date of institution of the suit at 8 per cent. per annum till date of payment, to be realized by sale, if necessary, of the property, if the amount due be not paid within six months from the date of the decree of this Court.

PRIVY COUNCIL.*

SURIYA RÁU (PLAINTIFF)

and

THE RÁJÁ OF PITTAPÚR AND ANOTHER (DEFENDANTS).

P.C.
J.C.*
1884.
June 4th.

[On appeal from the High Court at Madras.]

Mitakshárá law of inheritance—A son's power to adopt—Impartible estate.—Failure to prove alleged custom in a family against adoption—Invalid agreement between father and father's brother, in a joint family, contrary to rights of son already born.

Two brothers, undivided under the Mitakshárá, the family estate being an impartible zamíndárí in the possession of one of them who had a son, contracted with each other that, in the event of an indefinite failure of male issue in the line of either of them, the estate should descend in the line of the brother having aurasa, (self-begotten) issue, and should not be alienated from the line of the latter by adoption:

Held, that this contract did not bind the son not to adopt, or exclude from the inheritance a son adopted by him. Such a stipulation was contrary to the law declared in the *Tagore case* (1) and was ineffectual to prevent the son's exercising his right of adoption.

APPEAL from a decree (19th September 1881) of the High Court, affirming a decree (23rd August 1880) of the District Judge of Godávari.

This appeal arose out of a suit claiming the impartible zamíndárí of Pittapúr, of which a former zamíndár, Venkata Niladri Ráu, died on the 25th of February 1828, leaving three sons. Of these, the eldest, Venkata Suriya Ráu, succeeded his father as zamíndár, and the others obtained maintenance. In 1845, Venkata Suriya Ráu and his surviving brother, Kumara Venkata Ráu, the third brother Buchi Venkata Ráu being then dead, made an agreement, in the form of karárnámas executed by the brothers in each other's favor, whereby it was declared that certain villages comprised in the zamíndárí were set apart for the maintenance of the younger brother. The agreement, which bore date 26th April 1845, contained the clause set forth in their Lordships' judgment, to the effect that the family property should, in the event of failure of

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* *Present:* Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.

(1) 9 B.L.R., 377, 403; L.R., I.A., Sup. Vol., 1872-73, 47.

SURIYA RÁU v. RÁJÁ OF PITTAPÚR.

issue in the line of either of the brothers in possession of the zamíndárí, go over to the line of the other brother having aurasa issue, and "should not be alienated by making adoption and the like."

The present Rájá, son of Venkata Suriya Ráu, whom he succeeded in the possession of the impartible zámíndarí in 1850, adopted a son on the 28th September 1873, he having no issue of his body, though he was married. Against this Rájá, as first defendant, and the son adopted by him, as second defendant, this suit was brought in 1879 by the present appellant.

The latter was the son of the Rájá's paternal uncle, Kumara Venkata Ráu, who was one of the parties to the karárnámas of 1845. The plaintiff sought to obtain a declaration that the adoption was invalid, alleging an old and uninterrupted custom to exist in this family that no adoption should be made obstructing the right of succession in the nearest male line; and that if any Rájá for the time being had no aurasa issue, or male heirs of his body, then the eldest and nearest male in the aurasa line of the original founder was to get the inheritance. This family custom had been confirmed by the karárnámas of 26th April 1845, on which the plaintiff also relied.

The defendants having denied the existence of the alleged custom, and the effect ascribed by the plaintiff to the karárnámas of 1845, the principal issues were whether the former could be proved and whether the latter were valid as against the present Rájá.

The District Judge found that the family was undivided, the zamíndárí being ancient and impartible and descending to the eldest son alone. The fact which he accepted that adoption had not taken place in fifteen generations of successive Rájás, of whom five had been childless, was insufficient, in his opinion, to establish a family custom acted upon through a long series of years, such as would displace the general law. Besides finding against the alleged custom, he was of opinion that, as a matter of Mitakshará law, no head of a family could so bind his living co-parcener, by a contract entered into without the consent of the latter, as to deprive him of the right legally incident to his share in the estate, viz., the right to adopt. He referred to *K. Venkatramanna* v. *K. Brammanna Sastrulu*,(1) Mayne on Hindú Law and Usage,

(1) 4 M.H.C.R., 345.

SURIYA RÁU v. RÁJÁ OF PITTAPÚR.

paras. 292, 293 and 294. The case cited showed that where, upon the division of family property, the co-parceners agreed that the share of any one of them, or his heirs, dying without issue, should be divided among the other shareholders, and the son of one of the latter, contrary to the above agreement, sold the share, which he inherited from his father, who received it upon the division, the sale was held valid as his right of disposition could not be taken away in the above manner.

The suit was dismissed with costs, and an appeal against this decree was dismissed by the High Court (Kindersley and Muttusámi Ayyar, JJ.). They were of opinion that in the case of an impartible zamíndári, belonging, as this did, to a joint Hindú family, each co-parcener had two distinct rights against the zamíndár for the time being. The one was a right to be maintained, the other an interest in succeeding to the zamíndári by survivorship. The grant made in this case of villages, for the maintenance of a junior branch of the family, did not, in the absence of an express contract to that effect, imply a renunciation of the right of succession by survivorship. The acceptance of maintenance by an undivided member of a joint Hindú family, before division, would not, in the case of impartible estate, any more than in the case of partible, bar his right of inheritance. So much as to the effect of the karárnámas. The decision, however, rested upon this, that no custom that the actual zámíndár should not adopt had been proved to exist in this family. Although in five instances childless zamíndárs in this family had abstained from adopting, it did not appear that any one of them had done so because he was prohibited by the custom, of the family from so doing. And, if any such custom had existed, the attempt to preclude adoption by agreement need not have been made.

The judgment of the High Court, after stating the facts, was as follows:—

"We agree with the District Judge in finding that the parties are not divided. In every zamíndárí which belongs to a joint Hindú family, each co-parcener has two distinct rights as against the zamíndár for the time being in connection with the estate. He has the right to be maintained, and he has the right to succeed to the zamíndárí by survivorship. A grant of villages in lieu of his claim and that of his descendants to a periodical payment for their maintenance is of the nature of a final arrangement for the

SURIYA RÁU v. RÁJÁ OF PITTAPÚR.

support of the junior branch of the family; and, in the absence of an express contract to that effect, it does not imply a renunciation of the right of succession by survivorship. The acceptance of maintenance by an undivided member of a joint Hindú family before division will not bar his right to demand partition in the case of partible property, and when the estate is impartible, this right of enforcing is modified into a right of succession.

"But we rest our decision upon the determination of the second question, whether the adoption of the second defendant by the first defendant is invalid by reason of a custom in the family that the zamíndár does not adopt.

"On this question we agree with the District Judge in finding that no custom binding on the defendant, that the actual zamíndár should not adopt a son, has been proved. Such a custom would be so much at variance with the general Hindú law, with the religious feelings which impel a sonless Hindú to make an adoption and with those texts which encourage the practice of adoption, that it may be doubted whether in a tribe of Hindú origin such a custom would be enforced. But, in the present case, it is sufficient to say that no such custom has been proved. It appears that among sixteen persons, who have in succession held the zamíndári before the first defendant, five died without male issue, and might, but did not, adopt a son. But, of those five men, one died at the age of 27, another at 28, and two others at 48, the age of the remaining one being unknown. No argument can safely be drawn from the cases of those who died at the early age of 27 or 28: and even the others may not have abandoned all hope of begetting a son. It is impossible to say what reasons, if any, may have influenced the elder men to abstain from adopting a son. They may not have found a suitable boy for adoption. They may have doubted whether an adoption would be recognized by the ruling power; or they may have been indisposed for some other reason to adopt a son. But it does not appear that any zamíndár abstained from adoption because he was prohibited from making an adoption by the custom of the family: and, if any such custom had obtained in the family, and had been recognized as having the force of law, it would have been unnecessary for the plaintiff and his father to bind themselves by express agreement not to adopt. The answer filed by Suriya Ráu, the father of first defendant, in Suit 23 of 1820, goes no further than this, that 'from the days of the founder

SURIYA RÁU v. RÁJÁ OF PITTAPÚR.

up to this time no member of our family, who was a Rájá, adopted a son.' And in his answer to the appeal 2 of 1823 he says that 'nobody in this samasthánam who up to this time was Rájá made an adoption.' In that suit, Niladri Rau was resisting the claim of one Buchi Tammayya to be his adopted son, and if at that time (1820) he could have pleaded that the adoption would have been void as prohibited by family custom, he would have said so. But he argued only that the adoption of a son by the Rájá was unprecedented, and therefore improbable.

"The agreement executed by the first defendant's father in favour of the plaintiff's father in 1845 provides that in case of the failure of naturally born sons in either line, the other line should take the immovable property of both. 'But it should not be alienated (to strangers) by making an adoption or the like.' The words 'to strangers' are to be found only in the counterpart. It may here be observed that the first defendant's father had no power to bar his son by the agreement of 1845 from the exercise of his right to adopt a son in the event of his having no male issue. Similar expressions are to be found in the agreement executed in 1869 by the present first defendant in favour of his brother since deceased. So in the recital at the commencement of the letter addressed by the first defendant to the Governor in Council in 1871, it was recited that the zamíndári had 'descended under the rule of primogeniture through a line of legitimate heirs uninterrupted by any adoption.' And in the proposed answer it was recited 'as it has never been customary in the family of the late Rájá for the Rájá, who reigns, to adopt children.'

"All these recitals appear to us merely to point to the undoubted fact that hitherto the actual zamíndár had not made an adoption. In some instances the fact is used as an argument to show that in the particular instance an adoption by the zamíndár would be improbable, but, in no case has it been stated that such adoption was prohibited by any rule observed in the family, or that such an adoption would be void. The oral evidence, which is not very reliable, points in the same direction. On the second question, therefore, we are of opinion that the plaintiff has not shown that the adoption of the second defendant by the first was invalid by reason of any custom in the family binding upon him."

On this appeal, Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* appeared for the appellant; Mr. *J. F. Leith, Q.C.*, and Mr. *R. V.*

SURIYA RÁU v. RÁJÁ OF PITTAPÚR.

Doyne for the respondents. It was not attempted, for the appellant, to dispute the finding of both the Courts in India that the alleged family custom against adoption had not been proved. But the argument on behalf of the appellant related to the effect of the agreement of 1845, considered as a family arrangement. It was contended that the entire absence of any previous adoption in this family, and the strong tendency to avoid adoption shown by successive zamíndárs should have been considered in connection with the fact of the agreement of 1845 having been entered into, the large proportion of the zamíndárí devoted to the maintenance of the younger brother, and the terms of the agreement. It having been shown to be in accordance with the feelings of the family that the agreement should be made, the question was whether the son's rights under the Mitakshárá might not be considered as waived in support of what, in this family, was regarded as an expedient family arrangement, founded on good consideration. There had been a ratification of what the father had arranged. As to what constituted ratification, see *Trowell* v. *Shenton*.(1)

Reference was also made to *Raja Venkata Rao* v. *Court of Wards*(2) and *Fanindra Deb Raikat* v. *Rajeswar Das*.(3)

Without counsel for the respondents being called upon, their Lordships' judgment, after Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* had been heard, was delivered by

Sir BARNES PEACOCK.—This case has been very ably argued by the learned counsel for the appellant. He very properly did not contend that the custom not to adopt had been proved. This is a question of fact which was decided concurrently by both Courts below, and could not properly be raised now before this committee.

The case having now been thoroughly sifted, it appears that the only point to be decided is, what was the legal effect of the agreement of the 26th of April 1845 between Suriya Ráu and his brother Kumara. At that time Gangádhara, the son of Suríya, was living. The estate was governed by the Mitakshárá law. It is clear that Suriya, the father, could not by the agreement of 1845 so bind the estate that an adopted son of his son Gangádhara should not take by descent. The agreement is contained in the 10th article, by which the two brothers stipulated as follows:—

"As to the immovable property belonging to us both, the said

(1) L.R., 8 Ch. D., 318. (2) I.L.R., 2 Mad., 128; L.R., 7 I.A., 38.
(3) I.L.R., 11 Cal., 463; L.R., 12 I.A., 72.

SURIYA RÁU v. RÁJÁ OF PITTAPÚR.

immovable property shall, in case of the failure of 'aurasa' (self-begotten) male issue in either of these two lines, *i.e.*, either for yourself or in your line of aurasa sons, or in my line of aurasa sons, be put in possession of the other line, but it shall not be alienated by making adoption and the like." It is unnecessary for their Lordships to determine whether that agreement was or was not binding between the parties who made it. It is clear that the father of Gangádhara could not bind his son, who was then in existence, not to adopt, or legally stipulate that if he should adopt the son so adopted should not inherit. The words are: "In case of the failure of self-begotten male issue." Mr. Mayne was forced to admit that those words meant an indefinite failure of issue; and that an adopted son should not ever take by descent from his father. It appears to their Lordships that that would be entirely altering the law of descent, and contrary to the principle laid down in the *Tagore case*.(1)

Their Lordships are therefore of opinion that the decision of the High Court was right, and that the agreement of 1845 did not operate to prevent the adopted son of Gangádhara from succeeding to this property. It has been very properly admitted by the learned counsel for the appellant that the similar agreement which was made by Gangádhara is not one of which the present plaintiff, who was no party to it, could take advantage.

Under these circumstances, their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court, and dismiss this appeal. The appellant must pay the costs of the appeal.

Solicitors for the appellant—*T. L. Wilson & Co.*

Solicitors for the respondent, the Raja of Pittapúr—*Frank Richardson & Sadler*.

C.B.

(1) 9 B.L.R., 377, 403.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. Aug. 16, 20.

AYYAVAYYAR (RESPONDENT), APPELLANT,

and

SHÁSTRAM AYYAR (PETITIONER), RESPONDENT.*

Civil Procedure Code, ss. 244, 583.

The Court has power to award to a successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree.

IN suit 14 of 1884 the Subordinate Judge of Tinnevelly decreed, *inter alia*, that defendant No. 3 should pay half the costs of the plaintiff. The plaintiff recovered Rs. 871-11-0 in execution. On appeal the decree was reversed and defendant No. 3 levied this sum with interest from plaintiff. Upon this plaintiff applied for a refund of the amount levied as interest (Rs. 56-12-3) and the Court (K. R. Krishna Menon) ordered a refund on the ground that there was no provision in the decree to levy interest. Against this order defendant No. 3 appealed.

Bháshyam Ayyangár for appellant.

Parthasaradi Ayyangár for respondent.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The question before us is whether a Court can award interest on a sum ordered to be repaid by way of restitution under a decree passed in an appeal (s. 583, Code of Civil Procedure). We are referred to the decision in *Ram Sahai* v. *The Bank of Bengal* (1) in support of the contention that appellant is entitled to interest on the refund claimed. The appellant's pleader argues that the case is analogous to an order for the refund of mesne profits in a similar case and refers to *Lati Kooer* v. *Sobadra Kooer*.(2)

On the other hand, the respondent's pleader urges that *Ram Sahai* v. *The Bank of Bengal* is inconsistent with the Full Bench

* Appeal against Order 75 of 1886.

(1) I.L.R., 8 All., 262.

(2) I.L.R., 3 Cal., 720.

decision of the same High Court in *Ram Ghulam* v. *Dwarka Rai*,(1) in which it was held that a suit for mesne profits in such a case was not barred by s. 244, Code of Civil Procedure. That decision was followed in *Gannu Lal* v. *Ram Sahai*.(2)

As regards the recovery of mesne profits under s. 583, the decisions of the Calcutta and Allahabad High Courts would appear to be conflicting. But in regard to the award of interest upon a sum of which the restitution is ordered under s. 583 of the Code of Civil Procedure, we are of opinion that the principles laid down by the Privy Council in *Rodger* v. *The Comptoir D'Escompte de Paris* (3) on appeal from the Supreme Court of Hong Kong should govern the case. In that appeal Lord Cairns, in giving the judgment of the Privy Council, pointed out that, if only the principal sum was restored to the petitioners without any interest, a very grave injury would be done. The petitioners would recover a sum taken away from them by mistake only after a considerable lapse of time, and without the ordinary fruits derived from the enjoyment of money. On the other hand, these fruits would have been enjoyed by a person who, by mistake or wrong, obtained possession of the money under a judgment, which had been reversed. Under those circumstances, the Privy Council held that a perfect judicial determination would not be arrived at unless the persons who had had their money improperly taken from them should have their money restored to them with interest for the time during which the money had been withheld.

After noticing the case of *Blake* v. *Mowatt*(4) in the House of Lords, in which money which had been ordered to be paid under a decree was ordered by the Court below to be restored together with interest on the capital sum, their Lordships proceeded to say that they "had reason to believe that the practice of the Courts in India, when there had been a reversal of the decree in the Privy Council and money had been ordered in India to be paid back in consequence of that reversal, was to order the payment of interest." Their Lordships therefore believed, so far as any precedents existed, they were in favor of a restitution of the money with interest, and considered that the practice was in accordance with right principle and justice.

(1) I.L.R., 7 All., 170.

(2) I.L.R., 7 All., 179.

(3) L.R., 3 P.C., 465.

(4) Not reported.

AYYAVAYYAR v. SHÁSTRAM AYYAR.

This decision was also followed by the High Court of Allahabad in *Jaswant Singh* v. *Dip Singh*(1) and was held not inconsistent with the Full Bench ruling in *Ram Ghulam* v. *Dwarka Rai*.(2)

We are of opinion therefore that the Court has power to award appellant interest upon the amount improperly levied. We set aside the order of the Subordinate Judge and allow appellant interest upon the sum levied at the rate of 6 per cent. per annum from the date of his payment of the sum to the Court Amin till the date of refund. The respondent must pay appellant's costs in this appeal.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. July 30. August 4.

VENKATARAMAN AND OTHERS (PETITIONERS AND APPELLANTS)

and

MAHALINGAYYAN (RESPONDENT).*

Civil Procedure Code, ss. 248, 295, 622—Execution Proceedings—Rateable distribution—Application for further execution—Notice.

A, and subsequently B, obtained decrees against X, in execution of which the same land was attached, and B obtained an order for rateable distribution. Neither decree was satisfied. A then applied for attachment of other property and the sale was fixed for 28th September. On 25th September B filed a petition for further attachment under ss. 250, 274, and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 295, because no application for execution was pending:

Held, on appeal, that the petition for execution was wrongly rejected, but that the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution.

PETITION, under s. 622 of the Code of Civil Procedure, praying the High Court to revise the order made by J. A. Davies, Acting District Judge of Tanjore, on civil miscellaneous petition No. 757, and Appeal against the order passed by the same Court on civil miscellaneous petition 758 of 1885, between the same parties.

(1) I.L.R., 7 All., 432. (2) I.L.R., 7 All., 170.

* Appeal against Order 7 of 1886 and C.R.P. 10 of 1886.

VENKATARAMAN v. MAHALINGAYYAN.

The facts are stated in the judgment of the Court (Collins, C.J., and Parker, J.).

Rámá Ráu for petitioners and appellants.

Subramanya Ayyar for respondent.

JUDGMENT.—A decree was passed against the respondent, Gopala Mahalingayyan, in original suit 2 of 1884, on the file of the District Court of Tanjore, in execution of which certain lands were attached, the sale of which was fixed for 1st December 1884.

The present petitioners had got a decree for money against respondent in the Subordinate Court of Tanjore (original suit 74 of 1882), in execution of which the same land was attached and the sale fixed for 17th November 1884.

By miscellaneous petition 640 of 1884, the petitioners applied on 15th November 1884 to the District Court for rateable distribution of the sum realized by the sale, and the petition was granted, but neither of the two decrees was fully satisfied.

The plaintiff in original suit 2 of 1884 again applied for the attachment of other properties.

In petition No. 757, the present petitioners applied for further execution in original suit 74 of 1882, but the Acting District Judge, on 25th September 1885, rejected the application on the ground that it was too late, since the lands of which the attachment was sought were to be sold on 28th September in execution of the decree in original suit 2 of 1884, and as notice had to go to the judgment-debtor, more than a year having elapsed since the date of the last application. They appeal against this order, urging that no notice under s. 248 of the Code of Civil Procedure was necessary, since they had made an application for execution on 15th November 1884, in civil miscellaneous petition 640, which order had been subsequently confirmed by the High Court on appeal.

Simultaneously with applying for further execution on 24th September 1885, the petitioners by civil miscellaneous petition 758 of 1885 asked for rateable distribution of the assets to be realized by the sale to take place on 28th September. The Acting District Judge disposed of this on the same day (26th September), having previously disposed of the application for execution, and rejected it as no execution petition was pending.

We have no doubt that the Judge was in error in dismissing the application for further execution. No notice under s. 248 of

VENKATARAMAN v. MAHALINGAYYAN.

the Code of Civil Procedure was necessary, and even if it had been, all that is required by s. 295 is that the petitioners should apply to the Court for rateable distribution before the assets have been realized, and this they did in the present case.

We have, however, further to consider whether this Court can, and should interfere under s. 622 of the Code of Civil Procedure, since no application was pending, one having been rejected by mistake, when the Judge passed the order refusing rateable distribution. As, at the moment of the rejection of the application no execution petition was pending, it can hardly in strictness be said that the Judge failed to exercise a jurisdiction vested in him by law, though he passed an order which he would not have done had he not been under a mistake in the first instance. It might be possible to hold that the petitioners were entitled to be placed in the same position as they would have been had the Judge not made a mistake, but they are not without their remedy, and as the assets have probably now been already distributed, we will refer them to the remedy indicated in the penultimate clause of s. 295.

The Appeal against the order refusing execution must be allowed with costs, and the Civil Revision Petition 10 of 1886 is dismissed, but without costs.